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**Annual report of the United Nations High Commissioner
for Human Rights and reports of the Office of the
High Commissioner and the Secretary-General**

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*

**Yearly supplement of the Secretary-General to his quinquennial report
on capital punishment**

Summary

The present report is submitted pursuant to resolution 30/5 of the Human Rights Council. The report examines the consequences arising at various stages of the imposition and application of the death penalty on the enjoyment of the human rights of those facing the death penalty. It pays specific attention to the right to equality and non-discrimination in the context of the use of the death penalty. The report also highlights the discriminatory application of the death penalty to foreign nationals.

* The report was submitted after the deadline in order to reflect the most recent developments.



I. Introduction

1. In its resolution 30/5, the Human Rights Council requested the Secretary-General to dedicate the 2017 annual supplement to his quinquennial report on capital punishment to the consequences arising at various stages of the imposition and application of the death penalty on the enjoyment of the human rights of those facing the death penalty and other affected persons, paying specific attention to the right to equality and non-discrimination, including on foreign nationals, and to present it to the Human Rights Council at its thirty-sixth session.

2. In March 2017, the Office of the United Nations High Commissioner for Human Rights (OHCHR), on behalf of the Secretary-General, sent notes verbales to States, international, regional and intergovernmental bodies, national human rights institutions and non-governmental organizations, requesting information to inform the Secretary-General's report.¹ In follow-up to the resolution, OHCHR also convened an expert group meeting in May 2017 on the linkages between the application of the death penalty and the right to equality and non-discrimination. The present report is prepared principally on the basis of information received from stakeholders and views provided during the expert group meeting. The Secretary-General draws the attention of the Human Rights Council to relevant information contained in the 2015 yearly supplement to his quinquennial report on capital punishment (A/HRC/30/18), which examines possible consequences of the imposition and application of the death penalty on the enjoyment of various human rights.

II. Right to equality and non-discrimination

3. Under international human rights law, non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute general principles relating to the protection of human rights. Article 2 of the Universal Declaration of Human Rights prohibits discrimination in the enjoyment of civil, cultural, economic, political and social rights. That principle is also reflected in the preamble and in Articles 1 (3) and 55 of the Charter of the United Nations. Article 2 (1) of the International Covenant on Civil and Political Rights and article 2 (2) of the International Covenant on Economic, Social and Cultural Rights require State parties to respect and ensure the rights recognized in the respective Covenants of all persons within their territories and subject to their jurisdiction, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

4. Additionally, article 26 of the International Covenant on Civil and Political Rights provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. Article 26 also establishes that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground including those enumerated in article 2 of the Covenant. Article 14 (1) of the Covenant provides that all persons shall be equal before the courts and tribunals, while article 14 (3) provides that, in the determination of any criminal charge against "him", everyone shall be entitled, in full equality, to the minimum guarantees enumerated in article 14 (3) (a)-(g).

5. According to the Human Rights Committee, the term "discrimination" should be understood to imply any distinction, exclusion, restriction or preference based on any ground such as the ones listed in article 2 of the International Covenant on Civil and Political Rights and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons of all rights and freedoms.²

¹ All submissions are on file with the Secretariat and available for consultation.

² See Human Rights Committee, general comment No. 18 (1989) on non-discrimination. The general non-discrimination provisions of article 2 (1) have also been addressed in general comment No. 28

6. In the view of the Human Rights Committee,³ article 26 does not merely duplicate the guarantee already provided for in article 2, but provides in itself an autonomous right. It prohibits discrimination in law or in any field regulated and protected by public authorities. Thus, when legislation is adopted by a State party it must comply with the requirement of article 26 of the International Covenant on Civil and Political Rights and its content and implementation should not be discriminatory.

7. The Committee on Economic, Social and Cultural Rights stated that non-discrimination is an immediate and cross-cutting obligation in the International Covenant on Economic, Social and Cultural Rights. Article 2 (2) requires State parties to guarantee non-discrimination in the exercise of each of the economic, social and cultural rights enshrined in the Covenant and can only be applied in conjunction with those rights.⁴

8. Other international human rights law instruments also provide for protection against discrimination and, together with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, form part of the international legal framework to be taken into account by States in their administration of the justice system, including when applying the death penalty. Notably, those instruments are the International Convention on the Elimination of All Forms of Racial Discrimination,⁵ the Convention on the Elimination of All Forms of Discrimination against Women,⁶ the Convention on the Rights of the Child,⁷ the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,⁸ the Convention on the Rights of Persons with Disabilities,⁹ the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,¹⁰ and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.¹¹

9. At the regional level, the African Charter on Human and Peoples' Rights,¹² the African Charter on the Rights and Welfare of the Child,¹³ the Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁴ the American Convention on Human Rights,¹⁵ the Arab Charter on Human Rights,¹⁶ and the Association of Southeast Asian Nations Human Rights Declaration¹⁷ also provide for protection against discrimination.

10. Article 6 of the International Covenant on Civil and Political Rights regulates the imposition of the death penalty. Under article 6 (2), in States parties that have not abolished the death penalty, the application of the death penalty is strictly limited to the most serious crimes. In 2002, the Human Rights Committee adopted the view that the contents of paragraph 2 should be read as narrowly construed.¹⁸ The application of the death penalty must also be in a manner consistent with all other provisions of the Covenant, in particular the right to fair trial, as provided in article 14 of the Covenant, and the non-discrimination requirements of articles 2 (1) and 26 of the Covenant.

(2000) on the equality of rights between men and women. See also general comment No. 31 (2004) on the nature of the general legal obligation imposed on State parties to the Covenant.

³ See Human Rights Committee, general comment No. 18 (1989) on non-discrimination.

⁴ See Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights.

⁵ Art. 1 (1).

⁶ Art. 1.

⁷ Arts. 2 (1) and 30.

⁸ Art. 7.

⁹ Art. 5.

¹⁰ Arts. 1 and 2.

¹¹ Arts. 1 and 2.

¹² Art. 2.

¹³ Art. 3.

¹⁴ Art. 14.

¹⁵ Arts. 1 and 24.

¹⁶ Art. 2.

¹⁷ Arts. 2 and 3.

¹⁸ See Human Rights Committee, communication No. 829/1998, *Judge v. Canada*, Views adopted on 5 August 2002, para. 10.5.

III. Equal access to justice and the right to fair trial

A. Disproportionate impact of the use of the death penalty on poor or economically vulnerable individuals

11. International law recognizes the right to legal representation as an essential component of fair trial in criminal matters.¹⁹ In particular, in capital cases, States are required to provide adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases,²⁰ including during detention and arrest.²¹

12. The availability and quality of legal representation is a key factor in determining whether a defendant receives a death sentence. Due to limited or inadequate legal aid services, poor or less privileged individuals often do not have access to effective legal representation and run a higher risk of being subject to the death penalty, leading to inherent bias in their experience of the criminal justice system. The Special Rapporteur on extrajudicial, summary or arbitrary executions has noted that failure to provide an adequately funded State-wide public defender has the predictable result of poor legal representation for defendants in capital cases,²² and has recommended that authorities should ensure such services are made available.²³

13. The law in several retentionist States requires that defendants in death penalty cases be provided with a lawyer, including at the State's expense if necessary.²⁴ Unavailability of effective legal representation in capital cases thus not only leads to violations of the right to a fair trial and the right to life,²⁵ but also increases social inequality in the criminal justice system.²⁶

14. A large number of death row prisoners come from economically disadvantaged backgrounds. For example, reportedly 74 per cent of the prisoners sentenced to death in India are economically vulnerable;²⁷ nearly 90 per cent of the 300 people on death row in Malaysia live below the poverty line,²⁸ and 58 per cent of death row inmates in the United States of America are from African American, Hispanic or other communities with economically vulnerable backgrounds.²⁹ Switzerland reported that underprivileged people

¹⁹ See International Covenant on Civil and Political Rights, art. 14 (3) (d); European Convention on Human Rights, art. 6 (3) (c); Charter of Fundamental Rights of the European Union, art. 47; American Convention on Human Rights, art. 8 (2) (d); African Charter on Human and Peoples' Rights, art. 7 (1) (c).

²⁰ See Economic and Social Council resolution 1989/64, para. 1 (a). See also Human Rights Committee, communications No. 985/2001, *Aliboeva v. Tajikistan*, Views adopted on 18 October 2005, para. 6.4; No. 964/2001, *Saidova v. Tajikistan*, Views adopted on 8 July 2004, para. 6.8; No. 781/1997, *Aliev v. Ukraine*, Views adopted on 7 August 2003, para. 7.3; and No. 554/1993, *LaVende v. Trinidad and Tobago*, Views adopted on 29 October 1997, para. 5.8.

²¹ See United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

²² See A/HRC/11/2/Add.5, para. 15.

²³ *Ibid.*, para. 74.

²⁴ UNODC and UNDP, *Global Study on Legal Aid: Country Profiles* (2016), pp. 25, 37, 60, 71, 91, 129 and 275.

²⁵ See Human Rights Committee, communication No. 223/1987, *Robinson v. Jamaica*, Views adopted on 30 March 1989, para. 10.4.

²⁶ *Ibid.* See also *Strickland v. Washington* 466 U.S. 688 (1984), in which the Supreme Court of the United States decided that the purpose of the effective assistance guarantee was not to improve the quality of legal representation, but rather to ensure a fair trial.

²⁷ Centre on the Death Penalty, National Law University, Delhi, *Death Penalty India Report* (2016), p. 101. Available at www.deathpenaltyindia.com/wp-content/uploads/2016/05/Death-Penalty-India-Report-Volume-1.pdf.

²⁸ Rebecca Lowe, International Bar Association, "The Ultimate Price of Poverty", September 2016, p. 7.

²⁹ See <https://deathpenaltyinfo.org/documents/FactSheet.pdf>. See also the Criminal Justice Project of the National Association for the Advancement of Colored People Legal Defense and Educational Fund, Inc. "Death row U.S.A.: fall 2016". Available from www.naacpldf.org/files/about-us/DRUSAFall2016.pdf.

and marginalized groups face a higher risk of being sentenced to death and/or executed, as they rarely have the resources required for a proper defence.³⁰ In other cases, serious concern over the adequacy of legal aid lawyers causes families to hire private lawyers at great expense, resulting in debts. In India, for example, reportedly over 70 per cent of prisoners represented by private lawyers in the trial courts and High Courts were economically vulnerable.³¹

15. Inadequacy of defence counsel in capital cases has a detrimental impact on the fairness and integrity of the legal process.³² The Inter-American Commission on Human Rights stated that the right to legal representation must be guaranteed in a manner that renders it effective and therefore requires not only that counsel be provided, but that defence counsel be competent in representing the defendant. National authorities are required, under article 8 (2) (c) of the American Convention on Human Rights, to intervene if a failure by legal aid counsel to provide effective representation is manifested.³³ Some jurisdictions practise both civil and traditional justice systems where legal representation is not provided in the latter, and some jurisdictions face severe institutional challenges in which defence lawyers are often impaired by inexperience and lack of training.³⁴

16. The link between a defendant's socioeconomic background and the adequacy of his or her legal defence can amount to unequal access to justice and examples of that can be found in various jurisdictions that have retained the death penalty. In the Philippines, for example, the Commission on Human Rights has claimed that the justice system is biased against those who cannot afford to hire competent legal representation. Records show that most of the people subjected to the death penalty are poor. As they are usually financially unable to pay for counsel, the court appoints counsel *de officio* for them who are often inexperienced, and in some cases, have proved themselves ineffective. As a result, the Commission stated in 2016 that "while the law is not discriminatory, the practical effect of the death penalty is discrimination [sic] against the poor".³⁵

17. Similarly, the Kenya National Commission on Human Rights reported that "many of the death row inmates do not benefit from a fair trial largely because of extrinsic factors including poverty, poor education and remote location". It reported that the majority of the death row inmates it interviewed for a survey "lacked any form of legal representation during their trials or appeals".³⁶

18. The vast majority of prisoners in the Caribbean cannot afford to pay for legal representation and are therefore provided with an attorney through an inadequate legal aid system. The accused are often assigned a very junior member of the Bar to prepare the defence, usually without any expert help, medical or otherwise.³⁷ The Judicial Committee of the Privy Council³⁸ has considered the question of whether gross incompetence of a trial

³⁰ See the submission of Switzerland.

³¹ Centre on the Death Penalty, National Law University, Delhi, *Death Penalty India Report*, p. 133.

³² See Stephen B. Bright, "Counsel for the poor: the death sentence not for the worst crime but for the worst lawyer", *Yale Law Journal*, vol. 103, No. 7 (May 1994).

³³ Inter-American Commission on Human Rights, *The death penalty in the Inter-American System of Human Rights: From restrictions to abolition* (OAS official records), p. 123.

³⁴ See www.deathpenaltyworldwide.org/legal-representation.cfm. See also communication No. 240/1987, *Collins v. Jamaica*, Views adopted on 1 November 1991, para. 7.6, in which the Human Rights Committee stated that in capital punishment cases, legal aid should not only be made available, it should enable counsel to prepare his client's defence in circumstances that can ensure justice.

³⁵ Advisory on the reimposition of the death penalty, CHR (V) A2016-002, Commission on Human Rights of the Philippines, 7 November 2016, p. 7, which may be consulted in the files of the secretariat.

³⁶ Submission of Kenya National Commission on Human Rights on the consequences of the imposition of the death penalty on the enjoyment of human rights in Kenya, March 2017, p. 3, which may be consulted in the files of the secretariat.

³⁷ OHCHR, *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (New York, 2014), p. 53.

³⁸ The Judicial Committee of the Privy Council is the court of final appeal for the United Kingdom of Great Britain and Northern Ireland overseas territories and Crown dependencies, and for those

lawyer, appointed by the Legal Aid Authority as the defendant had no means to appoint his own lawyer, had resulted in a miscarriage of justice that led to the imposition of the death penalty. In *Boodram v. the State (Trinidad and Tobago)*, it observed that the Legal Aid Authority appointed trial lawyer's conduct "revealed either gross incompetence or a cynical dereliction of the most elementary professional duties ... it is the worst case of the failure of counsel to carry out his duties in a criminal case that their Lordships have come across. The breaches are of such a fundamental nature that the conclusion must be that the defendant was deprived of due process ... the conclusion must be that the defendant did not have a fair trial".³⁹

19. Article 42 of the Constitution of Malawi provides that indigent defendants facing criminal charges are entitled to free legal aid "where the interests of justice so require".⁴⁰ In practice, however, legal aid is provided only in homicide cases as there are so few lawyers to serve the entire country. In its concluding observations on the initial report of Malawi, the Human Rights Committee expressed concern that the Legal Aid Office in Malawi was under-resourced and understaffed, and recommended that Malawi should allocate adequate financial and human resources to ensure the implementation of the Legal Aid Act (CCPR/C/MWI/CO/1/Add.1, para. 18).

20. In *Wiggins v. Smith*, the United States Supreme Court spelled out standards for "effectiveness" in the constitutional right to legal counsel guaranteed by the Sixth Amendment.⁴¹ Previously, the court had determined that the Sixth Amendment included the right to "effective assistance" of legal counsel, but it did not specify what constituted "effective", thus leaving the standards for effectiveness vague. In *Wiggins v. Smith*, the court set forth the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, as a specific guideline by which to measure effectiveness and competence of legal counsel. The guidelines aim to provide guidance and establish standards of practice for defence lawyers to ensure high quality legal representation for all persons facing a death sentence. The guidelines offer practical advice to lawyers from the moment the client is taken into custody through to pretrial proceedings, trial, post-conviction review, clemency proceedings and other connected litigation.⁴²

21. Reinforcing the link between poverty and access to justice and fair trial, there have been an increasing number of examples where the socioeconomic circumstances of a defendant in a death penalty case have been used as a mitigating factor to reduce a death penalty sentence. For example, the Supreme Court of India considered that "poverty or socioeconomic, psychic or undeserved adversities in life shall be considered as mitigating factors" in a capital case, if those factors had "a compelling or advancing role to play in the commission of the crime or otherwise influencing the criminal".⁴³ In Malawi, the High Court developed a set of core principles to guide mitigating factors in capital cases, including, inter alia, factors relating to the background of the accused such as socioeconomic status.⁴⁴ In China, the Supreme People's Court considered the low income of a defendant's family as a mitigating factor to reduce the penalty in a drug-related death penalty case.⁴⁵

Commonwealth countries that have retained the appeal to Her Majesty in Council or, in the case of Republics, to the Judicial Committee. See www.jcpc.uk.

³⁹ See *Boodram v. the State*, para. 40, 1 Criminal Appeal Reports 12 (2001), Judicial Committee of the Privy Council, Republic of Trinidad and Tobago.

⁴⁰ See www.malawi.gov.mw/images/Publications/act/Constitution%20of%20Malawi.pdf.

⁴¹ See *Wiggins v. Smith* (02-311) 539 U.S. 510 (2003); 288 F.3d 629, reversed and remanded. Judgment available at www.law.cornell.edu/supct/html/02-311.ZS.html.

⁴² See American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, revised ed. (Chicago, 2003).

⁴³ See Supreme Court of India, Criminal Appeal Number 659 of 2006, *State of Rajasthan v. Jamil Khan*.

⁴⁴ See www.reprive.org.uk/wp-content/uploads/2015/05/The-Republic-v.-Margret-Nadzi-Makolija.pdf.

⁴⁵ See www.zhuhaxingshi.com/xingshishiwu/295.html.

B. Disproportionate impact of the use of the death penalty on foreign nationals

22. International standards and safeguards relating to death penalty cases apply equally to persons facing the death penalty abroad. Those persons can be disproportionately affected by the death penalty because they are not familiar with the laws and procedures in the prosecuting State. They may have limited access to legal aid and inadequate, low-quality legal representation. They may not understand or speak the language in which proceedings are conducted, in particular when denied the free assistance of an interpreter which is required in accordance with article 14 (3) (f) of the International Covenant on Civil and Political Rights.⁴⁶

23. Access to consular assistance for foreign nationals is an important aspect of the protection of those facing the death penalty abroad and is provided for in the Vienna Convention on Consular Relations. In its resolution 71/187, the General Assembly called upon States to respect the right of foreign nationals to receive information on consular assistance when legal proceedings are initiated against them. The requirement that foreign nationals must be informed without delay after their arrest of that right was confirmed by the International Court of Justice,⁴⁷ which has provided for remedies in cases where that right was violated.⁴⁸ The Inter-American Court of Human Rights ruled that the denial of the right to consular notification constituted a violation of due process and the execution of a foreign national deprived of his or her right to consular services constituted arbitrary deprivation of life.⁴⁹

24. The Special Rapporteur on extrajudicial, summary or arbitrary executions reviewed the extent to which violations of safeguards designed to regulate the death penalty particularly impact foreign nationals (including migrant workers) and what additional responsibilities States have in that regard. The Special Rapporteur concluded that in States that have not yet abolished it, the impact of the death penalty on foreign nationals draws attention to various structurally discriminatory dimensions to its application, including financial or linguistic barriers, which may also impact domestic defendants. At the same time, the direct responsibilities that other States have with respect to the protection of the right to life of their nationals to intervene via consular services implies a duty of due diligence with respect to nationals potentially facing the death penalty overseas. The Special Rapporteur recommended that States that had abolished the death penalty should take all reasonable steps to ensure that their citizens do not face the death penalty overseas.⁵⁰

25. The Committee on the Elimination of Racial Discrimination has also addressed the issue of disproportionate use of the death penalty against foreign nationals. For instance, the Committee raised concerns at allegations that a disproportionate number of foreigners were facing the death penalty in Saudi Arabia. The Committee encouraged the State party to cooperate fully with the Special Rapporteur on extrajudicial, summary and arbitrary executions who had requested information on several cases of migrant workers who had not received legal assistance and had been sentenced to death.⁵¹

26. Staff of the Mexican Capital Legal Assistance Program had intervened in 1,128 cases of Mexicans facing legal proceedings in the United States of America for the crime of homicide, and avoided or reversed the application of the death penalty in 990 cases.⁵² According to the Program directors, that success shows that the active defence of people facing the death penalty can have a measurable and significant impact in reducing the application of the death penalty. The Program's capacity to provide assistance from the

⁴⁶ Penal Reform International, *Strengthening death penalty standards* (London, 2015), p. 6.

⁴⁷ See *Germany v. United States*, 2001 ICJ 104.

⁴⁸ See *Avena and Other Mexican Nationals*, 2004 ICJ 128.

⁴⁹ See Inter-American Commission on Human Rights, Advisory Opinion OC-16/99 of 1 October 1999.

⁵⁰ See A/70/304, paras. 112-120.

⁵¹ See CERD/C/62/CO/8.

⁵² See the submission of the Mexican Capital Legal Assistance Program.

earliest stages of a case is crucial, which in turn depends largely on prompt consular notification whenever a Mexican national is arrested and faces capital charges.

27. In Indonesia, a significant number of death row prisoners are foreign nationals, particularly those convicted of drug-related offences.⁵³ Twelve out of fourteen executions in 2015 were of foreign nationals. Reportedly, several death penalty cases involving foreign nationals in which the Indonesian authorities had failed to correctly identify or verify the identity and nationality of the defendants resulted in those defendants not being able to exercise their right to seek assistance from the consular authorities of their States of origin.⁵⁴ In other cases, where the nationality of the individuals concerned was known, defendants in death penalty cases have reportedly been denied the right to contact their embassy or contact has been delayed.⁵⁵

28. Furthermore, some countries place explicit limits to a foreign national's access to legal representation and support. For example, in Indonesia, article 51 (1) of Law No. 24/2003 on the Constitutional Court stipulates that an application for a constitutional review of any provisions in a law can only be made by an Indonesian national. That has resulted in the Constitutional Court rejecting applications for constitutional review submitted by foreign nationals who were facing the death penalty. In Kenya, under section 36 of the Legal Aid Act 2016, some categories of foreign nationals are excluded from access to State-funded counsel, and in Uganda, foreign nationals are allegedly not provided with a lawyer when they are charged with an offence against the security of the State, which is punishable by death.⁵⁶

C. Disproportionate impact of the application of the death penalty on individuals exercising the right to religion or beliefs and freedom of expression

29. Article 18 (2) of the International Covenant on Civil and Political Rights prohibits coercion that would impair the right to have or adopt a religion or belief. According to the Human Rights Committee, that includes the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to religious beliefs and congregations, to recant their religion or belief or to convert. The same protection is enjoyed by holders of all beliefs of a non-religious nature.⁵⁷ According to the Committee, freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including, inter alia, the right to replace one's current religion or belief with another or to adopt atheistic views or to retain one's religion or belief.⁵⁸

30. As highlighted by several human rights treaty bodies, the death penalty can never be applied as a sanction against religious conduct and non-religious forms of beliefs, the very criminalization of which violates international human rights law.⁵⁹ Furthermore, the Human Rights Committee has stated that States parties that retain the death penalty for such conduct commit a serious violation of their obligations under article 6 of the International Covenant on Civil and Political Rights read alone and in conjunction with article 2 (2).

31. Nevertheless, laws carrying the death penalty are disproportionately used against persons exercising their rights to freedom of expression, peaceful assembly and association in some countries, in particular individuals belonging to minority groups. In a statement

⁵³ According to the Ministry of Law and Human Rights, there were 34 foreign nationals out of 52 prisoners on death row for drug crimes as of April 2015.

⁵⁴ See Amnesty International, *Flawed Justice: Unfair Trials and the Death Penalty in Indonesia*, (London, 2015).

⁵⁵ *Ibid.*, p. 42.

⁵⁶ See the submission of Cornell Law School, "The Unavailability of Effective Legal Representation in Death Penalty Cases in Africa", March 2017.

⁵⁷ See general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, para. 5.

⁵⁸ *Ibid.*

⁵⁹ See CCPR/C/MRT/CO/1, para. 21; CERD/C/PAK/CO/21-23, para. 21; CCPR/C/79/Add.84, para. 16.

issued at the sixth World Congress against the Death Penalty in 2016, the United Nations High Commissioner for Human Rights noted that some States clamp down on so-called “terrorist behaviour” which is actually a pretext for shutting down political opponents. He noted that they seek to criminalize the legitimate exercise of fundamental freedoms by including them in overly vague counter-terrorism legislation; and emphasized that participation in peaceful protests and criticism of a government — whether in private, on the Internet or in the media — are neither crimes nor terrorist acts. The High Commissioner stated that the threat or use of the death penalty in such cases is an egregious violation of human rights.⁶⁰

32. Several States continue to criminalize forms of non-religious beliefs, including 13 States that impose the death penalty for blasphemy or apostasy.⁶¹ Furthermore, persons criticizing religious faith, carrying out academic studies of the origins of religions and persons belonging to minorities manifesting religious or non-religious convictions other than the religion practised by the majority of the population, may run the risk of being accused of “blasphemy”, a charge still punishable by death in many States.⁶²

33. While the Criminal Code of Afghanistan makes no specific reference to blasphemy or apostasy, the courts rely on Islamic law to address that issue. The Special Rapporteur on extrajudicial, summary or arbitrary executions reported cases concerning the use of death penalty against individuals belonging to Christian minorities in Afghanistan, some of whom were subjected to apostasy and other *Qisas* (sharia law punishment).⁶³

34. The Penal Code of Brunei Darussalam contains a range of provisions that restrict the right to freedom of thought, conscience and religion. They include the imposition of the death penalty for blasphemy. In 2014, OHCHR expressed deep concern about those provisions and stated that the application of the death penalty for such a broad range of offences contravened international law.⁶⁴

35. The Penal Code of Pakistan includes provisions on religious defamation and blasphemy, which carry the death penalty or life in prison, and often target non-believers, religious minorities and dissenting Muslims. In 2016, the Committee on the Elimination of Racial Discrimination expressed concern over the broad application of blasphemy laws in Pakistan.⁶⁵ The Committee was also concerned about the disproportionate use of those laws against individuals belonging to ethnic and religious minorities, and at reports about the large number of blasphemy cases based on false accusations. The Committee recommended that Pakistan should consider repealing its blasphemy laws and take all measures necessary to prosecute and punish those who had made false accusations.⁶⁶

36. The Special Rapporteur on the situation of human rights in the Islamic Republic of Iran noted that the Islamic Penal Code often criminalized acts that were not considered sufficiently serious to warrant capital punishment.⁶⁷ In 2011, The Human Rights Committee expressed concern that article 225 of the draft Penal Code was aimed at making the death penalty mandatory for convicted male apostates. It recommended that the State party should ensure that its legislation and practices fully conformed to article 18 of the International Covenant on Civil and Political Rights and urged the State party to revoke article 225 of the draft Penal Code.⁶⁸

⁶⁰ See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20150&LangID=E.

⁶¹ See the foreword to the 2016 edition of the Freedom of Thought Report, published by the International Humanist and Ethical Union, which was written by the Special Rapporteur on freedom of religion or belief. Available from <http://freethoughtreport.com/foreword-to-the-2016-edition>.

⁶² See A/HRC/27/23, para. 36.

⁶³ See A/HRC/17/28/Add.6, para. 77 (including footnote 7).

⁶⁴ See www.un.org/apps/news/story.asp?NewsID=47552#.WTfBoeQ0NbV.

⁶⁵ Particularly sections 295, 295-A, 295-B, 295-C, 298-A, 298-B, 298-C of the Pakistan Penal Code 1860.

⁶⁶ See CERD/C/PAK/CO/21-23 paras. 21-22.

⁶⁷ See A/HRC/31/69, para. 14.

⁶⁸ See CCPR/C/IRN/CO/3, para. 23.

37. The Special Rapporteur on freedom of religion or belief noted that all the sharia penal codes of Nigeria, except in Kano State, provided that Muslims could be convicted for offences that were punishable by death under sharia law itself, even in the absence of a provision in the penal code. In addition to raising questions under the principle of *nulla poena sine lege*, the Special Rapporteur stated that that provision opened the possibility of criminalization of conversion and therefore raised concern about the right to freedom of religion or belief as protected by universally accepted human rights standards.⁶⁹

38. In Mauritania, article 306 of the Penal Code provides for the death penalty for apostasy, but if the defendant repents before a court, the Supreme Court has the authority to cancel the death sentence, or reduce it to a prison term and a fine. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment regretted the use of the provisions of article 306 of the Penal Code of Mauritania and the imposition of the death penalty for crimes that did not fall under the category of “most serious crimes”.⁷⁰

39. In 2015, the use of the death penalty in Saudi Arabia for charges of apostasy resulted in the violation of the freedom of expression of a Saudi-born Palestinian poet. A group of Special Rapporteurs urged Saudi Arabia to halt the execution of the poet, whose sentence was based on a collection of poems published in 2008 and the testimony of a witness who had allegedly overheard the poet making blasphemous comments in a public cafe.⁷¹ The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression stated that sentencing a poet to death for his writings and alleged blasphemous comments was not in accordance with any interpretation of human rights. The Special Rapporteur in the field of cultural rights noted that the death penalty imposed on the accused for his poetry amounted to a grave violation of freedom of artistic expression.⁷²

40. Article 126 of the Penal Code of the Sudan provides that any Muslim who declares publicly that he or she has adopted any religion other than Islam commits the crime of apostasy, which is punishable by death. However, the provision waives the death penalty if the convicted person reconverts to Islam.⁷³ In 2014, a Sudanese convert to Christianity was sentenced to 100 lashes and the death penalty. That was denounced by several special rapporteurs who called on the Sudan to limit the application of the death penalty to “the most serious crimes”, if at all, and to repeal the discriminatory elements of the Penal Code, affirming that the ability to choose one’s religion was a basic human right.⁷⁴

IV. Discriminatory laws and practices in death penalty cases

A. Discriminatory use of the death penalty against racial and ethnic minorities

41. In November 2015, the Forum on Minority Issues considered the issue of minorities in the criminal justice system, including the use of the death penalty against minorities. It recommended that, in countries that had not abolished the death penalty, States should ensure that it was not applied as a result of discriminatory or arbitrary application of the law, including the lack of the provision of equal access to competent legal assistance. It also recommended that States should implement safeguards guaranteeing protection of the rights of those facing the death penalty. It further recommended that States should undertake further studies to identify the underlying factors of the substantial racial and ethnic

⁶⁹ See E/CN.4/2006/5/Add.2, para. 76.

⁷⁰ See A/HRC/34/54/Add.1, para. 34.

⁷¹ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16838&LangID=E.Ibid.

⁷² Ibid.

⁷³ See Sudan Penal Code of 1991, art. 126.

⁷⁴ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14618#sthash.aZwBmuN4.dpuf.

disparities in the application of the death penalty, with a view to developing effective strategies aimed at eliminating discriminatory practices.⁷⁵

42. States should take concrete and effective steps to eliminate racial disparities at all stages of the criminal justice system, taking into account general recommendation No. 31 (2005) of the Committee on the Elimination of Racial Discrimination on the prevention of racial discrimination in the administration and functioning of the criminal justice system.

43. In 2014, The Human Rights Committee expressed its concern about the continuing use of the death penalty in the United States of America and, in particular, the disproportionate application of the death penalty amongst African American defendants. The Committee recommended that the United States of America should take measures to effectively ensure that the death penalty was not imposed as a result of racial bias.⁷⁶ The Committee on the Elimination of Racial Discrimination expressed similar concerns.⁷⁷ According to the report of the Working Group of Experts on People of African Descent on its mission to the United States of America in January 2016, the racial composition of the jury is one of the main identified causes of racial bias in the application of the death penalty.⁷⁸

44. In October 2016, the Special Rapporteur on extrajudicial, summary or arbitrary executions made a statement at the launch of the Parliamentary Fact Sheet on the Death Penalty and Terrorism-related Offences, in which she highlighted the fact that 65 countries had retained the death penalty for terrorism-related offences, out of which 15 had carried out executions in the past 10 years and 7 had imposed the death penalty in 2015 alone. She stressed that many of those antiterrorism laws discriminated against religious minorities in practice and that in some cases that had resulted in executions.⁷⁹

45. In the Islamic Republic of Iran, the execution of ethnic minorities is frequently reported. In his report to the Human Rights Council on the situation of human rights in the Islamic Republic of Iran, the Secretary-General reported that on 5 August 2016 alone, 20 people belonging to the Kurdish minority had been executed for alleged terrorism-related offences, although concerns had been expressed by the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran and by the United Nations High Commissioner for Human Rights regarding the fairness of their trials.⁸⁰ In 2011, in its concluding observations on the third periodic report of the Islamic Republic of Iran, the Human Rights Committee noted with concern the high rate of State executions in ethnic minority areas in the country.⁸¹

B. Discriminatory use of the death penalty based on gender or sexual orientation

46. The Committee on the Elimination of Discrimination against Women, the Special Rapporteur on violence against women, its causes and consequences, and the Working Group on the issue of discrimination against women in law and in practice have challenged the criminalization of adultery as discriminatory. In the light of article 6 of the International Covenant on Civil and Political Rights, which requires States parties that have not abolished the death penalty to limit it to the most serious crimes, the Human Rights Committee concluded that the imposition of the death penalty for adultery is contrary to the Covenant.⁸²

⁷⁵ See A/HRC/31/72, para. 72.

⁷⁶ See CCPR/C/USA/CO/4, para. 8.

⁷⁷ See CERD/C/USA/CO/7-9, para. 20.

⁷⁸ See A/HRC/33/61/Add.2, para. 40.

⁷⁹ See www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20800&LangID=E.

⁸⁰ See A/HRC/34/40, para. 11.

⁸¹ See CCPR/C/IRN/CO/3, para. 12.

⁸² See CCPR/C/79/Add.25, para. 8.

47. The imposition of the death penalty for offences relating to consensual homosexual conduct continues to be provided for in the legislation of many States.⁸³ While few cases of executions for consensual same-sex conduct have been carried out recently, the existence of such laws discriminates against the conduct of lesbian, gay, bisexual and transgender persons. Those laws also send a social message. They have an intimidating effect and can create an enabling environment for acts of violence and stigma.

48. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights have expressed concern at the fact that consensual same-sex relations remain a crime punishable by death in some countries and have concluded that the application of the death penalty in that context represents a grave violation of human rights, including the rights to life, privacy and non-discrimination.⁸⁴ The Special Rapporteur on extrajudicial, summary or arbitrary executions has reiterated that death sentences may be imposed only for the most serious crimes and that offences related to homosexual conduct and sexual relations between consenting adults do not meet that threshold.⁸⁵ The European Union guidelines on the death penalty also emphasize that the death penalty must not be applied or used in a discriminatory manner on any ground, including sex or sexual orientation.⁸⁶

V. Use of the death penalty against individuals with mental and intellectual disabilities

49. Article 10 of the Convention on the Rights of Persons with Disabilities provides that every human being has the inherent right to life and that States parties will take all necessary measures to ensure the effective enjoyment of that right by persons with disabilities on an equal basis with others. In its resolution 2005/59, the Commission on Human Rights urged all States that still maintain the death penalty not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute such a person (para. 7 (c)).

50. That prohibition is firmly rooted in the customs and practices of most legal systems. For instance, the European Union has affirmed that “capital punishment shall not be imposed on persons suffering from any mental illness or having an intellectual disability”.⁸⁷ However, a challenge remains with regard to determining to whom that prohibition will apply.

51. Thus, in practice, many elements subjectively assessed can result in sentencing persons with mental disabilities to death, starting with the lack of a clear definition and understanding of “mental disability” and other terms. In the United States of America, despite Supreme Court rulings⁸⁸ prohibiting the execution of “insane prisoners” or those suffering from “mental retardation”, the absence of a definition of those terms has resulted in the sentencing and execution of numerous persons with mental disabilities, leaving federal States to determine “appropriate ways to enforce the constitutional restriction upon [the] execution sentence”.⁸⁹ Another issue relates to the need for effective legal representation and adequate presentation of the evidence showing the convicted person’s disability, the need for mental health expertise and the need for courts to take the evidence into account and examine the issue.⁹⁰

⁸³ See A/HRC/29/23, para. 46.

⁸⁴ See communication No. 488/1992, *Toonen v. Australia*, Views adopted on 31 March 1994. See also CCPR/C/YEM/CO/5, CCPR/C/IRN/CO/3 and E/C.12/IRN/CO/2.

⁸⁵ See A/67/275, paras. 36-38. See also A/HRC/27/23, para. 28.

⁸⁶ See https://eeas.europa.eu/sites/eeas/files/guidelines_death_penalty_st08416_en.pdf.

⁸⁷ *Ibid.*

⁸⁸ See *Ford v. Wainwright* 477 U.S. 399 (1986) and *Atkins v. Virginia* 536 U.S. 304 (2002).

⁸⁹ See *Atkins v. Virginia* 536 U.S. 304 (2002). The decision in *Hall v. Florida*, 527 U.S. (2014) provided that “intellectual disability is a condition, not a number” and even if the IQ test is helpful, it remains “imprecise”.

⁹⁰ *Death penalty and the victims* (United Nations publication, Sales No. E.16.XIV.2), pp. 128-139.

52. The Supreme Court of India ruled that, with regard to mental illness of the accused, it felt that justice would be met by commuting the sentence of death into life imprisonment.⁹¹ The Inter-American Court of Human Rights has ruled that in order to ensure a fair trial, States “shall ensure that all persons accused of a crime whose sanction is the mandatory death penalty are duly informed, at the initiation of the criminal proceedings against them, of the right to obtain a psychiatric evaluation carried out by a state-employed psychiatrist”.⁹²

VI. Conclusions and recommendations

53. The imposition of the death penalty is increasingly regarded as being incompatible with fundamental tenets of human rights, in particular human dignity, the right to life and the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. States that continue to impose and implement death sentences should establish a moratorium on executions with a view to abolishing the death penalty.

54. Low-income individuals and foreign nationals are often unable to access effective legal representation, as legal aid services are generally limited or inadequate. That means they cannot exercise their right to equal protection before the law. Therefore, they are less likely to mount an effective defence in capital cases and so are disproportionately subjected to the death penalty. States should ensure that all accused people can exercise their right to equal access to justice through adequate legal representation, which is an essential component of fair trials in criminal proceedings. States should ensure adequate and qualified legal representation at every stage of civil and criminal proceedings in capital punishment cases through effective legal aid programmes. Furthermore, foreign nationals may also face legal barriers in the exercise of their rights. In that regard, the competent authorities must inform the persons concerned of their right to contact the relevant consular post and, if those persons so request, notify the consular services of those who have been deprived of their liberty, in accordance with the Vienna Convention on Consular Relations.

55. The implementation of the death penalty without the requisite transparency makes it difficult, if not impossible, to assess whether it is being carried out in compliance with international human rights standards. Retentionist States should systematically and publicly provide full and accurate data on death sentences that are carried out. That data should include information on charges and disaggregated data, including on gender, age, nationality, ethnic origin and other relevant demographics of the persons affected. Such data is necessary to ensure compliance with international human rights standards.

56. States should ensure that persons with mental or intellectual disabilities are not sentenced to death. Laws and sentencing guidelines must be developed or amended to prohibit the imposition of the death sentence and the execution of such persons.

57. States should undertake further studies to identify the underlying factors that contribute to the substantial racial and ethnic disparities in the application of the death penalty, where they exist, with a view to developing effective strategies aimed at eliminating such practices.

⁹¹ See Writ petition (criminal) No. 55 of 2013, *Shatrughan Chauhan & Anr v. Union of India & Ors*, paras. 244 and 208.

⁹² See Inter-American Court of Human Rights, *DaCosta Cadogan v. Barbados*, judgment of 24 September 2009, para. 105.