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The United Nations Human Rights Committee: The Evolution of the Punishment of the Death Penalty

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**THE DEATH PENALTY: A VIOLATION OF
HUMAN DIGNITY?**
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THE UNITED NATIONS HUMAN RIGHTS
COMMITTEE: THE EVOLUTION OF THE
PUNISHMENT OF THE DEATH PENALTY

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As a former member and Chairperson of the Human Rights Committee, I will address the issue of death penalty based on three instruments:

First: Article 6 of the International Covenant on Civil and Political Rights dealing with the right to life.

Second: The Second Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of death penalty.

Third: General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life.

There is no need for me, at the outset, to speak about the value of the Covenant or the Additional Protocol. They both reflect the will of the international community to agree on a number of provisions reflecting ways and means to address the death penalty based on the classical rule of law (Vienna Convention on the Law of the Treaties) which render the agreed provisions an obligation to be respected and implemented by the Parties to the two legal instruments.

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Therefore, the clarification I would like to point out relates to the General Comment. In this regard, and briefly, I would like to state that the general comment is elaborated by the Human Rights Committee and not by the States Parties. It is a way to provide interpretation of the provisions of the Covenant and clarify the scope and meaning of its articles. It analyzes a specific article in an extended and comprehensive fashion.

The Committee takes its authority from article 40, paragraph 4 of the Covenant, which provides that it may transmit such general comments as it may consider appropriate to all States Parties.

A general comment reads as a general statement of law that expresses the Committee's conceptual understanding of the content of a particular provision, and it is a very useful guide to the normative substance of international human rights obligations.

This function enables the Committee to adapt the provisions of the Covenant to modern circumstances in which practice may have evolved substantially since the Covenant was adopted and thus contribute to the development of international law by covering present and future needs and not to keep the Covenant in a state of stagnation.

After this brief explanation, I will address the first instrument, which is *Article 6 of the Covenant dealing with the right to life*. Paragraphs 1, 3, 4, 5 and 6 are addressing specifically the issue of the death penalty. It sets the parameters on the imposition of the death penalty in order to limit its application. Such criteria and parameters can be summarized as follows for the States that have not abolished the death penalty:

1. The death penalty 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.
2. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
3. Anyone sentenced to death shall have the right to seek a pardon or commutation of the sentence. This may be granted in all cases.

4. The death penalty shall not be imposed for crimes committed by persons below the age of 18.

5. It shall not be carried out on pregnant women.

The interpretation of such obligations shall be dealt with in detail when I will address General Comment 36 on Article 6 on the right to life in order to shed light on the approach of the Committee towards its understanding and application of the provision of the Covenant.

The second instrument is the *Second Protocol to the Covenant aiming at abolishing the death sentence*.

The title of the protocol reflects the essence, substance and main obligations of the State party not to execute any person within its jurisdiction as well as its obligation to abolish the death penalty within its jurisdiction.

The only reservation which could be made to the present protocol is 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. Such reservation shall be communicated to the Secretary General of the UN during the time of ratification or accession by the State, which will also include the relevant provisions of its national law applicable to wartime. The State party has also the obligation to notify the Secretary General of the UN of any beginning and ending of a state of war applicable to its territory. Also, the obligation of non-execution shall not be subject to any derogation. Finally, the provisions of the protocol shall extend to all parts of Federal States without any limitations or exceptions.

Now, let me present *General Comment 36 adopted by the Human Rights Committee on the right to life*, which provides the interpretation of the Committee of the salient provisions of both the Covenant and the additional protocol.

In relation to the States that have abolished the death penalty, the Committee's view can be summarized as follows in relation to the States Parties:

1. They are barred from reintroducing the death penalty. Like the Covenant, the Second Optional Protocol does not contain termination provisions, and the States Parties cannot denounce it. Therefore, the abolishing is irrevocable or irreversible.
2. They cannot deport, extradite or transfer persons to a Country in which they are facing criminal charges that carry the death penalty unless credible and effective assurances against the imposition of the death penalty have been obtained.
3. The abolition of the death penalty should apply retroactively to individuals charged or convicted. Therefore, the offender should benefit of lighter penalties adopted after the commission of the criminal offence. Such retroactive application of the abolition derives from the fact that the need for applying the death penalty cannot be justified once it has been abolished

Now I will address issues related to death penalties for States which did not abolish it. The first issue relates to prohibition and refraining from its application.

The two cases of prohibition of its application are:

1. Crimes committed by persons under the age of 18 at the time of the offence.
2. The death penalty shall not be carried out on pregnant women.

As for the concept of “refrain,” it relates to persons where execution would be exceptionally cruel and would lead to exceptionally harsh results for them or their families as persons at an advanced age or a parent to very young children and persons with intellectual disabilities.

As for the parameters setting the criteria for the application of death penalty, they could be summarized as follows:

1. The meaning of most serious crimes as stipulated in Article 6 is qualified in the general comment as crimes of extreme

gravity involving intentional killing. Therefore, crimes not resulting directly and intentionally in death, although serious in nature, can never serve as the basis for the imposition of the death penalty (drug, political crimes, attempted murder are examples).

2. A limited degree of involvement in the commission of most serious crimes, such as providing the physical means, cannot justify the imposition of the death penalty.

3. The death penalty should be in accordance with the law in force at the time of the commission of the crime (Article 6 para. 2 is explicit on that).

4. Civilians must not be tried for capital crimes before military tribunals.

5. Courts of customary justice are not considered judicial institutions offering sufficient fair trial guarantees that would enable them to try capital crimes.

6. The death penalty can only be carried out (a) pursuant to final judgment after petitions to all other non-judicial avenues have been exhausted like the consideration of requests for official or private pardons; and (b) should not be carried out as long as international interim measures are in place (review of the sentence before international courts or monitoring bodies).

As for the interpretation of the term “arbitrarily deprived of his life” stipulated in paragraph 1 of Article 6, the interpretation of the Committee is:

1. A death penalty conducted in violation of domestic laws of criminal procedure or evidence will be unlawful and arbitrary.

2. The same is true for violations of fair trial guarantees in proceedings resulting in the imposition of the death penalty.

3. Criminal convictions resulting in the death penalty, which are based on information procured by torture or cruel, inhuman or degrading treatment of interrogated persons, are also considered arbitrary deprivations of life.

4. The term will apply also if there is no judicial discretion in the application of the death penalty. Judicial discretion means the evaluation of the personal circumstances of the offender and the particular circumstances of the offence by the Court.