

REDRESS

Ending Torture. Seeking Justice for Survivors

Written contribution to the

United Nations Human Rights Committee

General Discussion on the preparation for a General Comment on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights (ICCPR)

12 June 2015

A. Introduction

1. REDRESS welcomes the Human Rights Committee's decision to draft a new General Comment on Article 6 of the ICCPR, revisiting and expanding its earlier general comments No. 6 and 14 (from 1982 and 1984, respectively). REDRESS supports, and hopes to engage with, this very important project, which will provide authoritative guidance to State parties, reflecting developments in this area over more than 30 years.
2. REDRESS further welcomes the Human Rights Committee's invitation for written comments for the general discussion to commence the Committee's process of developing this general comment and provides this submission in response to it.
3. REDRESS suggests that it is important for the Committee in this general comment to underscore States' obligation to respect, to protect, and to fulfil human rights in the context of the right to life and resulting positive obligations in this regard.
4. REDRESS' mandate is to assist torture survivors to obtain justice and reparation. Consequently, these initial comments and reflections focus on those areas of Article 6 which intersect with our mandate and reflect the knowledge and experience that REDRESS has gained through its work over more than twenty years.
5. REDRESS believes that it would be important for the General Comment to expand on relevant areas such as the responsibility of States in respect of deaths in custody, torture resulting in death¹ and enforced disappearances. However, in this first submission we draw attention to several aspects which concern the **death penalty**. We believe that this is one area which the Human Rights Committee may wish to emphasise in its General Comment, given the significant evolution in the legal position of the death penalty under international law over the past thirty years. As outlined below, this evolution is evident in the jurisprudence of this Committee and other UN human rights treaty bodies, regional and domestic courts and the statements of oversight bodies and UN special procedures.

¹ See for example, UN Human Rights Committee (HRC), *Sathasivam and Saraswathi v. Sri Lanka*, UN Doc. CCPR/C/93/D/1436/2005, (31 July 2008), paras 6.2-6.4; HRC, *Khazmi v. Libya*, UN Doc. CCPR/C/108/D/1832/2008, (4 September 2013), paras 8.1-8.3; and HRC, *Eshonoz v. Uzbekistan*, UN Doc. CCPR/C/99/D/1225/2003, (18 August 2010), para 9.7.

REDRESS' work with clients in cases involving the death penalty, including in the aftermath of an unfair trial and where a client has been held in conditions in violation of the prohibition of torture, cruel, inhuman or degrading treatment or punishment on death row, has convinced us that there is a need for further authoritative guidance in this area.²

B. Torture, Cruel, Inhuman or Degrading Treatment or Punishment and the Death Penalty

I. Violations of the exclusionary rule and the death penalty

6. As noted in General Comment No. 6, in countries which have not yet abolished the death penalty, it is not permissible to implement a death sentence unless strict procedural safeguards have been complied with.³
7. This principle is reflected in the case law of international human rights treaty bodies. The execution of a death sentence imposed following a trial which violated fair trial guarantees violates the right to life.⁴
8. REDRESS recalls that one of the most important guarantees of a fair trial is that the law "must ensure that statements or confessions obtained in violation of article 7 of the Covenant are excluded from evidence, except if such material is used as evidence that torture or other treatment prohibited in this provision occurred."⁵ This exclusionary rule derives from the absolute prohibition against torture, cruel, inhuman or degrading treatment or punishment (other ill-treatment) and is reflected in all the main international human rights instruments that deal with torture. The scope of the exclusionary rule is broad; statements made as a result of torture or other cruel, inhuman or degrading treatment or punishment "may not be invoked against the person concerned or against any other person in any proceedings."⁶ Nonetheless, courts in various states continue to rely on evidence allegedly obtained as a result of torture, including in proceedings that may result, or have resulted, in the imposition of the death penalty.⁷

² See for example: <http://www.redress.org/case-docket/andargachew-tsege>; <http://www.redress.org/case-docket/meriam-yahia-ibrahim-daniel-wani-and-their-two-children-martin-wani-and-maya-wani-v-sudan>; <http://www.redress.org/case-docket/wilson-v-the-philippines>; <http://www.redress.org/case-docket/al-hawsawi-case-1>.

³ HRC, General Comment No. 6: Article 6 (Right to life), (30 April 1982), paras 6-7. See also, HRC, *Earl Pratt and Ivan Morgan v. Jamaica*, Communication, No. 210/1986 and 225/1987, UN Doc. Supp. No. 40 (A/44/40) at 222 (6 April 1989), para 150; HRC, *Wright v. Jamaica*, Communication, No. 349/1989, UN Doc. CCPR/C/45/D/349/1989, (18 August 1992), paras 8.7 and 10; HRC, Concluding observations regarding Iran, UN Doc. CCPR/C/IRN/CO/3, (29 November 2011), para 12; ECtHR, *Öcalan v. Turkey*, No.46221/99, (12 March 2003), paras 167-175; HRC, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, (23 August 2007), para. 6: "...as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all requirements of article 14."

⁴ See e.g., HRC, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, (23 August 2007), para. 59; HRC, *Daniel Monguya Mbenge v. Zaire*, Communication, No. 16/1977, UN Doc. CCPR/C/OP/2 at 76, (25 March 1983), para. 15; IACoHR, Report No. 53/13, Case 12.864 (*Teleguz, United States*) (15 July, 2013), para 131; ECtHR, *Bader and Kanbor v. Sweden*, No. 13284/04, (8 November 2005), paras 44-48; HRC, *Carlton Reid v. Jamaica*, Communication, No. 250/1987, UN Doc. CCPR/C/39/D/250/1987, (20 July 1990), paras 11.3-11.6; ACHPR, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, (12 October 2013), para 201; HRC, *Mwamba v. Zambia*, UN Doc. CCPR/C/98/D/1520/2006, (10 March 2010), para. 6.7; HRC, *Yuzepchuk v Belarus*, UN Doc. CCPR/C/112/D/1906/2009 (17 November 2014), para 8.6; HRC, Concluding observations regarding Yemen, UN Doc. CCPR/C/YEM/CO/5, (23 April 2012), para 4; IACoHR, Report No. 11/15, Case 12.833 (*Rocha Diaz, United States*) (23 March, 2015), para. 106.

⁵ HRC, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, (23 August 2007), para. 41. See also, UN General Assembly, *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1975; ACHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, "any confession or other evidence obtained by any form of coercion or force may not be admitted as evidence or considered as probative of any fact at trial or in sentencing"; HRC, General Comment No. 20: Article 7 (30 September 1992), para 12. See also, HRC, *Chiti v Zambia*, UN Doc. CCPR/C/105/D/1303/2004, (28 August 2012), para 12.6.

⁶ Note by the Secretary-General, UN Doc. A/54/426, (1 October 1999), para 12. See also, CAT, *Bairamov v. Kazakhstan*, UN Doc. CAT/C/52/D/497/2012, (12 June 2014), para. 8.10.

⁷ See e.g., HRC, *Yuzepchuk v Belarus*, UN Doc. CCPR/C/112/D/1906/2009 (17 November 2014), paras 8.2- 8.6; *Akhadov v. Kyrgyzstan*, UN Doc. CCPR/C/101/D/1503/2006, (29 April 2011), para. 7.5; IACoHR, Report 81/07, Case 12.504, Merits (Publication), *Daniel and Kornel*

9. Particular concerns regarding the implementation of the exclusionary rule have been identified in the context of counter-terrorism.⁸ In this context some states have sought to depart from ordinary evidentiary rules, including in some cases the exclusionary rule.⁹ REDRESS recalls that this Committee has explained that fair trial guarantees must also be respected and fulfilled if a trial is held in a military or special court.¹⁰ The UN Special Rapporteur on torture and the Committee against Torture have held that “the exclusionary rule applies no matter where in the world the torture was perpetrated and even if the State seeking to rely on the information had no previous involvement in or connection to the acts of torture.”¹¹ The failure to respect the exclusionary rule is of particular concern in the context of counter-terrorism trials where defendants may face the death penalty.
10. Various international and regional human rights treaty bodies, including this Committee, have held that the imposition of the death penalty following a trial which relied on evidence obtained through torture, and thus violated fair trial guarantees, constitutes a violation of the right to life.¹²
- 11. REDRESS notes that General Comments Nos. 6 and 32 have referenced the requirement of respect for the guarantees of a fair trial in cases that may result in imposition of the death penalty. In light of developments in this area REDRESS suggests that General Comment No. 36 could build on this guidance and reiterate the scope and significance of the exclusionary rule in the context of fair trial guarantees in cases which may result in a death sentence, emphasising that a failure to uphold these guarantees in this context would result in a violation of the right to life.**

II. Imposition of a death sentence following an unfair trial constituting treatment falling within the scope of the prohibition of torture

12. The European Court of Human Rights (ECtHR) has held that the imposition of the death penalty following an unfair trial constitutes a violation of the prohibition of cruel, inhuman and degrading treatment as well as the right to life.¹³ In this regard the Court stated that

to impose a death sentence on a person after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there exists a real possibility that the sentence will be enforced, must give rise to a significant degree

Vaux, Guyana, (15 October 2007), paras. 69; HRC, *Concluding observations on the initial report of Mauritania*, UN Doc. CCPR/C/MRT/CO/1, (21 November 2013), para 12; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/25/60, (10 April 2014), para 64: “The ineffectiveness of efforts to put an end to the practice of torture, or other ill-treatment, is often the result of the fact that State authorities continue to admit tainted evidence during trials.”

⁸ See e.g., *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/61/259 (14 August 2006).

⁹ See e.g., REDRESS, *Extraordinary Measures, Predictable Consequences: Security Legislation and the Prohibition of Torture*, September 2012, paras 50-54.

¹⁰ HRC, General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, (23 August 2007), para. 22.

¹¹ *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/HRC/25/60, (10 April 2014), para. 27. See also, paras 23-83 and CAT, *Concluding observations regarding the United Kingdom of Great Britain and Northern Ireland*, UN Doc. CAT/C/CR/33/3 (10 December 2014), para. 4.

¹² See e.g., *Akhadov v. Kyrgyzstan*, UN Doc. CCPR/C/101/D/1503/2006, (29 April 2011), para. 7.5: “In light of [the conclusion that there was a violation of Article 14] and given that the author has been sentenced to death following a trial held in violation of the fair trial guarantees, the Committee concludes that the author is also a victim of a violation of his rights under article 6, read in conjunction with article 14, of the Covenant”; IACoMHR, Report 81/07, Case 12.504, Merits (Publication), *Daniel and Kornel Vaux, Guyana*, (15 October 2007), para. 69; HRC, *Concluding observations on the initial report of Mauritania*, UN Doc. CCPR/C/MRT/CO/1, (21 November 2013), para 12.

¹³ ECtHR, *Öcalan v. Turkey*, No.46221/99, (12 March 2003), paras 167-175; ECtHR, *Al-Saadoon and Mufdhi v. UK*, No. 61498/08, (2 March 2010), paras 120-2. ECtHR, *Bader and Kanbor v. Sweden*, No. 13284/04, (8 November 2005), paras 44-48

of anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Convention.¹⁴

13. This Committee has echoed these findings, similarly identifying the anguish caused when a person is wrongfully subjected to the fear that he or she will be executed and that this anguish cannot be separated from the unfairness that underpins the sentence.¹⁵ In this regard this Committee found that “the imposition of any death sentence that cannot be justified under article 6 would automatically entail a violation of article 7.”¹⁶

14. REDRESS encourages the Committee to specify in General Comment No. 36 that the imposition of the death penalty following an unfair trial constitutes a violation of the prohibition of torture and other ill-treatment as well as the right to life.

III. Implementation of the death penalty resulting in violations of Article 7

15. The implementation of the death penalty carries a considerable, if not inherent, risk of a violation of the absolute prohibition of torture and other ill-treatment.¹⁷ This applies particularly to the so-called death row phenomenon and various methods of execution used in carrying out a death sentence.

i. The death row phenomenon

16. The circumstances of detention following imposition of the death penalty, have been categorised as the ‘death row phenomenon’, which

[C]onsists of a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death. Those circumstances include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held. Death row conditions are often worse than those for the rest of the prison population, and prisoners on death row are denied many basic human necessities.¹⁸

17. In *Soering v. UK*, the ECtHR recognised that returning a person to a State where he or she may be held on death row (here, to the USA, state of Virginia) could constitute a violation of article 3 of the European Convention on Human Rights in certain circumstances. The Court based this finding on a range of factors, and in particular on the very long period of time spent on death row in extreme conditions and the ever present and mounting anguish of awaiting execution of the death penalty.¹⁹ The Committee Against Torture,²⁰ UN Special

¹⁴ ECtHR, *Öcalan v. Turkey*, No.46221/99, (12 March 2003), para 169.

¹⁵ HRC, *Mwamba v. Zambia*, UN Doc. CCPR/C/98/D/1520/2006, (10 March 2010), para. 6.8

¹⁶ *Ibid.*

¹⁷ See e.g., *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279, (9 August 2012), paras 25-81.

¹⁸ *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279, (9 August 2012), para 42.

¹⁹ ECtHR, *Soering v UK*, No. 14038/88, (7 July 1989). See also, ECtHR, *Einhorn v. France*, No. 71555/01, (16 October 2001), (Admissibility Decision)

²⁰ See e.g., UNCAT, *Concluding observations regarding China*, UN Doc. CAT/C/CHN/CO/4, (12 December 2008), para 34; UNCAT, *Concluding observations regarding Japan*, CAT/C/JPN/CO/2, (28 June 2013), para 15; UNCAT, *Concluding observations regarding the United States of America*, UN Doc. CAT/C/USA/CO/3-5, (18 December 2014), para 25. The Committee further called on the State to improve physical conditions of detention facilities by adopting “urgent measures to remedy any deficiencies relating to temperature, insufficient ventilation and humidity levels in prison cells, including death row facilities” [at para 22].

Rapporteur on Torture²¹ and Inter-American Court of Human Rights²² and the Inter-American Commission²³ have arrived at similar findings.

18. This Committee has also recognised the existence of the death row phenomenon as a possible breach of Article 7, and will examine the facts in each case in making an assessment in this regard.²⁴ In a case that REDRESS has been involved in, this Committee observed that

[T]he authors' mental condition was exacerbated by his treatment in, as well as the conditions of, his detention, and resulted in documented long-term psychological damage to him. In view of these aggravating factors constituting further compelling circumstances beyond the mere length of time spent by the author in imprisonment under a sentence of death, the Committee concludes that the author's suffering under a sentence of death amounted to an additional violation of article 7. None of these violations were remedied by the Supreme Court's decision to annul the author's conviction and death sentence after he had spent almost fifteen months of imprisonment under a sentence of death.²⁵

- 19. REDRESS notes that General Comments Nos. 6 and 14 did not address the issue of conditions of detention following a death sentence and suggests that the Committee, in General Comment No. 36, provide specific guidance on the requirements that must be fulfilled regarding prisoners who are sentenced to death in order to prevent violations of both Articles 6 and 7. REDRESS recommends that these requirements include issues such as delays, conditions of detention, and a prohibition of indefinite solitary confinement.**

ii. Methods of execution

20. By definition the imposition of the death penalty causes serious harm, as it involves the deliberate killing of a human being by State authorities. The ECtHR has noted that

[w]hatever the method of execution, the extinction of life involves some physical pain. In addition, the foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering.²⁶

In recognition of this reality, relevant standards require that where the death penalty is executed, "it shall be carried out so as to inflict the minimum possible suffering."²⁷ Similarly, this Committee's General Comment on Article 7 specifies that when the death penalty is applied "it must not only be strictly limited in accordance with article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering."²⁸

21. In practice, however, meeting these standards is difficult. The UN Special Rapporteur on Torture has noted that "there is no categorical evidence that any method of execution in use

²¹ *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279, (9 August 2012), para. 78.

²² IACtHR, *Hilaire v. Trinidad and Tobago*, (Ser. C) No. 123, (21 June 2002), paras. 167-169. See also, IACoMHR, *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, OEA/Ser.L/V/II, Doc. 68, (31 December 2011), p. 176-186.

²³ IACoMHR, Report No. 44/14, Case 12.873 (*Arias, United States*) (17 July, 2014), paras 182; IACoMHR, Report No. 11/15, Case 12.833 (*Rocha Diaz, United States*) (23 March, 2015), para. 100.

²⁴ See e.g., HRC, *Kindler v. Canada*, Communication No. 470/1991, UN Doc. CCPR/C/48/D/470/1991, (11 November 1993); HRC, *Carlton Reid v. Jamaica*, Communication No. 250/1987, UN Doc. CCPR/C/39/D/250/1987, (20 July 1990), para 11.6; ACHPR, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, (12 October 2013), paras. 172-173.

²⁵ HRC, *Wilson v The Philippines*, UN Doc. CCPR/C/79/D/868/1999 (11 November 2003), para 7.4.

²⁶ ECtHR, *Al-Saadoon and Mufdhi v. UK*, No. 61498/08, (2 March 2010), para. 115.

²⁷ *Safeguards guaranteeing protection of the rights of those facing the death penalty*, Approved by Economic and Social Council resolution 1984/50 of 25 May 1984, para 9.

²⁸ HRC, General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) (30 September 1992), para 6.

today complies with the prohibition of torture and cruel, inhuman or degrading treatment in every case.”²⁹ A large number of bodies, including UN Treaty Bodies, UN special procedures, and regional and domestic courts, have raised, or addressed concerns in relation to the nature of a number of methods of execution including, stoning, asphyxiation by gas, hanging, and lethal injection. This has resulted in a series of rulings that such methods are incompatible with the prohibition of torture and other ill-treatment.³⁰

Stoning

22. International human rights treaty bodies have recognised and affirmed that stoning as a method of execution constitutes a violation of the prohibition of torture and ill-treatment.³¹
23. This Committee called on states to prohibit “the use of public executions, as well as stoning as a method of execution”³² and to “officially abolish the sentence of death by stoning.”³³ In a series of resolutions the former UN Commission on Human Rights called on states “to ensure that any application of particularly cruel or inhuman means of execution, such as stoning, be stopped immediately.”³⁴ Similarly, in a case assessing whether execution of a deportation order to Iran was permissible the ECtHR noted that “punishment of adultery by stoning still remains on the statute book and may be resorted to by the authorities” and found that there was a real risk of the applicant being subjected to treatment contrary to Article 3, which prohibits torture and inhuman or degrading treatment or punishment.³⁵

Gas asphyxiation

24. This Committee has held that execution by gas asphyxiation does not “meet the test of the ‘least possible physical and mental suffering’, and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant.”³⁶ This is because gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes.³⁷

Hanging

25. A number of domestic courts have determined that hanging as a method of execution is not compatible with the prohibition of torture and other ill-treatment. The High Court of Tanzania found in 1994 that the death penalty was unconstitutional on the grounds that execution by hanging violated the right to dignity of a person and constituted inherently cruel, inhuman and degrading treatment.³⁸ In 2012, the Lagos High Court assessed medical expert evidence regarding the death penalty and held that death by hanging or by firing

²⁹ *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279, (9 August, 2012), para. 41.

³⁰ See e.g., ECtHR, *Jabari v. Turkey*, No. 40035/98, (11 October 2000), para 41-42; ACHPR, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, (12 October 2013), para 169; IACoMHR, Report No. 11/15, Case 12.833 (*Rocha Diaz, United States*) (23 March, 2015); *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Report of the Secretary-General*, UN Doc. E/2015/49 (13 April 2015) paras 55-65.

³¹ *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279, (9 August 2012), para. 77: “Death by stoning... is already clearly prohibited under international law.”

³² HRC, *Concluding observations regarding Iran*, UN Doc. CCPR/C/IRN/CO/3, (29 November 2011), para 12.

³³ HRC, *Concluding observations regarding Yemen*, UN Doc. CCPR/CO/84/YEM, (9 August 2005), para 15; HRC, *Concluding observations regarding Yemen*, UN Doc CCPR/C/YEM/CO/5, (23 April 2012), para 4.

³⁴ UN Commission on Human Rights, *Commission on Human Rights Resolution 2003/67: The Question of the Death Penalty*, UN Doc. E/CN.4/RES/2003/67, (24 April 2003); UN Commission on Human Rights, *Commission on Human Rights Resolutions 2004/67: Question of the Death Penalty*, (21 April 2004), UN Doc. E/CN.4/RES/2004/67; UN Commission on Human Rights, *Human Rights Resolution 2005/59: The Question of the Death Penalty*, 20 April 2005, UN Doc. E/CN.4/RES/2005/59.

³⁵ ECtHR, *Jabari v. Turkey*, No. 40035/98, (11 October 2000), para 41-42.

³⁶ HRC, *Chitat Ng v. Canada*, Communication No. 469/1991, UN Doc. CCPR/C/49/D/469/1991, (7 July 1994), para 16.4; *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279, (9 August 2012), para. 77: “Death by... gas asphyxiation is already clearly prohibited under international law.”

³⁷ *Ibid*, para 16.3.

³⁸ High Court of the United Republic of Tanzania, *Republic v Mbushuu alias Dominic Mnyaroge and Kalai Sangula*, (22 June 1994).

squad amounted to a “violation of the condemned’s right to dignity of the human person and inhuman and degrading treatment.”³⁹

26. At the regional level, the African Commission has held that

[T]he execution of a death sentence by hanging may not be compatible with respect for the inherent dignity of the individual and the duty to minimize unnecessary suffering, because it is a notoriously slow and painful means of execution. If carried out without appropriate attention to the weight of the person condemned because hanging can result either in slow and painful strangulation, because the neck is not immediately broken by the drop, or, at the other extreme, in the separation of the head from the body.⁴⁰

27. The Inter-American Commission on Human Rights, the ECtHR, and this Committee have previously been presented with evidence that hanging as a method of execution violates the prohibition of torture and other ill-treatment. However, as violations had already been identified on other grounds, in these cases the respective treaty bodies considered it unnecessary to specifically address this issue.⁴¹

28. In a 2007 amicus curiae application to the Iraqi Supreme Criminal Tribunal the UN High Commissioner for Human Rights argued that hanging as a method of execution is contrary to Article 7 of the Covenant. The High Commissioner indicated that the executions by hanging in this case were so flawed as to amount, in their implementation, to cruel, inhuman and degrading punishment.⁴²

Lethal injection

29. In 1994 this Committee found that potential judicial execution by lethal injection was not in violation of Article 7 of the Covenant.⁴³ However, since this decision new evidence has emerged regarding the harmful impact of lethal injection. Serious concerns have been raised in a number of fora in relation to the use of lethal injection as a method of execution, in particular in the context of its use in the USA. This is largely attributable to a change in the combination of drugs used in executions resulting in a number of “botched executions” which have prompted litigation at the domestic and regional levels, as well as the expression of concern by UN bodies.⁴⁴

30. Due to the current unavailability of the combination of drugs previously used in lethal injections, retentionist States in the USA are relying on new combinations, the acceptability of which has generally not been assessed in previous litigation.⁴⁵ An execution in the State of

³⁹ The Nation, *Court restrains govt from executing five by hanging*, September 25, 2012. Available at: <http://thenationonlineng.net/new/court-restrains-govt-from-executing-five-by-hanging/>

⁴⁰ ACHPR, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, (12 October 2013), para 169.

⁴¹ IACoHR, Report No. 58/02, Case 12.275, Merits, Denton Aitken, Jamaica, October 21, 2002, para. 138; ECtHR, *Al-Saadoon and Mufdhi v. UK*, No. 61498/08, (2 March 2010); *Mwamba v. Zambia*, UN Doc. CCPR/C/98/D/1520/2006, (10 March 2010), para. 6.3.

⁴² Iraqi Supreme Criminal Tribunal, *In the Matter of Sentencing of Taha Yassin Ramadan*, Application for Leave to Intervene as Amicus Curiae of United Nations High Commissioner for Human Rights (8 February 2007). Available at: <http://online.wsj.com/public/resources/documents/tribunal20070207.pdf>.

⁴³ HRC, *Cox v. Canada*, Communication No. 539/1993, UN Doc. CCPR/C/52/D/539/19930, (9 December 1994), para 17.3; HRC, *Kindler v. Canada*, Communication No. 470/1991, UN Doc. CCPR/C/48/D/470/1991, (11 November 1993).

⁴⁴ See e.g., *Glossip v Gross*, currently awaiting decision in the US Supreme Court, Docket no. 14-7955 (lower court decision at 2015 WL 137627); IACoHR, Report No. 11/15, Case 12.833 (*Rocha Diaz, United States*) (23 March, 2015); HRC, *Concluding observations on the fourth periodic report of the United States of America*, UN Doc. CCPR/C/USA/CO/4, (23 April 2014), para 8.

⁴⁵ It is relevant to note that the drugs are no longer available in part due to the position taken by the European Union and the Council of Europe against the death penalty. *Commission Implementing Regulation (EU) No 1352/2011 of 20 December 2011, amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*: “(1) Regulation (EC) No 1236/2005 imposes a prohibition on exports of goods which have

Arizona took nearly two hours because it required fifteen doses of a new drug combination, where the initial dose was supposed to be a lethal one. In this case a reporter indicated that the prisoner gulped 640 times, fighting for his life.⁴⁶ A prisoner in Ohio “gasp[ed], choked, clenched his fists and appeared to struggle against his restraints for about 10 minutes” in an execution using a new combination of drugs, which took 26 minutes to result in death.⁴⁷ In Oklahoma Clayton Lockett “struggled violently, groaned and writhed, lifting his shoulders and head from the gurney” when a cocktail of drugs was administered to him. 16 minutes after the execution began, and without Lockett being declared dead, the blinds separating the execution chamber from the viewing room were closed. Shortly after the execution was called off and Lockett died of a heart attack 43 minutes after the first execution drugs were administered.⁴⁸

31. A US Supreme Court decision is expected in the coming months assessing the constitutionality of a new combination of drugs to be used in executions in Oklahoma. In this case the petitioners argue that Oklahoma has admitted that “administration of the second or third drug to a conscious prisoner would cause intense and needless pain and suffering” and that it has selected the drug “because of availability rather than to create a more humane execution.”⁴⁹ The Supreme Court is considering, *inter alia*, the question whether it is “constitutionally permissible for a state to carry out an execution using a three drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, coma-like unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious.”⁵⁰
32. This Committee recently noted “with concern reports about the administration, by some [US federal] states, of untested lethal drugs to execute prisoners and the withholding of information about such drugs.”⁵¹ Also in 2014, the UN Committee Against Torture expressed concern regarding executions in the US States of Arizona, Oklahoma and Ohio and called on the USA to “review its execution methods in order to prevent pain and prolonged suffering.”⁵² The Office of the High Commissioner for Human Rights criticised the cruelty of these executions and noted that the suffering endured during the execution could amount to cruel, inhuman and degrading treatment.⁵³

no practical use other than for the purpose of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment and controls on exports of certain goods that could be used for such purpose. It respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union, in particular respect for and protection of human dignity, the right to life and the prohibition of torture and inhumane and degrading treatment or punishment; (2) In some recent cases medicinal products exported to third countries have been diverted and used for capital punishment, notably by administering a lethal overdose by means of injection. The Union disapproves of capital punishment in all circumstances and works towards its universal abolition. The exporters objected to their involuntary association with such use of the products they developed for medicinal use. (3) It is therefore necessary to supplement the list of goods subject to trade restrictions to prevent the use of certain medicinal products for capital punishment...”

⁴⁶ NPR, *Botched Lethal Injection Executions Reignite Death Penalty Debate*, 6 January 2015, available at:

<http://www.npr.org/2015/01/06/375399560/botched-lethal-injection-executions-reignite-death-penalty-debate>.

⁴⁷ The Columbus Dispatch, *Dennis McGuire’s execution was not ‘humane,’ doctor says*, 13 August 2014, available at:

<http://www.dispatch.com/content/stories/local/2014/08/12/inmate-suffered-pain-during-execution-doctor-says.html>.

⁴⁸ The Guardian, *Oklahoma execution: Clayton Lockett writhes on gurney in botched procedure*, 30 April 2014, available at:

<http://www.theguardian.com/world/2014/apr/30/oklahoma-execution-botched-clayton-lockett>.

⁴⁹ *Glossip v Gross*, currently awaiting decision in the US Supreme Court, Docket no. 14-7955 (lower court decision at 2015 WL 137627), see: <http://www.supremecourt.gov/qp/14-07955qp.pdf>.

⁵⁰ *Ibid.*

⁵¹ HRC, *Concluding observations on the fourth periodic report of the United States of America*, UN Doc. CCPR/C/USA/CO/4, (23 April 2014), para 8.

⁵² CAT, *Concluding observations on the combined third to fifth periodic reports of the United States of America*, UN Doc. CAT/C/USA/CO/3-5 (19 December 2014), para 25. See also, IACoMHR, Report No. 11/15, Case 12.833 (*Rocha Diaz, United States*) (23 March, 2015), para. 86.

⁵³ UN News Centre, *UN rights office calls on US to impose death penalty moratorium after botched execution*, 2 May, 2014, available at: <http://www.un.org/apps/news/story.asp?NewsID=47706#VXbXbk1QaJB>.

33. In three petitions regarding detainees on death row in Virginia and in Texas the Inter-American Commission on Human Rights recently considered a number of issues regarding the use of lethal injection as a method of execution.⁵⁴ In the *Rocha Diaz* case the Commission stressed that

States have a reinforced special duty to ensure that the method of execution does not constitute cruel, infamous or unusual punishment. In this regard, the drugs and doses to be used in case of executions by lethal injection, as well as the composition of the execution team and the training of its members should be subjected to the highest quality control standards. In particular, the drugs used should be subject to government approval and regulation, the execution team should have appropriate medical training and lethal injection protocols should be available to the public to guarantee public scrutiny.⁵⁵

34. The Commission further criticised the failure to provide relevant information regarding the method of execution noting that “the State has the duty to inform the person sentenced to death, in a timely manner, about the drug and method of execution that will be used, so he or she is not precluded from litigating the right to be executed in a manner devoid of cruel and unusual suffering.”⁵⁶ In these cases the Commission found violations of the prohibition of cruel, infamous or unusual punishment, by exposing the petitioners to unjustified anguish and fear.⁵⁷

35. *There is increasing global recognition that most of the conditions in which capital punishment is actually applied, including the conditions of detention on death row and the methods of execution, render the punishment tantamount to torture. In many other cases, even if the conditions are less severe, the punishment still amounts to cruel, inhuman or degrading treatment.*⁵⁸ REDRESS notes that General Comment No. 6 did not consider methods of execution in the context of the death penalty and suggests that the Committee identifies in its General Comment No. 36 the methods of execution which are clearly prohibited under international law or raise serious concerns.

IV. Rights of family members of persons sentenced to death

36. International human rights treaty bodies have recognised that the failure to provide adequate information to family members of a person sentenced to death can result in a violation of the prohibition of torture and other ill-treatment.⁵⁹

37. This Committee has found a violation of Article 7 in a case where it recognised “the continued anguish and mental stress” caused to the mother and sister of a person sentenced to death

⁵⁴ IAComHR, Report No. 11/15, Case 12.833 (*Rocha Diaz, United States*) (23 March, 2015), paras 80-87; IAComHR, Report No. 44/14, Case 12.873 (*Arias, United States*) (17 July, 2014); and IAComHR, Report No. 53/13, case 12.864 (*Teleguz, United States*) (15 July, 2013).

⁵⁵ IAComHR, Report No. 11/15, Case 12.833 (*Rocha Diaz, United States*) (23 March, 2015), para. 84.

⁵⁶ IAComHR, Report No. 44/14, Case 12.873 (*Arias, United States*) (17 July, 2014), para 190. See also, IAComHR, Report No. 53/13, case 12.864 (*Teleguz, United States*) (15 July, 2013), paras 123-124; IAComHR, Report No. 11/15, Case 12.833 (*Rocha Diaz, United States*) (23 March, 2015), para 85.

⁵⁷ IAComHR, Report No. 11/15, Case 12.833 (*Rocha Diaz, United States*) (23 March, 2015), para 87; IAComHR, Report No. 53/13, case 12.864 (*Teleguz, United States*) (15 July, 2013), para 124; IAComHR, Report No. 44/14, Case 12.873 (*Arias, United States*) (17 July, 2014), para 193.

⁵⁸ *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279, (9 August 2012), para 75.

⁵⁹ See e.g., ACHPR, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, (12 Oct 2013), para 177; HRC, *Kovaleva v. Belarus*, UN Doc. CCRP/C/106/D/2120/2011, (27 November 2012), para 11.10.

by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his grave. The complete secrecy surrounding the date of the execution and the place of burial, as well as the refusal to hand over the body for burial in accordance with the religious beliefs and practices of the executed prisoner's family have the effect of intimidating or punishing the family by intentionally leaving it in a state of uncertainty and mental distress.⁶⁰

38. The African Commission on Human and Peoples' Rights has held that "the failure to give notice of the date and time of execution of the victim amount[ed] to cruel, inhuman and degrading punishment and treatment and therefore a violation of Article 5 of the African Charter."⁶¹
39. Similarly, the Committee Against Torture has expressed concern regarding unnecessary secrecy and uncertainty surrounding the execution of prisoners sentenced to death.⁶² In its concluding observations on states parties' reports, this Committee has raised concerns about violations of Article 7 arising from a systematic failure to inform relatives of the execution of a death sentence, the deferral of the issuance of a death certificate, and the failure to reveal the place of burial of the executed persons.⁶³
40. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has found that secret executions undermine due process safeguards and lead to the inhuman or degrading treatment or punishment of prisoners and their families.⁶⁴
- 41. REDRESS notes that General Comment No. 6 did not consider the rights of family members of persons sentenced to death and suggests that the Committee, in General Comment No. 36, provides guidance to States regarding the rights of family members of persons sentenced to death, as protected pursuant to Article 7 of the ICCPR.**

V. An evolving standard: the death penalty as a violation of the prohibition of torture and cruel, inhuman or degrading treatment or punishment

42. The legality of the death penalty under international law has traditionally been assessed through the framework of the right to life.⁶⁵ Increasingly, however, the direct relevance of the prohibition of torture and other ill-treatment to the death penalty is recognised, raising the prospect that the death penalty is incompatible with the absolute prohibition of such treatments. For example, in 2014 the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions stated that

⁶⁰ HRC, *Kovaleva v. Belarus*, UN Doc. CCPR/C/106/D/2120/2011, (27 November 2012), para 11.10. See also, *Toktakunov v. Kyrgyzstan*, UN Doc. CCPR/C/101/D/1470/2006, (21 April 2011), annex, para 6.3; *Khazmi v. Libya*, UN Doc. CCPR/C/108/D/1832/2008 (4 September 2013), paras 8.5.

⁶¹ ACHPR, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana*, (12 Oct 2013), para 177.

⁶² See e.g., CAT, *Concluding observations regarding Japan*, UN Doc. CAT/C/JPN/CO/2, (28 June 2013), para 15; CAT, *Concluding observations regarding Belarus*, UN Doc. CAT/C/BLR/CO/4 (7 December 2011), para 27.

⁶³ HRC, *Concluding observations regarding Uzbekistan*, UN Doc. CCPR/CO/83/UZB, (26 April 2005), para 8. 1. See also, CAT, *Concluding observations regarding China*, UN Doc. CAT/C/CHN/CO/4, (12 December 2008), para 34.

⁶⁴ ECOSOC, *Report of the UN Special Rapporteur on Extrajudicial, summary or arbitrary executions: Transparency and the Imposition of the Death Penalty*, UN Doc. E/CN.4/2006/53/Add.3, (24 March 2006), paras. 26-37.

⁶⁵ Though some international human rights treaties which recognise the right to life include exceptions in relation to the death penalty, the law in this area continues to evolve. For example, in the context of the ECHR although Article 2 (right to life) provides an exception in relation to the death penalty, it is widely accepted that this exception is no longer available under the ECHR. See e.g., ECtHR, *Al-Saadoon and Mufdhi v. UK*, No. 61498/08, (2 March 2010), para 120.

Regional systems in areas in which the death penalty continues to be practised should challenge this on the basis of the right to life, the right to dignity and the right to freedom from cruel, inhuman or degrading treatment or punishment.⁶⁶

43. Since the entry into force of relevant international human rights treaties, perceptions of the death penalty have evolved. In 2012, the UN Special Rapporteur on Torture concluded:

[T]hat there is an evolving standard whereby States and judiciaries consider the death penalty to be a violation per se of the prohibition of torture or cruel, inhuman or degrading treatment... The Special Rapporteur is convinced that a customary norm prohibiting the death penalty in all circumstances, if it has not already emerged, is at least in the process of formation.⁶⁷

44. To date assessments regarding the compatibility of the death penalty with the prohibition of torture and ill-treatment have often focused on elements of a particular case that would bring implementation of the death penalty within the scope of the prohibition. Thus the ECtHR stated that

[T]he manner in which the death penalty is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3.⁶⁸

45. International and domestic courts have made clear that the death penalty may not be carried out in relation to certain categories of persons.⁶⁹ These categories include children who were under eighteen years of age at the time when the crime was committed,⁷⁰ pregnant women,⁷¹ and mentally ill persons,⁷² and arguably, elderly persons⁷³ and new mothers.⁷⁴ These exceptions are premised on the recognition that the imposition of the death penalty in these cases would constitute torture or other ill-treatment. For example, the US Supreme Court construed the Eighth Amendment of the US Constitution, which prohibits cruel, inhuman and degrading treatment or punishment, “in the light of our ‘evolving standards of decency’” in concluding that “mentally retarded” offenders should be excluded from the death penalty.⁷⁵

46. Increasingly however, courts, relevant oversight bodies, and states moving towards abolition of the death penalty are recognising that the death penalty itself inherently violates the

⁶⁶ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/69/265 (6 August 2014), para 62.

⁶⁷ Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/67/279, (9 August, 2012), para 72.

⁶⁸ ECtHR, *Öcalan v. Turkey*, No.46221/99, (12 March 2003), para 168.

⁶⁹ *Safeguards guaranteeing protection of the rights of those facing the death penalty*, Approved by Economic and Social Council resolution 1984/50 of 25 May 1984, para 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.

⁷⁰ See e.g., CRC, Article 37(a); ICCPR, Article 6(5); ACHR, art. 4, para 5; African Charter on the Welfare of the Child, art. 5, para. 3; HRC, *Concluding observations on the initial report of Mauritania*, UN Doc. CCPR/C/MRT/CO/1, (21 November 2013), para 12; HRC, *Concluding observations regarding Iran*, UN Doc. CCPR/C/IRN/CO/3, (29 November 2011), para 13.

⁷¹ See e.g., *Safeguards guaranteeing protection of the rights of those facing the death penalty*, Approved by Economic and Social Council resolution 1984/50 of 25 May 1984, para 3; ICCPR, art. 6(5); ACHR, art. 4(5).

⁷² See e.g., *Sahadath v. Trinidad and Tobago*, UN Doc. CCPR/C/74/D/684/1996, (2 April 2002), para. 7.2; IACoHR, Report No. 44/14, Case 12.873 (*Arias, United States*), (17 July, 2014) paras 152-167.

⁷³ See e.g., Economic and Social Council, resolution 1989/64; ACHR, art. 4, para 5.

⁷⁴ See e.g., *Safeguards guaranteeing protection of the rights of those facing the death penalty*, Approved by Economic and Social Council resolution 1984/50 of 25 May 1984, para 3.

⁷⁵ United States Supreme Court, *Atkins v. Virginia 2002*, No. 00-8452, (20 June 2002), p. 17.

prohibition of torture and ill-treatment.⁷⁶ For example, the South African Constitutional Court in *State v. Makwanyane and Mchunu* (1995) held that the death penalty was contrary to the prohibition of cruel, inhuman or degrading treatment recognised in South African constitution.⁷⁷ Similarly, the Canadian Supreme Court in *United States v. Burns* held that capital punishment amounted to cruel and unusual punishment.⁷⁸

47. As this Committee is aware, the Committee against Torture is the UN Treaty body specifically established pursuant to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and regularly considers the reports of States Parties to that Convention “on the measures they have taken to give effect to their undertakings under this Convention.”⁷⁹ In further indication of the nexus between torture and other ill-treatment and the death penalty, the Committee against Torture is consistently using its concluding observations to identify violations of the prohibition of torture and other ill treatment in the context of the death penalty and to call for retentionist states to consider abolition of the death penalty.⁸⁰

48. This movement towards a recognition that the death penalty necessarily constitutes a form of torture or other ill-treatment underpins the ongoing worldwide trend towards abolition of the death penalty; in 2015 the UN Secretary General reported continued progress towards abolition and stated that 159 States can now be considered abolitionist when the States that are abolitionist for ordinary crimes and those that are abolitionist de facto, not having conducted an execution for ten years or more, are combined.⁸¹

49. REDRESS considers that this basis for the abolitionist trend and relevant jurisprudence raises the broader question of the compatibility of the death penalty with the prohibition of torture as an issue to be considered by the Committee in General Comment No. 36. In light of the inevitable mental suffering caused by the imposition of a death sentence, conditions during the period of waiting for the sentence to be carried out, as well as the pain and suffering caused during its final execution, the legality of the death penalty should be assessed not only in the context of Article 6, but also in light of obligations arising from Article 7.

⁷⁶ See e.g., *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/67/279, (9 August 2012), paras 65-72.

⁷⁷ Constitutional Court of South Africa, *State v. Makwanyane and M Mchunu*, Case No. CCT/3/94, (6 June 1995)

⁷⁸ Supreme Court of Canada, *United States v. Burns*, No. 26129, (15 February 2001), p. 289.

⁷⁹ UNCAT, Article 19.

⁸⁰ See e.g., CAT, *Concluding observations regarding Yemen*, UN Doc. CAT/C/YEM/CO/02 (17 December 2009), para 21: “The Committee recommends that the State party consider ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty. In the meantime, the State party should review its policy with regard to the imposition of the death penalty, and in particular take the measures necessary to ensure that the death penalty is not imposed on children.” CAT, *Concluding observations regarding Japan*, CAT/C/JPN/CO/2, (28 June 2013), para 15; CAT, *Concluding observations regarding Kenya*, CAT/C/KEN/CO/2 (19 June 2013), para 33; CAT, *Concluding observations regarding Madagascar*, CAT/C/MDG/CO/1 (21 December 2011), para 16; CAT, *Concluding observations regarding the Plurinational State of Bolivia*, UN Doc. CAT/C/BOL/CO/2 (14 June 2013), para 25; CAT, *Concluding observations regarding Ghana*, UN Doc. CAT/C/GHA/CO/1 (15 June 2011), para 12; CAT, *Concluding observations regarding Belarus*, UN Doc. CAT/C/BLR/CO/4 (7 December 2011), para 27.

⁸¹ *Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Report of the Secretary-General*, UN Doc. E/2015/49 (13 April 2015) para 26. See also, Inter-American Commission on Human Rights, “25 Years after the Adoption of the Protocol, the IACoMHR urges States to Abolish the Death Penalty or Take Steps toward its Abolition”, 8 June 2015, available at: http://www.oas.org/en/iachr/media_center/PReleases/2015/062.asp.