**Submission to the United Nations Human Rights Committee regarding**

**General Comment No. 36 on article 6 of the International Covenant**

**on Civil and Political Rights, on the right to life**

October 6, 2017

The **Cornell Center on the Death Penalty Worldwide** is a research, advocacy and training institute based at Cornell University Law School, New York, USA. The Center’s research focuses on the law and practice of capital punishment around the world, analyzed through the lens of international human rights law.

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**Introduction**

The following submission aims to provide concise observations on the interpretation and application of Article 6 that have not been covered by other NGOs or experts, particularly with regard to the right to effective assistance of counsel, the definition of arbitrariness, and the discriminatory application of the death penalty.

**The Right to Effective Legal Assistance**

The draft General Comment underscores that any “[v]iolation of the fair trial guarantees provided for in article 14 of the Covenant in proceedings resulting in the imposition of the death penalty may render the execution arbitrary in nature, and could lead to a violation of article 6 of the Covenant.”[[1]](#footnote-1) The Human Rights Committee has previously held that when a state violates an individual’s due process rights under the ICCPR, it may not carry out an execution.[[2]](#footnote-2)

Among the rights guaranteed by the ICCPR, few are as critical to the respect of due process as the right to effective legal representation. The draft General Comment currently lists the “lack of effective representation during all stages of the criminal proceedings” as a potential fair trial violation, “including during criminal interrogation, preliminary hearings, trial, and appeal.”[[3]](#footnote-3) While almost all death penalty states provide a legal right to defense counsel in capital cases,[[4]](#footnote-4) state practice often falls woefully short of minimum standards for adequate representation. Many capital defenders are under-resourced, underqualified or inadequately trained, and overburdened, leading to ineffective legal representation and a heightened risk of wrongful convictions, in contravention of article 14 of the Covenant.

The Committee should therefore consider further clarifying the concrete implications of the right to counsel, in order to give content to states parties’ heightened obligation to “provide special protection to persons facing charges for which the death penalty…by *allowing time and facilities for the preparation of their defense*, including the adequate assistance of counsel at every stage of the proceedings, *above and beyond the protection afforded in non-capital cases*.”[[5]](#footnote-5)

*Suggested Addition to Draft General Comment on States’ Obligation to Provide Effective Legal Representation*

Given the importance of legal representation to guaranteeing the fair trial rights contained in Article 14, and in light of states’ widespread failure to provide even minimally trained and competent counsel in capital cases, the Committee should consider including a separate paragraph in its General Comment clarifying that:

* As outlined in the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, states are obligated to provide adequate assistance of counsel at every stage of criminal proceedings, above and beyond the protection afforded in non-capital cases;
* States have a duty to ensure that indigent capital defendants receive legal assistance at every stage of criminal proceedings and at every court appearance of the defendant, including clemency and post-conviction proceedings, and must have a clear process for assigning legal representation to indigent defendants, particularly on arrest and appeal;
* States must oversee the provision of legal assistance by lawyers who are qualified, competent, not overburdened with excessive caseloads, and have sufficient time to mount a meaningful defense;
* States must sufficiently remunerate lawyers to represent indigent defendants at all stages of the criminal proceedings, and this funding should be sufficient to allow, among other fair trial necessities, independent investigation, expert testimony, witnesses, mental health testing, translators, and interpreters;
* States must ensure that defense lawyers have the right to access the evidence relied upon by the state, including mitigating evidence, within a reasonable time in advance of trial.

Below, we provide a brief explanation as to why these changes are warranted.

*States’ Current Failure to Provide Effective Legal Representation*

Many states provide inadequate or, occasionally, no legal representation to capital defendants. Severe shortages of lawyers have been reported in Afghanistan, Guinea, Malawi, Chad, Benin, Burkina Faso, Malawi, Mali, Sierra Leone, Republic of Congo, Eritrea, Gambia, Sudan, and Tanzania.[[6]](#footnote-6) Even where lawyers are available, they are often inexperienced and ill-prepared to defend an individual facing capital charges.[[7]](#footnote-7) In many death penalty states, including Equatorial Guinea, Guinea, Malawi, Uganda, and Zimbabwe, defense attorneys sometimes meet their clients for the first time on the day of trial.[[8]](#footnote-8)

As a matter of law, indigent defendants facing capital trials are entitled to legal aid. State-funded defense lawyers, however, whether appointed from the private bar or employed as public defenders, are universally underpaid. In practice, “state budget allocations to legal aid are minimal.”[[9]](#footnote-9) In Sierra Leone, lawyers receive a flat fee of 150 USD to represent the accused in capital cases.[[10]](#footnote-10) The UN Office on Drugs and Crime reported in 2011 that governments typically allocated few resources to legal aid.[[11]](#footnote-11) One law professor in Tanzania estimates that properly defending a murder case would require around 30 times more funding than is currently allocated to capital cases.[[12]](#footnote-12) In Cameroon, the entirety of the legal aid fee for a capital case barely covers the transportation costs of one prison visit within the capital of Yaoundé.[[13]](#footnote-13) In Zambia, the legal aid sector has been so underfunded that in 2007, 39% of the country’s public defender positions were left vacant.[[14]](#footnote-14)

*States’ Heightened Obligation to Provide Effective Legal Representation in Capital Cases*

State neglect in the provision of legal aid to indigent defendants has dire consequences in capital cases. It is not enough that states provide perfunctory legal representation—states must ensure that capital defendants receive representation by a **qualified** and **sufficiently resourced** lawyer, who has enough **time and facilities** to prepare an adequate defense, and who provides zealous advocacy at all stages of the legal process beginning with arrest.

A **qualified** capital defender must, at a minimum, be licensed to practice law and have adequate experience and training in criminal defense. Almost no states require that a state-appointed defender have prior capital defense training or even criminal defense experience. In Cameroon, it is not even necessary for the person representing a capital defendant to be a lawyer, and many law students reportedly accept poorly paid state assignments in capital cases in order to gain experience. In a chilling recent development, many of the death sentences passed by military courts for terrorism-related offenses over the past two years in Cameroon have reportedly followed trials where defendants are represented by so-called “jurists,” who are sympathetic to national security concerns and have little to no legal training.[[15]](#footnote-15)

Without **sufficient resources** to speak at length with their client and investigate the circumstances of the crime, capital defenders cannot mount a meaningful defense. In most death penalty states, no funds are allocated for these purposes and as a result, defense strategies falter on lack of funding rather than lack of evidence. The defense cannot therefore gather the facts to meaningfully hold the state to its burden of proof. Without resources, key witnesses cannot travel to court to testify or even have written statements notarized, and interpreters and experts cannot be hired.

Defense lawyers must also be afforded **adequate time** **and facilities** to prepare a defense that incorporates all of the elements uncovered during their investigations.[[16]](#footnote-16) In order to do so, and to realize the equality between state and defense protected by Article 14,[[17]](#footnote-17) capital defense lawyers must have full access to the evidence on which the state will rely, including potentially exonerating and mitigating evidence uncovered by the state investigation, within a reasonable time before the trial begins.[[18]](#footnote-18) Capital defenders in many death penalty states currently discover the state’s file far too late to prepare a meaningful defense. In Malawi, for example, the defense typically receives the case file a week or two in advance of trial.[[19]](#footnote-19) In a recent capital case in Zambia on which the Center provided assistance, the defense lawyer received the post-mortem report—which would turn out to contain key information leading to the dismissal of the murder charges—just a few weeks before the trial was scheduled to start.

The right to effective counsel should also extend to **clemency and other post-conviction procedures**, stages for which the right to legal representation is not currently included in the draft General Comment. In any proceeding that involves crafting legal arguments and/or drafting written submissions, counsel’s assistance is critical, especially because many death row inmates received little formal education and some are illiterate.[[20]](#footnote-20) Without a lawyer, death row prisoners will also likely be unable to challenge any fair trial violations committed at this stage, such as the absence of a meaningful possibility of pardon or review, or excessive delays in the decision-making process.[[21]](#footnote-21)

Coupled with this, states must have a **clear process for assigning legal representation** to indigent defendants, particularly at arrest and on appeal, so that capital defendants’ pre-trial and post-conviction rights are vindicated. Currently, there are significant challenges involved in obtaining legal representation on appeal in many death penalty states. Because state-funded lawyers have such limited resources, death row prisoners typically lose their lawyer after conviction in many states, including for instance Nigeria and Uganda.[[22]](#footnote-22)

**The Prohibition against Arbitrary Deprivation of Life**

In its jurisprudence, this Committee has repeatedly emphasized that deprivations of life must not be arbitrary.[[23]](#footnote-23) Arbitrary deprivations of life can result when states parties fail to adhere to the due process requirements of Article 14 of the Covenant.[[24]](#footnote-24) For example, the execution of a capital defendant whose guilt has not been established beyond a reasonable doubt constitutes an arbitrary deprivation of life. Though the Committee’s draft General Comment notes that State parties must “take all feasible measures in order to avoid wrongful convictions,”[[25]](#footnote-25) describing the risk factors for wrongful conviction would provide better guidance to states parties seeking to implement the Committee’s mandate. The Committee should consider adding cautionary statements with regard to other noted risk factors for wrongful convictions, including the use of torture or coercion to obtain confessions, faulty police investigation methods, and a lack of training and resources for defense counsel.[[26]](#footnote-26)

A lack of meaningful opportunity to obtain post-conviction review also decreases the likelihood that wrongful convictions can be remedied. In practice, many states lack procedural mechanisms to bring post-conviction arguments or impose undue limitations on the filing of post-conviction claims.[[27]](#footnote-27) In Indonesia, for example, the Supreme Court imposes a one-time limit on the judicial review of capital sentences based on new evidence.[[28]](#footnote-28) The Committee should consider adopting language in paragraph 47 of its General Comment that reiterates the right to counsel at the post-conviction stage and removes obstacles to post-conviction review when new, exonerating evidence is discovered. Based on the concerns set forth above, we suggest adding the following language in paragraph 47:

The execution of sentenced persons whose guilt has not been established beyond reasonable doubt also constitutes an arbitrary deprivation of life. States parties must therefore take all feasible measures in order to avoid wrongful convictions in death penalty cases, and to re-examine past convictions on the basis of new evidence, including new DNA evidence. *When such evidence emerges, states must ensure that death-sentenced prisoners be provided with effective legal representation and that no procedural rules hinder the adjudication of their post-conviction claims.* States parties should also consider the implications for the evaluation of evidence presented in capital cases of new reliable studies suggesting the prevalence of false confessions and the unreliability of eyewitness testimony, *particularly when associated with the use of torture or coercion, faulty police investigation methods, and lack of effective legal representation*.

Arbitrary death sentences are also more likely to occur when the unique circumstances of a capital defendant are not considered. For instance, many women charged with the murder of an intimate partner are survivors of gender-based violence, but courts rarely take this history into account as exonerating or mitigating evidence.[[29]](#footnote-29) The Committee should consider adding “*survivors of gender-based violence*” to the list of persons whom states should refrain from executing at the end of paragraph 53.[[30]](#footnote-30)

**Discrimination and the Death Penalty**

The present Covenant and the Convention for the Elimination of All Forms of Racial Discrimination protect capital defendants from the discriminatory application of the death penalty. As the Committee notes, the “right to life must be respected and ensured without distinction of any kind.”[[31]](#footnote-31) Any deprivation of life based on the discriminatory or disproportionate application of death penalty laws is arbitrary in nature. Among the grounds of discrimination the draft General Comment lists in paragraph 64, we suggest that the Committee add “*poverty and socio-economic status of the defendant*.” Death penalty scholars have long noted the over-representation of the poorest members of society on death row. Indeed, poverty is a factor that unites death row prisoners from Tanzania to Saudi Arabia, and from Jamaica to China. In a recent study conducted in India, 74.15% of capital defendants were found to be economically vulnerable.[[32]](#footnote-32) Socio-economically vulnerable defendants must rely on state-provided counsel, which is often of low quality due to the factors discussed *supra*, including the inadequacy of training, resources, and compensation available to state-funded counsel.[[33]](#footnote-33) This, in turn, makes indigent defendants more vulnerable to wrongful convictions.[[34]](#footnote-34)

**Conclusion**

We hope that in light of the information we have outlined above, the Human Rights Committee will consider our suggestions essential both to providing a complete and current interpretation of Article 6 (and its corollary guarantees under Article 14), and to offering states parties concrete guidance in fulfilling their treaty obligations.

1. Draft General Comment, para. 45, http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6\_EN.pdf. [↑](#footnote-ref-1)
2. *See, e.g.,* Johnson v. Jamaica, No. 588/1994, H.R. Comm. para. 8.9 (1996); Reid v. Jamaica, No. 250/1987, H.R. Comm. para. 11.5 (“[T]he imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes [. . .] a violation of article 6 of the Covenant.”); McLawrence v. Jamaica, No. 702/1996, H.R. Comm. para. 5.13 (1997) (same); Report of the Human Rights Committee, GAOR, 45th Session, Supplement No. 40, Vol. II (1990), Annex IX, J, para. 12.2, reprinted in 11 Hum. Rts. L.J. 321 (1990) (“in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial. . . is even more imperative”). See also OC-16/99, para. 135, Inter-Am. Ct. H.R. (Oct.1, 1999) (“[s]tates that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases”); G.A. Res. 35/172 (Dec. 15, 1980) (member states must “review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases”). [↑](#footnote-ref-2)
3. Draft General Comment, *supra* note 1, at para. 45. [↑](#footnote-ref-3)
4. *See* Center for the Death Penalty Worldwide, Death Penalty Database, <http://www.deathpenaltyworldwide.org>. [↑](#footnote-ref-4)
5. ECSOC Resolution 1989/64, Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (May 24, 1989) (emphasis added). [↑](#footnote-ref-5)
6. *See* Death Penalty Worldwide, Quality of Legal Representation, [http://www.deathpenaltyworldwide.org/country-search-post.cfm?98- 0chk=on](http://www.deathpenaltyworldwide.org/country-search-post.cfm?98-%200chk=on) (last visited Oct. 3, 2017). [↑](#footnote-ref-6)
7. *See* International Federation for Human Rights & The Botswana Centre for Human Rights, The Death Penalty in Botswana Hasty and Secretive Hangings: International Fact-Finding Mission 21 (No. 473/2, 2007); Amnesty International, Nigeria: Waiting for the Hangman 17 (2008); International Federation for Human Rights, The Death Penalty in Thailand (No. 411/2, 2005). In an attempt to address part of the root problem, the Cornell Center on the Death Penalty Worldwide is working to improve the quality of legal representation in death penalty cases by offering an intensive annual training workshop to capital defense lawyers. Named in honor of the South African Constitutional Court’s seminal decision abolishing the death penalty, the Makwanyane Institute will provide interactive skills training, litigation support, and opportunities for community building to 15 lawyers each year. In its first session, held in June 2017, it welcomed lawyers from common law jurisdictions in Africa. [↑](#footnote-ref-7)
8. Amnesty International, Equatorial Guinea: Submission to the UN Universal Periodic Review (2009); Human Rights Watch, We Have Lived in Darkness: A Human Rights Agenda for Guinea’s New Government (2011), <http://www.hrw.org/reports/2011/05/24/we-have-lived-darkness-0> (last visited Oct. 3, 2017); Graeme L. Hall, *Death Row in Uganda*, Counsel Magazine (2012)*,* [http://www.doughtystreet.co.uk/documents/uploaded-documents/Counsel\_2012\_08\_Int\_Hall\_(Final).pdf](http://www.doughtystreet.co.uk/documents/uploaded-documents/Counsel_2012_08_Int_Hall_%28Final%29.pdf) (last visited Oct. 3 2017); Death Penalty Worldwide, Malawi, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?98-0chk=on> (last visited Jan. 30, 2015); Brian Hungwe, *On Zimbabwe’s Death Row Without a Lawyer*, BBC News (May 2, 2010), <http://news.bbc.co.uk/2/hi/8675062.stm> (last visited Oct. 3, 2017). [↑](#footnote-ref-8)
9. United Nations Office on Drugs and Crime, Access to Legal Aid in Criminal Justice Systems in Africa, at vii (2011). [↑](#footnote-ref-9)
10. *Id.* at 11. [↑](#footnote-ref-10)
11. *Id.* at 18–19. [↑](#footnote-ref-11)
12. Eric Mirguet & Arnold Tsunga, Tanzania: The death sentence institutionalized? International Fact-Finding Mission 32(Antoine Bernard ed., International Federation for Human Rights, No. 412/2, Apr. 2005). [↑](#footnote-ref-12)
13. Death Penalty Worldwide, Cameroon, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Cameroon&region=&method>= (last visited Oct. 5, 2017). [↑](#footnote-ref-13)
14. United Nations Office on Drugs and Crime, *supra* note 9, at 10. *See also* Cornell Center on the Death Penalty Worldwide, Submission to the United Nations Office of the High Commissioner for Human Rights to inform the Report of the Secretary General on the Question of the Death Penalty (Mar. 2017). [↑](#footnote-ref-14)
15. Cornell Center on the Death Penalty Worldwide, Research Trip to Cameroon (Nov. 2016). [↑](#footnote-ref-15)
16. ICCPR, art. 14(3)(b). [↑](#footnote-ref-16)
17. ICCPR, art. 14(3)(e). [↑](#footnote-ref-17)
18. *See* Concluding Observations, Canada, CCPR/C/CAN/CO/5, at para. 13 (2005). This principle, applied here to a non-capital case, should be scrupulously respected in cases where there is the potential for capital punishment. [↑](#footnote-ref-18)
19. Interview with Professor Sandra Babcock, Faculty Director, Cornell Center on the Death Penalty Worldwide (Oct. 2017). [↑](#footnote-ref-19)
20. See our comments below on the overrepresentation of socio-economically vulnerable members of society on death row. [↑](#footnote-ref-20)
21. *See* Concluding Observations, Uganda, CCPR/CO/80/UGA, at para. 13 (May 4, 2004). *See also* Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2001/9, at para. 88 (Jan. 11, 2001). [↑](#footnote-ref-21)
22. Telephone interview with Ariane Adam, Africa Projects Officer, Reprieve (Feb. 14, 2017). *See also* Amnesty International, Nigeria: Waiting for the Hangman (2008). [↑](#footnote-ref-22)
23. Draft General Comment, *supra* note 1, at para. 17. [↑](#footnote-ref-23)
24. “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.” [↑](#footnote-ref-24)
25. Draft General Comment, *supra* note 1, at para. 47. [↑](#footnote-ref-25)
26. Cornell Center on the Death Penalty Worldwide, Innocence on Death Row: A Global Study (forthcoming Nov. 2017). [↑](#footnote-ref-26)
27. *Id.*  [↑](#footnote-ref-27)
28. Indonesia’s Constitutional Court recently struck down the one-review limit in capital cases, but the Supreme Court has in practice declined to implement that jurisprudence. A recent investigation by the National Ombudsman found illegal the continuation of the bar to more than one judicial review in capital cases. *See* Ombudsman of the Republic of Indonesia, Result of the Investigation of Ombudsman RI, Report Number 0793/LM/VIII/2016/JKT,

LBH Community lawyer for Humprey Ejike Jefferson (July 2017). [↑](#footnote-ref-28)
29. Cornell Center on the Death Penalty Worldwide, A Global Study on Women Facing the Death Penalty (forthcoming summer 2018) (title to be determined). [↑](#footnote-ref-29)
30. Draft General Comment, *supra* note 1, at para. 53, [↑](#footnote-ref-30)
31. *Id.* at para. 64. [↑](#footnote-ref-31)
32. National Law University of New Delhi, Death Penalty India Report (2016), <https://barandbench.com/wp-content/uploads/2016/05/Death-Penalty-India-Report-Volume-1.pdf>. [↑](#footnote-ref-32)
33. *Id.* [↑](#footnote-ref-33)
34. *Id.* [↑](#footnote-ref-34)