

Term of Reference
on the
Death Penalty
for the
**Advisory Council of Jurists,
Asia Pacific Forum of National
Human Rights Institutions**

**Background
Paper**

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Preface

At a meeting held in Darwin, Australia in July 1996 representatives of the national human rights commissions of Australia, India, Indonesia and New Zealand agreed to the establishment of the Asia Pacific Forum of National Human Rights Institutions. The national human rights commissions of the Philippines, Sri Lanka¹ and Fiji² have since also become members of the Forum.

The objectives of the Forum as set out in the *Larrakia Declaration*³ include:

To respond where possible with personnel and other support to requests from governments in the region for assistance in the establishment and development of national institutions,

To expand mutual support, co-operation and joint activity among member commissions through:

- information exchanges
- training and development for Commission members and staff
- development of joint positions on issues of common concern
- undertaking joint projects
- sharing expertise
- periodical regional meetings
- specialist regional seminars on common themes and needs

To establish themselves for these purposes as an informal Asia-Pacific regional forum of national human rights institutions.

At the Third Annual Meeting of the Forum in Indonesia in September 1998, Forum members established an Advisory Council of Jurists to provide national human rights institutions in the region with jurisprudential guidance on contemporary human rights issues.⁴ At the Fourth Annual Meeting held in Manila, the Philippines in September 1999 the members of the Forum:

- *agreed* to consider a reference on the issue of the death penalty to the Advisory Council of Jurists; and
- *requested* the Secretariat to develop a proposal for such a reference for consideration by Forum members between meetings.⁵

¹ Admitted at the Second Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, New Delhi, India, 1997.

² Admitted at the Fourth Annual Meeting of the Asia Pacific Forum of National Human Rights Institutions, Manila, the Philippines, 1999.

³ 'Larrakia Declaration: Conclusions, recommendations and decision', First Asia Pacific Regional Workshop of National Human Rights Institutions, Darwin, Australia, 8-10 July 1996.

⁴ 'Report of the Third Meeting of the Asia Pacific Forum of National Human Rights Institutions', 7th to 9th September 1998, Jakarta.

⁵ Asia Pacific Forum of National Human Rights Institutions, 'Report of the Fourth Annual Meeting', Manila, 6 - 8 September 1999, p. 16.

In March 2000 a draft term of reference was distributed to Forum members for comment. The term of reference subsequently adopted by Forum members is as follows:

The Asia Pacific Forum of National Human Rights Institutions refers to the Advisory Council of Jurists for advice and recommendation the question of whether the application of the death penalty is consistent with norms of international human rights law.

In particular the Council is to consider:

- (i) the range of offences for which international human rights law permits the imposition of the death penalty;**
- (ii) whether the resumption of executions by governments after long periods during which death sentences have been commuted or not executed for other reasons is consistent with international human rights law;**
- (iii) whether the enactment of laws that introduce or reintroduce the death penalty or that apply the death penalty to additional offences is consistent with international human rights law;**
- (iv) whether international human rights law allows for the imposition of the death penalty for crimes for which the sentence of death did not exist at the time the crime was committed;**
- (v) the nature and scope of procedural guarantees and other safeguards stipulated by international human rights law in the imposition and execution of the death penalty;**
- (vi) the restrictions that may be required by international human rights law on the manner and method of carrying out the death penalty;**
- (vii) whether there are further groups of persons, aside from those specified by international human rights law, upon whom it should not be permissible to impose the death penalty; and**
- (viii) whether international human rights law imposes any limitations on the duration and conditions of incarceration of persons sentenced to death.**

The Council may comment on:

- (i) the socio-economic, political and legal environments in Forum Member States;**
- (ii) the religious and cultural traditions in Forum Member States;**
- (iii) the roles to be served by a criminal justice system; and**
- (iv) the international legal obligations of each Member State.**

International human rights law includes but is not limited to the:

- Universal Declaration of Human Rights**
- International Covenant on Civil and Political Rights (ICCPR)**
- Second Optional Protocol to the ICCPR**
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**
- United Nations Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty.**

On the basis of this term of reference a questionnaire was distributed to governments, non-governmental organisations and national human rights institutions, asking them to outline in as much detail as possible the laws and practices pertaining to the death penalty in their own

State.⁶ Eight responses to the questionnaire were received, out of twenty-one questionnaires sent.⁷

This report will be considered by the Advisory Council of Jurists at the inaugural meeting of the Council to be held in Rotarua, New Zealand, from 7-9 August 2000.

⁶ See Appendix 1.

⁷ Fiji, Indonesia, Japan, Malaysia, New Zealand, Solomon Islands, South Korea and Thailand responded to the questionnaire.

Introduction

The imposition of the death penalty by States is expressly recognised in human rights instruments. The death penalty is characterised in most international and regional human rights instruments as an exception to the right to life. Though expressly recognising the death penalty, these human rights instruments also strictly limit its scope and impose rigorous procedural safeguards upon its imposition.

Within the Asia Pacific region⁸ the death penalty is widely used as a form of punishment. In 1999 over 75 per cent of executions imposed across the world took place in the region.⁹ Some of these executions were imposed with flagrant disregard for developing human rights standards. As this report shows, however, State laws and practices concerning the imposition of the death penalty vary greatly between different States of the region as does the degree of conformity with international human rights norms, practices and standards.

(i) International law and the death penalty

International law directly concerning the death penalty has evolved greatly since the issue was first canvassed as a concern of broad international interest in 1947 during the drafting of the *Universal Declaration of Human Rights*¹⁰. Ultimately, the death penalty was not specifically referred to in the *Declaration*. It was not until the *Convention for the Protection of Human Rights and Fundamental Freedoms*¹¹ (1950) that it became the subject of a human rights instrument and not until the *International Covenant on Civil and Political Rights*¹² (1966) that the death penalty was first mentioned and regulated by an international instrument.

⁸ For the purposes of this report the Asia Pacific region is defined as encompassing those States bordered by the Arabian peninsula, Syria, Armenia and Azerbaijan to the west; the islands in the Pacific as far as but excluding Hawaii to the east; Korea, Mongolia and Kazakhstan to the north; and Australia and New Zealand to the south.

⁹ Amnesty International Report 50/08/00 reported that 1813 executions were known to have taken place in 1999. China was known to have executed 1077, Iran 165 and Saudi Arabia 103. Executions also took place in Afghanistan, Iraq, Japan, Jordan, Mongolia, Pakistan, Philippines, Singapore, Taiwan, Thailand, United Arab Emirates, Viet Nam, and Yemen.

¹⁰ GA Res. 217 A(III), UN Doc. A/810 (hereinafter, the *Universal Declaration*). See Appendix 2.

¹¹ (1955) 213 UNTS 221, ETS 5. (hereinafter the *European Convention on Human Rights*). See Appendix 9.

¹² (1976) 999 UNTS 171 (hereinafter, the *ICCPR*). See Appendix 3.

International activity aimed at regulating the imposition of the death penalty is reflected in its inclusion in an increasing number of regional and international human rights¹³ and humanitarian¹⁴ instruments. The *African Charter on Human and Peoples' Rights*¹⁵, adopted in 1981 by the Organization of African Unity, is the only regional human rights instrument not to make mention of the death penalty.

The death penalty is also the subject of numerous international statements of various forms including the General Assembly resolution on the 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty'¹⁶ (1984), General Comments¹⁷ and concluding observations of the UN Human Rights Committee¹⁸ and resolutions of various United Nations bodies including the UN Commission on Human Rights.¹⁹ Other sources of relevance include the decisions of the regional tribunals of Europe and the American system. Finally, the death penalty is the subject of national legislation, national constitutions and the decisions of national courts.

(ii) National laws and the death penalty

The history of the international regulation of the death penalty reflects a general trend towards limiting the scope of the death penalty and increasing the safeguards that govern its imposition. This trend is mirrored at the State level by the growing number of States that are choosing to abolish the death penalty as evidenced by the adoption in Europe in 1983 of

¹³ *ICCPR; Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* GA Res 44/128, (1990) 29 *ILM* 1464 (hereinafter, the *Second Optional Protocol*) See Appendix 4; the *European Convention on Human Rights; Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty* ETS 114 (hereinafter *Protocol No. 6*); the *American Convention on Human Rights* (1979) 1144 UNTS 123, OASTS 36 (hereinafter, the *American Convention*) See Appendix 10; the *Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty* OASTS 73, 29 *ILM* 1447; and the *Convention on the Rights of the Child* (hereinafter. *CROC*) GA Res. 44/25, 28 *ILM* 1448. See Appendix 7.

¹⁴ *Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War*, (1950) 75 UNTS 135; *Geneva Convention of August 12, 1949 Relative to the Protection of Civilians*, (1950) 75 UNTS 135; *Protocol Additional I to the 1949 Geneva Conventions and Relating to The Protection of Victims of International Armed Conflicts*, (1979) 1125 UNTS 2; and *Protocol Additional II to the 1949 Geneva Conventions and Relating to The Protection of Victims of Non-International Armed Conflicts*, (1979) 1125 UNTS 609.

¹⁵ OAU Doc. CAB/LEG/67/3 rev. 5, 4 EHRR 417, 21 *ILM* 58.

¹⁶ ESC Res. 1984/50. Subsequently endorsed by GA Res. 39/118. See Appendix 8.

¹⁷ See in particular *General Comment 6(16)*, UN Doc. C PR/C/21/Add.1, also published as UN Doc. A/37/40, Annex V, UN Doc. CCPR/3/Add.1, at pp. 382-383. See Appendix 5; *General Comment 14(23)*, UN Doc. A/40/40, Annex XX, UN Doc. CCPR/C/SR.563; *General Comment 20(44)*, UN Doc. CCPR/C/21/Rev/1/Add.3; *General Comment 24(52)*, UN Doc. CCPR/C/21/Rev.1/Add.6, (1994) 15 *HRLJ* 464.

¹⁸ See for example, 'Concluding Observations of the Human Rights Committee: India', 04/08/97. CCPR/C/79/Add.81.

*Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty*²⁰; the adoption by the American system in 1990 of the *Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty*²¹; and ultimately the adoption by the United Nations in 1989 of the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*²². Each instrument binds the parties to them to abolishing the death penalty within their jurisdiction.

The adoption of these instruments marks the culmination of many years in which a small number of individual States abolished the death penalty but no discernible trend towards global abolition could be identified. The abolition of the death penalty by States used to be a largely South American phenomenon. Venezuela and Portugal (1867), Costa Rica (1882), Brazil (1889) and Ecuador (1897) had each abolished the death penalty by the end of the 19th Century.²³ In the first half of the 20th Century abolition of the death penalty occurred on a very small scale with Ecuador (1906), Uruguay (1907), Colombia (1910) and Iceland (1928) each abolishing the death penalty in that period.²⁴ Both the end of the Second World War and the fall of the Iron Curtain, however, precipitated a rapid move towards abolition in Europe and to a limited extent in Africa. A majority of States could now be said to be abolitionist, at least for all but exceptional crimes such as those perpetrated during war.²⁵

It is in the Asia Pacific region that the most notable exception in the move towards abolition of the death penalty is found. Fifty-eight States are encompassed within this region. Of these States, six have abolished the death penalty *de jure* for all crimes. Eighteen States have abolished the death penalty *de facto* in that they have not executed anyone in the past ten years or more.²⁶ This leaves thirty-four States that actively impose the death penalty.

¹⁹ See for example Commission on Human Rights resolutions 1999/61 and 2000/65.

²⁰ ETS 114.

²¹ OASTS 73, 29 *ILM* 1447.

²² GA Res. 44/128, (1990) 29 *ILM* 1464.

²³ William A. Schabas, *The Abolition of the Death Penalty in International Law*, (2nd ed.), Cambridge University Press, United Kingdom, 1997, p. 6.

²⁴ International Commission of Jurists, *Administration of the Death Penalty in the United States*, International Commission of Jurists, France, June 1996, pp. 213-214.

²⁵ 73 States are abolitionist for all crimes; 13 States are abolitionist for ordinary crimes only; 22 States are abolitionist in practice; 108 are therefore abolitionist in law or in practice; 87 States are retentionist. Amnesty International, 'Abolitionist and Retentionist Countries', 27 April 2000.

²⁶ See Table 1 outlining the status of the death penalty in the Asia Pacific region.

(iii) The scope of this report

A function of this report is to determine the international obligations according to which States in the region must act. Comparatively few States in the region, however, have acceded to or ratified international instruments generally or specifically relevant to the death penalty. As a result international principles expressed in such treaties and conventions have little bearing on the legality of State laws. This report therefore also compares the laws and practices of States in the region and the extent to which they are consistent with evolving *standards* and *norms* in international law as informed by international practice. Chapter One sets out the international law and standards that relate to the death penalty. Chapter Two contains information about State laws relative to the death penalty, comparing and contrasting State laws with international laws and standards.

The focus of this report is on the laws of the States whose human rights institutions are members of the Asia Pacific Forum: Australia, Fiji, India, Indonesia, Philippines, New Zealand and Sri Lanka. Comment is also made on the States whose human rights institutions may become members of the Forum: Nepal and Thailand. Finally, given the observer capacity accorded to the Islamic Iranian Human Rights Commission in Forum activities, the State of Iran is also considered.

Having created a human rights institution that is potentially eligible to become a member of the Asia Pacific Forum, these States stand apart from the other States of the region.²⁷ The act of creating an independent human rights institution signifies recognition of the importance of human rights as an issue of national and international concern. This act is insufficient, however, to ensure the protection of human rights. Particularly in relation to the most severe and final punishment, the death penalty, protection of human rights requires the commitment of States to the principles enshrined in international human rights instruments and vigilance in ensuring State compliance with these principles.

²⁷ The basis for membership is outlined in the following document: 'Larrakia Declaration: Conclusions, recommendations and decision', First Asia Pacific Regional Workshop of National Human Rights Institutions, Darwin, Australia, 8-10 July 1996.

Chapter One

(i) Whether the death penalty is permissible under international law

The *Universal Declaration of Human Rights* makes no reference to the death penalty. Indeed, it does not refer to *any* exceptions to the right to life and states simply in Article 3 that:

Everyone has the right to life, liberty and security of person.

The *Universal Declaration* was conceived of as a “common standard of achievement”²⁸ and not a document creating binding legal obligations. The *ICCPR* was intended to create such binding obligations.

Article 6 of the *ICCPR* expressly recognises the death penalty as an exception to the right to life as do the *American Convention on Human Rights* and the *European Convention on Human Rights*. The *African Charter of Human and Peoples' Rights*, while not making specific reference to the death penalty, states that “No one may be arbitrarily deprived of this right”²⁹, implying that there are instances in which a person may be deprived of their life. If a State has simply ratified the *ICCPR*, or a regional equivalent, they are therefore free to impose the death penalty within the limitations stipulated by the instruments.

Notwithstanding the clear position at international law, several States have decided that the death penalty does in fact constitute a violation of the right to life. In October 1990, for example, the Hungarian Constitutional Court declared that the death penalty violated the “inherent right to life and human dignity” as provided under Article 54 of the Hungarian Constitution.³⁰ Similarly, in June 1995 the South African Constitutional Court declared the death penalty to be incompatible with the prohibition of “cruel, inhuman and degrading treatment or punishment” under the country’s interim constitution. Eight of the 11 judges also found that the death penalty violated the right to life.³¹

(ii) “Most serious crimes”

²⁸ Preamble, *Universal Declaration of Human Rights*.

²⁹ Article 4, *African Charter on Human and Peoples' Rights*.

³⁰ Quoted in Amnesty International, ‘International Standards on the Death Penalty’, Amnesty International Report ACT 50/06/97, August 1997.

Article 6 paragraph 2 of the *ICCPR* states that the:

... sentence of death may be imposed only for the most serious crimes ...

The *ICCPR*, however, does not provide a list or any indication of the crimes that are embraced by the term ‘most serious’. This phrase allows a broad spectrum of interpretations and, consequently, it has been criticised for permitting too much divergence in State practice and for therefore failing to limit the apparent ‘overuse’ of the death penalty by some States.³²

Various United Nations documents and bodies have, however, outlined the broad parameters of the phrase and identified some offences that would not fall within its scope. In 1984 the ‘Safeguards Guaranteeing Protection of Those Facing the Death Penalty’ were adopted by the Economic and Social Council and subsequently endorsed by the General Assembly.³³ The first safeguard declares that the ambit of the term ‘most serious crimes’ “should not go beyond intentional crimes, with lethal or other extremely grave consequences.”³⁴ ‘Extremely grave consequences’ is not defined.

The United Nations Human Rights Committee’s *General Comment 6(16)* states that the expression ‘most serious crimes’ must be “read restrictively to mean that the death penalty should be a quite exceptional measure.”³⁵ The Committee’s consideration of States’ reports has often focussed on the length of the list of crimes punishable by death. In the case of Jordan, for example, eleven capital crimes was deemed to be “a high number”.³⁶

The Committee has identified certain individual offences and suggested that they do not meet the standard of Article 6 paragraph 2 of the *ICCPR*. These offences are:

- political offences³⁷
- crimes that do not result in loss of human life³⁸

³¹ *Makwanyane and Mchenu v The State* (1995) 16 *HRLJ* 154.

³² Daniel D. Nsereko, ‘Arbitrary Deprivation of Life: Controls on Permissible Deprivations’, in Bertrand G. Ramcharan (ed), *The Right to Life in International Law*, Martinus Nijhoff, Boston, 1985, pp. 254-255.

³³ ESC Res. 1984/50; GA Res. 39/118.

³⁴ ESC Res. 1984/50; GA Res. 39/118.

³⁵ *General Comment 6(16)*, §7.

³⁶ UN Doc. CCPR/C/SR.362, §43.

³⁷ UN Doc. CCPR/C/SR.200, §19 (1980).

³⁸ UN Doc. CCPR/C/79/Add.25, §8.

- conspiracy between civil servants and soldiers³⁹
- misappropriation of State or public property⁴⁰
- misuse of public funds⁴¹
- crimes against the economy⁴²
- robbery with violence⁴³
- treason⁴⁴
- espionage⁴⁵ and
- refusal to divulge previous political activities.⁴⁶

The Committee has also stated that it is unacceptable to impose the death penalty for economic crimes, corruption and adultery.⁴⁷

In relation to the growing problem of drug-related crimes the Committee has said that “to extend the death penalty to all cases of drug trafficking, including those involving the sale and consumption of unprocessed coca leaves, [is] an excessive measure.”⁴⁸ The Committee has also objected to “vaguely defined crimes”, including offences against “peace, humanity or human rights” or war crimes “motivated by hostility towards the Republic.”⁴⁹

Thus, some guidance has been given as to the crimes for which the death penalty is an inappropriate punishment. Broadly defined, the Human Rights Committee has indicated that ‘most serious crimes’ excludes the imposition of the death penalty when the crime did not involve the death of the victim. Specifically, the death penalty should not be imposed for political or economic crimes. Aside from such guidance provided by the Committee, the phrase ‘most serious crimes’ remains highly indeterminate in scope.

³⁹ ‘Initial Report of Mali’, UN Doc. CCPR/C/1/Add.49, UN Doc. CCPR/C/SR.284, §6.

⁴⁰ ‘Initial Report of Mongolia’, UN Doc. CCPR/C/1/Add.38; UN Doc. CCPR/C/SR.197, §6; UN Doc. CCPR/C/SR.198, §21; UN Doc. CCPR/C/SR.198, §32.

⁴¹ UN Doc. A/33/40, §153.

⁴² UN Doc. CCPR/C/1/Add.3, §7; also ‘Initial Report of Democratic Yemen’, UN Doc. CCPR.C.50/Add.2, UN Doc. CCPR/C/SR.927, SR.932, UN Doc A/45/40, §45; ‘Initial Report of Viet Nam’, UN Doc. CCPR/C/26/Add.3, UN Doc. CCPR/C/SR.982, SR.983, Sr.986, SR.987, UN Doc A/45/40, §465.

⁴³ ‘Initial Report of Mongolia’, UN Doc. CCPR.C.1/Add.38; UN Doc. CCPR/C/SR.197, §17; UN Doc. CCPR.C.SR.198, §32.

⁴⁴ UN Doc. CCPR/C/SR.258, §10.

⁴⁵ UN Doc. CCPR/C/SR.258, §10.

⁴⁶ UN Doc. CCPR/C/SR.200, §42.

⁴⁷ UN Doc. CCPR/C/79/Add.25, §8.

⁴⁸ ‘Second Periodic Report from Mauritius’, UN Doc. CCPR/C/28. Add.12.

(iii) Reintroduction of the death penalty

Paragraph 2 of Article 6 of the *ICCPR* starts with the phrase:

In countries which have not abolished the death penalty ...

The report of the Working Party of the Third Committee of the General Assembly explained that the phrase was “intended to show the direction in which the drafters of the Covenant hoped that the situation would develop.”⁵⁰

The phrase “In countries which have not abolished the death penalty” indicates that paragraph 2 is inapplicable to those States that have abolished the death penalty. Some commentators suggest that it also implies that there can be no reintroduction of the death penalty once it has been abolished.⁵¹ An express provision to this effect is contained in the *American Convention on Human Rights*.⁵² Without such a clear provision, however, debate remains as to whether the *ICCPR* permits the reintroduction of the death penalty by a State.

Members of the Human Rights Committee had an opportunity to comment on the reintroduction of the death penalty and its consistency with the *ICCPR* in the cases of *Kindler v Canada*⁵³ and *Cox v Canada*⁵⁴. In both cases Human Rights Committee members Chanet, Pocar and Urbina took the view that paragraph 2 of Article 6 precludes the reintroduction of the death penalty in a State that has already abolished it. In *Cox v. Canada* Chanet stated her belief that paragraph 2 is not an authorisation to re-establish the death penalty but merely “an implicit recognition of its existence.”⁵⁵ A similar opinion was expressed by Bertil Wennergren in *Kindler v. Canada*.⁵⁶

Committee members Kurt Herndl and Waleed Sadi came to the opposite conclusion in the case of *Cox v Canada*. Herndl and Sadi said that they could not accept the notion that a State that has abolished capital punishment is foreclosed from reintroducing it under the terms of

⁴⁹ ‘Initial Report of Democratic Yemen’, UN Doc. CCPR/C/SR.362, §43.

⁵⁰ UN Doc. A/C.3/SR.816, §19.

⁵¹ See for example R. Sapienza, ‘International Legal Standards on Capital Punishment’, in Bertrand G. Ramcharan (ed), *The Right to Life in International Law*, Martinus Nijhoff Publishers, Boston, 1985, p. 289.

⁵² (1979) 1144 UNTS 123, OASTS 36, Article 4§3.

⁵³ *Kindler v. Canada* (No. 470/1991).

⁵⁴ *Cox v. Canada* (No. 539/1993), (1994) 15 *HRLJ* 410.

⁵⁵ *Cox v. Canada* (No. 539/1993), (1994) 15 *HRLJ* 410 at 421.

the *ICCPR*. They noted that, by comparison, the *American Convention on Human Rights* specifically prohibits this possibility and that it also may be ‘read into’ the *Second Optional Protocol*.

Another argument in favour of the proposition that reintroduction is not permissible under the terms of the *ICCPR* relies on the relationship between paragraphs 2 and 6 of Article 6 both of which refer to abolition of the death penalty. Legal commentator on the issue of capital punishment and international law, William A. Schabas, relies on the *travaux préparatoires* to show that the abolition of the death penalty was a goal of the *ICCPR*. He supports this proposition by reference to the wording of paragraphs 2 and 6 which he notes were incorporated into the Article at the same time and for the same reason.⁵⁷

Ultimately the issue of the reintroduction of the death penalty under the terms of the *ICCPR* remains unresolved.

(iv) Resumption of executions after an extended period of no executions

De facto abolition is considered by the United Nations to be achieved when no executions have taken place in the preceding 10 years or more.⁵⁸ Based on this definition a large number of States are abolitionist notwithstanding the fact that they retain the death penalty in their statute books. Several States, for example, though retaining the death penalty in legislation, have in fact not carried out an execution since they became independent from former colonial governments.⁵⁹

The resumption of executions within these *de facto* abolitionist States is arguably a form of reintroduction and therefore subject to the same analysis as reintroduction by *de jure* abolitionist States. The resumption of executions when there has been *less* than a ten year period since the last execution, while not contrary to any provisions of the *ICCPR* could still

⁵⁶ *Kindler v. Canada* (No. 470/1991), p. 158.

⁵⁷ William A. Schabas, *The Abolition of the Death Penalty in International Law* (2nd ed.), Cambridge University Press, Cambridge, 1987, p. 103.

⁵⁸ See for example, UN Doc. E/CN.4/1998/82, §17.

⁵⁹ For example, Federated States of Micronesia, Kiribati, Maldives and Marshall Islands. For further examples see Table 1, Status of the death penalty in the Asia Pacific region.

be considered contrary to “the direction in which the drafters of the Covenant hoped that the situation would develop.”⁶⁰

(v) The imposition of the death penalty under a retrospective law

The law on this issue is clearly stated. Article 6 of the *ICCPR* allows for a sentence of death to be imposed only “in accordance with the law in force *at the time of the commission of the crime*”.⁶¹ This principle is restated and expanded upon in Article 15 which prohibits conviction for a crime which did not constitute a crime when the act was committed. This Article also prohibits the imposition of a punishment greater than that existing at the time the crime was committed or as was provided for by law after the offence was committed.

The ‘Safeguards guaranteeing protection of the rights of those facing the death penalty’ restate the principle against retrospectivity.⁶²

(vi) Specified categories of persons on whom the death penalty can not be imposed

Juvenile offenders

Article 6 paragraph 5 of the *ICCPR* prohibits the imposition of the death penalty on a person who committed a crime while below eighteen years of age. This prohibition is reiterated in Safeguard 6 of the ‘Safeguards guaranteeing protection of the right of those facing the death penalty’⁶³ and Article 37 of the *CROC*.

Pregnant women

The other prohibition set out in paragraph 5 of Article 6 of the *ICCPR* is that the “sentence of death ... shall not be carried out on pregnant women.” States have interpreted this provision in a multiplicity of ways. Periodic reports to the Human Rights Committee indicate that in some States the prohibition on execution comes to an end upon the termination of

⁶⁰ UN Doc. A/C.3/SR.816, §19.

⁶¹ *ICCPR*, Article 6§2.

⁶² ESC Res. 1984/50. Subsequently endorsed by GA Res. 39/118, §2.

⁶³ ESC Res. 1984/50. GA Res. 39/118, §2.

pregnancy⁶⁴ or upon the completion of some subsequent delay which may cover the period of lactation or extend up to two years.⁶⁵ Other periodic reports suggest that the sentence of death is permanently stayed if the condemned woman becomes pregnant.⁶⁶ Still others reveal rules that do not strictly conform to the *ICCPR*, such as a prohibition on pronouncement of a sentence of death on a pregnant woman (implying no particular protection if the woman becomes pregnant subsequent to sentencing)⁶⁷ or a total absence of a relevant provision.⁶⁸

The different interpretations given to this provision by States parties centre around one question: whether the prohibition against the imposition of the death penalty on pregnant women is permanent or falls into abeyance once the woman gives birth or the pregnancy is otherwise terminated. This issue was raised during the drafting of the Article but was never resolved.⁶⁹

Some confusion concerning the scope of the *ICCPR* provision has been clarified by the ‘Safeguards’ which set a *minimum* standard to be met with regards to the execution of pregnant women. Safeguard 6 states that the “new mothers” shall not be sentenced to death.⁷⁰ The reach of Article 6 beyond ‘new mothers’ remains uncertain.

(vii) Other categories of persons on whom the death penalty should not be imposed

Mentally disabled

The ‘Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’ prohibit the imposition of the death penalty “on persons who have become insane.”⁷¹ The

⁶⁴ ‘Third periodic Report of Senegal’, UN Doc. CCPR/C/64/Add.5, §34; ‘Supplementary Report of Denmark’, UN Doc. CCPR/C/1/Add.19; ‘Initial Report of Bulgaria’, UN Doc. CCPR/C/SR.131, §30; ‘Fourth Periodic Report of Tunisia’, UN Doc. CCPR/C/84/Add.1, §77e.

⁶⁵ ‘Initial Report of Madagascar’, UN Doc. CCPR/C/1/Add.14, UN Doc. CCPR/C/SR.87, §19; ‘Initial Report of Algeria’, UN Doc. CCPR/C/62/Add.1, §81; ‘Initial Report of Libyan Arab Jamahiriya’, UN Doc. CCPR/C/1/Add.3, UN Doc. CCPR/C/1/Add.20; ‘Initial Report of Iraq’, UN Doc. CCPT/C/1/Add.45; UN Doc. CCPT/C/SR.200, §19, §42; ‘Second Periodic Report of Yemen’, UN Doc. CCPR/C/82/Add.1, §16.

⁶⁶ ‘Initial Report of the Byelorussian Soviet Socialist Republic’, UN Doc. CCPR/C/1/Add.27; ‘Initial Report of Japan’, UN Doc. CCPR/C/10/Add.1; ‘Additional Supplementary Report of Jordan’, UN Doc. CCPR/C/1/Add.56; UN Doc. CCPR/C/SR.68, §11.

⁶⁷ ‘Supplementary Report of Cyprus’, UN Doc. CCPR/C/1/Add.28.

⁶⁸ ‘Initial Report of Canada’, UN Doc. CCPT/C/1/Add.43, UN Doc. CCPR/C/SR.202, §6.

⁶⁹ UN Doc. A/3764, §118.

⁷⁰ ESC Res. 1984/50. GA Res. 39/118, §2.

⁷¹ ‘Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty’, ESC Res. 1989/64.

resolution of the Economic and Social Council concerning the ‘Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty’ recommended that Member States:

take steps to implement the safeguards and strengthen further the protection of the rights of those facing the death penalty by: ... eliminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution.⁷²

Neither the ‘Safeguards’ nor the 1998 resolution on their implementation are treaties. They were, however, both endorsed by consensus by the Economic and Social Council revealing their high degree of acceptance within the international community.⁷³

⁷² ESC Res. 1989/64.

⁷³ William A. Schabas, *Abolition of the Death Penalty*, p. 167.

Elderly

Neither the *ICCPR* nor the original ‘Safeguards’ specify a maximum age above which a person can not be sentenced to death or executed. In contrast, paragraph 5 of Article 4 of the *American Convention on Human Rights* specifically prohibits the imposition of the death penalty on persons “over 70 years of age.”

There has been very little judicial discussion or commentary on this issue and insufficient information exists to establish State practice with regards to a maximum age requirement. In the resolution of the Economic and Social Council concerning the implementation of the ‘Safeguards’, however, the Council recommended that Member States establish “a maximum age beyond which a person may not be sentenced to death or executed.”⁷⁴ This measure would draw the international community in line with the practice in the American system and contribute to achieving the goal of gradual abolition of the death penalty.

(viii) Procedural safeguards

Arguably the procedural safeguards that a State is required to respect in the imposition of the death penalty are derived from three paragraphs of Article 6, paragraphs 1, 2 and 4 of the *ICCPR*.

Paragraph 1

Paragraph 1 states that a person is not to be ‘arbitrarily’ deprived of their life. It is unclear from the *travaux preparatoires* what was intended by the inclusion of this word⁷⁵ and scholars continue to struggle with its significance.

⁷⁴ ESC Res. 1989/64.

⁷⁵ C. K. Boyle, ‘The Concept of Arbitrary Deprivation of Life’, in Bertrand G. Ramcharan, ed., *The Right to Life in International Law*, Martinus Nijhoff, Boston, 1985, p. 225.

Paragraph 2

Paragraph 2 establishes clearer procedural requirements which proscribe the imposition of the death penalty for crimes “contrary to the provisions of the present Covenant”. According to the Human Rights Committee’s *General Comment 6(16)*, this reference to the Covenant has the effect of adding the provisions of Article 14 to Article 6.

The Committee has found violations of Article 14, and consequently of Article 6, in many death penalty cases. The entitlements which the Committee have found to be violated include: to be informed promptly of the nature and cause of the charge⁷⁶ (Article 14§3(a)); to have adequate time and facilities for the preparation of a defence⁷⁷ (Article 14§3(b)); to be tried in his or her presence and to defend him or herself⁷⁸ (Article 14§3(d)); to legal counsel⁷⁹ (Article 14§3(d)); to obtain the attendance of witnesses⁸⁰ (Article 14§3(e)); and to a right of appeal⁸¹ (Article 14§5).

In its deliberations concerning procedural safeguards and the death penalty, the Committee has clearly stated that “in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant is even more

⁷⁶ See for example *Mbenge v Zaire*, (No. 16/1977), UN Doc. CCPR/C/OP/2 in which the Committee found that Mbenge had been deprived of the time necessary for preparation of a proper defence due to no serious efforts having been made to notify Mbenge that he must appear before the tribunal; *Thomas v Jamaica*, (No. 272/1988), UN Doc. A/47/40 in which the Committee found that Thomas’s right to a fair trial had been violated by his conviction *in absentia*.

⁷⁷ See for example *Reid v Jamaica* (No. 250/1987) in which the complainant was only able to communicate with his legal aid attorney for the first time on the day of the trial; *Little v Jamaica* (No. 283/1988), UN Doc. A/47/40 in which, on appeal, a court-appointed attorney did not consult with Little despite several letters requesting an interview; *Mbenge v Zaire*, (No. 16/1977), UN Doc. CCPR/C/OP/2; *Thomas v Jamaica*, (No. 272/1988), UN Doc. A/47/40.

⁷⁸ See for example *Mbenge v Zaire*, (No. 16/1977), UN Doc. CCPR/C/OP/2; *Thomas v Jamaica*, (No. 272/1988), UN Doc. A/47/40.

⁷⁹ *Pinto v Trinidad and Tobago* (No. 232/1987) in which the court did not accept the accused’s arrangements for another attorney to represent him for the purposes of the appeal even when it would have entailed an adjournment.

⁸⁰ See for example *Grant v Jamaica* (No. 353/1988), UN Doc. A/49/40, Vol.II in which a judge failed to adjourn the trial and issue a subpoena into order to secure the attendance of a witness.

⁸¹ *Henry v Jamaica* (NO. 230/1987) in which the Jamaican Court of Appeal failed to issue a written judgment in a death penalty case, in effect obstructing further appeal. See also *Little v Jamaica* (No. 283/1988), p. 276; *Francis v Jamaica* (No. 320/1988); *Hamilton v Jamaica* (No. 333/1988), p.37; *Collins v Jamaica* (No. 356/1989); *Smith v Jamaica* (No. 282/1988), §10.5; *Champagnie, Palmer and Chisholm v Jamaica* (No. 445/1991), UN Doc. A/49/40, Vol. II, p. 136, §§7.2-7.3.

imperative.”⁸² The notion that capital cases receive special procedural treatment has long been recognised in some domestic jurisdictions.⁸³

Paragraph 4

Paragraph 4 establishes the requirement that:

Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence may be granted in all cases.

Pardon and commutation are rights for which the convicted person may apply. Pardon implies complete release, whereas commutation is the substitution of a death sentence with usually a lengthy term of imprisonment. Amnesty can be granted by the State⁸⁴ and means that the alleged criminal will not be charged with the crime in question. In many countries, the continued exercise of the power to grant pardons or commute sentences has led to the *de facto* abolition of the death penalty in that State.

(ix) Method of execution

Article 7 of the *ICCPR* states that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The Human Rights Committee has interpreted this Article to mean that in the case of the imposition of a death sentence, it must only be carried out “in such a way as to cause the least possible physical and mental suffering.”⁸⁵ The Committee has found that in a particular case asphyxiation by gas would be contrary to this requirement as it “may cause prolonged suffering and agony and does not result in death as swiftly as possible”.⁸⁶ Two dissenting members of the Committee identified stoning as a method of execution contrary to Article 7

⁸² *Reid v Jamaica* (No. 250/1987), §12.2.

⁸³ See for example in the United States *Furman v Georgia*, 408 US 238, 286-287 (1972) (Brennan J); *Callins v Collins, cert. denied*, 114 S.Ct. 1127, 127 L.Ed., 435 (1994) (Blackmun J., dissenting).

⁸⁴ UN Doc. E/CN.4/SR.310, at p. 13.

⁸⁵ *General Comment 20(44)*, UN Doc. CCPR/C/21/Rev/1/Add.3, §6.

⁸⁶ *Ng v Canada* (No. 469/1991), §16.3.

because it “is intended to and actually inflicts prolonged pain and suffering.”⁸⁷ The Committee has held that execution by lethal injection is not a breach of Article 7.⁸⁸

The Committee has been otherwise reluctant to enumerate the methods of judicial execution that offend Article 7. Committee member Christine Chanet explained her reluctance to do so when she wrote: ‘By engaging in this debate, the Committee finds itself obliged to take positions that are scarcely compatible with its role as a body monitoring an international human rights instrument.’⁸⁹

(x) Duration and conditions of incarceration

On the basis of the prohibition against torture provision of the *European Convention on Human Rights*⁹⁰ the European Court of Human Rights in 1989 developed the concept of the ‘death row phenomenon’.⁹¹ The Court had regard to the long duration spent on death row by the individual in this particular case, with “the ever present and mounting anguish of awaiting execution of the death penalty”⁹². They also took into account the age and mental state of the convicted person at the time of the offence. The Court held that his extradition to a State in which it was likely he would face the death penalty and be incarcerated on death row for several years would expose him to treatment going beyond the prohibition against torture provision of the *Convention*.⁹³

The potential ramifications of this decision have not been thoroughly explored, although support for the principle of a ‘death row phenomenon’ can be found in judgments of the Judicial Committee of the Privy Council⁹⁴, Supreme Court of Zimbabwe⁹⁵ and Constitutional Court of South Africa⁹⁶.

⁸⁷ *Ng v Canada* (No. 469/1991), p. 219.

⁸⁸ *Kindler v Canada* (No. 470/1991), UN Doc. A/48/40, Vol. II, p. 138.

⁸⁹ *Ng v Canada* (No. 469/1991), p. 220.

⁹⁰ Article 3, *European Convention on Human Rights*.

⁹¹ *Soering v United Kingdom* (App. No. 14038/88), Series A, Vol. 161.

⁹² *Soering v United Kingdom* (App. No. 14038/88), Series A, Vol. 161.

⁹³ *Soering v United Kingdom* (App. No. 14038/88), Series A, Vol. 161, §111.

⁹⁴ *Pratt and Morgan v Attorney General for Jamaica et. al.* (Nos. 210/1986, 225/1987), UN Doc. A/44/40.

⁹⁵ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General et. al.* See Laurel Angus, ‘Delay Before Execution: Is it Inhuman and Degrading Treatment?’, (1993) 9 *South African Journal of Human Rights* 432.

⁹⁶ *Makwanyane and Mchunu v The State*, (1995) 16 *HRLJ* 154.

The Human Rights Committee has made it clear, however, that the notion of a ‘death row phenomenon’ conflicts with its own established case law⁹⁷ which maintains that “[I]n principle prolonged judicial proceedings do not *per se* constitute cruel, inhuman or degrading treatment, even if they can be a source of mental strain for the convicted prisoners.”⁹⁸

Although the Committee is yet to overturn its decision on the ‘death row phenomenon’, some commentators and former members of the Committee believe that the Committee will soon reconsider its decision.⁹⁹

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has also had cause to address the issue of duration of incarceration, yet in relation to the brevity between conviction and carrying out the sentence. The Special Rapporteur has recommended “that States establish in their internal legislation a period of at least six months before a death sentence imposed by a court of first instance can be carried out, so as to allow adequate time for the preparation of appeals to a court of higher jurisdiction and petitions for clemency.”¹⁰⁰ A provision to this effect is contained within both the Third Geneva Convention of 1949 and Fourth Geneva Convention of 1949.¹⁰¹

Article 7 also raises the issue of the conditions on death row. The cases that have come before the Committee and in which they have found a violation of the *ICCPR* have included instances of beatings sustained while on death row¹⁰² and an absence of basic hygienic facilities and lack of medical or dental care¹⁰³. The effect of a finding that Article 7 and/or 10 of the *ICCPR* has been breached is that “the State party is under an obligation to take effective measures to remedy the violation suffered ... including the award of appropriate compensation, and to ensure that similar violations do not occur in the future.”¹⁰⁴ The Human

⁹⁷ *Simms v Jamaica* (No. 540/1993).

⁹⁸ *Pratt and Morgan v Jamaica* (Nos. 210/1986, 225/1987), §13.6.

⁹⁹ See for example Rosalyn Higgins, ‘Extradition, the Right to Life, and the Prohibition Against Cruel and Inhuman Punishment and Treatment: Similarities and Differences Under the ECHR and the ICCPR’, quoted in William A. Schabas, *The Abolition of the Death Penalty*, p. 134.

¹⁰⁰ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/1996/4, 25 January 1996, §556.

¹⁰¹ *Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War*, (1950) 75 UNTS 135, Article 101; *Geneva Convention of August 12, 1949 Relative to the Protection of Civilians* (1950) 75 UNTS 135, Article 75.

¹⁰² *Collins v Jamaica* (No. 240/1987); *Francis v Jamaica* (No. 320/1988). See also *Thomas v Jamaica* (No. 321/1988), UN Doc. A/49/40, Vol.II, p. 1, §9.2; *Bailey v Jamaica* (No. 334/1988), UN Doc. A/48/40, Vol. II, p.72, §9.3; *Hylton v Jamaica* (No. 407/1990), UN Doc. A/49/40, Vol. II, p.79, §9.3; *Berry v Jamaica* (No. 330/1988), §11.2 (violation of Article 10 but not Article 7.).

¹⁰³ *Kelly v Jamaica* (No. 253/1987).

¹⁰⁴ *Bailey v Jamaica* (No. 334/1988), §11.1.

Rights Committee does not appear to have passed judgment on the exceptional conditions usually found on death row including extra-ordinarily high security or the denial of any form of work or education.

Conclusion

There are several areas of the *ICCPR* provisions relating to the death penalty that the Human Rights Committee is yet to conclusively decide upon. As this overview of the law in the area shows, however, there are several strict requirements with which State parties are required to conform. There are also many standards which have been widely adopted by the international community and which can inform and guide States in their imposition of the death penalty regardless of their ratification of the particular instrument.

Chapter Two

(i) International and regional trends

By the end of 1999 the international statistics regarding abolition and retention of the death penalty among States were as follows:

- abolitionist for all crimes: 73
- abolitionist for ordinary crimes only: 13
- abolitionist in practice: 22
- total abolitionist in law or practice: 108
- total retentionist: 87.¹⁰⁵

Of the seventy-three States that are abolitionist for all crimes, fourteen fall within the Asia Pacific region as defined, these are Australia, Azerbaijan, Cambodia, Nepal, New Zealand and Turkmenistan. A further two States, the Cook Islands and Fiji, are abolitionist for ordinary crimes only and seven States are abolitionist in practice including Sri Lanka. A total of twenty-four Asia Pacific States are therefore considered abolitionist. India, Indonesia and the Philippines each retain the death penalty. The table below sets out the status of the death penalty in States of the Asia Pacific region.

¹⁰⁵ Amnesty International, 'Abolitionist and Retentionist Countries', 27 April 2000.

Table 1: Status of the Death Penalty in the Asia Pacific Region¹⁰⁶

Country	Abolitionist	Date of last execution	Retentionist	Executions in 1998 ¹⁰⁷
Afghanistan	-	-	x	10
Armenia	-	-	x	0
Australia	1985	1967	-	-
Azerbaijan	1998	1993	-	-
Bahrain	-	-	x	0
Bangladesh	-	-	x	0
Bhutan	De facto	1964	-	-
Brunei Darussalam	De facto	1957	-	-
Cambodia	1989	?	-	-
China	-	-	x	1067
Cook Islands	Ordinary crimes only	?	-	-
Democratic People's Republic of Korea	-	-	x	?
Federated States of Micronesia	x	No executions since independence	-	-
Fiji	Ordinary crimes only 1966	1964	-	-
India	-	-	x	0
Indonesia	-	-	x	0
Iraq	-	-	x	Hundreds unconfirmed ¹⁰⁸
Islamic Republic of Iran	-	-	x	155 ¹⁰⁹
Israel	Ordinary crimes only	1962	-	-

¹⁰⁶ Amnesty International, 'The Death Penalty: List of Abolitionist and Retentionist Countries', ACT 50/01/99, Revised 18 December 1999; Amnesty International, 'Abolitionist and Retentionist Countries', Revised 27 April 2000; Report of the Secretary-General, 'Promotion and Protection of Human Rights: Status of the International Covenants on Human Rights - Question of the death penalty', E/CN.4/1999/52, 12 January 1999.

¹⁰⁷ The figures provided for 1998 are of those executions that have been reported to Amnesty International. Amnesty International has reason to believe that in many cases the actual number of executions was higher, for example in Afghanistan, Jordan, Kyrgyzstan, Lebanon, Saudi Arabia, Syrian Arab Republic, Uzbekistan, Viet Nam and Yemen.

¹⁰⁸ Amnesty International, 'Amnesty International Report - 1999', Amnesty International, London, 1999, p. 202.

¹⁰⁹ Report on the Situation of Human Rights in the Islamic Republic of Iran, Mr Maurice Danby Copithorne, E/CN.4/1999/32, 28 December 1998.

	1954			
Japan	-	-	x	6
Jordan	-	-	x	9
Kazakhstan	-	-	x	0
Kiribati	x	No executions since independence	-	-
Kuwait	-	-	x	6
Kyrgyzstan	-	-	x	4
Lao People's Democratic Republic	-	-	x	?
Lebanon	-	-	x	2
Malaysia	-	-	x	?
Maldives	De facto	No executions since independence	-	-
Marshall Islands	x	No executions since independence	-	-
Mongolia	-	-	x	?
Myanmar	-	-	x	0
Nauru	De facto	No executions since independence	-	-
Nepal	1997	1979	-	-
New Zealand	1989	1957	-	-
Oman	-	-	x	6
Pakistan	-	-	x	4
Palau	x	-	-	-
Papua New Guinea	De facto	1950	-	-
Philippines ¹¹⁰	-	-	x	0
Qatar	-	-	x	?
Republic of Korea	-	-	x	-
Samoa	x	?	-	-
Saudi Arabia	-	-	x	29

¹¹⁰ The Philippines abolished the death penalty in 1986 but reintroduced it in 1993. The first execution in 23 years was held in 1999.

Singapore	-	-	x	28
Solomon Islands	x	No executions since independence	-	-
Sri Lanka	De facto	1976	-	-
Syrian Arab Republic	-	-	x	1
Tajikistan	-	-	x	0
Thailand	-	-	x	1
Tonga	De facto	1982	-	-
Turkmenistan	1999	?	-	-
Tuvalu	x	No executions since independence	-	-
United Arab Emirates	-	-	x	1
Uzbekistan	-	-	x	?
Vanuatu	x	No executions since independence	-	-
Viet Nam	-	-	x	18
Yemen	-	-	x	17
Total: 58	24		34	

In 1999 Amnesty International recorded over 1813 executions in 31 States including at least 1077 in China, 165 in Iran and 103 in Saudi Arabia.¹¹¹ More complete figures for 1988 show that the 1625 executions known to have taken place internationally occurred in nineteen of the thirty-seven States, of which nineteen are in the Asia Pacific region.¹¹²

¹¹¹ Amnesty International, New Release, 'Amnesty International releases statistics on worldwide executions for 1999, calls for moratorium', ACT 50/09/00.

¹¹² These States are Afghanistan, China, Iran, Iraq, Japan, Jordan, Kuwait, Kyrgyzstan, Lebanon, Oman, Pakistan, Saudi Arabia, Singapore, Taiwan, Thailand, United Arab Emirates, Uzbekistan, Vietnam, Yemen. Amnesty International, 'Death Sentences and Executions in 1998', ACT 51/01/99.

As these statistics show, the States of the Asia Pacific region comprise a comparatively large proportion of retentionist States and States that are actually carrying out executions. States in the region that carry out executions are predominantly, if not exclusively, in the Asian rather than the Pacific region. These States also tend to execute a comparatively large number of people each year based on a purely numerical comparison. China is the most obvious example of this as are Iran, Iraq and Saudi Arabia.

The high number of States in the region that retain the death penalty and the number that impose it regularly coincides with a general lack of commitment to recognising and ensuring international human rights standards. This is evidenced by the small number of States that have become party to core human rights instruments as set out in the table below.

Table 2: Status of Ratifications of Principal International Human Rights Treaties Relevant to the Death Penalty¹¹³

as of 21 March 2000

Country	ICCPR	CAT	CRC	OPT2
Afghanistan	X	X	X	-
Armenia	X	X	X	-
Australia	X	X	X	X
Azerbaijan	X	X	X	X
Bahrain	-	X	X	-
Bangladesh	-	X	X	-
Bhutan	-	-	X	-
Brunei Darussalam	-	-	X	-
Cambodia	X	X	X	-
China	S	X	X	-
Cook Islands	-	-	X	-
Democratic People's Republic of Korea	X	-	X	-
Federated States of Micronesia	-	-	X	-
Fiji	-	-	X	-
India	X	S	X	-
Indonesia	-	X	X	-
Iraq	X	-	X	-
Islamic Republic of Iran	X	-	X	-
Israel	X	X	X	-
Japan	X	X	X	-
Jordan	X	X	X	-
Kazakhstan	-	X	X	-
Kiribati	-	-	X	-
Kuwait	X	X	X	-
Kyrgyzstan	X	X	X	-
Lao People's Democratic Republic	-	-	X	-
Lebanon	X	-	X	-
Malaysia	-	-	X	-
Maldives	-	-	X	-
Marshall Islands	-	-	X	-
Mongolia	X	-	X	-

¹¹³ The information contained in this table is based on the Office of the United Nations High Commissioner for Human Rights, 'Status of Ratifications of the Principal International Human Rights Treaties', as of 15 May 2000, HRI/GEN/4.

Myanmar	-	-	X	-
Nauru	-	-	X	-
Nepal	X	X	X	X
New Zealand	X	X	X	X
Oman	-	-	X	-
Pakistan	-	-	X	-
Palau	-	-	X	-
Papua New Guinea	-	-	X	-
Philippines	X	X	X	-
Qatar	-	X	X	-
Republic of Korea	X	X	X	-
Samoa	-	-	X	-
Saudi Arabia	-	X	X	-
Singapore	-	-	X	-
Solomon Islands	-	-	X	-
Sri Lanka	X	X	X	-
Syrian Arab Republic	X	-	X	-
Tajikistan	X	X	X	-
Thailand	X	-	X	-
Tonga	-	-	X	-
Turkmenistan	X	X	X	X
Tuvalu	-	-	X	-
United Arab Emirates	-	-	X	-
Uzbekistan	X	X	X	-
Vanuatu	-	-	X	-
Viet Nam	X	-	X	-
Yemen	X	X	X	-
Total: 58	28	27	58	5
Signatories	1	1	-	-

Notes:

ICCPR: *International Covenant on Civil and Political Rights.*

CAT: *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.*

CRC: *Convention on the Rights of the Child.*

OPT2: *Second Optional Protocol to the International Covenant on Civil and Political Rights.*

‘s’ indicates that the State is a signatory to the specified treaty.

(ii) **Death penalty laws in member states**

Australia

The last execution to be held in Australia was in 1967. In 1973 the Commonwealth of Australia abolished the death penalty in relation to offences under Commonwealth law and under the laws of all Territories (Northern Territory, Australian Capital Territory, various Pacific islands and the Australian Antarctic Territory) by passing the *Abolition of the Death Penalty Act* (1973).¹¹⁴ Criminal law in Australia, however, is primarily a State concern. Not until 1987, when the state of Western Australia abolished the death penalty, was it completely abolished in all Australian jurisdictions.

In 1988 the Commonwealth passed the *Extradition Act* which states that a person is only eligible for extradition if:

Where the offence is punishable by a penalty of death – by virtue of an undertaking given by the extradition country to Australia, one of the following is applicable:

- (i) the person will not be tried for the offence;
- (ii) if the person is tried for the offence, the death penalty will not be imposed on the person;
- (iii) if the death penalty is imposed on the person, it will not be carried out.¹¹⁵

The Commonwealth Attorney-General *must* refuse to issue a surrender warrant unless the same conditions as stated above are met.¹¹⁶

Australia acceded to the *Second Optional Protocol* in December 1990.¹¹⁷

- Reintroduction of the death penalty

¹¹⁴ *Death Penalty Abolition Act* (1973).

¹¹⁵ Section 22, *Extradition Act* (1988).

¹¹⁶ Section 25, *Extradition Act* (1988).

¹¹⁷ Office of the United Nations High Commissioner for Human Rights, 'Status of Ratifications of the Principal International Human Rights Treaties', as of 15 May 2000. HRI/GEN/4.

Since the abolition of the death penalty in Australia there have been several calls for its reintroduction.¹¹⁸ In 1994 in the state of New South Wales, for example, the Capital Punishment Referendum Bill was introduced into the parliament. If it had been passed, electors would have been asked to vote in a referendum to decide whether to reintroduce capital punishment for murder in exceptional circumstances.¹¹⁹ This and other attempts to reintroduce the death penalty in Australia have failed.

The reintroduction of the death penalty in Australia would be contrary to its international obligations under the *Second Optional Protocol*. Article 1 of the *Protocol* declares:

1. No one within the jurisdiction of a State party to the present Optional Protocol shall be executed.
2. Each State party shall take all necessary measures to abolish the death penalty within its jurisdiction.

The original draft of article 1 included a provision stating that the death penalty could not be re-established in States which had abolished it. This clause, however, was considered by members of the drafting committee to be superfluous. Marc Bossuyt of the Sub-Commission on Prevention of Discrimination and Protection of Minorities wrote that, “a re-establishment of capital punishment would be contrary to the very object and purpose of the second optional protocol.”¹²⁰ This view has also been expressed by members of the Human Rights Committee.¹²¹

Fiji

Fiji has not ratified the *ICCPR*. The *Constitution of the Fiji Islands* (1997)¹²², however, provides for the right to life¹²³, freedom from torture¹²⁴ and procedural safeguards¹²⁵ in terms consistent with those of the *ICCPR*. Furthermore, the Constitution empowers the President to

¹¹⁸ See for example, K. Laster, ‘Famous Last Words: Criminal on the Scaffold, Victoria, Australia, 1842-1967’, *International Journal of the Sociology of Law* (1994): 14.

¹¹⁹ Kate Eastman, ‘Capital Punishment Referendum on the way?’, *Human Rights Defender*, Vol.3(5) (October 1994): 7.

¹²⁰ UN Doc. E/CN.4/Sub.2/1987/20, §162.

¹²¹ *Cox v. Canada* (No. 539/1993), (1994) 15 *HRLJ* 410 at 418.

¹²² Three days prior to the submission of this report the Interim Military Government of Fiji issued a decree which may be cited as the Fiji Constitution Amendment Act 1997 Revocation Decree 2000 which, effective from 29 May 2000, wholly removed the Fiji Constitution Amendment Act 1997. For the purposes of this report, however, the Fiji Constitution Amendment Act 1997 will be taken to still be in existence.

¹²³ Section 22, Constitution of the Fiji Islands (1997).

¹²⁴ Section 25, Constitution of the Fiji Islands (1997).

grant amnesty, pardon or commutation.¹²⁶ It should also be noted that the Constitution stipulates that in interpreting provisions of the Constitution regard must be had for developments in the understanding of the content and promotion of particular human rights.¹²⁷ The Constitution thereby imports international standards and discourse in relation to the human rights provisions contained therein.

The last execution to take place in Fiji was in 1963. In 1979 the death penalty for ordinary crimes was abolished. Life imprisonment was substituted as the punishment for murder. The Penal Code of Fiji¹²⁸, however, provides for the death penalty in the cases of treason¹²⁹, instigating invasion and genocide.¹³⁰ The death penalty is the mandatory sentence for these crimes.

- “Most serious crimes”

Fiji is not a party to the *ICCPR* and is therefore not bound by the terms of it. Nevertheless, by virtue of the interpretative clauses of the Constitution regard must be had to “developments in the understanding of the content of particular rights”.¹³¹ The right to life is specifically recognised in the Constitution.¹³² Developing international understanding about the content of this right is reflected in the directives of the Human Rights Committee. The Committee has stated on several occasions that the death penalty should not be imposed for crimes which do not result in the death of the victim. This principle is recognised in the ‘Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty’.¹³³ Treason and

¹²⁵ Sections 27, 28, 29, Constitution of the Fiji Islands (1997).

¹²⁶ Sections 115, Constitution of the Fiji Islands (1997).

¹²⁷ Section 3(b)(i)(ii), Constitution of the Fiji Islands (1997).

¹²⁸ On 29 May 2000 the Interim Military Government of Fiji issued a decree which may be cited as the Fiji Existing Law Decree 2000 which stipulated that all laws in existence before 29 May 2000 shall continue in force and:

shall be read with such modifications, adaptations, qualifications and exceptions as may be necessary in view of the Fiji Constitution Amendment Act 1997 Revocation Decree 2000.

For the purposes of this report the Penal Code of Fiji is taken to still be in force.

¹²⁹ At the time of writing seven Fijians were facing the possibility of being charged with treason for leading a *coup d’etat*. At the time of writing the coup leaders were holding the Prime Minister and other Members of Parliament hostage, claiming to abrogate the Constitution and demanding the dismissal of the Prime Minister and Parliament.

¹³⁰ *Penal Code* (1978), ss50, 51 and 69 respectively.

¹³¹ Section 3(b)(i)(ii), Constitution of the Fiji Islands (1997).

¹³² Section 22, Constitution of the Fiji Islands (1997).

¹³³ ESC Res. 1989/64.

instigating invasion without the death of a victim, therefore, should not be punishable by death.

Furthermore, the Committee has reached the same conclusion as that given express recognition in the *American Convention on Human Rights*, that the death penalty should not be imposed for political offences¹³⁴, including treason¹³⁵.

In keeping with the interpretative clause of its Constitution and developing international understanding, as reflected in the decisions of the Human Rights Committee and other international statements, the Advisory Council of Jurists may wish to consider whether Fiji should remove the crimes of treason and instigating invasion from the list of crimes punishable by death and whether Fiji should also be encouraged to ratify the *ICCPR* in order to demonstrate and better ensure the States' commitment to protecting the rights of those facing the death penalty.

India

India is a party to the *ICCPR*¹³⁶ and the *CROC*.¹³⁷ They are also a signatory to the *CAT*.¹³⁸

The *Constitution of India* (1950) provides that “no person shall be deprived of his life or personal liberty except according to procedure established by law.”¹³⁹ Limited procedural safeguards are stipulated in further articles of the Constitution.¹⁴⁰ The Constitution also provides that:

The State shall endeavour to foster respect for international law and treaty obligations in the dealings of organised peoples with one another.¹⁴¹

¹³⁴ UN Doc. CCPR/C/SR.200, §19 (1980).

¹³⁵ UN Doc. CCPR/C/SR.258, §10.

¹³⁶ India acceded to the *ICCPR* on 9 April 1979.

¹³⁷ India acceded to the *CROC* on 11 December 1992.

¹³⁸ India became a signatory to the *CAT and Other Cruel, Inhuman and Degrading Treatment or Punishment* on 14 October 1997.

¹³⁹ Article 21, Constitution of India (1950).

¹⁴⁰ See for example Article 14 (equality before the law); and Article 20 (prohibition of retrospective laws).

¹⁴¹ Article 51(c), Constitution of India (1950).

It has not been possible to obtain the most contemporary information about the specific crimes that are punishable by death in India. The Department of Justice 'World Factbook of Criminal Justice Systems' entry on India¹⁴² outlines the crimes for which the penalty was death as at mid-1993. These crimes were waging war against the Government of India, attempting or abetting war or mutiny, murder, attempted murder by a person serving a life sentence, murder and abetting the suicide of a child, a mentally retarded or intoxicated person.¹⁴³ In 1998 the Indian Government was reported to have expressed its intention to extend this list to include rape, child rape and the carrying of explosives.¹⁴⁴

- "Most serious crimes"

As a party to the *ICCPR*, India must ensure that it complies with all the terms of Article 6, including the requirement that the death penalty is only imposed for the "most serious crimes", defined by the Human Rights Committee as only those which involve the death of the victim. This observation was also made by the Human Rights Committee in its review of India's State Party report in 1997. In its concluding observations the Committee requested India bring its laws into compliance with this interpretation. The Committee also noted that the Penal Code was in violation of article 6 paragraph 5 in relation to juvenile offenders and requested the Indian Government to alter the Code to bring it into line with the *ICCPR*.¹⁴⁵

Indonesia

Legislation No. 39 'Concerning Human Rights' provides for the right to life¹⁴⁶; freedom from torture¹⁴⁷; and procedural safeguards¹⁴⁸ in terms less detailed than those of the *ICCPR*. The Act states that the right to life and freedom from torture "cannot be diminished under any circumstances whatsoever."¹⁴⁹ The State Gazette No. 165 limits the right to life as excluding abortion and the death penalty.¹⁵⁰

¹⁴² R. K. Raghavan, 'India: World Factbook of Criminal Justice Systems' (1993).

¹⁴³ R. K. Raghavan, 'India: World Factbook of Criminal Justice Systems' (1993).

¹⁴⁴ *Amnesty International Report 1999*, Amnesty International, London, 1999, p. 194.

¹⁴⁵ 'Concluding observations of the Human Rights Committee: India'. 04/08/97. CCPR/C/79/Add.81, para 20.

¹⁴⁶ Articles 4, 9(1), Legislation No. 39 of 1999 'Concerning Human Rights'.

¹⁴⁷ Articles 4, 33(1), 34 Legislation No. 39 of 1999 'Concerning Human Rights'.

¹⁴⁸ Articles 4, 18, Legislation No. 39 of 1999 'Concerning Human Rights'.

¹⁴⁹ Article 4, Legislation No. 39 of 1999 'Concerning Human Rights'.

The Act also states that “provisions set forth in international law concerning human rights ratified by the Republic of Indonesia, are recognized under this Act as legally binding in Indonesia.”¹⁵¹ Indonesia has not ratified the *ICCPR* but it is a party to the *CAT*¹⁵² and the *CROC*.¹⁵³

The death penalty can be imposed in Indonesia for ordinary and exceptional crimes. Crimes for which a death penalty can be imposed are: crimes endangering the security of the state; crimes endangering the life of others;¹⁵⁴ insubordination in times of war; joining the enemy; and informing the enemy of state secrets.¹⁵⁵ In 1997 Amnesty International identified crimes against state security, assassination of senior state officials, murder, theft resulting in murder, piracy and drug offences as those offences punishable by death.¹⁵⁶ The death sentence is discretionary¹⁵⁷ and a person sentenced to death can seek amnesty, pardon or commutation from the President.¹⁵⁸

- “Most serious crimes”

Indonesia is not a party to the *ICCPR* and the laws of Indonesia only recognise the treaties to which they have become a party. The Advisory Council of Jurists may wish to consider whether Indonesia should consider removing political offences from the list of those punishable by death in recognition of international norms as reflected in the *ICCPR*.

¹⁵⁰ Article 9(1), State Gazette of the Republic of Indonesia Number 165 of 1999, 23 September 1999

¹⁵¹ Article 7(2), Legislation No. 39 of 1999 ‘Concerning Human Rights’.

¹⁵² Indonesia ratified the *CAT and Other Cruel, Inhuman and Degrading Treatment or Punishment* on 28 October 1998.

¹⁵³ Indonesia ratified the *CROC* on 5 September 1990.

¹⁵⁴ Question 6, Indonesia, ‘Questionnaire - Reference on the Death Penalty’, 2 May 2000.

¹⁵⁵ Question 4, Indonesia, ‘Questionnaire - Reference on the Death Penalty’, 2 May 2000.

¹⁵⁶ Amnesty International - Report - ASA 03/01/97.

¹⁵⁷ Question 7, Indonesia, ‘Questionnaire - Reference on the Death Penalty’, 2 May 2000.

¹⁵⁸ Question 12, Indonesia, ‘Questionnaire - Reference on the Death Penalty’, 2 May 2000.

- Procedural safeguards

Amnesty International has raised concerns in the past about the extent to which trial and appeal procedures meet international standards, particularly with regards to the independence of the judiciary and the provision of such services as translators at trials.¹⁵⁹ The death penalty is a severe and final punishment. In recognition of the special nature of the death penalty in relation to other punishments and regardless of the absence of international obligations, the Advisory Council of Jurists may wish to consider whether the Indonesian government should ensure that persons convicted of capital offences are receiving the benefit of an independent and fair judicial process.

- Freedom from torture

Amnesty International has also raised the issue of conditions and duration of incarceration, citing instances of death row inmates being held for over 20 years in conditions in which their health deteriorated greatly.¹⁶⁰ In keeping with Indonesia's ratification of the *CAT* and the promulgation of Legislation No. 39 'Concerning Human Rights' the Advisory Council of Jurists may wish to consider whether the Indonesian Government should ensure that conditions for inmates sentenced to death are of a standard sufficient to meet its obligations under these instruments.

New Zealand

New Zealand is a party to the *ICCPR*¹⁶¹, the *CAT*¹⁶², and the *CROC*¹⁶³. New Zealand is also a party to the *Second Optional Protocol*¹⁶⁴. New Zealand abolished the death penalty for ordinary crimes in 1961¹⁶⁵ and for all crimes in 1989.¹⁶⁶ The last execution in New Zealand took place in 1957.

¹⁵⁹ Question 12, Indonesia, 'Questionnaire - Reference on the Death Penalty', 2 May 2000.

¹⁶⁰ Question 12, Indonesia, 'Questionnaire - Reference on the Death Penalty', 2 May 2000.

¹⁶¹ New Zealand ratified the *International Covenant on Civil and Political Rights* on 27 December 1978.

¹⁶² New Zealand ratified the *CAT and Other Cruel, Inhuman and Degrading Treatment or Punishment* on 9 December 1989.

¹⁶³ New Zealand ratified the *CROC* on 6 April 1993.

¹⁶⁴ New Zealand ratified the *Second Optional Protocol* on 21 February 1990.

¹⁶⁵ The death penalty could still be imposed under the terms of the *Crimes Act* 1961 for treason and the *Armed Forces Discipline Act* 1971 for certain military offences.

In relation to the extradition of persons who may be subject to the death penalty, the *Extradition Act* (1999) states that:

The Minister *may* determine that the person is not to be surrendered if:

- (a) it appears to the Minister that the person may be or has been sentenced to death by the appropriate authority in the extradition country, and the extradition country is unable sufficiently assure the Minister that:
 - (i) the person will not be sentenced to death; or
 - (ii) if that sentence is or has been imposed, it will not be carried out.¹⁶⁷

Note the discretionary nature of the Minister's power with regards surrendering the person in comparison with the Australian *Extradition Act* which imposes a positive duty on the Attorney-General not to surrender a person on whom the death penalty may be imposed.

- Reintroduction of the death penalty

While public support for the reintroduction of the death penalty is quite high¹⁶⁸ there do not appear to be any real moves within New Zealand to reintroduce the death penalty.

Furthermore, as in the case of Australia, to reintroduce the death penalty would be contrary to New Zealand's obligations under the *Second Optional Protocol*.

Philippines

The Philippines is a party to the *ICCPR*¹⁶⁹, the *CAT*¹⁷⁰ and the *CROC*.¹⁷¹

The *Constitution of the Republic of the Philippines* (1987) states that no person shall be deprived of life "without due process of law"¹⁷² and that "[n]either shall the death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter

¹⁶⁶ *Abolition of the Death Penalty Act* 1989.

¹⁶⁷ Section 35, *Extradition Act* (1999). Emphasis added.

¹⁶⁸ In 1997 an opinion poll conducted by the National Business Review indicated an increase in support of the reintroduction of the death penalty from 52% in 1992 to 63% in 1997. *Criminology Aotearoa/New Zealand*, No.8, September 1997: 11.

¹⁶⁹ Philippines ratified the *International Covenant on Civil and Political Rights* on 22 October 1986.

¹⁷⁰ Philippines acceded to the *CAT and Other Cruel, Inhuman and Degrading Treatment or Punishment* on 17 June 1986.

¹⁷¹ Philippines ratified the *CROC* 21 August 1990.

¹⁷² Section 1, Article III, Constitution of the Republic of the Philippines (1987).

provides for it.”¹⁷³ The Revised Penal Code provides for the death penalty in cases of treason¹⁷⁴; correspondence with a hostile country¹⁷⁵; qualified piracy¹⁷⁶; parricide¹⁷⁷; death or physical injuries inflicted under exceptional circumstances¹⁷⁸; murder¹⁷⁹; robbery with violence resulting in death of the victim¹⁸⁰; death caused as a result of arson¹⁸¹; rape with the use of a deadly weapon or by two or more persons; or by reason of or on the occasion of the rape, the victim has become insane.¹⁸²

- Reintroduction of the death penalty

In 1986, the Philippines became the first Asian country to abolish the death penalty.¹⁸³ In 1993, however, it was reintroduced.¹⁸⁴ The first execution to be carried out in the Philippines for 23 years was in February 1999. Between February and August 1999 a further four prisoners were executed. The President then suspended executions while he formed a “conscience committee” which was charged with considering whether pending executions should go ahead. Under the advice of the Committee the President commuted four death sentences. In October 1999 the Committee did not recommend clemency for one prisoner who was subsequently executed.¹⁸⁵ At the end of the year over 1000 prisoners remained under sentence of death.¹⁸⁶

In March 2000 the President decided to impose a moratorium on all executions for the remainder of the year,¹⁸⁷ a move welcomed by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary execution, Asma Jahangir.¹⁸⁸ The President has clearly

¹⁷³ Section 19(1), Article III, Constitution of the Republic of the Philippines (1987).

¹⁷⁴ Article 114, Act No. 3185: The Revised Penal Code (as amended). An Act Revising the Penal Code and Other Penal Laws.

¹⁷⁵ Article 120, The Revised Penal Code.

¹⁷⁶ Article 123, The Revised Penal Code.

¹⁷⁷ Article 246, The Revised Penal Code.

¹⁷⁸ Article 247, The Revised Penal Code.

¹⁷⁹ Article 248, The Revised Penal Code.

¹⁸⁰ Article 294, The Revised Penal Code.

¹⁸¹ Article 326, The Revised Penal Code.

¹⁸² Article 355, The Revised Penal Code.

¹⁸³ ‘Philippines: The Death Penalty. Criminality, Justice and Human Rights’, (November 1997).

¹⁸⁴ ‘Philippines: Executions put on hold’, Amnesty International – News Release – ASA 35/03/00, 24 March 2000.

¹⁸⁵ ‘The Death Penalty Worldwide: Developments in 1999’, Amnesty International Report, ACT 50/04/00.

¹⁸⁶ ‘Capital Punishment in the Philippines’, *Human Rights Solidarity*, Vol.10(2), February 2000.

¹⁸⁷ See for example Joel R. San Juan, ‘Palace sets freeze on executions’, Manila Times, March 24, 2000.

¹⁸⁸ Press Release, ‘UN Special Rapporteur on Extrajudicial Executions Welcomes Steps by Philippines President on Death Penalty Cases’.

stated, however, that there will be no commutation of the sentences of those already sentenced to death but merely a suspension of executions.¹⁸⁹

The reintroduction of the death penalty in 1993 and the resumption of executions after a period of 23 years are contrary to the spirit, if not also the terms, of article 6 of the *ICCPR*, particularly as it has been interpreted by the Human Rights Committee in recent years. The international trend to abolish the death penalty, particularly for ordinary crimes is reflected in the annual resolution passed by the Commission on Human Rights calling for States:

Progressively to restrict the number of offences for which the death penalty may be imposed;
To establish a moratorium on executions, with a view to completely abolishing the death penalty.¹⁹⁰

This resolution was passed during the 66th meeting of the Commission held in April 2000. The Philippines abstained from the vote.¹⁹¹

By reintroducing the death penalty, it is arguable that the Philippines has breached its obligations under the *ICCPR*. In order to remedy this, the Advisory Council of Jurists may wish to consider whether the current moratorium should be extended, allowing sufficient time for the death penalty to be abolished *de jure*.¹⁹² Finally, in order to prevent its reintroduction, the Advisory Council of Jurists may also wish to consider whether the permissive provisions of the Constitution should be removed.

- “Most serious crimes”

The Philippines Penal Code provides for the death penalty in cases of crimes that do not necessarily involve the death of the victim, for example rape. More than half of those on death row were convicted of rape.¹⁹³ Rape, like treason, correspondence with the enemy and piracy when they do not involve an additional offence of murder, do not qualify as being

¹⁸⁹ Joel R. San Juan, ‘Estrada okays one-year execution moratorium’, Manila Times, March 25, 2000.

¹⁹⁰ See for example Commission on Human Rights resolution 1999/61, 28 April 1999; Commission on Human Rights resolution 2000/65, 26 April 2000.

¹⁹¹ United Nations Press Release, Commission on Human Rights, 56th session, 26 April 2000, Afternoon.

¹⁹² The UN Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions has expressed the hope that “the suspension of executions and the establishment of a new review committee for death sentences will lead eventually to abolition of the death penalty.” United Nations Press Release, ‘UN Special Rapporteur on Extrajudicial Executions Welcomes Steps by Philippines President on Death Penalty Cases.’

¹⁹³ Rick Halperin, *The Journal*, 18 January 2000.

“most serious crimes” under the terms of article 6 as they do not involve the death of the victim.¹⁹⁴ Furthermore, the Human Rights Committee has clearly stated that the death penalty should not be imposed for political offences, identifying treason as a specific crime which does not satisfy the “most serious crime” test.¹⁹⁵

While the President deliberates on whether the moratorium will lead to the abolition of the death penalty for all crimes, the Advisory Council of Jurists may wish to consider whether steps should still be taken to remove the death penalty as the punishment for all crimes that do not satisfy the requirements of the “most serious crimes” test as set out in article 6 of the *ICCPR*.

- Procedural safeguards

As already noted, the *Constitution of the Philippines* states that no person shall be deprived of life “without due process of law”¹⁹⁶. This principle is given substance in further sections of the Bill of Rights which enshrine such principles as the presumption of innocence and impartiality¹⁹⁷ and freedom from torture or intimidation for those charged with criminal offences.¹⁹⁸

Concerns have been raised by Amnesty International and the U.S. Department of State in their annual country report on human rights practices about the degree to which the fair trial protection is undermined by corruption and inefficiency suffered by the judicial system.¹⁹⁹ Before the death penalty was first abolished by the Philippines, it is alleged by Amnesty International that the low level of due process afforded to capital cases resulted in innocent people being sentenced to death and the lapse of many years before they were acquitted.²⁰⁰ Furthermore, the U.S. State Department report identifies instances of torturous methods being

¹⁹⁴ *General Comment 6(16)*.

¹⁹⁵ UN Doc. CCPR/C/SR.258, §10.

¹⁹⁶ Section 1, Article III, Constitution of the Republic of the Philippines (1987).

¹⁹⁷ Section 14(2), Constitution of the Republic of the Philippines (1987).

¹⁹⁸ Section 12(2), Constitution of the Republic of the Philippines (1987).

¹⁹⁹ Philippines, ‘1999 Country Reports on Human Rights Practices’, Released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, February 25, 2000.

²⁰⁰ See ‘Philippines: Case studies in the use of the death penalty’, Amnesty International – Report ASA 35/08/89.

employed against those charged with criminal offences as a means of extracting confessions.²⁰¹

Articles 6 and 14 of the *ICCPR* set out the procedural requirements to be met in judicial proceedings. Article 7 prohibits torture, inhuman and degrading punishment and Article 10 requires all persons deprived of their liberty to be treated with humanity and with respect of the inherent dignity of the human person. Criticisms made by Amnesty and the State Department in relation to the judicial system in Philippines suggest that each of these articles is being breached and that such breaches are systemic.

The imposition of the death penalty is a final punishment and the most severe that a State can impose. In recognition of this, and in compliance with its obligations under the *ICCPR* and the *CAT*, the Advisory Council of Jurists may wish to consider whether the Philippines government should ensure that proceedings leading to the imposition of the death penalty conform to the highest standards of independence, competence, objectivity and impartiality.

Sri Lanka

Sri Lanka is a party to the *ICCPR*²⁰², the *CAT*²⁰³, and the *CROC*²⁰⁴.

The Sri Lankan Constitution specifies that no person shall be punished with death or imprisonment except by order of a competent court.²⁰⁵ By virtue of the President's right to grant pardon²⁰⁶ no executions have taken place in Sri Lanka since 1976. Consequently, it is considered abolitionist *de facto*.

In March of 1999 the government announced a policy change as part of a larger review of the President's prerogative of granting remissions of sentences imposed by the courts. The sentences of those convicted of murder or drug trafficking are no longer to be commuted to

²⁰¹ Philippines, '1999 Country Reports on Human Rights Practices', Released by the Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, February 25, 2000, Section 1(c).

²⁰² Sri Lanka acceded to the *ICCPR* on 10 June 1980.

²⁰³ Sri Lanka acceded to the *CAT and Other Cruel, Inhuman and Degrading Treatment or Punishment* on 2 January 1994.

²⁰⁴ Sri Lanka ratified the *CROC* on 12 July 1991.

²⁰⁵ Article 13(4), Constitution of Sri Lanka (1997).

²⁰⁶ Article 24, Constitution of Sri Lanka (1987).

life imprisonment.²⁰⁷ The President of Sri Lanka, Chandrika Bandaranayake Kumaratunga, determined that a change in commutation policy was necessary in order to provide a deterrent to rising levels of violent crimes.²⁰⁸ In 1995 the Sri Lankan government reached a similar decision when a motion moved in Parliament was accepted. The motion was that:

With a view to building a law-abiding, just, and civilised society, this parliament is of opinion that steps should be taken to re-implement the capital punishment (gallows) which remains ineffective though imposed at present by the court.²⁰⁹

- “Most serious crimes”

The crimes punishable by death, as set out in the Penal Code are murder²¹⁰, treason²¹¹, abetment of suicide²¹² and drug related offences²¹³. The death penalty is also provided for in the *Provision of the Emergency (Miscellaneous Provisions and Powers) Regulation*.²¹⁴

Sri Lankan law provides for the death penalty for many offences which do not involve the immediate death of the victim. Most of these crimes are drug related such as the manufacture, trafficking, possessing and importation of certain amounts of heroin. The Advisory Council of Jurists may wish to consider whether these provisions are contrary to Sri Lanka’s obligations under article 6 of the *ICCPR* and should be repealed to provide for a lesser punishment.

²⁰⁷ “The Death Penalty Worldwide: Developments in 1999”, Amnesty International – Report ACT 50/04/00.

²⁰⁸ Justice Minister, ‘Intense scrutiny before execution of death penalty’, *Sunday Observer*, 21 March 1999.

²⁰⁹ T. Sabaratnem, ‘Govt to re-implement death sentence forthwith’, *Daily News*, 20 August 1995.

²¹⁰ Section 296, Penal Code.

²¹¹ Section 114, Penal Code.

²¹² Section 299, Penal Code.

²¹³ Section 54A, Poisons, Opium and Dangerous Drugs (amendment) Act No. 13 of 1984.

²¹⁴ No. 13 of 1984.

- Resumption of executions

The resumption of executions in Sri Lanka is contrary to the spirit of article 6 of the *ICCPR* and the international trend towards abolition of the death penalty as reflected in the annual resolutions passed by the Commission on Human Rights.²¹⁵ Like the Philippines, Sri Lanka abstained from the vote on the resolution in April 2000.²¹⁶

(iii) Death penalty laws in non-member States

Iran

Iran has ratified the *ICCPR*²¹⁷ and the *CROC*.²¹⁸

The Constitution of Iran (1979) states that “The dignity, life, property, rights, residence, and occupation of the individual are inviolate, except in cases sanctioned by law”²¹⁹ and that “All citizens of the country, both men and women, equally enjoy the protection of the law and enjoy all human, political, economic, social and cultural rights, inconformity with Islamic criteria.”²²⁰

Iranian law provides for the imposition of the death penalty although very limited information is available outlining for which laws it may be imposed. Information gathered from United Nations and Amnesty International sources reveal that the death penalty is imposed for crimes including: converting a person from the Shi’a Muslim faith to the Baha’i faith²²¹, an Anglo-Saxon having sexual relations with an Iranian Muslim woman²²², membership of particular political organisations²²³, “corruption on earth”²²⁴, murder and robbery²²⁵, crimes of an economic nature²²⁶ and having sexual relations outside marriage.²²⁷

²¹⁵ Commission on Human Rights, resolutions 1999/61 and 2000/65.

²¹⁶ United Nations Press Release, Commission on Human Rights, 56th Session, 26 April 2000, Afternoon.

²¹⁷ Iran ratified the *ICCPR* on 23 June 1975.

²¹⁸ Iran ratified the *CROC* on 13 July 1994.

²¹⁹ Article 22, Constitution of Iran (1979).

²²⁰ Article 20, Constitution of Iran (1979).

²²¹ *Amnesty International Report – 1999*, p. 201.

²²² *Amnesty International Report – 1999*, p. 201

²²³ *Amnesty International Report – 1999*, p. 201.

²²⁴ *Amnesty International Report – 1999*, p. 201.

²²⁵ Amnesty International, ‘The Death Penalty Worldwide: Developments in 1999’, Amnesty International Report ACT 50/04/00, p. 26.

- “Most serious crimes”

Iranian law appears to provide for the death penalty in cases of crimes that do not necessarily involve the death of the victim, for example, economic crimes and crimes of a sexual nature. The Human Rights Committee has stated, specifically in relation to the party report presented by Iran that “the Committee considers the imposition of [the death penalty] for crimes of an economic nature, for corruption and for adultery, or for crimes that do not result in loss of life, as being contrary to the Covenant.”²²⁸ The Committee has recommended that domestic laws be revised with a view to “curtailing the number of offences currently punishable by the death penalty.”²²⁹ Resolutions to this effect have been passed by the Commission on Human Rights²³⁰ and the General Assembly.²³¹

Official statistics confirming the number of executions that have taken place in any one year in Iran have not been provided by the Iranian authorities despite requests made by the UN Special Representative and assurances by the authorities that such information would be made available.²³² Information received by the Special Representative by other means has indicated that, for example, in 1998 approximately 155 death sentences were carried out.²³³ The Human Rights Committee has stated that “it deplores the extremely high number of death sentences that were pronounced and carried out in the Islamic Republic of Iran” and has recommended that the number of executions be reduced.²³⁴

- Execution of juveniles

²²⁶ Concluding observations of the Human Rights Committee: Iran, CCPR/C/79/Add.25, 03/08/93, §8.

²²⁷ Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Ms Asma Jahangir, E/CN.4/1999/39/Add.1, 6 January 1999.

²²⁸ Concluding observations of the Human Rights Committee: Iran, CCPR/C/79/Add.25, 03/08/93, §8.

²²⁹ CCPR/C/79/Add.25, §18.

²³⁰ See for example, ‘Situation of human rights in the Islamic Republic of Iran’, E/CN.4/RES/2000/28, 18 April 2000.

²³¹ See for example, ‘Human Rights Situation in the Islamic Republic of Iran’, A/RES/54/177, 24 February 2000.

²³² ‘Interim report on the situation of human rights in the Islamic Republic of Iran, prepared by the Special Representative of the Commission on Human Rights, A/54/365, 21 September 1999.

²³³ Report on the Situation of Human Rights in the Islamic Republic of Iran, Mr Maurice Danby Copithorne, E/CN.4/1999/32, 28 December 1998.

²³⁴ CCPR/C/79/Add.25, §18.

Amnesty International reported the execution of a child offender in 1999. Executed in October 1999, the offender was 17 when executed.²³⁵ The Associated Press reported in January 2000 that another child offender was executed at the age of 17.²³⁶

The execution of persons who have committed a crime while under the age of 18 is strictly prohibited by both the *ICCPR* and the *CROC*, both of which have been ratified by Iran. Iran does not appear to have made any relevant reservations to either instrument.²³⁷

- Procedural safeguards

The Constitution of Iran states that “The passing and execution of a sentence must be only by a competent court and in accordance with law.”²³⁸ Concerns have been raised by Amnesty International, the UN Special Representative, the Human Rights Committee and Commission on Human Rights in relation to the apparent absence of basic elements of a fair trial in Iran. Such rights as the right to access a lawyer, to be brought promptly before a judge and the right to be tried in public were each identified by the UN Special Representative as rights which were violated by Iran.²³⁹

The Human Rights Committee has recommended that Iranian legislation and practice be made to conform to Article 14 of the *ICCPR*.²⁴⁰ The Commission on Human Rights and the General Assembly have also passed resolutions expressing their concern “at the continuing violations of human rights in the Islamic Republic of Iran, in particular executions in the apparent absence of respect for internationally recognized safeguards ... the failure to comply with international standards in the administration of justice and at the absence of due process of law.”²⁴¹

- Method of execution

²³⁵ Amnesty International, ‘The Death Penalty Worldwide: Developments in 1999’, Amnesty International Report ACT 50/04/00, p. 26.

²³⁶ Associated Press, 16 January 2000.

²³⁷ Report of the Sub-Commission on the Promotion and Protection of Human Rights, ‘Status of Withdrawals and Reservations with respect to the International Covenants on Human Rights’, E/CN.4/2000/96, 14 December 1999.

²³⁸ Article 36, Constitution of Iran (1979)

²³⁹ Report on the situation of Human Rights in the Islamic Republic of Iran, Mr Maurice Danby Copithorne, E/CN.4/2000/35, §11.

²⁴⁰ Concluding observations of the Human Rights Committee: Iran, CCPR/C/79/Add.25, 03/08/93, §20.

The Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms Asma Jahangir, noted in her report of 1999 that stoning has been used as a method of imposing the death penalty in Iran.²⁴² Two members of the Human Rights Committee have identified stoning as a method of execution which contravenes Article 7 of the *ICCPR*.²⁴³

Furthermore, it should be noted that the Human Rights Committee, in its concluding observations, has stated that “public executions should be avoided.”²⁴⁴ It is unknown whether Iran still employs stoning as a method of execution and whether executions are still carried out in public.

Nepal

Nepal is a party to the *ICCPR*²⁴⁵, the *CAT*²⁴⁶, and the *CROC*²⁴⁷. Nepal is also a party to the *Second Optional Protocol*.²⁴⁸ Nepal abolished the death penalty for ordinary crimes in 1990²⁴⁹ and for all crimes in 1997²⁵⁰. The last execution in Nepal took place in 1979.²⁵¹

The Constitution of Nepal (1997) states that “no law shall be made which provides for capital punishment.”²⁵² The abolition of the death penalty is therefore constitutionally entrenched as compared with the Australian and New Zealand cases in which the abolition of the death penalty has only been legislated for.

No information is available as to whether any moves or calls for the reintroduction of the death penalty in Nepal have been made. As in the case of Australia and New Zealand, however, to do so would be contrary to Nepal’s obligations under the *Second Optional Protocol*.

²⁴¹ CHR Res. E/CN.4/RES/2000/28; GA. Res. A/RES/54/177.

²⁴² Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, Ms Asma Jahangir, E/CN.4/1999/39/Add.1, 6 January 1999, §103.

²⁴³ *Ng v Canada* (No. 469/1991), p. 219.

²⁴⁴ Concluding observations of the Human Rights Committee: Iran, CCPR/C/79/Add.25, 03/08/93, §18.

²⁴⁵ Nepal ratified the *International Covenant on Civil and Political Rights* on 13 May 1991.

²⁴⁶ Nepal ratified the *CAT* on 13 May 1991.

²⁴⁷ Nepal ratified the *CROC* on 14 September 1990.

²⁴⁸ Nepal ratified the *Second Optional Protocol* on 4 March 1998.

²⁴⁹ Amnesty International, ‘List of Abolitionist and Retentionist Countries’, ACT 50/01/99, 18 December 1999.

²⁵⁰ Article 12(1) Constitution of Nepal (1997).

²⁵¹ Amnesty International, ‘List of Abolitionist and Retentionist Countries’, ACT 50/01/99, 18 December 1999.

Thailand

Thailand is a party to the *ICCPR*²⁵³ and the *CROC*.²⁵⁴

The Constitution of Thailand provides that:

A person shall enjoy the right and liberty in his or her life and person.

A torture, brutal act, or punishment by a cruel or inhumane means shall not be permitted; provided, however that punishment by death penalty as provided by law shall not be deemed the punishment by a cruel or inhumane means under this paragraph.²⁵⁵

The crimes for which the death penalty can be imposed are crimes against the person, crimes against property and drug-related offences.²⁵⁶ The death penalty will not be imposed upon offenders who were under 17 years of age at the time of the commission of the offence²⁵⁷, nor upon pregnant women or the insane.²⁵⁸

- “Most serious crimes”

Amnesty International reports that specific crimes for which the death penalty can be imposed include: production, import or export of heroin; possession of more than 100 grams of heroin; robbery; rape; kidnapping; insurrection; treason; and espionage.²⁵⁹ As these crimes do not result in the death of the victim, the Advisory Council of Jurists may wish to consider whether the imposition of the death penalty for these crimes is contrary to Thailand’s obligations under Article 6 of the *ICCPR* which permits the imposition of the death penalty only for the “most serious crimes.”

- Juvenile offenders

²⁵² Article 12(1) Constitution of Nepal (1997).

²⁵³ Thailand ratified the *International Covenant on Civil and Political Rights* on 29 October 1996.

²⁵⁴ Thailand ratified the *CROC* on 27 March 1992.

²⁵⁵ Section 31, Constitution of Thailand (1997).

²⁵⁶ Question 6, Thailand, ‘Questionnaire – Reference on the Death Penalty’, 28 April 2000.

²⁵⁷ Question 9(a), Thailand, ‘Questionnaire – Reference on the Death Penalty’, 28 April 2000.

²⁵⁸ Question 9, Thailand, ‘Questionnaire – Reference on the Death Penalty’, 28 April 2000.

²⁵⁹ Amnesty International, ‘Against the Tide: the Death Penalty in Southeast Asia’, Amnesty International Report ASA 03/01/97, January 1997.

The Thai Government, in a declaration made in relation to Article 6 of the *ICCPR*, clarified the legal position of juvenile offenders in relation to the death penalty. The Thai Penal Code allows for the imposition of the death penalty on persons who were 17 years or older at the time of the commission of the offence. This is contrary to Article 6 of the *ICCPR* and contrary to Article 37 of the *CROC*. In the declaration, however, the Government notes that Section 75 of the Thai Penal Code “enjoins, or in some cases allows much latitude for, the Court to take into account the offender’s youth as a mitigating factor in handing down sentences.”

In its response to the Questionnaire distributed by the Asia Pacific Forum, the Ministry of Foreign Affairs noted that the relevant agencies concerned are reviewing the relevant to law with a view to increasing the minimum age for the imposition of the death penalty to persons over 18 years of age.²⁶⁰

- Pregnant women

Thai legislation does not allow for the imposition of the death penalty on a pregnant women until the child is delivered or the pregnancy otherwise ended. This provision would appear to contravene the ‘Safeguards’ which state that “new mothers” shall not be sentenced to death.²⁶¹

²⁶⁰ Question 11, Thailand, ‘Questionnaire – Reference on the Death Penalty, 28 April 2000.

²⁶¹ ESC Res., 1984/50. GA Res. 39/118, §2.

Conclusions

(i) General Findings

The death penalty is recognised in international human rights instruments as an exception to the right to life. These instruments, however, impose strict limitations on when and how a death sentence can be determined and executed. The use of the death penalty by States reflects this trend towards limiting the scope of the punishment. In many States the number of crimes which are punishable by death are steadily decreasing to the extent that approximately half the States of the world have abolished the death penalty.

A comparatively large number of States in the Asia Pacific region allow for the death penalty as a form of punishment and a number of these States impose the death penalty on a comparatively frequent basis. Of the Asia Pacific Forum members, only Australia and New Zealand have abolished the death penalty *de jure* for all crimes. Both States are also parties to the *Second Optional Protocol* and therefore are not able, under international law, to reintroduce the death penalty. Fiji retains the death penalty for exceptional crimes and Sri Lanka has abolished the death penalty *de facto*. India, Indonesia and the Philippines retain the death penalty for ordinary crimes.

The laws governing the death penalty in each of the retentionist States in the Asia Pacific Forum give rise to issues of concern when compared to international standards as exemplified in the terms of the *ICCPR*. Parties to this instrument are bound by its terms to protect the rights contained therein. In so doing, regard must be had to decisions of the Human Rights Committee as the body charged with overseeing the implementation of the treaty and other statements as produced, for example, by the Commission on Human Rights. Fiji and Indonesia are not parties to the *ICCPR* and are therefore not bound by its terms. This is not prohibitive of these States looking to the terms of the *ICCPR* for guidance in how their laws should be developed and applied.

The *ICCPR* imposes specific limitations on the use of the death penalty and requires strict procedural safeguards be met. Regardless of whether States are parties to the *ICCPR*, care must be taken when imposing the death penalty to ensure that these limitations and

safeguards are protected and due regard is had to the unique nature of this punishment, its severity and finality.

(ii) Possible findings of fact specific to member States

Australia

Australia would ensure its obligations under the *Second Optional Protocol* are met by never reintroducing the death penalty as a punishment in the Federal jurisdiction and prohibiting a State from reintroducing it within its own jurisdiction.

Fiji

Fiji has not ratified the *ICCPR* and the *CAT*.

Three crimes remain punishable by death in Fiji.

The crimes that remain punishable by death include political offences and offences that do not involve the death of the victim.

India

India has not ratified the *CAT*.

India continues to impose the death penalty as a punishment for crimes that do not involve the death of the victim.

Indian penal legislation allows for the death penalty to be imposed on a juvenile.

Indonesia

Indonesia has not ratified the *ICCPR*.

Indonesian legislation allows the death penalty to be imposed for crimes which do not involve the death of the victim and which are political in nature.

New Zealand

New Zealand can ensure its obligations under the *Second Optional Protocol* are met by never reintroducing the death penalty.

Philippines

A moratorium on executions has been implemented in Philippines and yet the death sentences of those persons currently awaiting execution have not been commuted.

Philippines legislation allows the death penalty to be imposed for crimes which do not involve the death of the victim.

Sri Lanka

No executions have taken place in Sri Lanka since 1976 yet the death penalty has not been abolished.

Sri Lankan legislation allows the death penalty to be imposed for crimes which do not involve the death of the victim.

Sri Lanka retains the death penalty for the crime of treason in contravention of the specific directives of the Human Rights Committee.

(iii) Findings in relation to non-member States

Iran

Iran has not ratified the *CAT*.

Iranian legislation allows the death penalty to be imposed for crimes which do not involve the death of the victim.

Iranian legislation allows for the death penalty to be imposed on a juvenile.

Nepal

Nepal can ensure its obligations under the *Second Optional Protocol* are met by never reintroducing the death penalty.

Thailand

Thailand has not ratified the *CAT*.

Thailand legislation allows the death penalty to be imposed for crimes which do not involve the death of the victim.

Thai legislation provides for the execution of juvenile offenders.

Appendices

1 Questionnaire – Reference on the Death Penalty

The purpose of this questionnaire is to gather relevant and up-to-date information regarding the imposition of the death penalty in your State. This information will be used to form a reference on the death penalty in the Asia Pacific region.

1. Does your State retain the death penalty? YES NO

2. If not, has your State abolished the death penalty:
(a) *de facto* (in fact/by practice although not in law); or

(b) *de jure* (in law, eg by legislation)?

Further comments: (eg if abolished *de facto* - what led to the cessation of executions?)

3. If your State abolished the death penalty *de jure*, in what year did it do so? _____

4. Does your State retain the death penalty for military crimes, or crimes committed in time of conflict? (If yes, please outline the crimes for which the death penalty is retained)

YES NO

5. In what year was the last execution in your State? _____

6. If your State retains the death penalty, what crimes are punishable by death? Please be as specific as possible. _____

7. Is the death penalty a:

(a) mandatory; or

(b) discretionary sentence for these crimes?

Further comments: (eg what factors are taken into consideration when exercising the discretion whether to execute) _____

8. How many executions were carried out in your State last year? _____

9. Are there any restrictions on who can be executed in your State?
(a) minimum age beneath which an offender cannot be executed;

please specify the age: _____

(b) maximum age above which an offender cannot be executed;

please specify the age: _____

(c) women;

(d) pregnant women;

(e) nursing women;

(f) mentally retarded.

(g) Others: please specify _____

Further comments: _____

10. Does the death penalty system in your State allow for the imposition of a sentence of death when at the time the crime was committed it was not a capital offence?

YES NO

Further comments: _____

11. Does the death penalty system in your State allow for the imposition of a sentence of death when, at the time the crime was committed, the offender was a minor?

YES NO

Further comments: _____

12. Does the death penalty system in your State allow for:
- (a) amnesty;
 - (b) pardon; and/or
 - (c) commutations of a death sentence?

Further comments: (eg who has the power to commute sentences or to grant a pardon?)

13. Does the death penalty system in your State allow for appeal of:
- (a) the conviction for the crime; and/or
 - (b) the decision to impose the death penalty.

Further comments: (eg is there a limit on the number of appeals that can be lodged?)

14. Does the death penalty system in your State require more stringent procedural guarantees to be followed in the event of a capital case or are the procedures the same as for all other cases? (eg unanimous jury vote)

YES NO

If yes, please specify: _____

15. Does your State allow for legal aid to be provided to those convicted of capital crimes who cannot afford to pay a lawyer to represent them?

YES NO

Further comments: _____

16. What form(s) of execution are used in your State:

- (a) firing squad;
- (b) beheading;
- (c) hanging;
- (d) crucifixion;
- (e) electric chair;
- (f) lethal injection;
- (g) gas chamber;
- (h) stoning

(i) Other: please specify _____

Further comments: (eg recent transition or plan to make transition from one form or execution to another) _____

17. Does your State carry out executions:

- (a) in public; or
- (b) in private?

18. For how long are most people in prison between their conviction for a capital offence and their execution? _____

19. How far in advance of their execution are prisoners required to be informed of their execution date? _____

20. Describe the conditions in the prisons for prisoners who are under a sentence of death.

2 Universal Declaration of Human Rights

Article 3

Everyone has the right to life, liberty and security of the person.

3 International Covenant on Civil and Political Rights

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.
2. 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.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 15

1 . No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

4 Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty

The States Parties to the present Protocol,

Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,

Recalling article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,

Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable,

Convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life,

Desirous to undertake hereby an international commitment to abolish the death penalty,
Have agreed as follows:

Article 1

1. No one within the jurisdiction of a State Party to the present Protocol shall be executed.
2. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

Article 2

1. No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.
2. The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary-General of the United Nations the relevant provisions of its national legislation applicable during wartime.
3. The State Party having made such a reservation shall notify the Secretary-General of the United Nations of any beginning or ending of a state of war applicable to its territory.

Article 3

The States Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with article 40 of the Covenant, information on the measures that they have adopted to give effect to the present Protocol.

Article 4

With respect to the States Parties to the Covenant that have made a declaration under article 41, the competence of the Human Rights Committee to receive and consider

communications when a State Party claims that another State Party is not fulfilling its obligations shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 5

With respect to the States Parties to the first Optional Protocol to the International Covenant on Civil and Political Rights adopted on 16 December 1966, the competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdiction shall extend to the provisions of the present Protocol, unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Article 6

1. The provisions of the present Protocol shall apply as additional provisions to the Covenant.
2. Without prejudice to the possibility of a reservation under article 2 of the present Protocol, the right guaranteed in article 1, paragraph 1, of the present Protocol shall not be subject to any derogation under article 4 of the Covenant.

Article 7

1. The present Protocol is open for signature by any State that has signed the Covenant. 2. The present Protocol is subject to ratification by any State that has ratified the Covenant or acceded to it. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Protocol shall be open to accession by any State that has ratified the Covenant or acceded to it.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States that have signed the present Protocol or acceded to it of the deposit of each instrument of ratification or accession.

Article 8

1. The present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession.
2. For each State ratifying the present Protocol or acceding to it after the deposit of the tenth instrument of ratification or accession, the present Protocol shall enter into force three months after the date of the deposit of its own instrument of ratification or accession.

Article 9

The provisions of the present Protocol shall extend to all parts of federal States without any limitations or exceptions.

Article 10

The Secretary-General of the United Nations shall inform all States referred to in article 48, paragraph 1, of the Covenant of the following particulars:

- (a) Reservations, communications and notifications under article 2 of the present Protocol;
- (b) Statements made under articles 4 or 5 of the present Protocol;
- (c) Signatures, ratifications and accessions under article 7 of the present Protocol;
- (d) The date of the entry into force of the present Protocol under article 8 thereof.

Article 11

1. The present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Protocol to all States referred to in article 48 of the Covenant.

5 General Comment on Article 6 of the International Covenant on Civil and Political Rights (General Comment 6(16))

1. The right to life enunciated in article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (art. 4). However, the Committee has noted that quite often the information given concerning article 6 was limited to only one or other aspect of this right. It is a right which should not be interpreted narrowly.

2. The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year. Under the Charter of the United Nations the threat or use of force by any State against another State, except in exercise of the inherent right of self-defence, is already prohibited. The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life. In this respect, the Committee notes, in particular, a connection between article 6 and article 20, which states that the law shall prohibit any propaganda for war (para. 1) or incitement to violence (para. 2) as therein described.

3. The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The 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.

4. States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.

5. Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

6. While it follows from article 6 (2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes". Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the "most serious crimes". The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right

to life within the meaning of article 40, and should as such be reported to the Committee. The Committee notes that a number of States have already abolished the death penalty or suspended its application. Nevertheless, States' reports show that progress made towards abolishing or limiting the application of the death penalty is quite inadequate.

7. 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. It also follows from the express terms of article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant. The procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. These rights are applicable in addition to the particular right to seek pardon or commutation of the sentence.

6 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Article 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

Article 16

1. Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

7 Convention on the Rights of the Child

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

8 Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty

1. 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.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

3. Persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on new mothers, or on persons who have become insane.

4. Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.

5. Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

9. Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering.

**9 Convention for the Protection of Human Rights and Fundamental Freedoms
(European Convention on Human Rights)**

Article 2

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

10 American Convention on Human Rights

Article 4

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.

6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.