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**CIVIL AND POLITICAL RIGHTS, INCLUDING THE QUESTIONS
OF DISAPPEARANCES AND SUMMARY EXECUTIONS**

**Report of the Special Rapporteur on extrajudicial,
summary or arbitrary executions, Philip Alston***

* The notes to the present report are contained in annex II and are circulated as received in the language of submission only.

Summary

This report, submitted in accordance with Human Rights Council decision 1/102, details the principal activities of the Special Rapporteur in 2006. It also examines four issues of particular importance.

1. **The mandate of the Special Rapporteur in armed conflicts.** The report rejects the notion, put forward by one State in particular, that matters arising in the context of armed conflict are beyond the purview not only of the Special Rapporteur but of the Human Rights Council itself. Such an approach would contradict very long-standing policies of the Commission on Human Rights, the Economic and Social Council, and the General Assembly and would critically undermine their ability to address pressing threats to human rights in many of the situations before the Council.
2. **“Mercy killings” in armed conflict.** Accepting the notion of so-called “mercy killings” would undermine key rules of international law applicable during armed conflicts. The prohibition under international humanitarian law of killing those who have laid down their arms or have been placed *hors de combat* by sickness, wounds, detention, or any other cause must be resolutely upheld.
3. **Most serious crimes.** The requirement of human rights law that the death penalty should be imposed only for the “most serious crimes” continues to be interpreted subjectively by certain States. The report examines the *travaux* of the International Covenant on Civil and Political Rights, surveys the jurisprudence of the Human Rights Committee, and analyses the comments by the Secretary-General, principles declared by the Economic and Social Council and the Commission on Human Rights and concludes that, if it is to comply with the most serious crimes restriction, the death penalty can only be imposed in cases where it can be shown that there was an intention to kill which resulted in the loss of life.
4. **Mandatory death sentences.** The experience of numerous judicial and quasi-judicial bodies has demonstrated that mandatory death sentences are inherently over-inclusive and unavoidably violate human rights law. The categorical distinctions that may be drawn between offences in the criminal law are not sufficient to reflect the full range of factors relevant to determining whether a death sentence would be permissible in a capital case. In such cases, individualized sentencing by the judiciary is required in order to prevent cruel, inhuman or degrading punishment and the arbitrary deprivation of life.

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I. INTRODUCTION

1. In addition to reporting on the principal initiatives undertaken in 2006 to address the scourge of extrajudicial executions around the world,¹ this report focuses on four issues of particular importance: (a) the mandate of the Special Rapporteur in armed conflicts; (b) “mercy killings” in armed conflict; (c) the “most serious crimes” for which the death penalty may be imposed; and (d) the international law status of the mandatory death penalty.
2. The report is submitted pursuant to Human Rights Council resolution 1/102.
3. The report takes account of information received and communications sent in the period 1 December 2005 to 30 September 2006. It should be noted, however, that the addendum to the present report - which contains the details of the communications sent and the replies received - follows a different chronology, the details of which are explained below.²
4. An overview of my terms of reference, a list of the specific types of violations of the right to life upon which I take action, and a description of the legal framework and methods of work used in implementing this mandate can be found in document E/CN.4/2005/7, paragraphs 5-12.
5. I am grateful to the staff of the Office of the High Commissioner for Human Rights for their assistance in the conduct of my work, and to Mr. William Abresch and Mr. Jason Morgan-Foster of the Project on Extrajudicial Executions at New York University Law School, who have provided expert assistance and advice.

II. ACTIVITIES

A. Communications

6. An indispensable aspect of the Special Rapporteur’s mandate involves the sending of communications designed to facilitate a productive and meaningful dialogue with Governments in response to credible allegations of violations relating to extrajudicial executions.
7. This report covers communications sent and replies received over the past year.³ The details of my concerns and the information provided in response by Governments are reflected in considerable detail in addendum 1 to this report. That addendum is an integral, and for some purposes even the most important, part of the report on work done under this mandate. I have classified the responses received according to their level of adequacy and have provided evaluative “observations” designed to capture the outcome of each set of exchanges with a Government.
8. A very brief statistical profile of the communications sent during the period under review shows that 135 communications were sent to 51 countries and 2 other actors (including 44 urgent appeals and 75 letters of allegation and 16 communications following up on previous correspondence) concerning a total of more than 1,531 individuals. A breakdown of the subjects

of those appeals shows that they involved 336 males, 55 females, more than 1,087 persons whose sex was unknown, 53 minors, 58 members of religious, ethnic or indigenous minorities, 22 human rights defenders, 36 migrants and 16 journalists. More than 145 persons were killed for exercising their freedom of opinion and expression, 4 were killed in the name of honour, 4 were killed for their sexual orientation and 19 of those killed were suspected terrorists.

9. Overall, the proportion of government replies received to communications sent during the period under review remains low: an average of 47.9 per cent. (However, if government replies received during the period under review but relating to communications sent during the previous period are included, the proportion of communications to which replies were received rises to 55.3 per cent.) This means that, as during the previous year, roughly half of the communications sent drew no response from the Government concerned within a reasonable time period. As indicated in my previous report, this response rate must be considered problematic, particularly in the case of a long-established procedure that addresses an issue as grave as the alleged violations of the right to life.

B. Visits

1. Visits undertaken in 2006

10. During the course of 2006, I undertook two visits:

(a) **Guatemala.** I visited Guatemala from 21 to 25 August 2006 at the invitation of its Government and met with government officials and members of civil society. In Guatemala, over 5,000 people die violently each year. A degree of State responsibility derives from the involvement of its agents in some forms of violence and its ineffectual response to others. During my visit, I gathered evidence on the prevalence and causes of phenomena such as social cleansing, "femicide", lynching, killings motivated by sexual orientation or identity, the killing of human rights defenders and prison violence. Guatemala's choice is between a human rights-consistent approach based on a working system of criminal justice (and in line with the vision of the Peace Accords) or a brutal and repressive response, often advocated under the rubric of a *mano dura* (iron fist), to crack down on "undesirable" elements. My report is in document A/HRC/4/20/Add.2.

(b) **Lebanon and Israel.** I undertook a joint visit with the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Representative of the Secretary-General on human rights of internally displaced persons and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. We visited Lebanon from 7 to 10 September and Israel from 10 to 14 September 2006. Our report (A/HRC/2/7) found that, in many instances, Israel had violated human rights and humanitarian law by failing to fully distinguish between military and civilian objectives, to fully apply the principle of proportionality, and to take all feasible precautions to minimize civilian injury and damage. With respect to Hezbollah, our report found that it had violated humanitarian law by targeting civilian populations and by disregarding the principle of distinction.⁴

2. Outstanding requests for visits

11. As of December 2006 I had made requests to visit 29 countries and the Occupied Palestinian Territories. Of those 29, only 5 countries - Guatemala, Israel, Lebanon, Peru and the Philippines - have actually proceeded with plans for a visit. The visit to the Philippines is scheduled for February 2007, the visit to Peru was postponed for technical reasons, and the Palestinian Authority has issued an invitation. Singapore has requested further information.

12. The responses of the remaining 23 countries have ranged from complete silence, through formal acknowledgement, to acceptance in principle but without meaningful follow-up. Particularly troubling is the fact that seven Council members have failed to issue requested invitations: Bangladesh, China, India, Indonesia, Pakistan, the Russian Federation and Saudi Arabia. In some cases the relevant requests were first made some six years ago. It is noteworthy that the General Assembly responded to this situation in December 2006 by urging "all States, in particular those that have not done so, to cooperate with the Special Rapporteur so that his mandate can be carried out effectively, including by favourably and rapidly responding to requests for visits, mindful that country visits are one of the tools for the fulfilment of the mandate ...".⁵

13. The remaining States that have so far failed to respond affirmatively to requests for a visit are: Brazil, Central African Republic, El Salvador, Iran (Islamic Republic of), Israel, Kenya, Lao People's Democratic Republic, Nepal, Peru, Singapore, Trinidad and Tobago, Thailand, Togo, Uganda, United States of America, Uzbekistan, Venezuela, Viet Nam and Yemen.

14. For a comprehensive list of the status of all outstanding requests, see annex 1.

C. The situation in the Islamic Republic of Iran

15. The Islamic Republic of Iran has issued a "standing invitation" to the special procedures but has repeatedly failed to respond to my requests that dates for a visit be set, despite an oral exchange during the third session of the Council, several high-level meetings and an extensive correspondence. In my annual report to the Commission and the Council in 2006 (E/CN.4/2006/53 and addenda) I drew particular attention to this situation.

16. Between August 2004 and March 2006 I sent 12 communications, involving nine boys and six girls who had been sentenced to death in Iran for crimes committed when they were under 18. Three girls were sentenced for murder and three others for "acts contrary to chastity". Four boys were sentenced for murder, one for drug trafficking, three for abduction and rape, and one for attempted hijacking. According to the available information four juvenile offenders have been executed and two acquitted. Five other death sentences are "on hold" and one is under review. The status of the remaining three cases is unclear.

17. The information received is clearly credible and there is every reason to believe that the Iranian judiciary is freely ignoring the prohibition on the juvenile death penalty. This constitutes a clear violation of Iran's obligations under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights. There is no other country in the world in relation to which I regularly receive allegations of this type. This is not surprising, since the

juvenile death penalty has been specifically abolished in virtually every other country. If the Council is to take seriously its responsibilities in relation to extrajudicial executions, it will respond appropriately to this wholly unacceptable situation.

III. ISSUES OF PARTICULAR IMPORTANCE

A. The mandate of the Special Rapporteur in armed conflicts

18. An earlier report examined the law applicable to violations of the right to life in armed conflict and the role of the Special Rapporteur in response thereto.⁶ This view has, however, been consistently rejected by one State. These objections, by the United States of America, have been raised in a wide range of contexts, thus underscoring the importance of carefully examining their validity. In essence, the United States position consists of four propositions: (a) the “war on terror” constitutes an armed conflict to which international humanitarian law applies; (b) international humanitarian law operates to the exclusion of human rights law; (c) international humanitarian law falls outside the mandate of the Special Rapporteur and of the Council; and (d) States may determine for themselves whether an individual incident is governed by humanitarian law or human rights law.⁷ If accepted, these propositions would have far-reaching consequences for the Council and for its ability to contribute in any way to many of the situations that are currently most prominent on its agenda.

1. The alleged exclusivity of the two bodies of law

19. Contrary to this proposition, it is widely agreed that the two bodies of law, far from being mutually exclusive, are complementary. The International Court of Justice has observed that the test of what is an arbitrary deprivation of life in the context of hostilities “falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities”.⁸ But it went on to clarify that “the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation ...”.⁹ In *Congo v. Uganda*, for example, it found separate violations of international humanitarian law and human rights law, thus conclusively underscoring the fact that the former does not wholly replace the latter during an armed conflict.¹⁰ This is consistent with the conclusion of the Human Rights Committee that while “more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of [certain] Covenant rights, both spheres of law are complementary, not mutually exclusive”.¹¹ Similarly, the Commission and the General Assembly have regularly reaffirmed “that international human rights law and international humanitarian law are complementary and not mutually exclusive”.¹²

2. Humanitarian law in the Commission’s mandate

20. The Commission on Human Rights, with the consistent endorsement of the Economic and Social Council, regularly treated international humanitarian law as falling within its terms of reference. Examples of this practice abound,¹³ and it suffices to cite three examples. First, in relation to the former Yugoslavia, the Commission, in 1992, “call[ed] upon all parties ... to ensure full respect for ... humanitarian law”¹⁴ and “[r]emind[ed] all parties that they are bound to comply with their obligations under international humanitarian law ...”.¹⁵ This resolution was subsequently endorsed by the Economic and Social Council.¹⁶

21. Two years later, in relation to the same situation, the Commission “[c]ondemn[ed] categorically all violations of human rights and international humanitarian law by all sides”.¹⁷ It then applied international humanitarian law to the situation and “denounce[d] continued deliberate and unlawful attacks and uses of military force against civilians and other protected persons ... non-combatants, ... [and] ... relief operations”.¹⁸

22. Third, in relation to Rwanda, the Commission “[c]ondemn[ed] in the strongest terms all breaches of international humanitarian law ... and call[ed] upon all the parties involved to cease immediately these breaches”.¹⁹ It also “[c]all[ed] upon the Government of Rwanda to ... take measures to put an end to all violations of ... international humanitarian law by all persons within its jurisdiction or under its control”.²⁰

23. As these examples make clear, both the Commission and the Council clearly and repeatedly accepted that international humanitarian law formed part of the Commission’s terms of reference. In replacing the Commission by the Council, the General Assembly in no way undertook to narrow its competence in this respect.²¹

3. The Special Rapporteur’s mandate

24. The Special Rapporteur’s mandate is “to examine ... questions related to summary or arbitrary executions”. No reference is made to a limiting legal framework which would exclude certain such executions.²² Instead, the mandate has been defined in terms of the phenomenon of executions, in whatever context they might occur. In contrast, the United States position is that “while the Special Rapporteur may have reported on cases outside of his mandate, this does not give [him] the competence to address such issues”. It is certainly correct that the Special Rapporteur’s practice does not, on its own, establish competence. But when based on the terms of the relevant resolutions, and reinforced by the actions and votes of Governments in the Commission, the Economic and Social Council and the General Assembly, the Special Rapporteur is clearly not acting unilaterally. Of the many possible illustrations of this process,²³ the following are indicative.

25. First, in 1983, in the very first report under the mandate, my distinguished predecessor, Mr. Amos Wako, included a substantive section on “Killings in war, armed conflict and states of emergency” under the heading of international legal standards.²⁴ In that section, he noted that “[t]he Geneva Conventions of 12 August 1949 are also relevant ... Each of the Geneva Conventions clearly prohibits murder and other acts of violence against protected persons. They explicitly provide that ‘wilful killings’ are to be considered ‘grave breaches’ of the Geneva Conventions, that is, war crimes subject to universality of jurisdiction.”²⁵ His report was endorsed by the Commission.²⁶

26. Second, in January 1992 Mr. Wako annexed to his annual report a “List of Instruments and other Standards which Constitute the Legal Framework of the Mandate of the Special Rapporteur”.²⁷ The Geneva Conventions appear as item 3 in a 14-point list. This report was also endorsed by the Commission which explicitly “welcome[d] his recommendations ...”,²⁸ some of which had focused explicitly on extrajudicial executions during armed conflict.²⁹

4. Determining compliance

27. The position put forward by the United States would give every State the power unilaterally, and without external scrutiny, to determine whether or not a specific incident is covered by the mandate of the Special Rapporteur. The implication is that the Special Rapporteur should automatically accept a State's own determination that a particular individual was an "enemy combatant" attacked in "appropriate circumstances". On this basis, a Government can target and kill any individual who it deems to be an enemy combatant, and it would not be accountable in that regard to the international community, let alone to the Council.

28. In effect, this position would place all actions taken in the so-called "global war on terror" in a public accountability void, in which no international monitoring body would exercise public oversight.³⁰ Creating such a vacuum would set back the development of the international human rights regime by several decades. In order to avoid such an unacceptable outcome, the Special Rapporteur would need to receive a detailed explanation of such incidents, so that he may determine independently whether they fall within the scope of the mandate provided by the Council.

B. "Mercy killings" in armed conflict

29. The expression "mercy killings" has recently been used to characterize certain killings by the military in the context of armed conflicts. One example concerns the court martial of Capt. Rogelio Maynulet for the shooting of an Iraqi man in Baghdad in May 2004. A "mercy killing" argument was central to the defence.³¹ Although originally charged with murder for shooting twice at point-blank range,³² Maynulet was ultimately convicted of assault with intent to commit voluntary manslaughter and sentenced to dismissal from the army and no confinement.³³ Another example, also from Iraq, is the invocation of a mercy killing defence for two soldiers who mistakenly opened fire on what appears to have been a group of non-combatant teenagers. Realizing their mistake, medics hurried to treat the injured, when, according to reports,

"[a] dispute broke out among a handful of soldiers standing over one severely wounded young man who was moaning in pain. An unwounded Iraqi claiming to be a relative of the victim pleaded in broken English for soldiers to help him. But to the horror of bystanders, Alban, 29, a boyish-faced sergeant who joined the Army in 1997, retrieved an M-231 assault rifle and fired into the wounded man's body. Seconds later, another soldier, Staff Sgt. Johnny Horne, Jr., 30, of Winston-Salem, NC, grabbed an M-16 rifle and also shot the victim".³⁴

30. On this basis United States officials characterized the shooting as a "mercy killing", citing statements by Alban and Horne that they had shot the wounded Iraqi "to put him out of his misery".³⁵ Subsequently, other soldiers present at the scene expressed surprise that the victims were not rushed to hospital.³⁶ In January 2005, Alban was convicted of murder and conspiracy to commit murder after a one-day court martial in Baghdad. He was sentenced to one year's confinement, demotion to private and a bad-conduct discharge.³⁷

31. A third example concerns a recommendation that Specialist Juston R. Graber be court-martialled for killing an Iraqi in a raid on a potential insurgent stronghold north-west of Baghdad. Informed reports suggest that the “mercy killing” defence would also be raised in this case, as Graber allegedly shot the Iraqi in the head as the man lay dying.³⁸

32. Despite the extent to which military officials, commentators, and even military judges seem willing to entertain a “mercy killing” defence, it is clear that such a characterization is entirely unacceptable under the applicable rules of international humanitarian law. In international armed conflicts, article 12 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) is clear that the wounded or sick “shall be respected and protected in all circumstances ... Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered ...”.³⁹ The ICRC Commentary on this provision, based on the *travaux préparatoires*, considers such “derelictions of duty ... [to be] the gravest a belligerent can commit in regard to the wounded and sick in his power”.⁴⁰ It notes that “the heinous crimes in question were already prohibited in the 1929 text, which established the principle of respect and protection in all circumstances - a principle which is general and absolute in character”.⁴¹

33. Although the Geneva Conventions of 1949 limited most protection of the wounded and sick to a narrow class of “protected persons”, the First Additional Protocol to the Geneva Conventions expanded the scope of protection to cover all persons affected by international armed conflict. Article 75 of Additional Protocol I extends protection to those persons who do not qualify for the status of “protected persons” under the 1949 Conventions; this article includes protection against “violence to ... life, health, or physical or mental well-being ... in particular, murder”.⁴² Similarly, article 8 (a) of Protocol I expands the definition of “wounded and sick” to include civilians as well as soldiers.⁴³ Such persons would also benefit from the protection of common article 3 to the Geneva Conventions, as discussed below, which constitute “a minimum yardstick” applicable to all armed conflicts.⁴⁴

34. In non-international armed conflicts, common article 3 to the Geneva Conventions requires that “members of armed forces ... placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds”.⁴⁵ Additional Protocol II further states that “[a]ll the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected”⁴⁶ and “all possible measures shall be taken ... to search for and collect the wounded ... [and] protect them against ... ill-treatment”.⁴⁷

35. The prohibition of murder of persons *hors de combat* and the obligation to protect the wounded from adverse treatment are norms of customary international law applicable in both international and non-international armed conflicts.⁴⁸

36. Although such “mercy killings” are sometimes presented as a “necessary evil” of war, such an analysis contradicts the foundations of the applicable law. Once enemy combatants have been rendered *hors de combat* by injury, they are no longer a threat to the opposing combatants, and there is simply no reason why it would be “necessary” to kill them.⁴⁹

37. Proponents of “mercy killings” often justify them out of compassion, but in practice they are much more likely to reflect an underlying dehumanization of the enemy. For example, Iraqis who witnessed the shootings by Alban and Horne said that “rather than provide medical help to an injured civilian, the soldiers had treated the Iraqi as if he were an animal struck by a car”.⁵⁰

38. It warrants underlining the fact that international humanitarian law does not allow - under any circumstances - the taking of the life of another as a purported act of “mercy”. The obligation to treat injured soldiers “humanely” and the obligation to “respect and protect” the wounded are incompatible with the idea of “mercy killings”. Rather, the obligation of parties to a conflict, in the presence of injured persons, is (i) to “take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked without adverse distinction”⁵¹ and (ii) to seek the appropriate medical care to the fullest extent practicable and with the least possible delay.⁵² Individual parties to the conflict, who lack medical training, may not take the medical care of the wounded into their own hands by deciding to end the life of an injured person on the battlefield. Such killings are an unequivocal violation of international humanitarian law.

C. Imposing the death penalty only for the “most serious crimes”

39. International human rights law provides that States which retain the death penalty can only impose it for “the most serious crimes”. That phrase has thus assumed major importance in efforts to determine when the death penalty might acceptably be imposed. While its precise meaning has not been spelled out in treaty form, the debates over its drafting, principles of interpretation adopted subsequently, and the by now very extensive practice of international human rights mechanisms have all combined to clarify the meaning and significance of the phrase.

40. The first Special Rapporteur dealt with the issue of the “most serious crimes” as early as 1984 when he surveyed the death penalty legislation of States to assess the range of offences for which it was then imposed in practice.⁵³ The results of the survey contributed to the elaboration of the safeguards guaranteeing protection of the rights of those facing the death penalty, which were adopted by the Economic and Social Council later that year.⁵⁴ In his next report, the Special Rapporteur noted that these safeguards would “serve as criteria for ascertaining whether an execution is of a summary or arbitrary nature”,⁵⁵ and he began to consider particular situations implicating the most serious crimes limitation.⁵⁶ In subsequent reports, the Special Rapporteur drew on the safeguards and their follow-up by the Council as well as on the jurisprudence of the Human Rights Committee in determining whether particular offences fell within or outside the scope of the “most serious crimes” requirement.⁵⁷ In communications with Governments, the Special Rapporteur has addressed death sentences for offences and conduct including⁵⁸ adultery,⁵⁹ apostasy,⁶⁰ blasphemy,⁶¹ bribery,⁶² acts incompatible with chastity,⁶³ corruption,⁶⁴ drug possession,⁶⁵ drug trafficking,⁶⁶ drug-related offences,⁶⁷ economic offences,⁶⁸ expressing oneself,⁶⁹ holding an opinion,⁷⁰ homosexual acts,⁷¹ matters of sexual orientation,⁷² manifesting one’s religion or beliefs,⁷³ prostitution,⁷⁴ organization of prostitution,⁷⁵ participation in protests,⁷⁶ premarital sex,⁷⁷ singing songs inciting men to go to war,⁷⁸ sodomy,⁷⁹ speculation,⁸⁰ “acts of treason, espionage or other vaguely defined acts usually described as ‘crimes against the State’”,⁸¹ and writing slogans against a country’s

leader.⁸² The range of offences involved invites an inquiry into the underlying normative rationale, and suggests that problems of non-compliance have remained widespread. It is clear that a subjective approach to this important issue is not viable, in the sense that a vast array of offences might understandably be classified by any given individual or Government as being among the “most serious”. But such an approach would render the relevant international law standard meaningless. As a result a systematic and normatively persuasive response is essential.

41. The basic requirement was first introduced in article 6 (2) of the International Covenant on Civil and Political Rights (ICCPR):

“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.”

42. This provision supplemented that prohibiting the arbitrary deprivation of life, in article 6 (1):

“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁸³

43. It has been much commented upon that neither term - “arbitrarily deprived” or “most serious crimes” - is further defined in ICCPR. In this regard, various sources are illuminating. And while the *travaux préparatoires* are but a supplementary means of interpretation, they do assist in understanding the ordinary meanings of these terms.

44. One insight that emerges from the *travaux* of article 6 of ICCPR is that the concepts of arbitrariness and of the “most serious crimes” serve to add a requirement of substantive justice to the requirements of formal legality and due process. An early version of the article stated that it “shall be unlawful to deprive any person of his life” with the one exception being upon “conviction of a crime for which this penalty is provided by law”.⁸⁴ Notably, this version, which implied that the legality of an execution would be determined solely within the domestic legal order, was rejected. A number of delegates pointed out that it would permit what amounted to arbitrary killing to be masked by the trappings of law.⁸⁵ Various substantive limits on the scope of death penalty laws were thus introduced, including a prohibition of arbitrary deprivations of life (with “arbitrarily” meaning either “illegally” or “unjustly”⁸⁶), a prohibition of death sentences for other than the “most serious crimes”, and a requirement that any such deprivation be consistent with ICCPR and the Convention on the Prevention and Punishment of the Crime of Genocide.⁸⁷ To determine whether a particular offence falls among the most serious crimes, thus, requires interpretation and application of the relevant international law rather than of the subjective approach opted for within a given State’s criminal code and sentencing scheme.

45. Another key insight to be drawn from the *travaux* relates to the apparent imprecision of the terms used to define the scope of the right to life. The report of the Secretary-General to the General Assembly on the draft Covenant identified three views that had been advanced during the drafting of ICCPR. The first was that the right to life should be expressed in absolute terms

and that “no mention should be made of circumstances under which the taking of life might seem to be condoned”.⁸⁸ This view was widely rejected as unrealistic in the context of a binding legal instrument.⁸⁹ The second view was that the provision should “spell out specifically the circumstances in which the taking of life would not be deemed a violation of the general obligation to protect life”,⁹⁰ and a number of detailed enumerations of exceptions were provided by those holding this view. Others considered, however, that even if agreement could be reached on each particular exception, “any enumeration of limitations would necessarily be incomplete”.⁹¹ The third view - which prevailed - was that a general formulation should be adopted that provided a principled basis for distinguishing permissible and impermissible deprivations of life.⁹²

46. The approach adopted was that only one exception - the death penalty - would be expressly specified. It was considered that the concepts of arbitrariness and of the most serious crimes, while complex, were nonetheless accessible to legal reasoning.⁹³ It was noted, moreover, that inasmuch as they had juridical meaning, these concepts could be clarified and given precision through subsequent jurisprudence. It was submitted that the views of the body established to implement ICCPR, the Human Rights Committee, along with the comments of States and the consideration of world public opinion would clarify these concepts as concrete cases arose.⁹⁴

47. In essence this is the same approach that has been used in relation to all of the terms which have required jurisprudential development in order to give operational clarity to the norms of human rights law, many of which are inevitably and sometimes intentionally relatively open-ended. The evolving jurisprudence in relation to the terms “arbitrary” and “most serious crimes” has developed along two tracks. First, the evaluation of particular sentencing schemes has facilitated incremental clarification without requiring attempts to arrive at an exhaustive enumeration. Second, expert and intergovernmental bodies that have had the time to focus on the concept in light of the whole corpus of international human rights law have proven capable of more precisely defining the scope of the “most serious crimes” in terms of general principles. Moreover, there has been a fruitful interaction between the two modes of jurisprudential development.⁹⁵

48. The first major attempt to clarify the “most serious crimes” provision on the level of principle was that undertaken by the Economic and Social Council in the early 1980s, resulting in the safeguards. These were drafted by the Committee on Crime Prevention and Control of the Council. Its preliminary draft included a provision specifying that, “Capital punishment may be imposed only for the most serious crimes.” At the Council’s request, the Secretary-General commented on that draft. He noted the “persistent disparity in the number of offences liable to the death penalty” and observed that the norm remained “unclear and open to differing interpretations”. As a result, he proposed the following reformulation in order that article 6 (2) of ICCPR and article 3 of the Universal Declaration of Human Rights “may be properly applied”:

“Capital punishment may be imposed only for the most serious crimes, it being understood that their scope should be limited to intentional lethal offences. Accordingly, it should be excluded for offences which are considered to be of a merely political nature, or for cases in which the political nature of the offence exceeds its criminal aspects.”⁹⁶

49. The provision ultimately adopted by the Economic and Social Council and the General Assembly largely adopted this approach:

“In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.”⁹⁷

50. The safeguards drafted by the Committee were adopted by the Economic and Social Council and subsequently by the General Assembly,⁹⁸ and the Secretary-General was requested by the Council to report on the implementation of the safeguards by States.⁹⁹ The reports of the Secretary-General have clarified the meaning accorded in practice to the phrase “intentional crimes with lethal or other extremely grave consequences”. While noting that it has given rise to “wide interpretation by a number of countries”, the Secretary-General concluded that “the meaning of intentional crimes and of lethal or other extremely grave consequences is intended to imply that the offences should be life-threatening, in the sense that this is a very likely consequence of the action”.¹⁰⁰

51. With respect to particular offences, the Commission on Human Rights and the Human Rights Committee have determined that a wide range of specific offences fall outside the scope of the “most serious crimes” for which the death penalty may be imposed.¹⁰¹ These include: abduction not resulting in death,¹⁰² abetting suicide,¹⁰³ adultery,¹⁰⁴ apostasy,¹⁰⁵ corruption,¹⁰⁶ drug-related offences,¹⁰⁷ economic crimes,¹⁰⁸ the expression of conscience,¹⁰⁹ financial crimes,¹¹⁰ embezzlement by officials,¹¹¹ evasion of military service,¹¹² homosexual acts,¹¹³ illicit sex,¹¹⁴ sexual relations between consenting adults,¹¹⁵ theft or robbery by force,¹¹⁶ religious practice,¹¹⁷ and political offences.¹¹⁸ The last of these has presented particular complexities, inasmuch as offences against the State or the political order are often drawn broadly so as to encompass both non-serious and very serious crimes and ambiguously so as to leave the Government discretion in defining the offence. Instances in which the Committee has expressed concern that offences carrying the death penalty are “excessively vague”,¹¹⁹ “imprecise”,¹²⁰ “loosely defined”,¹²¹ “so broad [as to encompass] a wide range of acts of differing gravity”,¹²² or “couched in terms so broad that the imposition of the death penalty may be subject to essentially subjective criteria”,¹²³ have included legislation regarding “opposition to order and national security violations”,¹²⁴ “attacks against the internal security of the State”,¹²⁵ “categories of offences relating to internal and external security”,¹²⁶ “secession, espionage or incitement to war”,¹²⁷ a broadly written definition of terrorism,¹²⁸ and various other political offences.¹²⁹

52. The Human Rights Committee has reached conclusions regarding the principled content of the “most serious crimes” provision that are consistent with, and give further refinement to, those expressed in the safeguards and the comments of the Secretary-General. In one of its earliest general comments, the Committee observed that: “[t]he deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities The Committee is of the opinion that the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure.”¹³⁰ This analysis has been greatly refined over the ensuing decades through the insights provided by

dealing with the host of concrete situations discussed above, and a review of its jurisprudence today suggests more precise conclusions. First, the Committee has thus far only found cases involving murder not to raise concerns under the most serious crimes provision.¹³¹ Second, it has consistently rejected the imposition of a death sentence for offences that do not result in the loss of life.¹³² Third, the Committee's conclusion that the death penalty may not be mandatory even for murder suggests that a most serious offence must involve, at a minimum, intentional acts of violence resulting in the death of a person.¹³³ Indeed, the Committee and the Commission have rejected nearly every imaginable category of offence other than murder as falling outside the ambit of the most serious crimes.

53. The conclusion to be drawn from a thorough and systematic review of the jurisprudence of all of the principal United Nations bodies charged with interpreting these provisions is that the death penalty can only be imposed in such a way that it complies with the stricture that it must be limited to the most serious crimes, in cases where it can be shown that there was an intention to kill which resulted in the loss of life.

D. The prohibition of the mandatory death penalty

54. The Special Rapporteur has addressed communications to a number of Governments noting that legislation dictating the mandatory imposition of the death penalty is prohibited under international human rights law. This section more fully elaborates the law underpinning that prohibition.¹³⁴ The view of the Special Rapporteur has been informed by, and is generally consistent with, the approach adopted by almost every judicial or quasi-judicial human rights body in the world. This includes, in particular, the Commission on Human Rights¹³⁵ and the Human Rights Committee. In addition, the same approach has been adopted by a wide range of national courts and other judicial bodies such as the Privy Council.¹³⁶ The legal reasoning underpinning these views is thus highly persuasive when it comes to interpreting international human rights norms, whether they be based on treaty or customary law.¹³⁷

55. The intuitive argument against the mandatory death penalty is strong - surely, a human facing death merits a chance to present reasons why he or she should be allowed to live - but some still contend that this opportunity may be denied. The principal argument that has been advanced in favour of the compatibility of mandatory death sentences with international human rights law has been that, insofar as an offence carrying such a penalty covers only the "most serious crimes", all of the facts legally relevant to the permissibility of such a sentence will be considered in the course of obtaining a conviction. To this it has been added that other factors relevant to a sense of justice will be considered should the convict exercise his or her "right to seek pardon or commutation of the sentence".¹³⁸ However, the key insight that has emerged from the approach adopted by the world's human rights bodies has been that the proper application of human rights law - especially of its provisions that "[n]o one shall be arbitrarily deprived of his life"¹³⁹ and that "[n]o one shall be subjected to ... cruel, inhuman or degrading ... punishment"¹⁴⁰ - requires weighing factors that will not be taken into account in the process of determining whether a defendant is guilty of committing a "most serious crime".¹⁴¹ As a result, these factors can only be taken into account in the context of individualized sentencing by the judiciary in death penalty cases.¹⁴²

56. The understanding that mandatory death sentences are per se violations of human rights law originates in the efforts of a number of judicial and quasi-judicial bodies to distinguish between mandatory death penalty laws that respected human rights and those that did not. Each began by attempting to discern whether a particular offence for which the death penalty was mandatory was sufficiently narrowly drawn that anyone convicted of that offence could justly receive the death penalty. The process of pursuing this case-by-case approach led to the conclusion that even if the offence had been drafted to cover only the “most serious crimes”, there would invariably be other factors regarding each individual case that would be relevant to the legal determination of whether a death sentence would be consistent with also upholding the defendant’s human rights.¹⁴³ The conclusion, in theory as well as in practice, was that respect for human rights can be reliably ensured in death penalty cases only if the judiciary engages in case-specific, individualized sentencing that accounts for all of the relevant factors.¹⁴⁴

57. The Human Rights Committee’s first consideration of the mandatory death penalty turned on the requirement of ICCPR that a “sentence of death may be imposed only for the most serious crimes”.¹⁴⁵ In *Lubuto v. Zambia* the applicant had been sentenced to death pursuant to a law that made the death sentence mandatory for the offence of aggravated robbery in which firearms were used. The Committee concluded that the offence was defined in an overinclusive manner because it included crimes that “did not produce the death or wounding of any person”.¹⁴⁶ Because some of the crimes covered by the offence were not among the most serious, a mandatory death sentence was inappropriate. This was not a finding that mandatory death sentences inherently violate international law. Although the mandatory death penalty in question was unacceptable, the Committee’s tacit view was that its defects could be remedied by a legislative amendment that would draw an additional distinction in its codification of the offence.

58. Subsequent cases persuaded the Committee that no such solution was viable in practice. In other words, legislative classifications are inherently overinclusive and that reliable proportionality is achievable only through individualized sentencing.¹⁴⁷ *Thompson v. Saint Vincent* concerned a mandatory death sentence for murder, which was defined to include only “intentional acts of violence resulting in the death of a person”.¹⁴⁸ The Committee found that the mandatory death sentence was “arbitrary”, even in these circumstances, because it would be arbitrary for the court not to consider the “defendant’s personal circumstances” and the “circumstances of the particular offence” in order to ascertain “whether this exceptional form of punishment is appropriate ...”.¹⁴⁹ In *Kennedy v. Trinidad and Tobago*, the Committee went even further when it found a mandatory death sentence for murder, defined to include “situations where a person commits a felony involving personal violence and where this violence results even inadvertently in the death of the victim”, to violate the prohibition on arbitrary deprivation of life.¹⁵⁰ The problem identified by the Committee in this and subsequent cases was not that an individual was being sentenced to death for a crime that was not among the most serious. Rather, it was that conviction for a most serious crime was not per se sufficient to satisfy other requirements of human rights law.¹⁵¹

59. The same logical path - from testing offences carrying a mandatory death sentence for overinclusiveness to requiring individualized sentencing - has been followed by a number of other judicial organs, including the Judicial Committee of the Privy Council¹⁵² and the Supreme Court of India. The latter found in *Mithu* that the sheer range of scenarios in which

idiosyncratic circumstances would make the death penalty permissible for one, but impermissible for another in superficially similar circumstances demonstrated the impossibility of a just mandatory death penalty, concluding that:

“It has to be remembered that the measure of punishment for an offence is not afforded by the label which that offence bears, as for example ‘Theft’, ‘Breach of Trust’ or ‘Murder’. The gravity of the offence furnishes the guideline for punishment and one cannot determine how grave the offence is without having regard to the circumstances in which it was committed, its motivation and its repercussions. The legislature cannot make relevant circumstances irrelevant, deprive courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death. ... A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case. The infinite variety of cases and facets to each would make general standards either meaningless ‘boiler plate’ or a statement of the obvious. ... The task performed by the legislature while enacting [mandatory death penalty legislation] is beyond even the present human ability”¹⁵³

60. The approach uniformly shared by international human rights bodies is entirely consistent with the Court’s conclusion that “law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead”.¹⁵⁴

61. Such a conclusion could only be rejected were one to reject the long-standing jurisprudence of the Human Rights Committee that the right to life is the “supreme right” and that “the deprivation of life by the authorities of the State is a matter of the utmost gravity”. Accordingly, “the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities”.¹⁵⁵ It has thus been consistently found in practice that permitting mandatory death sentences makes it inevitable that some persons will be sentenced to death even though that sentence is disproportionate to the facts of their crimes. Whatever inexactitude might be tolerated in determining the size of a fine or the length of a sentence in years, uncertainty in the decision between life and death is incompatible with the strict control with which the law must protect the right to life. As the Supreme Court of the United States held when ending that country’s use of the mandatory death penalty:

“the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case”.¹⁵⁶

62. It is clear, therefore, that in death penalty cases, individualized sentencing by the judiciary is required to prevent cruel, inhuman or degrading punishment and the arbitrary deprivation of life.

IV. CONCLUSIONS AND RECOMMENDATIONS

63. **The prohibition of the execution of those who were under 18 at the time of committing a crime is of fundamental importance to international human rights law. The Islamic Republic of Iran is the only country in the world in relation to which I continue to receive significant numbers of credible reports of such sentences being imposed and, in some cases, carried out on juveniles. Iran is a party to two treaties which explicitly outlaw this practice. My repeated requests over several years to visit Iran in order to ascertain the accuracy of these reports and to explore through dialogue ways in which to remedy any shortcomings have yielded no response. This is despite the fact that a “standing invitation” has been issued. This is now a matter in relation to which the Council will need to respond appropriately.**

64. **International human rights law and international humanitarian law are complementary bodies of law. Suggestions that the extrajudicial executions mandate and, much more importantly, the Human Rights Council as a whole are excluded from inquiring into possible violations of human rights or humanitarian law committed in any context in which an armed conflict may or may not be occurring would dramatically reduce the relevance of the Council and would eliminate all public scrutiny under international law for such violations. The Council should uphold and continue its very long-established practice - dating back almost a quarter of a century in the case of this mandate alone - of scrutinizing alleged violations of both human rights and humanitarian law, even if committed in the context of an armed conflict.**

65. **The death penalty must, under international law, only be applied for the most serious crimes. This standard, like all others in international human rights law, cannot be interpreted subjectively by each individual country without making a mockery of the basic principle. Over the past two decades international jurisprudence from a wide range of sources has succeeded in bringing clarity to the question of which crimes can legitimately be classified as being the “most serious”. As a result, the death penalty can only be imposed in cases where it can be shown that there was an intention to kill which resulted in the loss of life.**

66. **Making the death penalty mandatory for certain crimes, in such a way that a judge is prohibited from taking the circumstances of an individual accused person into account in sentencing, is illegal under international human rights law. This is not to say that countries which retain the death penalty are unable to apply that penalty in the majority of cases involving a most serious crime, but they are obligated to at least provide for the possibility that a judge might find a death sentence impermissible in a particular individual’s case because of extenuating circumstances of one kind or another.**

Annex I

MISSION REQUESTS OUTSTANDING AS OF 7 DECEMBER 2006

Bangladesh. Request sent on 20 March 2006. Follow-up request sent on 16 November 2006. No response received. HRC member up to 2009.

Brazil. Request sent on 11 July 2006. Government indicated acceptance in principle but that pre-election timing was not appropriate. Renewed request sent, post-elections, on 16 November 2006. No response.

China. Request sent on 24 March 2005. Meeting with the Permanent Representative in Geneva in June 2005. No response. HRC member up to 2009.

Central African Republic. Request sent on 16 November 2006. No response.

El Salvador. Request sent on 20 March 2006. No substantive reply.

India. Request sent in October 2000. Follow-up request sent on 1 December 2005. Meeting with the Permanent Representative in Geneva in June 2006. Follow-up requests sent on 6 September 2006 and 16 November 2006. No response. HRC member up to 2007.

Islamic Republic of Iran. Request sent on 14 January 2004, noting that a standing invitation had been extended by the Government. Immediate response indicating that a visit would be acceptable in principle but would have to be considered in the context of missions sought by other special procedures. Follow-up letter sent on 11 February 2005. On 4 April 2005, meeting with Permanent Representative in Geneva. Follow-up letters sent on 18 April 2005 and 9 August 2005. Further meeting with Permanent Representative in Geneva on 14 October 2005. Follow-up letters sent on 17 October 2005, and 16 November 2006. No substantive response. Standing invitation.

Indonesia. Request sent on 27 September 2004. Follow-up sent on 13 March 2006. No substantive response. HRC member up to 2007.

Israel. Request sent on 16 June 2006 and meeting with Permanent Representative in Geneva. Acknowledgement received but no substantive response.

Kenya. Request sent on 20 March 2006. Follow-up request sent on 16 November 2006. No response.

Lao People's Democratic Republic. Request sent on 20 March 2006. No response.

Nepal. Request sent on 27 September 2004. No substantive reply.

Pakistan. Request sent in October 2000. Follow-up request sent on 1 December 2005. No substantive reply. HRC member up to 2008.

Peru. Request of 30 November 2005. Accepted in January 2006. HRC member up to 2008. Standing invitation.

Russian Federation. Request sent in 2003. Follow-up request sent on 17 September 2004. After consultation with government officials the request was redrafted and sent on 14 June 2005. Meeting with Deputy Permanent Representative in Geneva in June and October 2006. No substantive reply.

Saudi Arabia. Request sent on 11 May 2005. Government responded on 27 July 2005 that time was not right. Follow-up letter sent on 24 August 2005. HRC member up to 2009.

Singapore. Request sent on 16 November. Government responded on 1 December 2006 requesting more information as to the purpose of the visit and its relationship to my mandate.

Trinidad and Tobago. Request sent on 16 November 2006. Acknowledgement received. No substantive response.

Thailand. Request sent on 8 November 2004. Written information provided by Government on 31 January and 8 March 2005. Requests renewed on 30 August 2005 and 10 November 2005. No substantive response.

Togo. Request sent on 11 May 2005. Accepted on 26 October 2005. On 23 March 2006 a letter was sent requesting confirmation of specific dates. No response was received.

Uganda. Request sent on 20 March 2006. No response.

United States of America. Request sent on 16 November 2006. No reply.

Uzbekistan. Request sent on 19 May 2005. Government replied in a press statement dated 20 May 2005 alleging “prejudgment and preconception” on my part. No further response.

Venezuela. Request sent on 16 November 2006. No reply.

Viet Nam. Request sent on 20 March 2006. Follow-up sent on 16 November 2006. No reply.

Yemen. Request sent on 16 November 2006. Government response on 20 November 2006 requesting more information in order “to ensure the highest possible level of cooperation and support from the Government with the Special Rapporteur”. Response sent by the Special Rapporteur on 5 December 2006.

Annex II

NOTES TO THE REPORT

¹ The term “extrajudicial executions” is used in this report to refer to executions other than those carried out by the State in conformity with the law. As explained in my previous report “[t]he terms of reference of this mandate are not best understood through efforts to define individually the terms ‘extrajudicial’, ‘summary’ or ‘arbitrary’, or to seek to categorize any given incident accordingly”. Rather, “the most productive focus is on the mandate itself, as it has evolved over the years through the various resolutions of the General Assembly and the Commission” (E/CN.4/2005/7, para. 6).

² See note 3 below.

³ In order to comply with strict reporting deadlines, and to give Governments a minimum of two months to reply, the present report reflects communications sent between 1 December 2005 and 30 September 2006, and responses received from Governments between 1 December 2005 and 1 December 2006. A comprehensive account of communications sent to Governments up to 1 December 2006, along with replies received up to the end of January 2007, and the relevant observations of the Special Rapporteur, are reflected in addendum 1 to this report.

⁴ This report was extensively criticized by some Council members at the third session, but most criticism was based upon a leaked version of a draft which was later significantly revised.

⁵ General Assembly Res. 61/173 (2006), para. 13.

⁶ E/CN.4/2005/7, paras. 41-54.

⁷ See, e.g., Communication of 4 May 2006 from the United States.

⁸ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, para. 25.*

⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, para. 106; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2005, para. 216.*

¹⁰ *Id.*, at paras. 216-20, 345(3).

¹¹ Human Rights Committee, General Comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (art. 2), CCPR/C/21/Rev.1/Add.13 (2004), para. 11.

¹² CHR Res. 2005/34 and GA Res. 61/173.

¹³ A lengthier list of examples is provided in the communication sent to the United States on 30 November 2006. *See also* Daniel O'Donnell, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 *Int'l Rev. Red Cross* 481 (1998).

¹⁴ CHR Res. 1992/S-1/1, para. 1.

¹⁵ *Id.* at para. 9.

¹⁶ ECOSOC Decision 1992/305.

¹⁷ CHR Res. 1994/72, para. 4.

¹⁸ *Id.* at para. 7. Taking note of this resolution, the ECOSOC “approved ... [t]he Commission’s ... request that the Special Rapporteur ... continue to submit periodic reports ... on the implementation of Commission resolution 1994/72”, ECOSOC Res. 1994/262.

¹⁹ CHR Res. S-3/1, para. 1.

²⁰ *Id.* This resolution was explicitly endorsed by ECOSOC Decision 1994/223.

²¹ GA Res. 60/251 (2006).

²² CHR Res. 1982/29, para. 2; ECOSOC Res. 1982/35, para. 2.

²³ See communication sent to the United States on 30 Nov. 2006.

²⁴ E/CN.4/1983/16, paras. 29-39.

²⁵ *Id.* at paras. 33-34.

²⁶ CHR Res. 1983/36, para. 3.

²⁷ E/CN.4/1992/30, p. 176.

²⁸ CHR Res. 1992/72, para. 3.

²⁹ E/CN.4/1992/30, para. 649(f) and para. 651(b).

³⁰ The International Committee on the Red Cross (ICRC), although exercising valuable humanitarian oversight in such matters, does not act in a manner which satisfies the need for public accountability.

³¹ “Charges Reduced in Iraq Killing”, *Los Angeles Times*, Dec. 8, 2004; “U.S. Officer Calls Killing an Act of Mercy”, *New York Times*, 9 September, 2004.

³² *Id.*

³³ “Army Officer Convicted in Iraqi’s Death Is Freed”, *New York Times*, April 2, 2005.

³⁴ “‘Mercy killing’ of Iraqi revives GI conduct debate”, *Los Angeles Times*, Nov. 5, 2004.

³⁵ *Id.*

³⁶ *Id.*

³⁷ “U.S. soldier convicted in ‘mercy killing’”, *Desert News* (Salt Lake City), Jan. 15, 2005.

³⁸ “Army Officer Calls for Death In Slaying Case”, *New York Times*, September 3, 2006.

³⁹ Geneva Convention I, 1949, Art. 12. Article 12 of Geneva Convention II contains an equivalent prohibition concerning wounded or shipwrecked at sea.

⁴⁰ *ICRC Commentary to the First Geneva Convention of 1949*, p. 138.

⁴¹ *Id.*

⁴² Additional Protocol I to the Geneva Conventions (1977), Art. 75(2)(a)(i). The Commentary to this provision states explicitly that “cases in which the status of prisoner of war or of protected person were denied to certain individuals, the protection of Article 75 must be applied to them as a minimum”. *Commentary to the First Additional Protocol to the Geneva Conventions*, p. 866, para. 3014. For a similar situation with respect to another provision of the Geneva Conventions (Fourth Geneva Convention, Art. 4), *See Congo v. Uganda, I.C.J. Reports 2005, Judgment of 19 Dec. 2005*, Separate Opinion of Judge Simma, para. 26 (“The gap thus left by Geneva Convention Article 4 has in the meantime been - deliberately - closed by Article 75 of Protocol I Additional to the Geneva Conventions of 1949.”).

⁴³ Protocol I, Art. 8(a). As the ICRC Commentary makes clear, the Protocol therefore “does not retain the distinction made between these two categories by the Conventions as regards the wounded and sick. On this basis a wounded soldier and a wounded civilian are entitled to identical protection.” *Commentary to Protocol I*, p. 117, para. 304. *See also* First Additional protocol to the Geneva Conventions, Article 10.

⁴⁴ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 *I.C.J. Reports*, p. 114, para. 218.

⁴⁵ Geneva Conventions of 1949, Common Article 3.

⁴⁶ Additional Protocol II, Art. 7(1).

⁴⁷ Additional Protocol II, Art. 8.

⁴⁸ International Committee of the Red Cross, *Customary International Humanitarian Law* (Jean-Marie Henckaerts & Louise Doswald-Beck, eds. 2005) (hereinafter “ICRC Study on Customary law”), pp. 306-308 (Rule 87 - civilians and persons *hors de combat* must be treated humanely), pp. 311-314 (Rule 89 - prohibition of murder of persons *hors de combat*), pp. 403-405 (Rule 111 - protection of wounded, sick, and shipwrecked).

⁴⁹ See, e.g., *ICRC Commentary to the First Geneva Convention of 1949*, p. 136 (“It is only the soldier who is himself seeking to kill who may be killed. The abandonment of all aggressiveness should put an end to aggression.”).

⁵⁰ “‘Mercy Killing’ of Iraqi Revives GI Conduct Debate”, *supra* note 34.

⁵¹ First Geneva Convention, art. 15; Second Geneva Convention, Art. 18; Fourth Geneva Convention, Art. 16(2); Additional Protocol I, Art. 10; Geneva Conventions, Common Art. 3; Additional Protocol II, Art. 8, *ICRC Study on Customary Law*, *supra* note 49, at pp. 396-399 (Rule 109).

⁵² First Geneva Convention, Arts. 12(2), 15(1); Second Geneva Convention, Arts. 12(2), 18; Fourth Geneva Convention, Art. 16(1); Geneva Conventions, Common Art. 3; Additional Protocol II, Arts. 7-8; *ICRC Study on Customary law*, *supra* note 49, at pp. 400-403.

⁵³ E/CN.4/1984/29, paras. 38-40.

⁵⁴ ECOSOC Res. 1985/50; see generally *Arbitrary and Summary Executions*, Note by the Secretary-General, E/AC.57/1984/16 (25 January 1984).

⁵⁵ E/CN.4/1985/17, para. 24.

⁵⁶ E/CN.4/1985/17, paras. 31-38.

⁵⁷ See, e.g., E/CN.4/1997/60, para. 91: “[The *Safeguards* state that] the scope of crimes subject to the death penalty should not go beyond intentional crimes with lethal or other extremely grave consequences. The Special Rapporteur concludes from this, that the death penalty should be eliminated for crimes such as economic crimes and drug-related offences. In this regard, the Special Rapporteur wishes to express his concern that certain countries, namely China, the Islamic Republic of Iran, Malaysia, Singapore, Thailand and the United States of America, maintain in their national legislation the option to impose the death penalty for economic and/or drug-related offences.”

⁵⁸ This list is not comprehensive. In the earlier years, especially, the communications addenda to the reports of the Special Rapporteur often do not include the full text of communications, at times making the determination of the norms at issue difficult from today’s vantage point.

⁵⁹ E/CN.4/2006/53/Add.4, para. 35 (Nigeria); E/CN.4/2006/53/Add.2, para. 150 (Sudan); E/CN.4/2003/3, para. 60 (Nigeria and Sudan); E/CN.4/2000/3, para. 70.

⁶⁰ E/CN.4/2006/53/Add.2, para. 150 (Sudan).

- ⁶¹ E/CN.4/1994/7, para. 475 (Pakistan).
- ⁶² E/CN.4/1994/7, para. 209 (China).
- ⁶³ E/CN.4/2006/53/Add.1, pp. 87-88 (Islamic Republic of Iran).
- ⁶⁴ E/CN.4/1994/7, para. 209 (China).
- ⁶⁵ E/CN.4/2005/7/Add.1, para. 721 (Thailand).
- ⁶⁶ E/CN.4/1999/39/Add.1, para. 236 (Thailand); E/CN.4/2004/7/Add.1, paras. 524-525 (Singapore; *see also* E/CN.4/2004/7, para. 51).
- ⁶⁷ A/51/457 (1996), para. 107.
- ⁶⁸ E/CN.4/2002/74, para. 114; E/CN.4/2001/9, para. 83; A/51/457 (1996), para. 107.
- ⁶⁹ E/CN.4/2006/53/Add.1, pp. 307-317 (Yemen).
- ⁷⁰ E/CN.4/1998/68/Add.1, para. 227 (Iran); E/CN.4/2006/53/Add.1, pp. 307- 317 (Yemen).
- ⁷¹ E/CN.4/2002/74/Add.2, para. 546 (Somalia; *see also* E/CN.4/2002/74, para. 65); E/CN.4/2006/53/Add.2, para. 150 (Sudan); E/CN.4/2006/53/Add.1, pp. 108-110 (Islamic Republic of Iran).
- ⁷² E/CN.4/2000/3, para. 70.
- ⁷³ E/CN.4/1998/68/Add.1, para. 227 (Iran); E/CN.4/2006/53/Add.1, pp. 307-317 (Yemen); E/CN.4/2002/74, para. 114; E/CN.4/2001/9, para. 83.
- ⁷⁴ E/CN.4/2000/3, para. 70.
- ⁷⁵ E/CN.4/2000/3/Add.1, para. 110 (China).
- ⁷⁶ E/CN.4/2000/3/Add.1, para. 111 (China).
- ⁷⁷ E/CN.4/2002/74/Add.2, para. 456 (Nigeria; *see also* E/CN.4/2002/74, para. 115).
- ⁷⁸ E/CN.4/2005/7/Add.2, para. 56 (Sudan).
- ⁷⁹ E/CN.4/2006/53/Add.4, para. 35 (Nigeria).
- ⁸⁰ E/CN.4/1994/7, para. 209 (China).
- ⁸¹ E/CN.4/2002/74, para. 114; E/CN.4/2001/9, para. 83; E/CN.4/2000/3, para. 70.
- ⁸² E/CN.4/2002/74/Add.2, paras. 338, 342 (Islamic Republic of Iran; *see also* E/CN.4/2002/74, para. 116).

⁸³ The provisions protecting the right to life in the American Convention on Human Rights also specify that “[n]o one shall be arbitrarily deprived of his life” (art. 4(1)) and that the death penalty “may be imposed only for the most serious crimes” (art. 4(2)) but also states that, “In no case shall capital punishment be inflicted for political offenses or related common crimes” (art. 4(4)). With respect to the African regional human rights system, “Although the African Charter of Human and Peoples’ Rights is silent on the subject of capital punishment, the African Commission on Human and Peoples’ Rights has called upon states that maintain the death penalty to ‘limit the imposition of the death penalty only to the most serious crimes’.” William A. Schabas, “International law and the death penalty: reflecting or promoting change?”, in *Capital Punishment: Strategies for Abolition* (eds. Hodgkinson & Schabas 2004), p. 46.

⁸⁴ See Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* (1987), pp. 113-145.

⁸⁵ See, e.g., E/CN.4/SR.152, paras. 12-13 (“His delegation’s view [was] that the word ‘law’, as understood in the covenant, referred exclusively to laws which were not contrary to the principles of the [Universal] Declaration [of Human Rights]. ... Unless such a formula was included, the text of article 5 [now 6] would be acceptable to any dictator, as there would be nothing to prevent him from enacting laws contrary to the spirit of the Declaration.”); E/CN.4/SR.140, para. 38 (“[T]he greatest danger to be guarded against was that of actions of the State against the individual. ... Comparatively primitive and incautious in their methods until recently, totalitarian states had since become very careful to preserve an appearance of legality while arbitrarily killing their opponents.”).

⁸⁶ A/2929, p. 83, para. 3. See also Manfred Nowak, *CCPR Commentary* (2nd revised ed. 2005), pp. 127-128: “Although the term ‘arbitrarily’ was criticized as too vague, the HRCComm [Human Rights Commission] ultimately opted for it after lengthy discussion. ... [In the Third Committee of the General Assembly:] Despite strong criticism of the vagueness of the word ‘arbitrarily’ and a Dutch proposal that Art. 6 be drafted along the same lines as Art. 2 of the ECHR, the majority insisted on the formulation adopted by the HRCComm, even though its meaning had not been clarified. Several delegates took the opinion that arbitrarily was synonymous with the term ‘without due process of law’ common in Anglo-American law. Others argued that it contained an ethical component, since national legislation could also be arbitrary. The Committee of Experts, which had taken up the interpretation of this term at the request of the Committee of Ministers of the Council of Europe, concurred with the view of the Chilean delegate in the HRCComm that arbitrary deprivation of life contained elements of *unlawfulness* and *injustice*, as well as those of *capriciousness* and *unreasonableness*.”

⁸⁷ A/2929, pp 83-84. The recognition that a death sentence cannot be imposed “contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide” indicates another key limitation on what may constitute a capital crime.

Under international law, each individual may as of right exercise liberty of movement; choose his or her own residence; leave any country; enjoy individual and family privacy; think freely, adopt a religion or belief of his or her choice; manifest his or her religion or belief in worship,

observance, practice and teaching; hold opinions without interference; express him or herself freely; seek, receive and impart information and ideas of all kinds; assemble peacefully; associate with others; form or join a trade union; marry and found a family; take part in the conduct of public affairs; to vote, and to stand as a candidate for election. ICCPR, arts. 12, 17, 18, 19, 21, 22, 23, 25. The exercise of these and other human rights cannot be punished with death; indeed, such conduct cannot be punished at all. Even when the enjoyment of a right might be subjected to a legitimate limitation or derogation, its exercise cannot be considered to rise to the level of a “most serious crime” for which the death penalty might be imposed. *See also* E/CN.4/2006/53/Add.1, pp. 307-317 (Yemen); E/CN.4/1998/68/Add.1, paras. 221-227 (Islamic Republic of Iran); Nigel Rodley, *The Treatment of Prisoners Under International Law* (2nd ed. 1999), p. 220.

⁸⁸ A/2929, p. 82, para. 1.

⁸⁹ A/2929, p. 82, para. 1.

⁹⁰ A/2929, p. 82, para. 2. This same basic debate also played out over the more specific concept of the most serious crimes. The term “most serious crimes” was “criticized as lacking precision” and some suggested the explicit exclusion of particular categories of offences from the concept. A/2929, page 84, para. 6. However, exhaustively enumerating examples proved as difficult in the abstract as it had under the broader rubric of arbitrary deprivation.

⁹¹ A/2929, p. 82, para. 2; *see also* E/CN.4/SR.140, paras. 2, 13.

⁹² A/2929, p. 82, para. 3.

⁹³ *See, e.g.*, E/CN.4/SR.140, para. 3 (“The precise significance of the word ‘arbitrarily’ had been very fully discussed by the Commission on Human Rights and by the Third Committee of the General Assembly and it had been concluded that it had a precise enough meaning. It had been used in several articles in the Universal Declaration of Human Rights and referred both to the legality and the justice of the act.”).

⁹⁴ On the contemplated role of the HRC and of world public opinion, *see, e.g.*, E/CN.4/SR.139, para. 8: “As the Commission intended to include implementation measures in the covenant, it would provide for an international body to focus world public opinion on the acts of countless signatories to the covenant. That international body and public opinion would easily judge what was arbitrary and what was not.”

On the role of States, *see, e.g.*, E/CN.4/SR.139, para. 45: “In time a sort of jurisprudence on the subject would certainly be established based on the comments of governments, and it would subsequently be possible to supplement the covenant in the light of that jurisprudence.” The sense of this observation was clarified by the delegate’s observation that the list of particular non-arbitrary deprivations of life proposed by some for inclusion in the text of the ICCPR would, despite its exclusion, “form one of the basic elements in any jurisprudence of that sort.”

⁹⁵ A particularly significant example is that the recognition that mandatory death sentences were *per se* violations of human rights law stemmed from a gradual understanding through the adjudication of concrete cases that the “most serious crimes” limitation did not fully capture the concept of the non-arbitrary imposition of capital punishment.

⁹⁶ *Arbitrary and Summary Executions*, Note by the Secretary-General, E/AC.57/1984/16, paras. 40-43 (25 January 1984).

⁹⁷ *Safeguards*, para. 1.

⁹⁸ ECOSOC Res. 1984/50 (25 May 1984); GA Res. 39/118 (14 December 1984).

⁹⁹ ECOSOC Res. 1990/51 (24 July 1990).

¹⁰⁰ *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, E/2000/3 (31 March 2000), para. 79.

Additional insights are provided by the views of the European Union. After reviewing the resolutions of the GA and the provisions of the ICCPR and the *Safeguards*, in its *Guidelines to EU Policy Towards Third Countries on the Death Penalty*, the European Council determined that, among the minimum standards that should be met by all States maintaining the death penalty, is:

Capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences. The death penalty should not be imposed for non-violent financial crimes or for non-violent religious practice or expression of conscience. (*Guidelines to EU Policy Towards Third Countries on the Death Penalty* (3 June 1988), at <http://www.eurunion.org/legislat/DeathPenalty/Guidelines.htm>.)

In keeping with the *erga omnes* character of the right to life, the EU has elected to make démarches to non-EU countries regarding practices deviating from this and other minimum standards. (See Roger Hood, *The Death Penalty: A Worldwide Perspective* (3rd ed. 2002), pp. 16-18.)

¹⁰¹ This kind of legal offence-specific legal analysis also takes place at the national level. For a number of papers working out the implications of the most serious crimes standard for particular offences, ranging from illegally raising capital to smuggling precious metals, within a single legal system see *The Road to the Abolition of the Death Penalty in China: Regarding the Abolition of the Non-Violent Crime at the Present Stage* (Press of Chinese People’s Public Security University of China, 2004).

¹⁰² CCPR/CO/72/GTM, para. 17 (2001) (Guatemala).

¹⁰³ A/50/40, para. 35 (1995) (Sri Lanka).

¹⁰⁴ CCPR/C/79/Add.25, para. 8 (1993) (Islamic Republic of Iran).

- ¹⁰⁵ CCPR/C/79/Add.85, para. 8 (1997) (Sudan).
- ¹⁰⁶ CCPR/C/79/Add.25, para. 8 (1993) (Islamic Republic of Iran).
- ¹⁰⁷ A/50/40, para. 35 (1995) (Sri Lanka); A/55/40, para. 13 (2000) (Kuwait).
- ¹⁰⁸ CCPR/C/79/Add.1, para. 5 (1992) (Algeria); CCPR/C/79/Add.25, para. 8 (1993) (Islamic Republic of Iran).
- ¹⁰⁹ CHR Res. 1999/61, para. 3(b) (28 April 1999); CHR Res. 2002/77, para. 4(c) (25 April 2002); CHR Res. 2005/59 (20 April 2005), para. 7(f).
- ¹¹⁰ CHR Res. 1999/61, para. 3(b) (28 April 1999); CHR Res. 2002/77, para. 4(c) (25 April 2002); CHR Res. 2005/59 (20 April 2005), para. 7(f).
- ¹¹¹ CCPR/C/79/Add.85, para. 8 (1997) (Sudan).
- ¹¹² CCPR/C/79/Add.84, para. 11 (1997) (Iraq).
- ¹¹³ CCPR/C/79/Add.85, para. 8 (1997) (Sudan).
- ¹¹⁴ CCPR/C/79/Add.85, para. 8 (1997) (Sudan).
- ¹¹⁵ CHR Res. 2002/77, para. 4(c) (25 April 2002); CHR Res. 2005/59 (20 April 2005), para. 7(f).
- ¹¹⁶ CCPR/C/79/Add.85, para. 8 (1997) (Sudan); CCPR/CO/83/KEN, para. 13 (2005) (Kenya).
- ¹¹⁷ CHR Res. 1999/61, para. 3(b) (28 April 1999); CHR Res. 2002/77, para. 4(c) (25 April 2002); CHR Res. 2005/59 (20 April 2005), para. 7(f).
- ¹¹⁸ CCPR/C/79/Add.101, para. 8 (1998) (Libyan Arab Jamahiriya).
- ¹¹⁹ CCPR/CO/75/VNM, para. 7 (2002) (Viet Nam); CCPR/C/79/Add.101, para. 8 (1998) (Libyan Arab Jamahiriya).
- ¹²⁰ CCPR/CO/71/SYR/Add.1, para. 9 (2001) (Syrian Arab Republic).
- ¹²¹ CCPR/C/79/Add.116, para. 14 (1999) (Cameroon).
- ¹²² CCPR/C/79/Add.23, para. 8 (1993) (Egypt).
- ¹²³ CCPR/CO/72/PRK, para. 13 (2001) (Democratic People's Republic of Korea).
- ¹²⁴ CCPR/CO/75/VNM, para. 7 (2002) (Viet Nam).
- ¹²⁵ CCPR/CO/76/TGO, para. 10 (2002) (Togo).

¹²⁶ A/55/40, para. 13 (2000) (Kuwait).

¹²⁷ CCPR/C/79/Add.116, para. 14 (1999) (Cameroon).

¹²⁸ CCPR/C/79/Add.23, para. 8 (1993) (Egypt).

¹²⁹ CCPR/CO/71/SYR/Add.1, para. 9 (2001) (Syrian Arab Republic); CCPR/CO/72/PRK, para. 13 (2001) (Democratic People's Republic of Korea); CCPR/C/79/Add.101, para. 8 (1998) (Libyan Arab Jamahiriya).

¹³⁰ HRC, *General Comment 6* (1982) (emphasis added); see also *Baboeram et al. v. Suriname*, Communication No. 146/1983 and 148 to 154/1983 (1985), para. 14.

¹³¹ In a series of communications concerning the extradition of persons to a country in which they could face the death penalty, the HRC evaluated whether extradition would expose the communication's author "to a real risk of a violation of Article 6, paragraph 2 [of the ICCPR]" in the destination country, and it did not find a violation where the crime in question was murder. *Kindler v. Canada*, Communication No. 470/1991, para. 14.3 (1993) (no violation where extradition was for "premeditated murder, undoubtedly a very serious crime"); *Chitat Ng v. Canada*, Communication No. 469/1991, para. 15.3 (1994) ("The Committee notes that Mr. Ng was extradited to stand trial on 19 criminal charges, including 12 counts of murder. If sentenced to death, that sentence, based on the information which the Committee has before it, would be based on a conviction of guilt in respect of very serious crimes."); *Cox v. Canada*, Communication No. 539/1993, para. 16.2 (1994) (no violation where extradition was for "complicity in two murders, undoubtedly very serious crimes"). See also *Roger Judge v. Canada*, Communication No. 829/1998 (2003) (finding extradition to violate ICCPR, art. 6 where extraditing country had abolished the death penalty, regardless whether extradition was on a most serious crime).

¹³² This has been stated explicitly in the concluding observations on some country reports. See CCPR/C/79/Add.25, para. 8 (1993) (Islamic Republic of Iran) ("In the light of the provision of article 6 of the Covenant, requiring States parties that have not abolished the death penalty to limit it to the most serious crimes, the Committee considers the imposition of that penalty ... for crimes that do not result in loss of life, as being contrary to the Covenant."); CCPR/CO/83/KEN, para. 13 (2005) (Kenya) ("[T]he Committee notes with concern ... that the death penalty applies to crimes not having fatal or similarly grave consequences, such as robbery with violence or attempted robbery with violence, which do not qualify as 'most serious crimes' within the meaning of article 6, paragraph 2, of the Covenant.")

¹³³ *Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998 (2000), para. 8.2-3. See also E/CN.4/1998/68/Add.3, para. 21: "The notion of most serious crimes was later developed in the Safeguards guaranteeing protection of the rights of those facing the death penalty, according to which the most serious crimes are those 'intentional crimes with lethal or other extremely grave consequences'. The Special Rapporteur considers that the term 'intentional' should be equated to premeditation and should be understood as deliberate intention to kill."

¹³⁴ Previous reports on the Special Rapporteur have also discussed the prohibition of mandatory death sentences briefly. A/61/311, para. 57; E/CN.4/2005/7, paras. 63-64; E/CN.4/2002/74, paras. 114, 120; E/CN.4/2001/9, para. 83; A/55/288, paras. 34, 36; E/CN.4/2000/3, paras. 70, 73, 98; E/CN.4/1999/39, paras. 63, 82.

¹³⁵ CHR Res. 2005/59, para. 7 (f).

¹³⁶ The first national court to strike down the mandatory death penalty as a violation of rights was that of the United States Supreme Court in 1976. *Woodson et al. v. North Carolina*, 428 U.S. 280 (1976); *Sumner v. Shuman*, 483 U.S. 66 (1987) (clarifying that the holding in *Woodson* did not have exceptions). The Supreme Court of India invalidated that country's last remaining mandatory death penalty law in 1983, and the Constitutional Court of Uganda followed suit in 2005. *Mithu v. State of Punjab*, 2 S.C.R. 690 (1983); *Susan Kigula and 416 others v. Attorney General*, Constitutional Petition No. 6 of 2003, Judgement of 10 June 2005.

Influenced by the reasoning of the US and Indian decisions, international treaty bodies began contributing to the jurisprudence in the mid-1990s. The HRC first found a mandatory death penalty law incompatible with the ICCPR in 1995 and did so in more general terms in 2000. *Lubuto v. Zambia*, Human Rights Committee, No. 390/1990 (1995); *Thompson v. Saint Vincent*, Human Rights Committee, No. 806/1998 (2000). The Inter-American Commission on Human Rights reached the same conclusion in 1999. *Rudolph Baptiste v. Grenada*, Inter-American Commission on Human Rights, Case 11.743, Report No. 38/00 (1999). The Inter-American Court of Human rights confirmed this jurisprudence in 2002. *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Series C, No. 94 (21 June 2002).

The most influential recent judgements have been those of the Judicial Committee of the Privy Council. The Privy Council first considered the constitutionality of a mandatory death penalty law in *Ong Ah Chuan v. Public Prosecutor* (1980) and found that law constitutional. *Ong Ah Chuan v. Public Prosecutor* (1980) 3 WLR 855 (Privy Council; appeals from the Court of Criminal Appeals of Singapore). However, in subsequent cases the Privy Council has rejected this line of reasoning and established that the mandatory death penalty is incompatible with human rights. The question of whether the mandatory death penalty violated individual human rights was settled by 2002. *Reyes v. The Queen* [2002] 2 App. Cas. 235 (P.C.), judgement of 11 March 2002 (Belize); *Queen v. Hughes* [2002] 2 App. Cas. 259 (P.C.), judgement of March 2002; *Fox v. The Queen* [2002] 2 App. Cas. 284 (P.C.), judgement of March 2002. See also Eastern Caribbean Court of Appeal, *Spence and Hughes v. The Queen*, Crim. App. Nos. 20 of 1998 and 14 of 1997, judgement of 2 April 2001. Later cases have primarily concerned questions of whether those rights were enforceable under particular constitutional schemes. See Joanna Harrington, *The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean*, *American Journal of International Law*, Vol. 98, No. 1 (January 2004), pp. 126-140. In a 2006 case, the Privy Council noted that the evolution of its jurisprudence was due not to the changing content of the law but to the gradual process by which judges came to understand that law: "It is ... clear that it took some time for the legal effect of entrenched human rights guarantees to be appreciated, not because the meaning of the rights

changed but because the jurisprudence on human rights and constitutional adjudication was unfamiliar and, by some courts, resisted.” *Bowe v. The Queen*, Privy Council Appeal No. 44 of 2005 (8 March 2006) (appeal from the Court of Appeal of the Bahamas), para. 42.

¹³⁷ The Special Rapporteur has, for example, engaged in dialogue with several Governments on the universal significance of the jurisprudence of the Judicial Committee of the Privy Council. E/CN.4/2006/53/Add.1, pp. 34-36, 199-206, 247-249.

¹³⁸ ICCPR, art. 6(4).

¹³⁹ ICCPR, art. 6(1).

¹⁴⁰ ICCPR, art. 7. Note that insofar as a violation of Article 7 results in the deprivation of life it also constitutes a violation of Article 6. *See* ICCPR, art. 6(2): “sentence of death may be imposed only ... not contrary to the provisions of the present Covenant”.

¹⁴¹ *See also* E/CN.4/2006/53/Add.1, 232-242.

¹⁴² ICCPR, art. 14(5): “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”

¹⁴³ The relevance of a range of factors has been noted by judicial and quasi-judicial bodies. *See, e.g., Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998 (2000), para. 8 (“defendant’s personal circumstances” and the “circumstances of the particular offence”); *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Series C, No. 94 (21 June 2002), para. 87 (“prior criminal record of the offender”, “the subjective factors that could have motivated his conduct”, “the degree of his participation in the criminal act”, “the probability that the offender could be reformed and socially readapted”, “whether the death penalty is the appropriate punishment or not for the specific case in light of the circumstances of the offender’s conduct”).

¹⁴⁴ While this explanation of the reasoning behind these cases is somewhat stylized, it clarifies far more than it obscures.

¹⁴⁵ ICCPR, art. 6(2).

¹⁴⁶ *Lubuto v. Zambia*, Communication No. 390/1990 (1995), para. 7.2.

¹⁴⁷ The distinction between evaluating general legislation and individual sentences under human rights law can also be understood as an example of the difference between “macro-policy at the central level” and the “micro-policy of specific law enforcement bodies”. *See* Liu Renwen, “Strict Restriction on Death Penalty and its Paths in China” in *The Road to the Abolition of the Death Penalty in China: Regarding the Abolition of the Non-Violent Crime at the Present Stage* (Press of Chinese People’s Public Security University of China, 2004).

¹⁴⁸ *Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998 (2000), para. 8.2.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998 (2002), para. 7.3.

¹⁵¹ The HRC has affirmed its holding in *Thompson* in a number of its other final views. *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998 (2002); *Carpo et al. v. The Philippines*, No. 1077/2002 (2002); *Pagdayawon Rolando v. Philippines*, Communication No. 1110/2002 (2004); *Ramil Rayos v. Philippines*, Communication No. 1167/2003 (2004); *Hussain et al. v. Guyana*, Communication No. 862/1999 (2005); *Mr. Webby Chisanga v. Zambia*, Communication No. 1132/2002 (2005); *Lawrence Chan v. Guyana*, Communication No. 913/2000 (2006); *Larrañaga v. the Philippines*, Communication No. 1421/2005 (2006); *Raymond Persaud and Rampersaud v. Guyana*, Communication No. 812/1998 (2006).

¹⁵² The logical structure of the conclusion reached by these various judicial and quasi-judicial bodies was clearly stated by the Privy Council in *Bowe* in the following syllogism:

- (1) It is a fundamental principle of just sentencing that the punishment imposed on a convicted defendant should be proportionate to the gravity of the crime of which he has been convicted;
- (2) The criminal culpability of those convicted of murder varies very widely;
- (3) Not all those convicted of murder deserve to die.

Bowe v. The Queen, Privy Council Appeal No. 44 of 2005 (8 March 2006) (appeal from the Court of Appeal of the Bahamas), para. 29.

¹⁵³ *Mithu v. State of Punjab*, 2 S.C.R. 690, 704, 707-708 (1983) (internal citations and quotation marks omitted).

¹⁵⁴ *Mithu v. State of Punjab*, 2 S.C.R. 690, 704 (1983).

¹⁵⁵ HRC, *General Comment 6* (1982) (emphasis added); see also *Baboeram et al. v. Suriname*, Communication No. 146/1983 and 148 to 154/1983 (1985), para. 14.

¹⁵⁶ *Woodson et al. v. North Carolina*, 428 U.S. 280, 304-305 (1976) (internal citations omitted).
