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WORLDWIDE ABOLITION OF THE DEATH PENALTY

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I. Introduction

Article 6 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right to life for every human being, including protection from the deprivation of life, which must be protected by law.¹ Although article 6 permits the death penalty, the death penalty is limited to the most serious crimes and cannot be arbitrary.² Laws provide the most reliable and binding protection of life, unlike moratoriums that temporarily protect rights until the time the moratorium may be lifted. Even though there is no complete ban on capital punishment, current practices of countries are prohibited by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). CAT defines torture as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted upon a person by or at the instigation or consent of a public official acting in an official capacity to intimidate, punish, obtain information, or for any reason based on discrimination of any kind.³ Additionally, CAT prohibits the use of torture or cruel, inhuman, or degrading punishment or treatment committed by officials or under authorization and consent.⁴

This report reviews the status of the death penalty worldwide, the methods of execution violating the prohibition against torture, the conditions on death row that do not

¹ International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978), p. 4, available from <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf>.

² *Id.*

³ The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113 23 I.L.M. 1027 (1988), p. 1, available from <http://www.ohchr.org/Documents/ProfessionalInterest/cat.pdf>.

⁴ *Id.*

comply with the prohibition against torture, and discusses how moratoriums violate the ICCPR and CAT.

II. Abolition of the Death Penalty

This report will provide the updated status of the death penalty from the 2016 Human Rights Advocate (HRA) report, A/HRC/31/NGO/184.⁵ As of 2016, one hundred and forty countries are abolitionists of the death penalty in law or practice.⁶ Thirty-two of those one hundred and forty countries retain the death penalty, but are considered abolitionist in practice because there have not been any executions within the past ten years and are believed to have policies in place to not carry out executions.⁷

The abolition of death sentencing and execution is a growing trend among countries, yet fifty-eight countries still retain death sentencing and execution for ordinary crimes.⁸ In many countries, the abolition of the death penalty has been initiated through judicial or legislative processes.⁹ For example, in 2016, the Supreme Court of Zimbabwe heard two challenges to the death penalty in terms of its constitutionally and the humanity of extended periods on death row.¹⁰ The case, which planned to be heard February 1st, 2017, will address whether two prisoners on death row will have their executions carried

⁵ Human Rights Advocates, *Death Penalty and the Prohibition Against Torture and Cruel, Inhuman and Degrading Treatment and Punishment* (2016), available from <http://www.humanrightsadvocates.org/wp-content/uploads/2016/03/Torture-and-the-Death-Penalty-.pdf>.

⁶ Amnesty International, *Death Penalty 2015: Facts and Figures* (Apr. 2016), available from <https://www.amnesty.org/en/latest/news/2016/04/death-penalty-2015-facts-and-figures/>.

⁷ Death Penalty Information Center, *Abolitionist and Retentionist Countries* (December 2015), available from <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140#all%20crimes>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Report of the Secretary-General: Question of the death penalty, ¶ 2, U.N. Doc. A/HRC/33/20 (July 20, 2016).

out despite the nation's abolition of carrying out of the death penalty in its 2013 Constitution.¹¹ Even though Zimbabwe is an abolitionist of the death penalty, the country has at least ninety-five prisoners on death row.¹² Amnesty International is calling upon Zimbabwe to declare an official moratorium on executions and totally abolish the cruel, inhuman and degrading punishment.¹³ Application of the death penalty to the prisoners would be in violation with article 15 of ICCPR, which requires the offender to benefit from the new law if the law imposes a lighter penalty subsequent to the committed offense.¹⁴

Another example is Mongolia, which has changed its criminal code procedure to reflect abolition of the death penalty, but has postponed imposition of the code.¹⁵ The new criminal code was adopted in December 2015 and was due to become effective from September 2016.¹⁶ However, on August 30th, 2016, Mongolia declared a yearlong delay until July 2017 to impose the new code due to needing more time to prepare for the implementation, including training law enforcement officers, producing rules and procedures, and strengthening relevant criminal justice structures to reflect the new

¹¹ The Zimbabwean, *Death Penalty Challenge in the Constitutional Court* (Jan. 2017), available from <http://thezimbabwean.co/2017/01/death-penalty-challenge-constitutional-court/>.

¹² Amnesty International, *Zimbabwe: End the death penalty after 10-year execution hiatus* (July 2015), available from <https://www.amnesty.org/en/latest/news/2015/07/zimbabwe-end-the-death-penalty-after-10-year-execution-hiatus/>.

¹³ *Id.*

¹⁴ *Supra* at note 1 p. 9.

¹⁵ Concluding Observations on the Second Periodic Report of Mongolia, ¶ 7, U.N. Doc. CAT/C/MNG/CO/2 (Sept. 5, 2016).

¹⁶ Amnesty Intl., *Mongolia: Logistical Challenges Should Not Delay Abolition of Death Penalty and Measures to Combat Torture*, ASA 30/4806/2016 (Sept. 13, 2016).

code.¹⁷ The postponement of the implementation undermines the country's journey towards abolition of the death penalty, which the country began in January 2010 when it established an official moratorium on all executions.¹⁸ Amnesty International expressed its disappointment in Mongolia's delay of the new code and urges the government and the parliament to work together to reverse the decision.¹⁹ Additionally, the Committee against Torture has expressed its concern for the postponement of the criminal code and the situation of prisoners on death row.²⁰ The Committee recommends that Mongolia treat the death row prisoners in the same fashion as other prisoners.²¹ Under CAT and the Second Optional Protocol to the ICCPR, Mongolia has an obligation to bring its domestic laws in line with international human rights treaties that it is a party to.²² Article 15 of the ICCPR also requires that Mongolia's amendment to its criminal code apply retroactively of its original date of adoption.²³

In nations that retain the death penalty, such as the United States, many individual states have become abolitionists of the practice. To date, there are nineteen states that are abolitionists of the death penalty, including Delaware as of August 2016, through the legislature or case law.²⁴ On August 2, 2016, the Delaware Supreme Court declared the state's capital sentencing procedures unconstitutional, which leaves Delaware without a

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Supra* at note 15, ¶ 21-22.

²¹ *Id.*

²² *Supra* at note 16.

²³ *Supra* at note 1 p. 9.

²⁴ Death Penalty Information Center, *States With and Without the Death Penalty* (Nov. 2016), available from <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>.

valid death penalty statute.²⁵ Additionally, there are states that have pursued the abolition of the death penalty with gubernatorial moratorium.²⁶ Eleven states with the death penalty and the United States federal government and military have not had an execution in the last ten years.²⁷ However an issue in the United States death penalty is the discriminate application of the penalty based on race. Comprehensive studies have shown that black defendants are three times more likely to receive the death penalty over white defendants in similar cases.²⁸

There are also other countries, such as China, where it is difficult to understand the status of the death penalty because of the lack of transparency. China deems its death sentencing and execution statistics as a state secret.²⁹ However, it is estimated that thousands of people are executed annually based on statistics, provided by the Dui Hua Foundation, showing executions ranging from twelve thousand in 2002 to two thousand four hundred in 2013.³⁰ The Dui Hua's research has the best figures available since they were obtained from a judicial official with access to the number of executions carried out each year.³¹ Additionally, Amnesty International was able to confirm one thousand

²⁵ Death Penalty Information Center, *Delaware Supreme Court Declares State's Death Penalty Unconstitutional*, available from <http://www.deathpenaltyinfo.org/category/categories/states/delaware>.

²⁶ *Supra* at note 24.

²⁷ *Id.*

²⁸ Death Penalty Information Center, *Facts about the Death Penalty* (Feb. 2017), available from <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

²⁹ The Dui Hua Foundation, *Criminal Justice*, available from http://duihua.org/wp/?page_id=136.

³⁰ *Id.*

³¹ The Dui Hua Foundation, *China Executed 2,400 People in 2013* (Oct. 2014), available from http://duihua.org/wp/?page_id=9270.

executions in China in 2015, but believes that more executions were carried out.³²

Transparency in the use of the death penalty is necessary because it has direct consequences for the human rights of the persons sentenced to death as well as for the other affected persons.³³ If China ratifies the ICCPR, transparency is also important to determine whether China's conduct complies with article 6 of the ICCPR, which requires that the death penalty may only be used for the most serious crimes.³⁴

III. Methods of Execution

In 2015, sixty-one countries carried out nearly two thousand death sentences.³⁵ Twenty-five countries executed over one thousand six hundred people, which is over a fifty percent increase from executions performed in 2014 and the highest number of executions since 1989.³⁶ There may be more executions that are not accounted for since China's statistics on death sentences and executions are a state secret.³⁷ Most methods of execution that have been used in the last few years determined to be violations of the prohibition against torture. For example, the European Court of Human Rights has held that death by stoning constitutes torture.³⁸ Also the Human Rights Committee has held that execution by gas asphyxiation is torture.³⁹

³² Amnesty Intl., *Death Sentences and Executions in 2015*, ACT 50/3487/2016 (Apr. 6, 2016).

³³ *Supra* at note 10.

³⁴ *Supra* at note 1.

³⁵ *Supra* at note 24.

³⁶ *Supra* at note 6.

³⁷ *Supra* at note 24.

³⁸ *Jabari v. Turkey*, 29 E.H.R.R. CD 178 (1999).

³⁹ H.R. Comm., *Chitat Ng v. Canada*, Comm. No. 469/1991, 49th Sess., U.N. Doc. CCPR/C/49/D/469/1991 at ¶ 16.4 (Nov. 5 1993). Canada abolished the death penalty in December 1998. Amnesty International, *Death Penalty in Canada*, available from <http://www.amnesty.ca/our-work/issues/abolish-the-death-penalty/death-penalty-in-canada>.

The most executions have taken place in China, Iran, Saudi Arabia, and the United States—in that order.⁴⁰ There are various methods of execution being used. Saudi Arabia uses beheading.⁴¹ Afghanistan, Bangladesh, Egypt, India, Iran, Iraq, Japan, Jordan, Malaysia, Pakistan, South Sudan, and Sudan use hanging.⁴² China, United States, and Viet Nam use lethal injections.⁴³ Shooting is used by Chad, China, Indonesia, North Korea, Saudi Arabia, Somalia, United Arab Emirates, Yemen, and Taiwan, province of China.⁴⁴

A 2017 report, provided by Amnesty International, claims that thirteen thousand people, mostly civilians, have been hanged in a Syrian government military prison in recent years.⁴⁵ Amnesty International accuses the Assad government of running a human slaughterhouse and engaging in a policy directed towards the extermination by hanging thousands of civilians.⁴⁶ Amnesty International further states that the killings by hanging amount to war crimes and crimes against humanity.⁴⁷ Since 2011, thousands of people have been detained in prisons by the Syrian government where they have been incarcerated in horrific conditions and thousands have died in confinement.⁴⁸ The research of information was gathered over a year from December 2015 to December 2016, including interviews with a group of survivors who endured the torture and

⁴⁰ *Supra* at note 6.

⁴¹ *Amnesty International Global Report: Death Sentences and Executions 2015*, p. 6, available from <https://www.amnesty.org/en/documents/act50/3487/2016/en/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Amnesty International Report, *Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison, Syria*, p. 6 (2017), MDE 24/5415/2017.

⁴⁶ *Id.*

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 12-13.

mistreatment, former guards and officials, and former judges and Syrian lawyers.⁴⁹ The research shows that once or twice a week prisoners are taken out of their cells and brought to another building where they are hanged to death.⁵⁰

Private companies have taken steps to stop the use of lethal injections and to help countries move towards abolition of the death penalty.⁵¹ For example, Pfizer, a pharmaceutical company, restricted the sale of seven products that have been part of lethal injection protocols in some countries.⁵² Also, Akorn, a generics drug manufacturer, has prohibited future sales of drugs for executions.⁵³

The compliance of businesses with human rights responsibilities is profound in countries, such as the United States where the prohibited product for lethal injections closes off the last remaining open-market source of drugs used in executions.⁵⁴ More than twenty American and European drug companies have already adopted such restrictions, citing either moral or business reasons.⁵⁵ These actions have also influenced the European Union to strengthen Europe-wide export licensing procedures for products that prisons use in executions.⁵⁶

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 6.

⁵¹ Report of the Secretary-General: Moratorium on the use of the death penalty, ¶ 55, U.N. Doc. A/71/332 (Aug. 15, 2016).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Erick Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, The New York Times, (May 13, 2016), available from <https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html>.

⁵⁵ *Id.*

⁵⁶ *Supra* at note 51, ¶ 56.

There have also been collaborations between companies and institutions on the national and regional levels to prevent the use of drugs in executions.⁵⁷ For example, the national contact point in the Netherlands of the Organization for Economic and Cooperation and Development created an agreement with Mylan, Dutch drug manufacturer, to impose standard distribution controls, which prohibit the use of its products for executions.⁵⁸

These steps by private companies on the death penalty have influenced the United Nations High Commissioner for Human Rights to call on all businesses to act in accordance with their human rights responsibilities as set out in the Guiding Principles on Business and Human Rights.⁵⁹ The Commissioner also stated that there may be businesses outside the pharmaceutical industry that are contributing to the administration of the death penalty, and those businesses should also carry out human rights due diligence.⁶⁰

IV. Death Row Phenomenon

Article 7 of the ICCPR states, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁶¹ Case law has determined that prolonged incarceration on death row and the impact the incarceration has on prisoners is cruel, inhuman, or degrading treatment or punishment. *Soering v. United Kingdom* explains that the death row phenomenon is the premeditated inhuman treatment of prisoners on death row causing physical and mental suffering from the feeling of fear,

⁵⁷ *Id.* at ¶ 57.

⁵⁸ *Id.*

⁵⁹ *Id.* at ¶ 56.

⁶⁰ *Id.*

⁶¹ *Supra* at note 1 p. 5.

inferiority, and humiliation.⁶² The treatment constitutes inhuman or degrading when there is a combination of suffering and delay before execution where the prisoner anticipates the execution in anguish.⁶³ *Pratt and Morgan v. Attorney General for Jamaica* also established that an execution being held years after conviction constitutes inhuman punishment.⁶⁴

A. Length of Time on Death Row

In the United States, many of the individual states that have not executed prisoners in the last ten years hold prisoners on death row that essentially may never be executed.⁶⁵ Also, in non-death penalty U.S. states, such as New Mexico and Delaware, there are still prisoners sitting on death row despite the abolition of the death penalty in those states.⁶⁶ Many of the death row inmates typically spend over a decade awaiting execution and some prisoners have been on death row for over twenty years. Holding prisoners on death row awaiting an execution that will not occur violates the ICCPR.

Regardless of whether executions are public or in secret, all methods of execution can inflict inordinate pain and suffering.⁶⁷ Secret executions inflict pain and suffering especially when there is short notice or no notice of when the execution is to occur. The lack of notice constitutes torture as part of the death row phenomenon because of the

⁶² *Soering v. United Kingdom*, 11 E.H.R.R. 439, 472 (1989).

⁶³ *Id.* at 473.

⁶⁴ *Pratt and Morgan v. The Attorney General of Jamaica*, 3 SLR 995, 2 AC 1 (1994).

⁶⁵ Death Penalty Information Center, *Time on Death Row*, available from <http://www.deathpenaltyinfo.org/time-death-row>.

⁶⁶ *Supra* at note 28. Holding the prisoners on death row violates Article 15 of the ICCPR; however, the U.S. took a reservation to the article 15 provision. 102 Cong. Rec. S4781-4784 (daily ed., April 2, 1992).

⁶⁷ Human Rights Council Res. 30/5, p. 2, U.N. Doc. A/HRC/RES/30/5 (Oct. 1, 2015).

psychological impact on the prisoners who await their death.⁶⁸ For example, in Japan, families, lawyers, and the public are usually notified about executions after they take place since Japan has secret executions.⁶⁹ Also in Japan, prisoners are given notice only a few hours prior to the execution, but some prisoners are not given a warning at all.⁷⁰ Aside from secret executions, defendants have been denied adequate legal counsel, denied a mandatory appeal process for capital cases, and several prisoners with mental and intellectual disabilities have been executed on death row, which all contravene with the international standards on the use of the death penalty.⁷¹

B. Conditions on Death Row

The Human Rights Council has emphasized the need to ensure that persons facing the death penalty are treated with humanity and with respect for their inherent dignity, and to improve conditions in prisons in accordance with international standards, such as the Standard Minimum Rules for the Treatment of Prisoners.⁷²

Although some countries have abolished the death penalty, conditions on death row are still a concern for prisoners. For example, in Benin, the 2016 court decision to abolish the death penalty left fourteen prisoners on death row waiting in limbo as to what the next steps are.⁷³ The death row prisoners are kept separate from the non-death row prisoners and are suffering life-threatening diseases, and depend on their relatives to provide them

⁶⁸ *Supra* at note 65.

⁶⁹ Amnesty International, *Japan: Man hanged as secretive executions continue* (Nov. 2016), available from <https://www.amnesty.org/en/latest/news/2016/11/japan-man-hanged-as-secretive-executions-continue/>.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Supra* at note 67.

⁷³ Amnesty International, *Benin: Death row prisoners held in cruel limbo* (Jan. 2017), available from <https://www.amnesty.org/en/latest/news/2017/01/benin-death-row-prisoners-held-in-cruel-limbo/>.

with medicine rather than depending on the state.⁷⁴ The Committee against Torture has expressed concern for the prisoners and provided recommendations that the prisoners receive their basic needs and rights, in accordance with international standards, and that they are provided the protection of fundamental legal safeguards provided by the Convention.⁷⁵

The recent report of Syria exemplifies the horrific conditions in prisons. The prisoners in Syria are not allowed to make any sound, including when they are tortured or else they are punished.⁷⁶ Cellmates are forced to pick one another to be tortured each day and prisoners have reported being forced to rape one another.⁷⁷ In addition, prisoners are deprived of food, water, medicine, and medical care, which result in deaths of thirst, of hunger, of diseased, and treatable infections.⁷⁸

V. Moratoriums

A commonly known resolution to the abolition of the death penalty has been to enact moratoriums on the punishment. The Human Rights Council has taken note that many countries with different legal systems and cultures are applying a moratorium to prevent the practice of the death penalty.⁷⁹ However, there are two major concerns with moratoriums. First, countries with moratoriums continue to impose death sentences.⁸⁰ Second, even when death sentences are ceased, moratoriums may still be lifted and the practice of imposing death sentencing resumed.

⁷⁴ *Id.*

⁷⁵ *Supra* at note 15.

⁷⁶ *Supra* at note 45 at p. 36.

⁷⁷ *Id.* at 7

⁷⁸ *Id.* at 34-36.

⁷⁹ *Supra* at note 67.

⁸⁰ *Supra* at note 51, ¶ 8.

For example, in 2015, there were at least three hundred and sixty executions in twelve countries within the Asia-Pacific region.⁸¹ The number of executions mostly attributed to Pakistan hitting its highest record of executions at three hundred and twenty six after lifting a six-year moratorium on the execution of civilians in terror-related crimes in December of 2014.⁸² The moratorium was lifted in response to a deadly Taliban attack on a school in Peshawar; however, the majority of the hundreds executed by the death penalty were not convicted of terror offenses.⁸³ Pakistan additionally lifted the moratorium on the death penalty in all capital cases in March 2015.⁸⁴ Jordan is another example portraying the temporary relief that moratoriums provide. In December 2014, Jordan ended an eight-year de facto moratorium on the death penalty and executed eleven individuals in the same month for terrorism-related crimes.⁸⁵ The United Nations High Commissioner for Human Rights expressed deep regret in the lifting of the moratoriums in Pakistan and Jordan, emphasizing that no judiciary was infallible.⁸⁶

Additionally, Chad lifted a de facto moratorium in November 2003 and immediately after executed nine prisoners.⁸⁷ There were also ten suspected Boko Haram members executed in August 2015 by firing squad after being sentenced to death in a trial following a quick process that may not have respected international human rights law.⁸⁸

⁸¹ *Supra* at note 24.

⁸² *Id.*

⁸³ British Broadcasting Corporation, *What is behind Pakistan's dramatic rise in executions?* (Dec. 2015), available from <http://www.bbc.com/news/world-asia-33033333>.

⁸⁴ The Diplomat, *Pakistan and the Death Penalty* (Apr. 2016), available from <http://thediplomat.com/2016/04/pakistan-and-the-death-penalty/>.

⁸⁵ *Supra* at note 51, ¶ 27.

⁸⁶ *Id.*

⁸⁷ International Federation for Human Rights: Internal Mission of Investigation, 404/2 (Sept. 2014), available from <https://www.fidh.org/IMG/pdf/td404a.pdf>.

⁸⁸ *Supra* at note 51, ¶ 27.

Special procedures mandate holders of the Human Rights Council condemned the resumption of executions in Chad and called to reinstate the moratorium on the use of the death penalty, with a view to its complete abolition.⁸⁹

VI. Conclusion

Over the years, there has been a growing trend in the abolition of the death penalty among countries and even within the individual states of countries. However, with some of the countries that are considered abolitionists of the death penalty, there are still growing concerns for countries complying with article 15 of ICCPR and with properly imposing procedural changes in their laws that are directed towards abolition of the death penalty.

Although more countries have become abolitionists in the death penalty, there has also been growing numbers in executions. In order to properly monitor the number of executions and the methods used to execute, it is crucial for countries to disclose all relevant information and be transparent so that there is sufficient awareness of whether international human rights standards are being abided by.

To ensure that the right to life is protected, countries must understand that even though only a few methods of execution have been constituted as torture, all methods are capable of inflicting unnecessary pain and suffering to individuals. Private companies exemplify the different ways that to combat the practice of the death penalty and shows the world's interest in the abolition of the death penalty.

Compliance with the ICCPR and CAT require the death row phenomenon to come to an end. The prolonged waiting period that prisoners face on death row cause unnecessary

⁸⁹ *Id.*

pain and suffering to the prisoners and their families who are not told if and when the execution may take place. Additionally, the impact that the waiting period has on the prisoner's mental and physical state is torturous.

Lastly, as moratoriums are intended to provide a halt on executions, they are often undermined by the continued practice of the death penalty despite a moratorium. Or the moratorium becomes lifted as seen in Pakistan, Jordan, and Chad, and the movement towards the abolition of the death penalty becomes lost.

VII. Recommendations

The Human Rights Advocates recommends the Human Rights Council:

- 1.** Urge all countries that are a party to the ICCPR to abide by its provisions to protect the right to life by prohibiting or limiting the use of the death penalty and continue to adhere to the universal prohibition against torture and cruel, inhuman, and degrading treatment or punishment.
- 2.** Urge all countries with a moratorium or seeking a moratorium to move towards the abolition of the death penalty through its state law in accordance with international human rights standards.