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**PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL,  
POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS,  
INCLUDING THE RIGHT TO DEVELOPMENT**

**Report of the Special Rapporteur on torture and other cruel, inhuman  
or degrading treatment or punishment, Manfred Nowak\***

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\* Late submission.

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## Summary

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment submits his third report to the Human Rights Council. In chapter II he summarizes his activities between August and December 2008 (the period since the submission of his interim report to the General Assembly (A/63/175), including updates on country visits, future visits and pending requests for invitations, and highlights of key presentations and meetings. In chapter III, the Special Rapporteur focuses on the compatibility of the death penalty with the prohibition of cruel, inhuman and degrading punishment. He concludes that the historic interpretation of the right to personal integrity and human dignity in relation to the death penalty is increasingly challenged by the dynamic interpretation of this right in relation to corporal punishment and the inconsistencies deriving from the distinction between corporal and capital punishment, as well as by the universal trend towards the abolition of capital punishment. The Special Rapporteur invites the Council to request a comprehensive legal study on the compatibility of the death penalty with the right to personal integrity and human dignity. In chapter IV, he discusses a human rights-based approach to drug policies, concluding that drug users are often subjected to discriminatory treatment and that States have a positive obligation to ensure the same access to prevention and treatment in places of detention as outside them. He recommends that the Council take up the question of drug policies in the light of international obligations in the area of human rights at a future session.

## **I. INTRODUCTION**

1. The present report, the third by the current mandate holder, is submitted in accordance with Human Rights Council resolution 8/8.
2. Chapter I contains a summary of the activities of the Special Rapporteur between August and December 2008, since the submission of his interim report to the General Assembly (A/63/175). In chapter III, the Special Rapporteur focuses on the relationship between the death penalty and the prohibition of cruel, inhuman and degrading punishment. In chapter IV, he raises questions relating to a human rights-based approach to drug policies.
3. The summary of communications sent by the Special Rapporteur from 15 December 2007 to 14 December 2008 and the replies received thereto from Governments by 31 December 2008 are found in document A/HRC/10/44/Add.1. Document A/HRC/10/44/Add.2 contains a summary of the information provided by Governments and non-governmental organizations on the implementation of the recommendations of the Special Rapporteur following his country visits. With regard to addendum 2, the Special Rapporteur wishes to state that, starting with the present report, the format of the follow-up report has been modified with the aim of rendering it more reader-friendly and of facilitating the identification of the steps taken in response to recommendations. For this reason, follow-up tables have been created containing the recommendations of the Special Rapporteur, a brief description of the situation when the country visit was made, an overview of steps taken in previous years and included in previous follow-up reports, and more detailed information on the specific measures taken in the current year. These tables are submitted to the respective Governments for their input and comments before the report is published. Documents A/HRC/10/44/Add.3 and 4 are reports of country visits to Denmark and the Republic of Moldova, respectively. Document A/HRC/10/44/Add.5 is a preliminary note on his visit to Equatorial Guinea.

## **II. ACTIVITIES OF THE SPECIAL RAPPORTEUR**

4. The Special Rapporteur draws the attention of the Council to his fourth interim report submitted to the General Assembly (A/63/175), which he presented on 23 October 2008. In that report, he described his activities for the period January to July 2008, the period since the submission of his report to the Council (A/HRC/7/3 and addenda).

### **A. Communications concerning human rights violations**

5. During the period from 15 December 2007 to 14 December 2008, the Special Rapporteur sent 78 letters of allegations of torture to 48 Governments and 155 urgent appeals to 49 Governments on behalf of persons who might be at risk of torture or other forms of ill-treatment.

### **B. Country visits**

6. In the period since the submission of his report to the General Assembly, the Special Rapporteur has completed a mission to Equatorial Guinea (9 to 18 November 2008). A preliminary note on his findings is to be found in addendum 5 to this report.

## **Pending requests**

7. Between September and November 2008, the Special Rapporteur renewed requests for invitations from the following States: Algeria (request first made in 1997); Afghanistan (2005); Belarus (2005); Bolivia (2005); Côte d'Ivoire (2005); Egypt (1996); Eritrea (2005); Ethiopia (2005); Fiji (2006); Gambia (2006); India (1993); Iran (Islamic Republic of) (2005); Israel (2002); Liberia (2006); Libyan Arab Jamahiriya (2005); Papua New Guinea (2006); Saudi Arabia (2005); Syrian Arab Republic (2005); Turkmenistan (2003); Uzbekistan (2006); and Yemen (2005). He regrets that some of these requests are long-standing. Other outstanding requests are with Iraq (2005), Tunisia (1998) and Zimbabwe (2005). New requests have been sent to Jamaica, Kazakhstan (which has responded favourably), Trinidad and Tobago and Uruguay.

## **C. Highlights of key presentations and consultations**

8. On 28 and 29 August 2008, at the International Expert Conference "15 Years Vienna World Conference on Human Rights", the Special Rapporteur served as Chairperson of the Working Group on Challenges to the National Implementation of International Human Rights Standards and made a presentation on results and achievements since the Vienna Conference.

9. At a side meeting organized by Human Rights Watch/International Harm Reduction Association on 16 September 2008 on the theme "Ensuring human rights in drug policy: a panel and discussion on human rights and public health challenges in policies relating to drug control" in the Human Rights Council, he made a presentation entitled "A human rights-based approach to international narcotic drug policy: a Topic for the Human Rights Council?".

10. On 18 September 2008, the Special Rapporteur participated in an expert meeting to discuss the forthcoming Handbook of the Office of the High Commissioner for Human Rights (OHCHR) on international human rights law and international humanitarian law in Geneva.

11. On the occasion of the second Academic Penal Regime Days, held at Vienna University on 23 September 2008, he made a presentation on the theme "Human rights monitoring of detention centres through external visiting mechanisms".

12. On 3 October 2008, the Special Rapporteur met with the new United Nations High Commissioner for Human Rights in Geneva.

13. On 20 October 2008, the Special Rapporteur held a meeting with the Executive Director of the United Nations Office on Drugs and Crime, in Vienna, to discuss possible areas of cooperation.

14. On 22 October 2008, the Special Rapporteur participated in a meeting on international aviation law on the theme "Engaging with international bodies to promote legal safeguards and protect human rights in the counter-terrorism context", organized by the Working Group on Protecting Human Rights While Countering Terrorism of the Counter-Terrorism Implementation Task Force. On the same day, he gave a lecture on the theme "Combating torture" at Columbia Law School in New York.

15. On 23 October 2008, the Special Rapporteur presented his interim report (A/63/175) to the General Assembly and, during a meeting with the President of the General Assembly, discussed challenges to the absolute prohibition of torture.

16. On 24 October 2008, in New York, he participated in a parallel event on the theme “Persons with disabilities and torture”, sponsored by the Permanent Mission of Costa Rica to the United Nations and co-organized by several non-governmental organizations. On the same day, he also met with the Department on Access to Justice of the United Nations Development Programme.

17. On 30 and 31 October 2008, the Special Rapporteur gave a training course on the International Covenant on Civil and Political Rights at Bilgi University, Istanbul.

18. On 7 November 2008, he gave a speech on the topic of the World Court of Human Rights at the annual meeting of the German Society of the United Nations, Berlin.

19. On 6 and 7 November 2008, the Special Rapporteur participated in a workshop on the theme “Extraordinary renditions and the protection of human rights”, held in the framework of the Transatlantic Project on counter-terrorism and human rights at Vienna University, and delivered a speech on the role of special procedures in relation to renditions.

20. On 20 November 2008, he had meetings with the Committee against Torture and members of the United Nations Subcommittee on Prevention of Torture in Geneva. Issues of common concern were discussed, in particular thematic issues that had come up over the previous year.

21. On 3 December 2008, at Webster University Vienna, the Special Rapporteur gave a speech on the theme “Challenges to the absolute prohibition of torture”.

22. On 4 December 2008, he took part in a panel discussion on the documentary “Taxi to the dark side”, together with former Guantanamo detainee Murat Kurnaz in the framework of the Human Rights Film Festival “This Human World/One World in Vienna”.

23. On 5 December 2008, in his capacity as Rapporteur of the Swiss Initiative to commemorate the sixtieth anniversary of the Universal Declaration of Human Rights, he presented a working paper entitled “Protecting dignity: an agenda for human rights”.

24. On 8, 10, 12 and 15 December 2008, he gave keynote speeches relating to the sixtieth anniversary of the Universal Declaration of Human Rights in Copenhagen, Cape Town, Vienna and Magdeburg (Germany), respectively.

#### **D. Press statements**

25. On 6 October 2008, together with 12 experts, the Special Rapporteur issued a statement in support of the Dignity and Justice for Detainees Week initiated by the High Commissioner, drawing attention to violations of economic, social and cultural rights frequently experienced by detainees, the needs of particular groups, and the increased risk of ill-treatment in detention settings.

26. On 24 October 2008, on the occasion of the presentation of his report to the General Assembly, the Special Rapporteur issued a statement shedding light on the two key themes in his report, namely the protection against torture of persons with disabilities, and solitary confinement. In the same statement, he also deplored that torture was still a frequent or even standard practice in many countries and called on States to replace the paradigm of opacity reigning in many detention facilities with one of transparency, by allowing independent monitoring of the places where persons are deprived of their liberty.

27. On 9 December 2008, on the occasion of the sixtieth anniversary of the Universal Declaration on Human Rights, together with other special procedures mandate holders, he issued a joint statement entitled "It is my right" to call upon all to intensify efforts to realize the promise of dignity, justice and equality for all contained in the Declaration.

28. On 10 December 2008, on the occasion of the adoption of the Optional Protocol to the International Covenant on Economic Social and Cultural Rights by the General Assembly, the Special Rapporteur, together with 35 other mandate holders, issued a press release entitled "Economic, social and cultural rights: legal entitlements rather than charity".

### **III. THE DEATH PENALTY IN LIGHT OF THE PROHIBITION OF CRUEL, INHUMAN AND DEGRADING PUNISHMENT**

29. During the interactive dialogue on the report of the Special Rapporteur (A/63/175) before the General Assembly, the representative of France, on behalf of the European Union, asked whether or not the death penalty was compatible with the prohibition of cruel, inhuman or degrading punishment under international law in the present section, the Special Rapporteur seeks to explore different angles of this issue on the basis of political and legal trends and the jurisprudence of a variety of international, regional and monitoring bodies.

#### **A. Trend towards the abolition of capital punishment**

30. To date, the death penalty has been primarily addressed in relation to the right to life. This is not surprising, as capital punishment has been regulated in international treaty law as an explicit exception to the right to life. Article 2 of the European Convention on Human Rights of 1950 stipulates only one condition for capital punishment to be in conformity with the right to life, namely that the accused is sentenced by a court following his (or her) conviction of a crime for which this penalty is provided by law. The International Covenant on Civil and Political Rights is more demanding; four of the six paragraphs of article 6 dealing with the right to life are devoted to capital punishment. The death penalty can only be carried out pursuant to a final judgement of a competent court, arrived at in accordance with the minimum guarantees of a fair trial and other provisions of the Covenant; it can only be applied for the most serious crimes, in accordance with the law in force at the time of the commission of the crime; it should not be applied for crimes committed by persons below 18 years of age; it should not be carried out on pregnant women; and anyone sentenced to death should have the right to seek pardon or commutation of the sentence. In addition, article 6 (2) and (6) clearly convey the message that the Covenant promoted the abolition of capital punishment and that abolitionist States parties are

prevented from reintroducing it. Article 4 of the American Convention on Human Rights<sup>1</sup> builds on the Covenant but develops it further. It explicitly requires abolitionist States not to re-establish the death penalty; prohibits capital punishment for political offences or related common crimes; and prohibits its imposition on persons who, at the time the crime was committed, were over 70 years of age. The Convention on the Rights of the Child, in its article 37 (a), requires States parties to ensure that capital punishment is not imposed for offences committed by persons younger than 18 years of age.

31. The trend towards the abolition of capital punishment has also led to various protocols to the above-mentioned treaties, which in effect amount to respective amendments of the right to life for the States parties to such protocols. The sixth and thirteenth Additional Protocols to the European Convention on Human Rights, adopted in 1983 and 2002, respectively, call for the general prohibition of capital punishment, in times of both peace and war. Both the Council of Europe and the European Union made it a requirement for States wishing to join their respective organizations that they abolish capital punishment. For these reasons, Europe (with the exception of Belarus) today is a death penalty-free zone. Similarly, the Organization of American States, by means of the adoption of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty of 1990, clearly aim at its abolition, and Latin American States, with the exception of Guyana, Trinidad and Tobago and Jamaica, are abolitionist. In the same year, the United Nations adopted the Second Optional Protocol to the Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty. Although only a limited number of States in effect became parties to these two protocols, they encouraged many States in all regions of the world to abolish capital punishment progressively, either de jure or at least de facto. When the United Nations was founded in 1945, only a small minority of seven States in the world had abolished the death penalty in law or practice.<sup>2</sup> At November 2008, this number had increased to a total of 141 States from all regions of the world.<sup>3</sup>

32. The trend towards abolition of capital punishment is also reflected by the fact that, even for the most horrible crimes, such as war crimes, genocide and crimes against humanity, international criminal law does not allow for the death penalty. Whereas the main war criminals of World War II had been sentenced to death by the military tribunals of Nuremberg and Tokyo, the Statutes of the International Criminal Court and of the ad hoc criminal tribunals established by the Security Council deliberately excluded capital punishment. Also, the Commission on Human Rights encouraged this trend in various resolutions. Before it was replaced by the Human Rights Council, the Commission in its last resolution 2005/59, called upon States that still maintained the death penalty to abolish it completely and, in the meantime, to establish a moratorium on executions. To date, the Council has not taken up this issue. In December 2007,

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<sup>1</sup> See the decision of the Human Rights Committee of 5 August 2003 in *Judge v. Canada*, communication No. 829/1998, paras. 10.2-10.6.

<sup>2</sup> See Amnesty International at [www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes](http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crimes).

<sup>3</sup> See A/63/293, para. 12, and [www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries](http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries).



however, the General Assembly adopted resolution 62/149 in which it envisaged that the Council could continue to work on this issue, and in which it called upon all States that maintained the death penalty to progressively restrict its use, to reduce the number of offences for which it may be imposed, and to establish a moratorium on executions with a view to abolishing the death penalty.<sup>4</sup> In addition, the Assembly called upon States that had abolished the death penalty not to reintroduce it and requested the Secretary-General to submit a report on the use of capital punishment based upon information to be provided by all States. Resolution 62/149 was reaffirmed by the Assembly in December 2008 with a slightly stronger majority.<sup>5</sup> In subsequent reports (A/63/293, paras. 14 and 69), the Secretary-General confirmed that there is a trend towards abolition. In addition, in November 2008, the African Commission on Human and Peoples' Rights adopted a resolution calling on African States to observe a moratorium on the death penalty.<sup>6</sup>

33. Despite the above non-binding resolutions of the highest political body of the United Nations and the clear trend towards abolition under international treaty law and practice, this legal analysis must conclude that, for States that have not yet ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights or the respective protocols to the European and American Conventions on Human Rights, the further use of the death penalty does not constitute a violation of the right to life. This conclusion does, however, not provide a legal response to the question raised above, namely whether capital punishment is to be considered cruel, inhuman or degrading punishment in the sense of article 7 of the International Covenant on Civil and Political Rights or article 16 of the Convention against Torture.

34. Traditionally, this question has been negated on the basis of a systematic and historical interpretation of the Covenant and comparable regional human rights treaties. The legal reasoning seems to be compelling: how can a certain practice be considered a violation of a specific provision of a treaty if it is explicitly permitted by another provision of the same treaty? Whereas this line of argument was certainly correct at the time when the human rights treaties were adopted, when the clear majority of States did not consider the death penalty cruel, inhuman or degrading, however, is it still compelling today? Would it not be more appropriate to interpret the meaning of "cruel, inhuman or degrading treatment and punishment" in the light of the present-day understanding of these words by Governments around the world? Human rights are a rapidly developing concept and most international and regional treaty monitoring bodies apply a dynamic interpretation of human rights treaty law.

### **B. Evolution of the prohibition of corporal punishment**

35. The prohibition of cruel, inhuman or degrading punishment has been interpreted in a dynamic manner in relation to the question of corporal punishment. Corporal punishment may be

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<sup>4</sup> A total of 104 States voted in favour of the resolution, 54 against and 29 abstained.

<sup>5</sup> A total of 105 States voted in favour of the resolution, 48 against and 31 abstained.

<sup>6</sup> See final communiqué of the forty-fourth ordinary session of the African Commission on Human and Peoples' Rights, held in Abuja from 10 to 24 November 2008.

compared to capital punishment in the sense that, even apart from the physical pain and suffering it might cause, over the last decades it has evolved to be considered a direct assault on the dignity of a person and therefore prohibited by international law. When the European Convention was adopted in 1950, corporal punishment, as capital punishment, was widely accepted in European societies, in particular as chastisement in the family and as disciplinary punishment in schools, prisons, the military and similar institutions. In other words, these comparatively lenient forms of corporal punishment were not regarded as cruel, inhuman or degrading punishment by most European States. This attitude significantly changed, however, during the 1960s and 1970s. Consequently, the European Court of Human Rights, in the landmark judgement of *Tyrer v. UK*, decided in 1978 by a dynamic interpretation of article 3 of the European Convention on Human Rights that birching of a juvenile, a traditional punishment on the Isle of Man, was no longer compatible with a modern understanding of human rights in Europe. Referring to the European Convention as a “living instrument” that needed to be “interpreted in light of present-day conditions”, the Court considered birching degrading punishment.<sup>7</sup> Only four years later, the Human Rights Committee, in its general comment on the prohibition of torture, cruel, inhuman or degrading treatment or punishment, expressed the unanimous opinion that the prohibition in article 7 of the International Covenant on Civil and Political Rights must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure (para. 2). In 2000, this opinion was confirmed in the individual case of *Osbourne v. Jamaica*, which concerned the judicial sentence of 10 strokes with a tamarind switch on naked buttocks in the presence of 25 prison warders. In a unanimous decision, the Committee stated that, irrespective of the nature of the crime to be punished, however brutal it might be, corporal punishment constituted cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.<sup>8</sup> This constant case law of the European Court of Human Rights and the Human Rights Committee has also been confirmed by the jurisprudence of the Inter-American Court of Human Rights,<sup>9</sup> the African Commission on Human and Peoples’ Rights and national courts,<sup>10</sup> as well as by the practice of other monitoring bodies, including the Committee against Torture<sup>11</sup> and the Special Rapporteur on torture.<sup>12</sup>

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<sup>7</sup> Judgement of 25 April 1978 in *Tyrer v. UK*, Series A.26, para. 31.

<sup>8</sup> Decision of 15 March 2000 in *Osborne v. Jamaica*, communication No. 759/1997, para. 3.3.

<sup>9</sup> Decision of 11 March 2005 in *Winston Caesar v. Trinidad and Tobago*, Series C No. 123.

<sup>10</sup> See for example the judgement of the Constitutional Court of Uganda, in *Kyamanywa v. Uganda*, Reference No. 10/2000, 1 December 2001, where the Constitutional Court in its ruling on a reference from the Supreme Court decided that corporal punishment was inconsistent with article 24 of the Constitution (and therefore void under article 2 of the Constitution) as being cruel, inhuman or degrading punishment.

<sup>11</sup> See the concluding observations on the State reports of Saudi Arabia, Yemen and Qatar in CAT/C/CR/28/5, paras. 4 (b), 8 (b), CAT/C/CR/31/4, para. 6 (b), and CAT/C/QAT/CO/1, para. 12.

<sup>12</sup> See E/CN.4/1993/26, para. 593, E/CN.4/1997/7, para. 8 and A/60/316, para. 28.

36. When the Declaration on Violence against Women was adopted in 1993, the prohibition of corporal punishment was extended to the private sphere of the family; in other words, an obligation was imposed on States to adopt legislative and other measures to protect women against domestic violence, including corporal punishment.<sup>13</sup> In addition, the positive obligation of States to effectively prohibit and prevent corporal punishment of children has been confirmed by various monitoring bodies, including the Committee on the Rights of the Child in relation to article 19 of the Convention on the Rights of the Child<sup>14</sup> and the European Committee of Social Rights in relation to the explicit provision in article 17 of the revised European Social Charter.<sup>15</sup>

37. Since corporal punishment in all its forms, as a judicial or criminal sanction, whether imposed by State authorities or by private actors, including schools and parents, has been qualified by all relevant intergovernmental human rights monitoring bodies as cruel, inhuman or degrading punishment, it follows that, under present international law, corporal punishment can no longer be justified, not even under the most exceptional situations.

### **C. Capital punishment in the light of the prohibition of cruel, inhuman and degrading punishment**

38. The question therefore arises whether this legal reasoning should not be equally applied to capital punishment. After all, is capital punishment not an aggravated form of corporal punishment? If the amputation of limbs is considered cruel, inhuman or degrading punishment, how can beheading then be qualified differently? If even comparatively lenient forms of corporal punishment, such as 10 strokes on the buttocks, are absolutely prohibited under international human rights law, how can hanging, the electric chair, execution by a firing squad and other forms of capital punishment ever be justified under the very same provisions?

39. Interestingly enough, the jurisprudence of international human rights monitoring bodies is much less clear in relation to capital punishment than it is in relation to corporal punishment. Even the European Court of Human Rights, which already in 1989 had found the death row-phenomenon in Virginia to constitute inhuman or degrading punishment,<sup>16</sup> never arrived at the conclusion that capital punishment per se violates article 3 of the European

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<sup>13</sup> See for example the reports of the Special Rapporteur on violence against women, most recently in E/CN.4/2006/61 and A/HRC/4/34, and the report of the Special Rapporteur on torture in A/HRC/7/3.

<sup>14</sup> See for example the concluding observations of the Committee on the State report of Monaco, 2002, CRC/C/15/Add.158, para. 26, on the State report of Antigua and Barbuda, 2003, CRC/C/15/Add.247, para. 36, on the State report of the former Republic of Macedonia, 2000, CRC/C/15/Add.118 and on the State report of Sri Lanka, 2003, CRC/C/15/Add.207, para. 29.

<sup>15</sup> See for example the decisions of the European Committee of Social Rights on the collective complaints of *OMCT v. Greece, Belgium and Ireland*, Nos. 17, 18 and 21/2003.

<sup>16</sup> Judgement of 7 July 1989 in *Soering v. UK*, Series A 161, para. 111.

Convention.<sup>17</sup> The Human Rights Committee followed the systematic interpretation of the rights to life and personal integrity originally developed by the European Court,<sup>18</sup> although it increasingly realized the inconsistency between its approaches towards corporal and capital punishment. This became most evident in its jurisprudence concerning different methods of execution. All members agreed that certain methods, such as stoning to death, which intentionally prolong pain and suffering, amount to cruel, inhuman or degrading punishment. But opinions differ considerably as to which methods of execution can still be considered “humane” today. In *Kindler v. Canada*, the majority held in 1993 that execution by lethal injection, as practised in Pennsylvania, did not amount to inhuman punishment.<sup>19</sup> The United States Supreme Court arrived at a similar conclusion in 2008.<sup>20</sup> On the other hand, in its views on *Ng v. Canada* in 1993, the majority of the Human Rights Committee found that execution by gas asphyxiation, as practised until recently in California, did amount to cruel and inhuman treatment and, as a consequence, Canada had violated article 7 of the Covenant by having extradited the applicant to the United States.<sup>21</sup> In *Staselovich v. Belarus*, the Committee found execution by a firing squad to be in conformity with article 7 of the Covenant, but at the same time held that the failure of the authorities to notify the mother of the scheduled date for the execution of her son and their subsequent persistent failure to notify her of the location of her son’s grave amounted to inhuman treatment vis-à-vis the mother.<sup>22</sup> The Inter-American Court on Human Rights, referring to the Soering case before the European Court of Human Rights, found in the decision of *Hilaire and others v. Trinidad and Tobago* that the fact that the victims in detention may be taken out of the cell to be hanged at any moment or compelled to live under circumstances that impinge on their physical and psychological integrity constituted cruel, inhuman and degrading treatment.<sup>23</sup> Along similar lines, the Special Rapporteur on extrajudicial, summary or arbitrary executions stated in a report submitted to the Council on transparency and the imposition of the death penalty that the practice of informing death row prisoners of their impending execution only moments before they die, and families only later, was “inhuman and degrading” (E/CN.4/2006/53/Add.3, para. 32).

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<sup>17</sup> See for example the carefully phrased judgement of the Grand Chamber of 12 May 2005 in *Öcalan v. Turkey*, Application No. 46221/99, para. 175.

<sup>18</sup> See for example the controversial decision of 30 July 1993 in *Kindler v. Canada*, Comm. No. 470/1991, para. 15.1.

<sup>19</sup> *Ibid.*, para. 15.3. See also the individual opinion of Herndl and Sadi.

<sup>20</sup> *Baze et al. v. Rees*, Commissioner, Kentucky Department of Corrections, et al. of 16 April 2008, No. 07-5439.

<sup>21</sup> Decision of 5 November 1993 in *Ng v. Canada*, communication No. 469/1991, para. 16.4.

<sup>22</sup> Decision of 3 April 2003 in *Mariya Staselovich (and Igor Lyashkevich) v. Belarus*, Comm. No. 887/1999, para. 9.2.

<sup>23</sup> Judgement of 21 June 2002, Series C, No. 94 paras. 168-169. See also A/63/293, para. 21.

40. Another controversial issue concerns the death row phenomenon. In 1993, the Judicial Committee of the Privy Council of the British House of Lords held in *Pratt and Morgan v. Attorney General of Jamaica* that any detention on death row for more than five years violated the constitutional prohibition of inhuman and degrading treatment.<sup>24</sup> The Human Rights Committee criticized this approach by stating that the case law of the Privy Council “conveys a message to States parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed. This is not a message the Committee would wish to convey to States parties. Life on death row, harsh as it may be, is preferable to death”.<sup>25</sup> Consequently, even in cases of detention on death row for more than 10 years, the Committee maintained its jurisprudence of not finding a violation of article 7 of the Covenant unless death row was aggravated by particularly harsh prison conditions.<sup>26</sup>

#### D. The death penalty and human dignity

41. The differing views reached by the Human Rights Committee and other authorities in grappling with the question whether detention on death row and of various methods of execution are compatible with the right not to be subjected to cruel, inhuman and degrading treatment suggest the need for a different, more fundamental approach to the matter. Again, useful guidance is provided by the reasons for the finding that corporal punishment amounts to cruel, inhuman and degrading treatment. In reaching this conclusion, the international human rights monitoring bodies did not examine the suffering caused by physical chastisement itself. On the contrary, in *Tyrer v. United Kingdom*, the European Court explicitly found that, although the applicant did not suffer any severe or long-lasting physical effects, his punishment whereby he was treated as an object in the power of authorities constituted an assault on precisely that which is one of the main purposes of article 3 to protect, namely a person’s dignity and physical integrity.<sup>27</sup> The same idea was expressed at about the same time by Supreme Court judge Justice Brennan with regard to the death penalty: “The fatal constitutional infirmity in the punishment of death is that it treats members of the human race as non-humans, as objects to be toyed with and

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<sup>24</sup> Judgement of 2 November 1993 (2 AC 1).

<sup>25</sup> Decision of 22 March 1996 in *Errol Johnson v. Jamaica*, Comm. No. 588/1994, para. 8.4.

<sup>26</sup> See for example the decisions in *La Vende and Bickaroo v. Trinidad and Tobago*, Comm. Nos. 554 and 555/1993; and *Francis v. Jamaica*, communication No. 606/1994.

<sup>27</sup> The African Commission approvingly quoted this judgement in *Curtis Francis Doebbler v. Sudan* and added “There is no right for individuals, and particularly the Government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State-sponsored torture under the Charter and contrary to the very nature of this human rights treaty.”

discarded. [It is] thus inconsistent with the fundamental premise of the clause [prohibiting cruel and unusual punishment] that even the vilest criminal remains a human being possessed of common human dignity.”<sup>28</sup>

42. This perspective on the death penalty as primarily a question of human dignity appears to underlie also the most important pronouncement of the international community on the death penalty. In its resolution 62/149, in which it called upon all States to establish a moratorium on executions with a view to abolish the death penalty, the General Assembly justified this by stating that the use of the death penalty undermined human dignity. Although the notion of human dignity underpins the development of human rights in general, this statement can be interpreted as implying that the clear majority of States Members of the United Nations today consider that the death penalty violates the right to not be subjected to cruel, inhuman or degrading punishment.

43. In this respect, it is also particularly noteworthy that the absolute prohibition of the death penalty against juvenile offenders in the Convention on the Rights of the Child is contained in article 37 (a), the provision prohibiting cruel, inhuman or degrading treatment or punishment, and not in article 6 on the inherent right to life.

44. The Committee against Torture has not yet developed a clear legal reasoning as to whether capital punishment per se constitutes cruel, inhuman or degrading punishment, nor has it pronounced itself in the individual complaints procedure on the compatibility of capital punishment with the prohibition of cruel, inhuman or degrading punishment in article 16 of the Convention against Torture. The Committee has, however, repeatedly called on States parties in the State reporting procedure to abolish capital punishment.<sup>29</sup>

45. At the national level, a significant number of courts of last instance and constitutional courts have found that the death penalty per se violates the prohibition of cruel, inhuman or degrading punishment.<sup>30</sup> One of the most convincing legal opinions to this effect was developed

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<sup>28</sup> This statement was made in a dissenting opinion to a judgement finding that the death penalty did not constitute “cruel and unusual” punishment. *Gregg v. Georgia*, Supreme Court of the United States, 428 US 53 (1976), Brennan J dissenting.

<sup>29</sup> A/55/44, para. 75 (g) and A/50/44, para. 169.

<sup>30</sup> See for example the judgements of the Constitutional Court of Hungary, ruling 23/1990 (X 31) AB, Constitutional Court of Hungary, judgement of 24 October 1990, Magyar Közlöny (Official Gazette), 31 October 1991; the Constitutional Court of Lithuania, judgement of 9 December 1998, case No. 2/98; the Constitutional Court of Albania, decision in the name of the Republic on the Incompatibility with the Constitution of the Criminal Code of the Republic of Albania dispositions providing for the death penalty, Tirana, 10 December 1999; Constitutional Court of Ukraine, case No. 1-33/99, judgement of 30 December 1999, para. 2. The Judicial Committee of the Privy Council, in a trilogy of cases known as the *The Queen v. Hughes*, held that imposition of the “mandatory death penalty” violated the right to humane treatment under the constitutions of St. Lucia, St. Christopher and Nevis and Belize.

by the South African Constitutional Court in the landmark judgement of *State v. Makwanyane and Mchunu* in June 1995.<sup>31</sup> The Constitutional Court provided a comprehensive review of the case law of international human rights monitoring bodies at that time and then arrived at the firm conclusion that capital punishment in any case must be regarded as cruel, inhuman and degrading punishment.

#### **E. Conclusions and recommendations**

46. **What conclusions can be drawn from the analysis of developments pertaining to the death penalty in the light of the prohibition of cruel, inhuman and degrading treatment? In principle, the answer to the legal question posed by the French delegate in the General Assembly depends on the interpretation of the words “cruel, inhuman or degrading treatment or punishment” in article 7 of the International Covenant on Civil and Political Rights and similar provisions in other international and regional human rights treaties. Traditionally, States and human rights monitoring bodies followed a systematic and historic interpretation of the right to personal integrity and human dignity in conjunction with the right to life, which explicitly contains an exception for capital punishment. This interpretation is in line with article 31 of the Vienna Convention on the Law of Treaties, which stipulates that provisions of international treaties should be interpreted in their context. At the time of the adoption of the respective treaties, this was a fully legitimate method of interpretation.**

47. **International human rights monitoring bodies and domestic courts, however, developed and effectively apply a dynamic interpretation of the provisions of human rights treaty law. They consider human rights treaties “living instruments” that need to be interpreted in the light of present-day conditions. The application of this method of interpretation to the right to personal integrity and human dignity by regional human rights courts and universal treaty monitoring bodies has the effect that corporal punishment, which was not regarded as cruel, inhuman or degrading punishment at the time of the adoption of the respective treaties, is today considered such. Consequently, States that still practise corporal punishment as a judicial or disciplinary measure or that do not take effective legislative and other measures to prohibit and prevent corporal punishment in the private sphere are found to violate the absolute prohibition of cruel, inhuman or degrading punishment. Although the systematic interpretation of international human rights treaties has to date prevented regional and universal treaty monitoring bodies from applying the same dynamic interpretation of the right to personal integrity and human dignity to the death penalty, this legal reasoning is increasingly being challenged by obvious inconsistencies deriving from the distinction between corporal and capital punishment and by the universal trend towards the abolition of capital punishment.**

48. **The Human Rights Council may wish to follow the call of the General Assembly in paragraph 4 of its resolution 62/149 to continue the work of the Commission on Human**

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<sup>31</sup> Judgement of 6 June 1995, case No. CCT/3/94.

**Rights in respect to the question of the death penalty and request a more comprehensive legal study on the compatibility of the death penalty with the right not to be subjected to cruel, inhuman or degrading punishment under present human rights law.**

#### **IV. APPLYING A HUMAN RIGHTS-BASED APPROACH TO DRUG POLICIES**

##### **A. International drug policies and human rights: two separate issues**

49. A number of human rights have been affected by how drug control policies are currently shaped, both at the international and national levels. This is particularly true for the two ends of the “drug continuum”, which share the brunt of the burden of current drug-control policies: the production side, because those who cultivate the plants used to produce narcotic drugs depend on them for their livelihood; and the consumer side (currently 26 million people - about 0.6 per cent of the planet’s adult population), because it runs a greatly increased risk of discrimination, criminalization and, as a result, of falling victim to a large range of human rights violations.

50. Contemporary drug policies have also diverted attention, and much-needed resources, from the public health sphere. For instance, the United Nations Office on Drugs and Crime, the main United Nations department working on drug control, in its World Drug Report 2008, concluded that “public health, the first principle of drug control, has receded from that position, overshadowed by the concern with public security”.<sup>32</sup>

51. While the three major conventions relating to drugs, although referring to prevention and rehabilitation,<sup>33</sup> left it to individual States to devise their policies in this area, the international drug control system has evolved practically detached from the United Nations human rights machinery, which could have provided valuable guidance on how the above references should be interpreted, taking into account international human rights norms. As a result, only in 1998 did the Declaration on the Guiding Principles of Demand Reduction include a reference to human rights and the Universal Declaration of Human Rights and highlighted principles such as participation of the community, sensitivity to culture and gender.<sup>34</sup> In addition, the annual General Assembly resolutions on countering the world drug problem include references to human rights and the Charter of the United Nations.<sup>35</sup>

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<sup>32</sup> See the “second unintended consequence” in the World Drug Report 2008, p. 216.

<sup>33</sup> For example, the Single Convention on Narcotic Drugs 1961, arts. 36.1.b and 38; the Convention on Psychotropic Substances, 1971, arts. 20 and 22; and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, art. 3.4. b, c, and d.

<sup>34</sup> General Assembly resolution S-20/3, annex, para. 8.

<sup>35</sup> For example, General Assembly resolution 62/176, para. 1.



52. In spite of the principles and the calls of the General Assembly, when describing international drug control in 2008, the United Nations Office on Drugs and Crime still stated that “a system appears to have been created in which those who fall into the web of addiction find themselves excluded and marginalized from the social mainstream, tainted with a moral stigma, and often unable to find treatment even when motivated to seek it”.<sup>36</sup>

53. In the present section the Special Rapporteur looks at a number of areas where torture and ill-treatment occur as a direct or indirect result of current approaches to drug control and makes recommendations on how the gap between the two parallel universes<sup>37</sup> could be bridged.

### **B. Drugs and the right to personal integrity and human dignity**

54. The linkages between drugs and the right to personal integrity and human dignity have not previously been exposed in a systematic way, in particular not from a torture/ill-treatment perspective. One of the factors contributing to this is the limited access to justice for drug users, which goes hand in hand with the criminalization and marginalization to which they are subjected in many contexts. Similarly, they appear to have had little access to regional and international mechanisms. However, links between drugs and ill-treatment have many faces, extreme examples being the use of drugs to blunt fear and pain in child soldiers,<sup>38</sup> or drugging to make people compliant or to obtain information.<sup>39</sup> In the present section, the Special Rapporteur will look at two areas in more depth: drug users in the context of the criminal justice system and situations resulting from restricted access to drugs for palliative care.

### **C. Drug users in the criminal justice system**

55. The Special Rapporteur, in the course of several of his country visits, has noted the challenges posed to criminal justice systems by punitive drug policies, in terms of sheer number but also of the special needs of drug users in detention. In Indonesia, about 35 per cent of the prison population are in detention on charges related to drug crimes. The use of, and dealing in, drugs within correctional institutions constitutes a major problem.<sup>40</sup> In this regard, the Special

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<sup>36</sup> See the “fifth unintended consequence” in the World Drug Report 2008, p. 216.

<sup>37</sup> Address of the Special Rapporteur on the right to health, Paul Hunt: Human Rights, Health and Harm Reduction. States’ amnesia and parallel universes, 11 May 2008. Available from [www.ihra.net/PaulHunt](http://www.ihra.net/PaulHunt).

<sup>38</sup> See for example with respect to Sierra Leone, Child Soldiers, Global Report 2008, Coalition to stop the use of child soldiers, p. 229.

<sup>39</sup> See A/HRC/7/3/Add.1, paras. 123 and 183; and E/CN.4/2006/6/Add.6, appendix 3, para. 11.

<sup>40</sup> A/HRC/7/3/Add.7, appendix 1, paras. 2, 12 and 96.

Rapporteur also refers to other United Nations human rights mechanisms that have expressed concerns about the severity of penalties relating to narcotics offences.<sup>41</sup>

56. Some of the problems faced by drug users in the criminal justice system with regard to ill-treatment are examined below.

### **1. Lack of access to medical treatment and drug substitutes during detention**

57. Drug users are particularly vulnerable when deprived of their liberty. One of the questions in this context concerns withdrawal symptoms and to what extent they may qualify as torture or ill-treatment. There can be no doubt that withdrawal symptoms can cause severe pain and suffering if not alleviated by appropriate medical treatment, and the potential for abuse of withdrawal symptoms, in particular in custody situations, is evident. In a 2003 case, without specifically stating that the woman died from withdrawal, the European Court of Human Rights found a violation of the prohibition of inhuman or degrading treatment or punishment based on “the responsibility owed by prison authorities to provide the requisite medical care for detained persons”.<sup>42</sup> Moreover, if withdrawal symptoms are used for any of the purposes cited in definition of torture enshrined in article 1 of the Convention against Torture, this might amount to torture.

58. Also at later stages of detention, access of detainees to medical treatment, including access to opioid substitution therapy, is often severely restricted. Whereas the World Health Organization (WHO), the United Nations Office on Drugs and Crime and UNAIDS all concur that the therapy is the most effective intervention available for the treatment of opioid dependence and a critical component of efforts to prevent the spread of HIV among injecting drug users,<sup>43</sup> that it considerably reduces mortality and epidemics among drug users and that it improves uptake and adherence to antiretroviral treatment for HIV-positive opiate drug users,<sup>44</sup>

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<sup>41</sup> A/HRC/4/40/Add.3, paras. 85-88; E/CN.4/1999/68/Add.2, paras. 817, 18 and 83; CCPR/CO/83/MUS, paras. 15 and 85-88; A/55/40, paras. 422-451; CCPR/CO/70/PER, para. 13.

<sup>42</sup> *McGlinchey and others v. The United Kingdom* (Application No. 50390/99), judgement of 29 April 2003, para. 57).

<sup>43</sup> See also WHO/UNODC/UNAIDS: Interventions to address HIV in prisons - drug dependence treatments. Evidence for action technical papers, 2007, at [www.unodc.org/documents/hiv-aids/EVIDENCE%20FOR%20ACTION%202007%20drug\\_treatment.pdf](http://www.unodc.org/documents/hiv-aids/EVIDENCE%20FOR%20ACTION%202007%20drug_treatment.pdf) and WHO, UNODC, UNAIDS, “Substitution maintenance therapy in the management of opioid dependence and HIV/AIDS prevention: Position paper” (2004).

<sup>44</sup> WHO background note: Access to Controlled Medications Programme, September 2008.

in some developing and transitional countries, the most effective treatments for opiate addiction are available to fewer than 1 per cent of those in need. According to recent reports, only in 33 countries, persons in detention have access to the therapy<sup>45</sup> (this does not mean generalized access, but availability in at least one prison).

59. In this regard, the Special Rapporteur wishes to recall the WHO/United Nations Office on Drugs and Crime Principles of Drug Dependence Treatment of March 2008,<sup>46</sup> which explicitly refer to the need to view drug dependence as any other health-care condition, in terms of the standards of ethical treatment and stress that drug addicts enjoy the right to autonomy and privacy. Access to treatment and care services needs to be ensured also for the patients not motivated to stop drug use or relapsing after treatment, as well as during detention periods in prison. The principles also emphasize that drug dependence treatment should in general be voluntary and that, if it is part of State-imposed penal sanctions, the patient should have the possibility to reject treatment. The Special Rapporteur underlines the requirement of consent in this respect and recalls that the Committee on Economic, Social and Cultural Rights interpreted article 12 of the Covenant on Economic, Social and Cultural Rights to include “the right to be free from [...] non-consensual medical treatment and experimentation” and stressed that States had the obligation to refrain from applying coercive medical treatments, unless on an exceptional basis in line with applicable international standards.<sup>47</sup>

## **2. High risk of infection with HIV/AIDS**

60. On average, 1 of every 10 new HIV infections is caused by injected drug use, and in some countries and regions, this percentage is much higher. According to WHO, of all new HIV infections in Eastern Europe and Central Asia in 2005, 67 per cent were due to injection drug use.<sup>48</sup> The Reference Group to the United Nations on HIV and Injecting Drug Use concluded that 1 in 5 of the 15.9 million injecting drug users could be HIV-positive; in addition, nine countries have HIV rates among injecting drug users of 40 per cent or more. In his report of March 2007 (A/61/816) the Secretary-General stated that estimates from 94 low- and middle-income countries show that the proportion of injecting drug users receiving some type of prevention services was 8 per cent in 2005, and observed that this indicates “virtual neglect of this most-at-risk population”.<sup>49</sup>

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<sup>45</sup> See International Harm Reduction Association (2008), “Global State of Harm Reduction 2008: Mapping the response to drug-related HIV and hepatitis C epidemics”, p. 18.

<sup>46</sup> [www.who.int/substance\\_abuse/publications/principles\\_drug\\_dependence\\_treatment.pdf](http://www.who.int/substance_abuse/publications/principles_drug_dependence_treatment.pdf).

<sup>47</sup> General comments No. 14, paras. 8 and 34.

<sup>48</sup> WHO background note: Access to Controlled Medications Programme, September 2008; and UNAIDS, AIDS Epidemic Update 07, at [http://data.unaids.org/pub/EPISlides/2007/2007\\_epiupdate\\_en.pdf](http://data.unaids.org/pub/EPISlides/2007/2007_epiupdate_en.pdf).

<sup>49</sup> [www.idurefgroup.unsw.edu.au/IDURGWeb.nsf/page/Key+Data+Holdings](http://www.idurefgroup.unsw.edu.au/IDURGWeb.nsf/page/Key+Data+Holdings).

61. Whereas these figures reflect the situation in society at large, they are normally exacerbated when it comes to persons deprived of their liberty since places of detention create high-risk settings from the point of view of HIV, because of higher rates of HIV, high prevalence of risky-behaviour, including injecting drug use and sharing of injecting equipment, and sexual activity.<sup>50</sup> The criminalization of drug use and of syringes may contribute to this heightened risk. At the same time, although there is strong evidence that needle and syringe programmes play a crucial role in the prevention of HIV infection, only in eight countries do prisoners have access to such programmes.<sup>51</sup>

62. The Special Rapporteur would like to stress that the Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council in its resolutions 663 C (XXIV) and 2076 (LXII), fully apply to drug users, in particular rule 22 (2), which requires that detainees have access to specialist treatment. He also refers to a 2006 case, *Khudobin v. Russia*, where the European Court of Human Rights found that the absence of medical assistance of a HIV-positive prisoner, in the given context, amounted to degrading treatment.<sup>52</sup>

### 3. Forcible testing for HIV or hepatitis C

63. Since drug users carry a higher risk of contracting blood-borne viruses, often owing to the unavailability of sterile injecting equipment, in many countries they are also disproportionately subjected to forcible testing, in particular with regard to HIV and hepatitis C. In the Special Rapporteur's view, in general, testing must be voluntary and based on informed consent. In particular cases and circumstances, however, forcible testing may be necessary, such as for the purpose of obtaining evidence in court proceedings, but only if the necessary safeguards are in place.<sup>53</sup>

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<sup>50</sup> See for example [www.who.int/hiv/topics/idu/prisons/en/index.html](http://www.who.int/hiv/topics/idu/prisons/en/index.html).

<sup>51</sup> International Harm Reduction Association (2008), "Global state of harm reduction 2008: mapping the response to drug-related HIV and hepatitis C epidemics", p. 17.

<sup>52</sup> "[T]he applicant was HIV-positive and suffered from a serious mental disorder. This increased the risks associated with any illness he suffered during his detention and intensified his fears on that account. In these circumstances the absence of qualified and timely medical assistance, added to the authorities' refusal to allow an independent medical examination of his state of health, created such a strong feeling of insecurity that, combined with his physical sufferings, it amounted to degrading treatment within the meaning of Article 3", 26 October 2006, para. 96.

<sup>53</sup> *Saunders v. the UK*, judgement of the European Court for Human Rights, 17 December 1996, paras. 69-74.

64. If testing is indispensable, the way in which it is undertaken needs to be least intrusive and respect the dignity of the person subjected to the testing. In this context, a case before the European Court of Human Rights is of interest, even though it concerns the process of securing evidence.<sup>54</sup>

65. If forcible testing is done on a discriminatory basis without respecting consent and necessity requirements, it may constitute degrading treatment, especially in a detention setting. Therefore, the Special Rapporteur welcomes the clear language used in the UNAIDS/WHO policy statement on HIV testing of 2004, regarding consent, which requires that, in order to be able to provide informed consent, the patients should at a minimum be informed of the clinical benefit and the prevention benefits of testing, their right to refuse, the follow-up services that will be offered and, in the event of a positive test result, the importance of anticipating the need to inform anyone at ongoing risk who would otherwise not suspect they were being exposed to HIV infection.<sup>55</sup> The statement also mentions the right to confidentiality, which, if not respected, might raise concerns regarding inhuman or degrading treatment or punishment.

#### **4. Use of the death penalty and discriminatory treatment in the administration of justice**

66. The Special Rapporteur is concerned that, in some countries, drug offences are punishable by the death penalty and consequently convicts are held on death row or sentenced to life-imprisonment. The Human Rights Committee, in its general comment No. 6 on the right to life, clearly stated that, under article 6 (2), States were obliged to restrict the application of the death penalty to the “most serious crimes”, which does not include drug-related crimes.<sup>56</sup> This position has been reiterated by the Special Rapporteur on extrajudicial, summary or arbitrary executions.<sup>57</sup> In the Special Rapporteur on torture’s view, drug offences do not meet the threshold of most serious crimes. Therefore, the imposition of the death penalty on drug offenders amounts to a violation of the right to life, discriminatory treatment and possibly, as stated above, also their right to human dignity.

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<sup>54</sup> “The authorities subjected the applicant to a grave interference with his physical and mental integrity against his will. They forced him to regurgitate, not for therapeutic reasons, but in order to retrieve evidence they could equally have obtained by less intrusive methods. The manner in which the impugned measure was carried out was liable to arouse in the applicant feelings of fear, anguish and inferiority that were capable of humiliating and debasing him. Furthermore, the procedure entailed risks to the applicant’s health, not least because of the failure to obtain a proper anamnesis beforehand. Although this was not the intention, the measure was implemented in a way which caused the applicant both physical pain and mental suffering. He therefore has been subjected to inhuman and degrading treatment contrary to Article 3.” *Jalloh v. Germany*, 11 July 2006, para. 82.

<sup>55</sup> See [www.who.int/rpc/research\\_ethics/hivtestingpolicy\\_en\\_pdf.pdf](http://www.who.int/rpc/research_ethics/hivtestingpolicy_en_pdf.pdf).

<sup>56</sup> General comment No. 6/16 of 27 July 1982 in A/37/40, annex V.

<sup>57</sup> A/HRC/4/20, para. 53.

67. Furthermore, the Special Rapporteur is concerned that, in many countries, persons accused or convicted of drug-related crimes are subject to other forms of discriminatory treatment in places of detention, including solitary confinement, special prison regimes and poor detention conditions. In Indonesia, for example, people convicted of drug-related crimes are held in special prison regimes, and suspected drug consumers and traders are particularly vulnerable to abuse, as ill-treatment is frequently used by the police to extract information on drug suppliers<sup>58</sup>. Moreover, in many cases, their detention and/or forced treatment are not subject to judicial review. For instance, at the time of the Special Rapporteur's visit to China, "enforced drug rehabilitation" programmes (*qianzhi jiedu*) were a specific form of administrative detention.<sup>59</sup>

#### **D. Palliative care/access to pain relief suffers from drug-control barriers**

68. Worldwide, millions of people continue to suffer from often severe pain,<sup>60</sup> although already in 1961, the Single Convention, in its preamble, recognized that "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes", and its articles 4 and 21 further referred to the need for drugs to be available for medical purposes and the treatment of the sick. At its twentieth special session, the General Assembly, in its Guiding Principles of Drug Demand Reduction, more firmly declared the commitment of States to ensure adequate availability of narcotic drugs for the treatment of pain. In its resolution 2005/25 on treatment of pain using opioid analgesics, the Economic and Social Council recognized the importance of improving the treatment of pain, including by the use of opioid analgesics, as advocated by WHO, especially in developing countries, and called upon Member States to remove barriers to the medical use of such analgesics, taking fully into account the need to prevent their diversion for illicit use.

69. However, access to narcotic drugs is still severely restricted and sometimes unavailable, in particular in the global South. WHO notes that "approximately 80 per cent of the world's population has either no, or insufficient access to, treatment for moderate to severe pain. This is true for both developing and industrialized countries. Each year tens of millions of patients suffer moderate to severe pain without treatment: 0.8 million end-stage HIV/AIDS patients, about

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<sup>58</sup> A/HRC/7/3/Add.7, paras. 22 and 64; appendix I, paras. 2 and 96.

<sup>59</sup> E/CN.4/2006/6/Add.6, para. 33, footnote 34. Whereas a new law regulating detention for drug offences that entered into force in 2008 eliminated the use of re-education through labour, according to reports received by the Special Rapporteur, compulsory rehabilitation is still proscribed.

<sup>60</sup> See for example World Health Organization briefing note on access to controlled medications programme, September 2008. See also the report of the International Narcotics Control Board for 2004 (E/INCB/1999/1), para. 15.

4 million terminal cancer patients, patients suffering injuries, caused by accidents and violence, patients recovering from surgery, women in labour, patients with chronic illnesses and paediatric patients”.<sup>61</sup>

70. Apart from poverty and lack of access to medical care in general, this appears to be partly caused by strict narcotic drug control laws and practices devised at the national level, sometimes underpinned by international drug control policies, at least in the past. In 1999, the International Narcotics Control Board acknowledged that “outdated restrictive regulations and, more frequently, uninformed interpretations of otherwise correct regulations, misguided fears, and ingrained prejudices about using opioids for medical purposes continue to prevail in many countries”. Similarly, in 2007, the Board stated that “the low levels of consumption of opioid analgesics for the treatment of pain in many countries, in particular in developing countries, continue to be a matter of serious concern to the Board. The Board again urges all Governments concerned to identify the impediments in their countries to the adequate use of opioid analgesics for the treatment of pain and to take steps to improve the availability of those narcotic drugs for medical purposes, in accordance with the pertinent recommendations of WHO”.<sup>62</sup>

### **E. Conclusions and Recommendations**

**71. With regard to human rights and drug policies, the Special Rapporteur wishes to recall that, from a human rights perspective, drug dependence should be treated like any other health-care condition. Consequently, he would like to reiterate that denial of medical treatment and/or absence of access to medical care in custodial situations may constitute cruel, inhuman or degrading treatment or punishment and is therefore prohibited under international human rights law. Equally, subjecting persons to treatment or testing without their consent may constitute a violation of the right to physical integrity. He would also like to stress that, in this regard, States have a positive obligation to ensure the same access to prevention and treatment in places of detention as outside.**

**72. Similarly, the Special Rapporteur is of the opinion that the de facto denial of access to pain relief, if it causes severe pain and suffering, constitutes cruel, inhuman or degrading treatment or punishment.**

**73. To address the many tensions between the current punitive approach to drug control and international human rights obligations, including the prohibition of torture and cruel, inhuman and degrading treatment, the Special Rapporteur calls on the Human Rights Council to take up the question of drug policies in the light of international obligations in the area of human rights at one of its future sessions.**

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<sup>61</sup> WHO background note: Access to Controlled Medications Programme, September 2008.

<sup>62</sup> Report of the International Narcotics Control Board for 2007, New York. See also WHO, Achieving balance in national opioids control policy. Guidelines for Assessment Geneva, 2000, available at [www.painpolicy.wisc.edu/publicat/00whoabi/00whoabi.pdf](http://www.painpolicy.wisc.edu/publicat/00whoabi/00whoabi.pdf).

**74. Regarding the review process, decided by the General Assembly at its special session in 1998, to be held in Vienna in March 2009, the Special Rapporteur recommends that States and the relevant United Nations agencies reassess their policies, bearing in mind the following points:**

**(a) States should ensure that their legal frameworks governing drug dependence treatment and rehabilitation services are in full compliance with international human rights norms;**

**(b) States have an obligation to ensure that drug dependence treatment as well as HIV/hepatitis C prevention and treatment are accessible in all places of detention and that drug dependence treatment is not restricted on the basis of any kind of discrimination;**

**(c) Needle and syringe programmes in detention should be used to reduce the risk of infection with HIV/AIDS; if injecting drug users undergo forcible testing, it should be carried out with full respect of their dignity;**

**(d) States should refrain from using capital punishment in relation to drug-related offences and avoid discriminatory treatment of drug offenders, such as solitary confinement;**

**(e) Given that lack of access to pain treatment and opioid analgesics for patients in need might amount to cruel, inhuman and degrading treatment, all measures should be taken to ensure full access and to overcome current regulatory, educational and attitudinal obstacles to ensure full access to palliative care.**

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