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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

Question of the death penalty

Report of the Secretary-General*

Summary

The present report is submitted pursuant to Human Rights Council decision 18/117 and resolution 48/9. The report analyses the relationship between articles 6 and 14 of the International Covenant on Civil and Political Rights, focusing on the right to seek pardon or commutation of sentences and the right to have one's conviction and sentence reviewed by a higher tribunal according to law, in accordance with the safeguards guaranteeing the protection of the rights of those facing the death penalty as set out in the annex to Economic and Social Council resolution 1984/50. Although considerable progress was made towards the abolition of the death penalty during the reporting period, an increased number of people were executed worldwide, which included a significant increase in executions for drug-related offences.

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



I. Introduction

1. The present report is submitted pursuant to Human Rights Council decision 18/117 and resolution 48/9. In its decision 18/117, the Human Rights Council requested the Secretary-General to continue to submit to the Council, in consultation with Governments, specialized agencies and intergovernmental and non-governmental organizations, a yearly supplement to his quinquennial report on capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. The report covers the period from 7 June 2022 to 6 June 2023 and is submitted to update previous reports on the question of the death penalty, including the quinquennial report of the Secretary-General.
2. In its resolution 48/9, the Human Rights Council requested the Secretary-General to dedicate the 2023 supplement to his quinquennial report on capital punishment to the relationship between articles 6 and 14 of the International Covenant on Civil and Political Rights focusing on the right to seek pardon or commutation of the sentence and the right to have one's conviction and sentence reviewed by a higher tribunal according to law, in accordance with the safeguards guaranteeing the protection of the rights of those facing the death penalty as set out in the annex to Economic and Social Council resolution 1984/50.
3. In preparing the present report, the Office of the United Nations High Commissioner for Human Rights (OHCHR), on behalf of the Secretary-General, sought contributions from Member States, international and regional organizations, national human rights institutions and non-governmental organizations.¹

II. Changes in law and practice

A. Abolition of the death penalty or initiatives towards its abolition, including establishing a moratorium on executions

4. The Human Rights Committee has concluded that article 6 (6) of the Covenant reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. In the Committee's view, the death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and the progressive development of human rights.²
5. During the reporting period, considerable progress was made towards the abolition of the death penalty. In December 2022, with 125 votes in favour, the General Assembly adopted a resolution, for the ninth time, on a moratorium on the use of the death penalty. Ghana, Liberia and Uganda voted in favour of the General Assembly resolution on a moratorium on the use of the death penalty for the first time.³

¹ Submissions were received from Argentina, Chile, Cuba, Ecuador, Italy, Jordan, Kenya, Lithuania, Mexico, Qatar, the Russian Federation, Saudi Arabia, Singapore, Switzerland and Togo, from the European Union, and from the Anti-Death Penalty Asia Network, the Capital Punishment Justice Project, Eleos Justice, Monash University, the International Federation of Action by Christians for the Abolition of Torture, the International Bar Association Human Rights Institute, the International Commission against the Death Penalty, Justice Project Pakistan, Project 39A, Reprieve, the Bahrain Institute for Rights and Democracy and the European Saudi Organization for Human Rights.

² Human Rights Committee, general comment No. 36 (2018), para. 50.

³ General Assembly resolution 77/222, and see the submission of the International Federation of Action by Christians for the Abolition of Torture.

6. Momentum towards abolition in sub-Saharan Africa continued, with the Central African Republic,⁴ Equatorial Guinea⁵ and Zambia⁶ abolishing the death penalty for all crimes. In July 2022, two draft laws were introduced in the Parliament of Ghana, aimed at abolishing the death penalty for ordinary crimes.⁷ In July 2022, the Senate of Liberia adopted a bill to abolish the death penalty, which is currently under consideration by Parliament.⁸ On 6 June 2023, the Senate of Côte d'Ivoire adopted a law authorizing the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.⁹

7. On 11 April 2023, the Parliament of Malaysia passed two bills abolishing the mandatory death penalty for 11 crimes, including murder and terrorism, and replacing it with alternative sentences. Once the bill is signed into law, its provisions will apply retroactively, granting 90 days to those on death row to seek a review of their sentences.¹⁰

8. In August 2022, the President of Sri Lanka confirmed that he would not sign for the execution of a death sentence imposed on a person by any court in Sri Lanka for any offence.¹¹

B. Global trends in the use of the death penalty

9. In its resolution 1989/64, the Economic and Social Council urged Member States to publish, for each category of offence for which the death penalty was authorized, and if possible on an annual basis, information on the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal, and the number of instances in which clemency had been granted, and to include information on the extent to which the safeguards referenced therein had been incorporated into national law. The General Assembly reiterated this recommendation in its resolution 77/222, urging States to make available relevant information, disaggregated by sex, age, disability, nationality and race, as applicable, and other applicable criteria, with regard to their use of the death penalty. The Secretary-General echoed this call by recommending that States systematically and publicly provide full, accurate and disaggregated data on death sentences, including on the socioeconomic and other status or vulnerabilities of convicted and executed persons and on the crimes of which they were convicted.¹² China and Viet Nam continue to classify data on the use of the death penalty as a State secret.¹³

10. Amnesty International's annual report on the global use of the death penalty noted a positive tendency towards abolition in 2022. However, it also highlighted an increase in the number of people known to have been executed worldwide, including a significant increase in executions for drug-related offences.¹⁴ According to its research, 883 executions were recorded in twenty countries in 2022, marking a 53 per cent increase from 2021 and the

⁴ See <https://worldcoalition.org/2022/06/26/central-african-republic-abolishes-the-death-penalty/>.

See also the submission of the International Federation of Action by Christians for the Abolition of Torture.

⁵ See <https://www.ohchr.org/en/press-releases/2022/09/comment-acting-un-high-commissioner-human-rights-nada-al-nashif-after>.

⁶ See <https://news.un.org/en/story/2023/01/1132212>.

⁷ Submission of the International Federation of Action by Christians for the Abolition of Torture.

⁸ Ibid.

⁹ See <http://fiacat.org/presse/communiqués-de-presse/3146-communique-op2-rci>.

¹⁰ See <https://www.ohchr.org/en/press-releases/2023/04/malaysia-un-experts-hail-parliamentary-decision-end-mandatory-death-penalty> and <https://www.hrw.org/news/2023/04/11/malaysia-repeals-mandatory-death-penalty>.

¹¹ See <https://www.ft.lk/front-page/President-informs-court-his-signature-will-not-be-used-to-execute-death-sentence/44-739349> and http://www.colombopage.com/archive_22B/Sep01_1662007289CH.php.

¹² A/HRC/48/29, para. 57.

¹³ Amnesty International Global Report, "Death sentences and executions: 2022", p. 6.

¹⁴ Ibid., p. 7.

highest number of executions it has recorded in the past five years.¹⁵ It asserts that this sharp increase in executions was due primarily to practices in the Middle East and North Africa region, where known executions went up by 59 per cent. Executions in the Middle East and North Africa region accounted for 93 per cent of known global executions in 2022, and 94 per cent of the executions in that region were carried out by the Islamic Republic of Iran (70 per cent) and Saudi Arabia (24 per cent).

11. In early May 2023, the United Nations High Commissioner for Human Rights decried a “frightening” number of executions that had taken place in the Islamic Republic of Iran since the beginning of the year. He indicated that an average of more than 10 people had been put to death each week in the Islamic Republic of Iran during that period. Most of these executions were for drug-related offences, and a disproportionately high number of those executed were from minorities.¹⁶ Special Rapporteurs and Working Groups of the Human Rights Council¹⁷ have condemned this spate of executions in the Islamic Republic of Iran, asserting that trials of some of the persons sentenced to death were marred by violations of due process guarantees in proceedings that fell short of international fair trial standards. They also indicated that Iranian authorities used the death penalty and execution as a tool of political repression against protesters, dissidents and minorities.¹⁸ Harm Reduction International asserted that around 40 per cent of those executed for drug offences in the Islamic Republic of Iran in 2022 were of Baluchi ethnicity, despite Baluchis accounting for roughly 2 per cent of the population.¹⁹

12. In November 2022, OHCHR reported that executions had taken place almost daily over the course of two weeks in Saudi Arabia after the authorities ended a 21-month unofficial moratorium on the use of the death penalty for drug-related offences. Seventeen men were executed between 10 and 22 November 2022 for drug and contraband offences.²⁰

13. Executions resumed in Kuwait and in the State of Palestine for the first time since 2017.²¹

14. In December 2022, OHCHR reported that the Taliban de facto authorities in Afghanistan had resumed judicial executions, including publicly.²² The Special Rapporteur on the situation of human rights in Afghanistan raised serious concerns regarding the independence and qualifications of those appointed by the Taliban de facto authorities to adjudicate cases, indicating that key judicial positions had been filled with religious scholars, mainly members of the Taliban. They were advised by muftis (Islamic scholars qualified to issue an opinion on a point of sharia law for specific cases), who were involved in pretrial and trial processes, including investigations and the provision of advice on punishment, with judges mainly following their advice. The Special Rapporteur was also alarmed by allegations of bribes and by reports that it was common for alleged perpetrators to be

¹⁵ See <https://www.amnesty.org/en/latest/news/2023/05/death-penalty-2022-executions-skyrocket/#tab-global-facts>.

¹⁶ See <https://www.ohchr.org/en/press-releases/2023/05/iran-frightening-number-executions-turk-calls-end-death-penalty>.

¹⁷ The Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, the Working Group on Arbitrary Detention, the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on freedom of religion or belief, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on minority issues, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

¹⁸ See <https://www.ohchr.org/en/press-releases/2023/05/iran-un-experts-condemn-recent-executions-urge-moratorium-death-penalty>.

¹⁹ Harm Reduction International, *The Death Penalty for Drug Offences: Global Overview 2022*, p. 30.

²⁰ See <https://www.ohchr.org/en/press-briefing-notes/2022/11/saudi-arabia-resumption-executions-drug-related-offences>.

²¹ See <https://www.aljazeera.com/news/2022/11/16/kuwait-executes-seven-people-despite-international-outcry> and <https://news.un.org/en/story/2022/09/1126021>.

²² See <https://news.un.org/en/story/2022/12/1131487>.

detained, sentenced and punished by the police and other security agencies all on the same day, without any semblance of due process or judicial review.²³

15. In a number of States, parliamentary and judicial processes have maintained the status quo with respect to the death penalty or sought regressive changes. In the Philippines, six bills are pending in the House of Representatives that aim to reintroduce the death penalty, including as a punishment for high-level drug traffickers.²⁴ In Belarus, one man was executed.²⁵ In early March 2023, the President of Belarus signed a bill introducing the death penalty for State officials and military personnel convicted of high treason. Belarus is the only country in Europe that continues to actively use the death penalty.²⁶

16. The Court of Appeal of Guyana upheld the constitutionality of the death penalty,²⁷ and the Judicial Committee of the Privy Council upheld the mandatory death penalty in Trinidad and Tobago.²⁸ In the United States of America, the State of Idaho has reinstated the firing squad as an execution method.²⁹

17. In the Democratic Republic of the Congo, three individuals were sentenced to death by a military tribunal on 16 November 2022. On 9 December 2022, around fifty deputies submitted a petition to the country's National Assembly demanding that the moratorium on the death penalty be lifted.³⁰ Executions were recorded in Somalia.³¹

III. Right to seek pardon or commutation of a death sentence

A. Legal framework

18. It is stated in article 6 (4) of the Covenant that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence, and that amnesty, pardon or commutation may be granted in all cases. This obligation is reflected in the safeguards guaranteeing protection of the rights of those facing the death penalty, as contained in the annex to resolution 1984/50 of the Economic and Social Council.

19. The Human Rights Committee has interpreted article 6 (4) of the Covenant to mean that States parties to the Covenant are required to allow individuals sentenced to death to seek pardon or commutation, to ensure that amnesties, pardons and commutations can be granted to them in appropriate circumstances, and to ensure that death sentences are not carried out before requests for pardon or commutation have been meaningfully considered and conclusively decided upon according to applicable procedures. The Committee also considered that no category of sentenced persons could be a priori excluded from such measures of relief, nor should the conditions for attainment of relief be ineffective, unnecessarily burdensome, discriminatory in nature or applied in an arbitrary manner.³² Furthermore, the Committee considered that it was contrary to the object and purpose of article 6 of the Covenant for States parties to take steps to increase de facto the rate of use of

²³ A/HRC/52/84, para. 51.

²⁴ Harm Reduction International, *The Death Penalty for Drug Offences: Global Overview 2022*, p. 25.

²⁵ Viasna Human Rights Centre, "Condemned prisoner's death date revealed more than a year after the execution", 17 February 2023.

²⁶ See <https://www.theguardian.com/world/2023/mar/09/russia-ally-belarus-brings-in-death-penalty-for-high-treason> and <https://www.reuters.com/world/europe/belarus-approves-death-penalty-officials-convicted-high-treason-2023-03-09/>.

²⁷ Guyana Times, "Appeal Court quashes death sentences imposed on three ex-GDF Coast Guards", 22 December 2022, available at <https://guyanatimesgy.com/appeal-court-quashes-death-sentence-imposed-on-3-ex-gdf-coast-guards/>.

²⁸ Judicial Committee of the Privy Council, *Chandler v. The State* (No. 2) (Trinidad and Tobago), judgment of 16 May 2022, available at <https://www.jcpc.uk/cases/docs/jcpc-2020-0051-judgment.pdf>.

²⁹ See <https://www.idahostatesman.com/news/politics-government/state-politics/article276868683.html>.

³⁰ Submission of the International Federation of Action by Christians for the Abolition of Torture.

³¹ See <https://www.voanews.com/a/somali-military-court-executes-13-militants-5-soldiers-/6995738.html>.

³² See the Committee's general comment No. 36 (2018), para. 47.

and the extent to which they resorted to the death penalty, or to reduce the number of pardons and commutations they granted.³³

20. The Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that the right to seek clemency implies the existence of a meaningful procedure through which to make such an application. This right must also ensure that the legislature or other actors do not take actions that eliminate the availability of amnesties, pardons and commutations.³⁴

21. In paragraph 5 of its resolution 1989/64, the Economic and Social Council called upon all Member States to publish information about the use of the death penalty for each category of offence for which the death penalty was authorized, including the number of death sentences in which amnesty or pardon had been granted. The Council also called upon States to publish information on the extent to which amnesties or pardons for death sentences were incorporated into national law. If possible, the reporting under this safeguard should occur on an annual basis.³⁵ The Secretary-General has echoed this call by urging States to systematically and publicly provide full, accurate and disaggregated data on the number of death sentences in which amnesty or pardon has been granted.³⁶ However, many retentionist States do not publicly provide data on their pardon and commutation processes, as part of an overall lack of transparency in reporting death penalty information.³⁷

B. Pardons and commutations

22. Amnesty International recorded pardons or commutations of death sentences in 26 countries, and at least 28 exonerations of prisoners under sentence of death in four countries, in 2022.³⁸ The majority of pardons and commutations appear to have taken place in sub-Saharan Africa, where at least 240 commutations, 67 pardons and 27 exonerations occurred across several countries.³⁹ In December 2022, Malawi finished commuting 25 death sentences in the country, leaving no prisoners remaining on death row.⁴⁰ The President of Zambia commuted the death sentences of the remaining 390 prisoners, including 11 women, on 8 February 2023.⁴¹ In Mali, three Ivorian soldiers who had been sentenced to death in absentia for assassination and conspiracy against the Government were granted a presidential pardon on 6 January 2023.⁴²

23. In the United States, in November 2022, the Governor of the State of Alabama ordered a halt to executions in the State after two failed attempts at lethal injections, calling for a “top-to-bottom” review of the process.⁴³ Three persons who had been convicted and sentenced to death had the charges against them dismissed in the States of Illinois,⁴⁴ Maryland⁴⁵ and Pennsylvania,⁴⁶ after the courts considered evidence of official misconduct, perjury, false accusations, false confessions and inadequate legal representation in their cases.

³³ Ibid., para. 50.

³⁴ A/HRC/8/3, para. 60.

³⁵ A/HRC/48/29, para. 7.

³⁶ Ibid., para. 57.

³⁷ Ibid., para. 28.

³⁸ Amnesty International Global Report, “Death sentences and executions: 2022”, p. 13.

³⁹ Ibid., p. 35.

⁴⁰ Submissions of the International Commission against the Death Penalty and Reprieve.

⁴¹ Submission of the International Commission against the Death Penalty; and see <https://www.barrons.com/news/zambia-commutes-nearly-400-death-sentences-after-law-change-01675886708> (from Agence France Presse).

⁴² Submission of the International Federation of Action by Christians for the Abolition of Torture.

⁴³ See <https://www.al.com/news/2022/11/gov-kay-ivey-orders-moratorium-on-executions-in-alabama.html>.

⁴⁴ See <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6378>.

⁴⁵ See <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6541>.

⁴⁶ See <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6222>.

In December 2022, the outgoing Governor of the State of Oregon commuted all remaining death sentences in the State.⁴⁷

24. At least 20 commutations and at least seven pardons were granted in States of the Middle East and North Africa region in 2022.⁴⁸ In July 2022, the United Arab Emirates commuted the sentence of a foreign woman who had been sentenced to death for drug trafficking.⁴⁹ Egypt commuted the death sentence of seven foreigners for drug trafficking in June 2022.⁵⁰

C. National practices

25. Member States and civil society organizations provided input on national practices concerning the right to seek pardon or commutation of a death sentence. According to the joint submission of the Anti-Death Penalty Asia Network, the Capital Punishment Justice Project, Eleos Justice and Monash University, the rate of approval of clemency applications has varied across countries in South-East Asia. For example, Thailand granted clemency to 95 per cent of its death row prisoners from 1991 to 2016, whereas Singapore only granted clemency to 0.6 per cent of its prisoners on death row during the same period.⁵¹ The Anti-Death Penalty Asia Network, the Capital Punishment Justice Project, Eleos Justice and Monash University believe that one of the reasons for this variation may be that reliance on clemency appears to be greater in nations where the legal system lacks other mechanisms for recognizing changed circumstances and correcting errors and inequities.⁵²

26. In its submission, the International Federation of Action by Christians for the Abolition of Torture noted that the frequency with which States granted pardons or commutations of death sentences also varied, with some States granting pardons or commutation measures on a yearly basis. The President of the Niger, for example, signs a decree commuting death sentences to sentences of life imprisonment every 18 December. Other nations such as Cameroon also do so, but less regularly.⁵³

27. The Anti-Death Penalty Asia Network, the Capital Punishment Justice Project, Eleos Justice and Monash University assert that the political status of the final decision maker may also influence clemency rates among States that retain the death penalty.

28. According to Reprieve, the Bahrain Institute for Rights and Democracy, the European Saudi Organization for Human Rights, the Anti-Death Penalty Asia Network, the Capital Punishment Justice Project, Eleos Justice and Monash University, the clemency application processes in some States are ambiguous and non-transparent.⁵⁴ In February 2021, the Saudi Human Rights Commission informed the Human Rights Council that any child who committed a crime carrying a death sentence in Saudi Arabia would be subject to a maximum

⁴⁷ *Oregon Capital Chronicle*, “Oregon Gov. Kate Brown commutes 17 death sentences, ending death row”, 13 December 2022, available at oregoncapitalchronicle.com/2022/12/13/oregon-gov-kate-brown-commutes-17-death-sentences-ending-death-row/.

⁴⁸ Amnesty International Global Report, “Death sentences and executions: 2022”, p. 32.

⁴⁹ See <https://www.haaretz.com/israel-news/2022-07-07/ty-article/.premium/israeli-gets-life-in-uae-prison-after-death-sentence-overturned/00000181-d8f0-dfe8-a7b7-fcf341dc0000>.

⁵⁰ See <http://www.handsoffcain.info/notizia/egypt-7-pakistanis-sentenced-to-death-commuted-to-life-imprisonment-60353541>.

⁵¹ Daniel Pascoe, “Republic of Singapore”, in *Last Chance for Life: Clemency in Southeast Asian Death Penalty Cases* (Oxford University Press, March 2019), chap. 4, available at: <https://academic.oup.com/book/37374/chapter-abstract/331356502?redirectedFrom=fulltext>.

⁵² Joint submission of the Anti-Death Penalty Asia Network, the Capital Punishment Justice Project, Eleos Justice and Monash University.

⁵³ Submission of the International Federation of Action by Christians for the Abolition of Torture.

⁵⁴ Joint submission of Reprieve and the Bahrain Institute for Rights and Democracy; joint submission of Reprieve and the European Saudi Organization for Human Rights; and joint submission of the Anti-Death Penalty Asia Network, the Capital Punishment Justice Project, Eleos Justice and Monash University.

sentence of 10 years in a juvenile institution, according to a royal decree issued in 2020.⁵⁵ However, the royal decree is yet to be officially enacted as law, despite being announced three years ago. It also appears that the contents of the royal decree have not been published, which makes it impossible to verify its scope or reach. In June 2021, Saudi Arabia executed an adult for crimes he had allegedly committed as a child.⁵⁶ Royal directives were then issued in June 2021, which ordered the General Directorate of Prisons to implement pardon procedures for individuals who were detained for drug offences. However, Reprieve and the European Saudi Organization for Human Rights claim lack of clarity on how this would apply for individuals sentenced to death.⁵⁷

29. The time that a prisoner spends on death row may also have a significant effect on clemency, because it increases the probability of a range of factors arising that may increase the likelihood of pardon or commutation. These factors include aiding ongoing or future police investigations, psychiatric or terminal illness, old age and regime change.⁵⁸ Long waiting times for the clemency applications themselves can become important decision-making criteria that lead to commutations. In March 2023, a Malaysian prisoner was granted clemency after the Anti-Death Penalty Asia Network successfully argued that his 29 years on death row were unjust.⁵⁹

30. Nevertheless, clemency applications should be heard within a reasonable period. According to the Human Rights Committee, under article 6 (4) of the Covenant, pardon or commutation procedures must offer certain essential guarantees, including certainty regarding the pardon and commutation procedures followed. Pardon and commutation procedures also require States parties to inform individuals sentenced to death, in advance, of the timeline for consideration of the request, and to inform them promptly about the outcome of the procedure.⁶⁰ The Anti-Death Penalty Asia Network, the Capital Punishment Justice Project, Eleos Justice and Monash University claim that the time taken to process clemency applications in the Asia-Pacific region ranges from less than a year in Viet Nam to upwards of 15–20 years in Malaysia and Thailand.

31. The International Federation of Action by Christians for the Abolition of Torture notes that the commutation of death sentences has even been delayed in some abolitionist States. It cites the example of Benin, where the death penalty was abolished in 2016 but 14 death row inmates in Akpro-Misséré Prison had to wait until 2018 to receive a presidential decree commuting their death sentences to life imprisonment.⁶¹

32. Kenya has taken steps to provide a clearly established right and procedure for making a clemency application under domestic law. Article 133 of the Constitution of Kenya provides the President with discretion to offer a pardon or to exercise the power of mercy, on the petition of any person. The criminal legislation of Kenya also protects this right. Section 332 (3) of the Criminal Procedure Code grants the President the authority to issue an order for commutation or pardon in respect of offenders sentenced to death. The Government of Kenya conducts awareness and sensitization programmes for prisoners on death row so that they can better understand their rights to appeal and their ability to access review

⁵⁵ Joint submission of Reprieve and the European Saudi Organization for Human Rights, referring to UN Web TV, 6th meeting, forty-sixth regular session of the Human Rights Council, United Nations, 23 February 2021, available at <https://media.un.org/en/asset/k1p/k1ptgc87e9>.

⁵⁶ See the joint submission of Reprieve and the European Saudi Organization for Human Rights; and “Mustafa al-Darwish: Saudi man executed for crimes committed as a minor”, BBC News, 15 June 2021, available at <https://www.bbc.co.uk/news/world-middle-east-57492219>.

⁵⁷ Joint submission of Reprieve and the European Saudi Organization for Human Rights.

⁵⁸ Joint submission of the Anti-Death Penalty Asia Network, the Capital Punishment Justice Project, Eleos Justice and Monash University.

⁵⁹ See https://malaysia.news.yahoo.com/suhakam-lauds-johor-pardoning-man-100116573.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAFQyk4-VKp9lNv7kNj_JqbhThSRefSwntBSQcuYJyYKiEFsMvvXOsbDZnHfmRcLsc0VvQm1KgFKGOBe0ScI6eWcTFh1NjICT4aTAnzyIgQqLCsvWavMTPGzxOsqC9vvFapcZKEZuDDR49xOyIUGOBUz9LObF4J-KRYjqhS65Hke.

⁶⁰ Human Rights Committee, general comment No. 36 (2018), para. 47.

⁶¹ Submission of the International Federation of Action by Christians for the Abolition of Torture.

platforms for appeals, pardons or commutations.⁶² Indonesia adopted a new Criminal Code which, once effective in 2026, will allow for the commutation of death sentences after 10 years of incarceration if certain conditions are met.⁶³

33. In Kenya, persons sentenced to death may apply electronically for a presidential pardon, commutation of sentence or stay of execution through the newly established⁶⁴ Electronic Petitions Management Information System portal,⁶⁵ or by filling out a form that can be downloaded from the portal. Petitioners can monitor the status of their petitions through the portal and the public can learn about the process by visiting the portal's website.

34. Government task forces can also help to improve the process of applying for pardon or commutation of a death sentence. In Kenya, a task force set up to review the country's laws relating to the exercise of the power of mercy has issued a series of recommendations, which include the sealing of criminal records to provide pardoned persons with better opportunities for gainful employment, and the establishment of a multi-agency reintegration committee tasked with assisting with the reintegration of pardoned persons into society.⁶⁶

35. In India, the rejection of a request for pardon or commutation of a death sentence is not necessarily final. Persons may file a request for judicial review of the rejection of a mercy petition in the High Court and the Supreme Court. While the courts cannot question executive pardon powers on the merits, they can review the rejection of a mercy petition if there has been an inordinate or unexplained delay in deciding the petition, or if the State Governor or President has refused to consider supervening circumstances or materials. Supervening circumstances could include delay in execution, insanity, mental illness, solitary confinement, reliance on judgments declared per incuriam, and procedural lapses in the disposal of the request for pardon.⁶⁷

36. While many countries recognize the right to seek pardon or commutation of a death sentence, certain crimes are often excluded from this right. In Cameroon, for example, Presidential Decree 2020/193 of 15 April 2020 excludes certain categories of convicted persons from the right to seek a commutation of their sentence. It is stated in article 4 of the decree that the commutation measures do not apply to persons who escaped detention, are repeat offenders, committed an infraction while in detention, or have been convicted of certain crimes, including terrorism. The International Federation of Action by Christians for the Abolition of Torture argues that, in practice, this automatically excludes large numbers of persons facing the death penalty, since a large percentage of persons sentenced to death in Cameroon have been convicted of crimes related to terrorism.⁶⁸ Similarly, Justice Project Pakistan asserts that the Anti-Terrorism Act in Pakistan bars commutations or pardons for individuals convicted of terrorism-related crimes, and that this has denied many death row prisoners in Pakistan the right to seek a mercy petition after conviction.

37. The European Union also values the importance of facilitating access to and understanding of clemency procedures. Over the years, it has supported programmes that provide moral support to death row inmates and their loved ones during commutation and retrial procedures.⁶⁹

38. Guidance from United Nations human rights mechanisms can have a positive effect on people's enjoyment of the right to seek pardon or commutation of a death sentence. In October 2019, the Ministry of Interior of Pakistan issued standard operating procedures for the consideration of mercy petitions, following input provided by the Human Rights Committee. Following this step, the country's Federal Ministry for Law and Justice drafted a criminal law and justice reforms bill in 2022, which contained a set of proposed

⁶² Submission of Kenya.

⁶³ See <https://www.mondaq.com/crime/1268552/key-provisions-of-indonesias-new-criminal-code> and <https://lens.civicus.org/indonesias-new-criminal-code-a-turn-for-the-worse/>; and Amnesty International Global Report, "Death sentences and executions: 2022", p. 8.

⁶⁴ The portal and website were launched on 13 April 2022; see <https://www.powerofmercy.go.ke/home>.

⁶⁵ Submission of Kenya, referring to <https://www.powerofmercy.go.ke/e-petition>.

⁶⁶ Submission of Kenya.

⁶⁷ Submission of Project 39A.

⁶⁸ Submission of the International Federation of Action by Christians for the Abolition of Torture.

⁶⁹ Submission of the European Union.

amendments to the Code of Criminal Procedure and the Penal Code. Although the bill has yet to be considered by the National Assembly, Justice Project Pakistan states that the bill was guided by the Committee's recommendations, and that it was aimed at improving the procedure through which prisoners seek pardons or commutations in Pakistan by ensuring transparency, certainty, objectivity and due process.⁷⁰ In April 2018, following clarifications sought by United Nations human rights experts, the King of Bahrain commuted the death sentences of four prisoners to life imprisonment a day after the Military Court of Appeal had confirmed their sentences.⁷¹

39. Domestic judiciaries also play an important role in ensuring that the right to seek pardon or commutation of a death sentence is fully respected. In 2021, for example, a Pakistani court ruled that a mercy petition was deficient because it did not include material referring to the petitioner's mental illness. The court directed that a fresh mercy petition be filed on his behalf, mentioning his plea of mental illness, along with copies of his entire medical history.⁷²

IV. Right to have one's conviction and sentence reviewed by a higher tribunal according to law

A. Legal framework

40. Article 14 (5) of the Covenant requires States parties to ensure that everyone convicted of a crime has the right to have their conviction and sentence reviewed by a higher tribunal according to law. The Human Rights Committee has stated that the expression "according to law" is not intended to leave the very existence of the right of review to the discretion of the States parties, since the right is recognized by the Covenant, and not merely by domestic law, and has clarified that the term rather relates to the determination of the modalities by which the review by a higher tribunal is to be carried out, as well as which court is responsible for carrying out the review.⁷³

41. Mandatory death sentences that leave domestic courts with no discretion as to whether to designate the offence as a crime warranting the death penalty, and whether to issue the death sentence in the particular circumstances of the offender, violate article 6 of the Covenant because they are arbitrary in nature.⁷⁴

42. The right to have one's conviction and sentence reviewed by a higher tribunal according to law is violated not only if the decision by the court of first instance is final, but also where a conviction imposed by an appeal court, or a court of final instance, following acquittal by a lower court, cannot be reviewed by a higher court according to domestic law. If the highest court of a country acts as the first and only instance, the absence of any right to review by a higher tribunal is not offset by the fact of being tried by the supreme tribunal of the State party concerned.⁷⁵

43. The right to have one's conviction and sentence reviewed by a higher tribunal imposes a duty to review the conviction and sentence substantively, on the basis of the sufficiency of the evidence, and the law, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without any consideration of the facts is not sufficient under the Covenant.⁷⁶ One important aspect of this factual consideration is the need to fully consider allegations that a death sentence is

⁷⁰ Submission of Justice Project Pakistan.

⁷¹ Submission of Reprieve and the Bahrain Institute for Rights and Democracy; and see <https://www.ohchr.org/en/press-releases/2018/04/bahrain-un-rights-experts-condemn-military-court-convictions-cite-torture>.

⁷² Submission of Justice Project Pakistan. See also <https://tribune.com.pk/story/2290483/the-madness-of-sanity>.

⁷³ Human Rights Committee, general comment No. 32 (2007), para. 45.

⁷⁴ Human Rights Committee, general comment No. 36 (2018), para. 37.

⁷⁵ Human Rights Committee, general comment No. 32 (2007), para. 47.

⁷⁶ *Ibid.*, para. 48.

based on evidence elicited through torture or ill-treatment. Indeed, the Human Rights Committee has stated that criminal convictions resulting in the death penalty that are based on information procured by torture or cruel, inhuman or degrading treatment of interrogated persons would violate articles 7 and 14 (3) (g) of the Covenant, as well as article 6.⁷⁷

44. However, article 14 (5) does not require a full retrial or a “hearing”, so long as the tribunal carrying out the review can examine the factual dimensions of the case. Therefore, the Covenant is not violated if the tribunal carrying out the review looks at the allegations against a convicted person in great detail, considers the evidence submitted at the trial and referred to on appeal, and finds that there was sufficient incriminating evidence to justify a finding of guilt.⁷⁸

45. The Human Rights Committee has also stated that the right to have one’s conviction reviewed cannot be exercised effectively if the convicted person does not have access to a reasoned, written judgment of the trial court. In this regard, if domestic law provides for several instances of appeal, the convicted person must have access to documents, such as trial transcripts, at least in the court of first appeal, if the Covenant is to be respected.⁷⁹ States parties must also take all feasible measures to review procedural barriers to reconsideration of convictions and to re-examine past convictions on the basis of new evidence, including new DNA evidence.⁸⁰

46. The right of appeal is especially important in death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14 (3) (d), but also of article 14 (5) since the denial of legal aid for an appeal effectively precludes an effective review of the conviction and the sentence. The right to have one’s conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, since this would deprive them of the opportunity to seek alternative representation to ensure that their concerns were raised at the appellate level.⁸¹

47. The standards and guarantees set forth in article 14 (5) overlap and interact with other provisions of the Covenant. The Human Rights Committee has stated that violation of the effective right to an appeal in proceedings resulting in the imposition of the death penalty would render the death sentence arbitrary in nature, and in violation of the right to life.⁸²

48. These protections set forth in articles 6 and 14 of the Covenant are reflected in the safeguards guaranteeing protection of the rights of those facing the death penalty, which were approved by the Economic and Social Council in its resolution 1984/50. The sixth of these safeguards establishes that anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and that steps should be taken to ensure that such appeals become mandatory.

49. The protections found in articles 6 and 14 of the Covenant and resolution 1984/50 of the Economic and Social Council are also related to paragraph 5 of resolution 1989/64 of the Economic and Social Council, which called upon all Member States to publish, for each category of offence for which the death penalty was authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of death sentences reversed or commuted on appeal, and the extent to which this safeguard was incorporated into national law. The Secretary-General has echoed this call by urging States to systematically and publicly provide full, accurate and disaggregated data on death sentences, including data on death sentences reversed or commuted on appeal.⁸³

⁷⁷ Human Rights Committee, general comment No. 36 (2018), para. 54.

⁷⁸ See the Committee’s general comment No. 32 (2007), para. 48.

⁷⁹ *Ibid.*, para. 49.

⁸⁰ Human Rights Committee, general comment No. 36 (2018), para. 43.

⁸¹ *Ibid.*

⁸² Human Rights Committee, general comment No. 36 (2018), para. 41.

⁸³ A/HRC/48/29, para. 57.

B. National practices

50. In their submissions, Member States and civil society organizations indicated positive developments among some retentionist States concerning the right to appeal one's conviction and sentence in death penalty cases.

51. In its submission, Chile reported that it retained the death penalty exclusively for certain crimes committed by its military personnel during times of war. These cases were heard by military tribunals instead of civilian courts. Initially, defendants were not afforded the right to appeal under these procedures, but the Supreme Court of Chile had recently determined that it had the right to review sentences issued by Chilean military tribunals under the five grounds of judicial review found in article 473 of the country's Penal Code.

52. In 2016, the Supreme Court of Chile relied on this new power of judicial review for the first time to annul a sentence issued by a military tribunal. From 2016 to 2021, the Supreme Court issued more than 30 annulments, benefiting more than 252 persons, all of whom had been sentenced by military tribunals during the country's dictatorship. In each of these cases, the power to review the sentences was premised on the fourth ground under article 473 (d) of the Penal Code, which permits review if an act "occurred or was discovered after the sentence was issued, or a document appeared that was unknown during the process, which would suffice to establish the innocence of the condemned person". In every instance where this ground provided standing for review, it was based on evidence that the death sentences had been based on statements obtained during torture.⁸⁴

53. The Supreme Court of Pakistan has established a presumption in favour of life sentences over the death penalty and has underscored that the circumstances of the accused and of the offence must be considered as mitigating factors against a death sentence.⁸⁵ This appears to have led to a significant reduction in the number of death row prisoners in Pakistan, with the figures dropping from 7,164 death row prisoners in 2012 to 3,226 in 2022, representing a 54.9 per cent decrease.⁸⁶

54. In 2017, the Supreme Court of Kenya declared that mandatory death sentences were unconstitutional because they violated the right to a fair trial, which included the right to appeal one's sentence. As a result, the Government decided to overhaul its death penalty regime and create a task force dedicated to reviewing the country's legislative framework on the death penalty. The review process has suggested eligibility for resentencing for all persons who have been subjected to the mandatory death penalty, including those convicted and sentenced to death prior to 2010 who are serving commuted sentences.⁸⁷

55. Despite these positive steps, challenges in ensuring the right to an effective appeal in death penalty cases persist among Member States. Reprieve and the Bahrain Institute for Rights and Democracy assert that the higher courts in Bahrain rely on evidence elicited through torture to confirm and finalize death sentences. They also allege that appellate judges in Bahrain do not investigate allegations of torture and ill-treatment, or rely on the outcome of investigations by Bahraini oversight bodies, which do not always comply with the international minimum standards required by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol).⁸⁸

56. In Myanmar, Martial Law Order 3/2021 remains in effect. The law provides for special or existing military tribunals, which try criminal cases involving civilian defendants in some townships, including death penalty cases, through summary proceedings and without a right to appeal.⁸⁹ In July 2022, the Secretary-General and the High Commissioner for

⁸⁴ Submission of Chile.

⁸⁵ Submission of Justice Project Pakistan.

⁸⁶ Submission of Justice Project Pakistan.

⁸⁷ Submission of Kenya.

⁸⁸ Joint submission of Reprieve and the Bahrain Institute for Rights and Democracy.

⁸⁹ Martial Law Order 3/2021 of 16 March 2021.

Human Rights condemned the execution of four democracy activists by the country's military following closed-door trials.⁹⁰

57. In December 2022, the President of Singapore assented to the Post-appeal Applications in Capital Cases Act, passed by Parliament, which introduced a new procedure for post-appeal applications in death penalty cases.⁹¹

V. Conclusions and recommendations

58. The Secretary-General welcomes the steady progress towards the universal abolition of the death penalty. Encouraging steps include the adoption of national laws abolishing the death penalty for all crimes, establishing judicial discretion by removing mandatory death penalties, and the adoption of laws authorizing the ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. The Secretary-General is also encouraged by the record number of countries that voted in favour of the ninth General Assembly resolution on a moratorium on the use of the death penalty.

59. With respect to countries that have not yet abolished the death penalty, the Secretary-General welcomes the overall trend of decreased use in recent years. However, he notes with concern that the imposition and application of the death penalty has resumed or increased significantly in a number of countries. The Secretary-General reiterates his recommendation that States that continue to use the death penalty should adopt a moratorium on executions with a view to abolition.

60. The Secretary-General recalls that all States should fully respect their obligations under international human rights law. Retentionist States are urged to refrain from using the death penalty for crimes not involving intentional killing, such as drug-related offences.

61. States should abolish the mandatory death penalty. Furthermore, a process that takes into account the personal circumstances of the offender and the particular circumstances of the offence, including its specific aggravating or attenuating elements, should be put in place for all those who have been mandatorily sentenced to death.

62. Pending abolition, States should ensure that legal guarantees and safeguards are effectively put in place and implemented, including the right of anyone to seek pardon and commutation through procedures that offer certain essential guarantees, which may be granted in all death penalty cases. States should also ensure that conditions for attaining pardons or commutations are not ineffective, unnecessarily burdensome, discriminatory in nature, or applied in an arbitrary manner. States should also ensure that clemency applications are heard within a reasonable period to satisfy article 6 (4) of the Covenant, which obliges States parties to provide certainty regarding the pardon and commutation procedures followed. States should also consider establishing government task forces to help improve the process for applying for pardon or commutation of a death sentence.

63. Pending abolition, States should ensure that everyone sentenced to death has the right to have his or her conviction and sentence reviewed by a higher tribunal according to law, guaranteeing that the conviction and sentence will be reviewed substantively, on the basis of the sufficiency of the evidence, and the law, taking particular care to fully investigate and consider allegations that a death sentence is based on evidence elicited through torture or ill-treatment, noting that the Istanbul Protocol could guide the investigations into these allegations. States should also ensure that civilian courts have the right to review any death sentences issued by military tribunals.

⁹⁰ See <https://press.un.org/en/2022/sgsm21383.doc.htm> and <https://www.ohchr.org/en/press-releases/2022/07/myanmar-bachelet-condemns-executions-calls-release-all-political-prisoners>.

⁹¹ See parliament.gov.sg/docs/default-source/default-document-library/post-appeal-applications-in-capital-cases-bill-34-2022.pdf.

64. The Secretary-General urges States to comply with transparency requirements on the imposition and application of the death penalty, and systematically and publicly provide full, accurate and disaggregated data on death sentences, including on pardons, commutations and appeals, in order to facilitate a fully informed public debate on the scope of the use of the death penalty and its impact on human rights.

65. The Secretary-General reiterates that he shares the view of the Human Rights Committee that the death penalty cannot be reconciled with full respect for the right to life, and that the abolition of the death penalty is desirable and necessary for the enhancement of human dignity and the progressive development of human rights and recalls that there is no conclusive evidence to support the proposition that the death penalty deters crime more effectively than any other punishment.

66. The Secretary-General encourages States to adopt further measures to limit the application of, or abolish, the death penalty in order to accelerate progress towards universal abolition and ensure full respect for the fundamental right to life.
