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**Draft General Comment No. 36 on**

**Article 6 (Right to Life) of the International Covenant on Civil and Political Rights**

**Written contribution submitted by The Advocates for Human Rights, a non-governmental organization in special consultative status, in collaboration with The World Coalition Against the Death Penalty, an alliance of NGOs, bar associations, local authorities and unions, and FIACAT, the International Federation of Action by Christians for the Abolition of Torture**

The Advocates for Human Rights (The Advocates) is a volunteer-based non- governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. The Advocates conducts a range of programs to promote human rights in the United States and around the world, including monitoring and fact finding, direct legal representation, education and training, and publications. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a Death Penalty Project to provide pro bono assistance on post-conviction appeals, as well as education and advocacy to end capital punishment. The Advocates currently holds a seat on the Steering Committee of the World Coalition Against the Death Penalty.

The World Coalition Against the Death Penalty (World Coalition), an alliance of more than 150 NGOs, bar associations, local authorities and unions, was created in Rome on 13 May 2002. The aim of the World Coalition is to strengthen the international dimension of the fight against the death penalty. Its ultimate objective is to obtain the universal abolition of the death penalty. To achieve its goal, the World Coalition advocates for a definitive end to death sentences and executions in those countries where the death penalty is in force. In some countries, it is seeking to obtain a reduction in the use of capital punishment as a first step towards abolition.

FIACAT, The International Federation of Action by Christians for the Abolition of Torture, is an international non-governmental human rights organisation, set up in 1987, which works towards the abolition of torture and the death penalty. The Federation brings together some thirty national associations, the ACATs, present in four continents. FIACAT represents its members before international and regional organisations; by referring the concerns of its members working on the ground to international bodies, FIACAT’s aim is to encourage the adoption of relevant recommendations and their implementation by governments. FIACAT works towards the application of international human rights conventions, the prevention of torture in places of detention, and an end to enforced disappearances and impunity. It also takes part in the campaign against the death penalty by calling on states to abolish capital punishment in their legal systems. FIACAT also assists its member associations in organising themselves, supporting them so that they can become important players in civil society, capable of raising public awareness and having an impact on the authorities in their country.

1. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) confirms that the right to life is at the core of human dignity, and declares that “no one shall be arbitrarily deprived of his life.” Recognizing that numerous countries around the world still retained the death penalty, Article 6(2) provides:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Article 6(6) makes clear that provisions of Article 6 striving to prevent the use of capital punishment in the most egregious instances (such as for juvenile offenders and pregnant women), and to provide a definite path to seek clemency, must not be used as excuses for failure to progress toward full abolition.

1. In 1982, the Human Rights Committee (the Committee) adopted General Comment No. 6 on the right to life as expressed in ICCPR Article 6. The Committee observed that this right to life “is the supreme right from which no derogation is permitted,” even in times of public emergency, and “should not be interpreted narrowly.” Referring specifically to capital punishment, the Committee admonished State parties that “all measures of abolition should be considered as progress in the enjoyment of the right to life . . .” The Committee noted some progress toward abolition,[[1]](#footnote-1) but deemed that progress “quite inadequate.”
2. Since the adoption of General Comment No. 6, the total number of countries that have abolished the death penalty for all crimes has grown to 104, with 30 others not having carried out any executions in the last ten years.[[2]](#footnote-2) Yet, while executions declined over the years in many countries that retain the death penalty, the pace of executions in some States has recently remained disturbingly high, and certainly has not declined consistent with an intention to move toward abolition.[[3]](#footnote-3) 23 countries carried out executions in 2016. As of mid-September, 15 had done so in 2017: Saudi Arabia had already carried out 71 executions, and Iran had executed 380 persons.[[4]](#footnote-4) Another 2000 people are currently under sentence of death in Iran.[[5]](#footnote-5)
3. General Comment No. 36 will be an important step in clarifying areas of uncertainty, and in emphasizing the Committee's conviction that all State parties must continue making swift and substantial movement toward full abolition of the death penalty. Addressed below are several observations we hope will assist the Committee in urging countries toward that vital goal:
4. **Paragraph 39** of the draft of General Comment No. 36 states that “. . . a limited degree of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission of murder, cannot justify the imposition of the death penalty.” The laws of some countries allow an individual who is present and participates in a non-lethal crime, such as a robbery, to be charged with capital murder if another person on the scene commits murder, even where there is no evidence that the individual so charged was involved in the killing, approved of it, or had knowledge that the killer intended to kill. In a number of such cases, the rather perverse outcome has been that person(s) who didn’t kill anyone can be sentenced to death while the killer ends up with a lesser sentence in a separate trial.[[6]](#footnote-6) The Committee should consider addressing this issue directly, with the pertinent phrase reading “a limited degree of complicity in the commission of even the most serious crimes, such as providing the physical means for the commission or murder or involvement in a collateral, non-lethal crime (such as the commission of a robbery during which another person commits murder), cannot justify the imposition of the death penalty.”
5. **Paragraph 43** confirms that the abolition of the death penalty should apply retroactively. It is important to note also that if a State party eliminates a mandatory death penalty scheme, a scheme which is prohibited as explained in paragraph 41, all persons sentenced under that scheme are retroactively entitled to resentencing hearings during which the sentencing authority shall have the discretion called for in paragraph 41, consistent with the retroactive leniency (lex mitior) principle and article 15, paragraph 1.
6. **Paragraph 44** addresses methods of execution and states that “injection of untested lethal drugs” is contrary to Article 7. This paragraph also should address laws that allow the sources of lethal injection drugs to be kept secret, thus preventing inquiry into whether such drugs are properly manufactured, labeled, and used. In response to the refusal of mainstream manufacturers to sell these drugs for use in executions, authorities in some jurisdictions in the United States began obtaining drugs from compounding pharmacies whose identities are withheld.[[7]](#footnote-7) This secrecy can lead to the use of improperly manufactured drugs that cause tortuous and inhumane suffering during the execution process. Moreover, such secrecy creates a legal obstacle to seeking a judicial remedy to preclude an imminent violation of article 7, in violation of article 2, paragraph 3. Of the five other countries that authorize lethal injection as a method of execution,[[8]](#footnote-8) only China has carried out executions this year.
7. **Paragraph 47** provides that States must take all feasible measures to avoid wrongful convictions, and “re-examine past convictions on the basis of new evidence, including new DNA evidence.” Further, the draft says, “States parties should also consider the implications for the evaluation of evidence presented in capital cases of new reliable studies suggesting the prevalence of false confessions and the unreliability of eyewitness testimony.” The burden should be on the State party, not the person sentenced to death, to fund such re-examinations. In a study released in April 2017, two professors of sociology and criminology reviewed 1500 cases in which the individual who had been convicted was later exonerated. They found a direct relationship between the severity of the offense and the likelihood that inaccurate and unreliable evidence, including false confessions, government misconduct, and bad science, led to the wrongful conviction. In other words, convictions for the “most serious crimes,” for which the death penalty is still permitted, are most likely to be wrongful convictions.[[9]](#footnote-9) States parties therefore should also re-examine convictions based upon recent developments indicating physical evidence is likely to have been flawed (such as hair sample evidence), and based on evidence of police or prosecutorial misconduct, such as withholding exculpatory evidence, or presenting false or misleading expert testimony. The Committee should also consider addressing the continued imposition of barriers, such as procedural bars, that prevent convicted person from being allowed to raise meritorious questions about the validity of the evidence that was used to convict them.
8. **Paragraph 48** provides that the death penalty must not be imposed in a discriminatory manner contrary to Articles 2(1) and 26. The draft mentions several categories of persons who may be subject to such discrimination, including “indigent persons,”[[10]](#footnote-10) and concludes that data suggesting these categories of persons are more likely to face the death penalty “. . . may raise concerns under article 2(1) read in conjunction with article 6, as well as under article 26.” With respect to indigent persons, Article 14’s requirement for the guarantee of a fair trial is also implicated. The evidence is overwhelming that indigent people who do not have sufficient resources to hire an attorney are afforded substandard representation. The vast majority of people sentenced to death come from disadvantaged socio-economic backgrounds and could not afford to pay for representation. Inadequate representation provided to defendants who cannot afford to pay, leading to the lack of a fair trial, is a discriminatory application of the death penalty.
9. **Paragraph 53** requires States to refrain from imposing the death penalty on individuals who have limited ability to defend themselves, such as persons with psycho-social and intellectual disabilities. This section should also address the procedures for establishing the existence of such disabilities, including the often extremely high evidentiary burdens that the accused must carry. For example, the U.S. state of Georgia executed Warren Hill in January 2015 despite wide agreement among experts that he had an intellectual disability. Indeed, a Georgia court had found as much using a “preponderance of the evidence” standard. However, a higher court rejected that finding, ruling that Hill was required to prove his disability “beyond a reasonable doubt.”[[11]](#footnote-11) Georgia has since executed two more men with intellectual disabilities applying the same standard.[[12]](#footnote-12)
1. According to Amnesty International, twelve countries abolished the death penalty between 1976 and 1982. Amnesty International, “Death penalty,” accessed Oct. 5, 2017, https://docs.google.com/spreadsheet/ccc?key=0AonYZs4MzlZbdGJiUzRwTVhlM25DWDlPdjBmNURjOUE&hl=en#gid=1. [↑](#footnote-ref-1)
2. World Coalition Against the Death Penalty, “Facts and Figures,” accessed Oct. 5, 2017, http://www.worldcoalition.org/media/resourcecenter/FactsFigures2017\_EN.pdf. [↑](#footnote-ref-2)
3. The Death Penalty Information Center reported that US death sentences reached a 40 year low in 2014, while US executions in 2014 were the lowest in 20 years. Death Penalty Information Center, “The Death Penalty in 2014: Year End Report,” accessed Oct. 5, 2017, http://deathpenaltyinfo.org/documents/2014YrEnd.pdf. But U.S. States carried out 28 executions in 2015, and 20 more in 2016. Eighteen people have so far been executed in 2017, as of September 18. Death Penalty Information Center, “Executions in the United States: Executions in 2017,” accessed Oct. 5, 2017, https://deathpenaltyinfo.org/executions-united-states. Death warrants are pending for an additional 17 individuals. Death Penalty Information Center, “Outcomes of Death Warrants in 2017,” accessed Oct. 5, 2017, https://deathpenaltyinfo.org/Outcomes\_of\_Death\_Warrants\_in\_2017. [↑](#footnote-ref-3)
4. World Coalition Against the Death Penalty, “Worldwide Database,” accessed Oct. 5, 2017, http://www.worldcoalition.org/worldwide-database.html [↑](#footnote-ref-4)
5. World Coalition Against the Death Penalty, “Islamic Republic of Iran,” accessed Oct. 5, 2017. http://www.worldcoalition.org/Iran-Islamic-Republic-of. [↑](#footnote-ref-5)
6. For example, in a case in the U.S. state of Arizona, the person who committed the murder was sentenced to a period of years in prison with the ability to be released, while another defendant who was known not to have participated in killing the victim was sentenced to death. Fernanda Santos, *Less Culpable, but With Longer Sentences,* New York Times, Apr. 5 2013, http://www.nytimes.com/2013/04/06/us/in-many-capital-cases-less-culpable-defendants-receive-death-penalty.html. [↑](#footnote-ref-6)
7. Reporters Committee for Freedom of the Press, “Lethal Secrecy,” accessed Oct. 5, 2017, https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2014/lethal-secrecy. [↑](#footnote-ref-7)
8. Cornell Center on the Death Penalty Worldwide, “Death Penalty Database,” accessed Oct. 5, 2017, http://www.deathpenaltyworldwide.org/search.cfm. [↑](#footnote-ref-8)
9. Scott Phillips and Jamie Richardson, *The Worst of the Worst: Heinous Crimes and Erroneous Evidence,* 45 Hofstra Law Review 417, (2017). [↑](#footnote-ref-9)
10. The World Coalition Against the Death Penalty reported on studies finding that the overwhelming majority of death row prisoners in Belarus, India, Nigeria, Saudi Arabia, and the United States were economically disadvantaged, and that poverty adversely impacted their access to adequate representation and a fair trial. [↑](#footnote-ref-10)
11. Death Penalty Information Center, “Georgia Sets Execution Date for Inmate with Intellectual Disabilities,” accessed Oct. 5, 2017, https://deathpenaltyinfo.org/node/6025. [↑](#footnote-ref-11)
12. Fair Punishment Project, “Why is Georgia Still Executing Individuals with Intellectual Disabilities, Mental Illnesses, and Severe Childhood Trauma?” accessed Oct. 5, 2017, http://fairpunishment.org/why-is-georgia-still-executing-individuals-with-intellectual-disabilities-mental-illnesses-and-severe-childhood-trauma/. [↑](#footnote-ref-12)