



QUNO

Quaker United Nations Office



Protection of the Rights of Children of Parents Sentenced to Death or Executed: An Expert Legal Analysis

Stephanie Farrior, JD, LLM

February 2019

This paper is part of QUNO's ongoing work on children of prisoners and children of parents sentenced to death or executed. Previous publications on this subject include:

- *Children of Parents Sentenced to Death*, Helen Kearney (2012)
- *Children of Parents Sentenced to Death or Executed: How are they affected? How can they be supported?* (2013)
- *Lightening the Load of the Parental Death Sentence on Children*, Oliver Robertson, Rachel Brett (2013)
- *Children of parents sentenced to the death penalty or executed: developments, good practices and next steps* (2014)
- *Forgotten Victims* (2016)
- *Can the children of parents sentenced to death or executed be considered victims of torture or cruel, inhuman or degrading treatment?* (2017)

To access these papers, please visit: <https://quno.org/resources/Children-of-Prisoners>

Human Rights & Refugees

QUNO's belief in the inherent worth of every individual leads us to work for the promotion and protection of human rights for all. Our Human Rights & Refugees programme raises up the concerns of marginalized groups, so they are better understood by international policy makers, which leads to stronger international standards. Frontline organizations can use these strengthened international standards as a tool to limit suffering, improve lives and challenge the root causes of injustice. Our work focuses on children of prisoners, children of parents sentenced to death or executed, conscientious objectors to military service, Indigenous peoples, migrants and refugees. For more information or to share comments and feedback, please contact:

Laurel Townhead
Representative, Human Rights & Refugees
ltownhead@quno.ch

Cassidy McKenna
Programme Assistant, Human Rights & Refugees
cmckenna@quno.ch

Acknowledgements

QUNO expresses its appreciation to the Ministry of Foreign Affairs of Belgium for funding the research and production costs of this publication. QUNO is thankful to Stephanie Farrior for bringing her thorough analysis and deep expertise to this project.

Suggested citation: Stephanie Farrior (2019), Protection of the Rights of Children of Parents Sentenced to Death or Executed: A Legal Analysis (Quaker United Nations Office, Geneva).

All QUNO work is published under a Creative Commons licence. More information and full details of the licence are available at creativecommons.org. Copies of QUNO publications can be downloaded free from our website: quno.org. Hard copies are available on request. Cover image: "Stairway" by flickr.com/photos/tracy_olson

Table of Contents

Foreword	4
About the Author	4
Introduction	5
Recognition of the human rights impacts on the children of parents sentenced to death or executed	6
Human rights affected when a child's parent is sentenced to death or executed	10
Respect for the best interests of the child	10
The right to freedom from torture and other ill-treatment	16
The prohibition of discrimination	23
The right to health	24
The right to education	26
The right to information	27
The principle of non-separation of a child from the parents	28
When a child is orphaned by the state	28
The right to protection from mental violence	29
The right to an adequate standard of living	29
Children of nationals who face the death penalty abroad	29
Conclusion	30
Recommendations	30

Foreword

Motivated by concern for the rights of an overlooked group of children for whom State action has increased risk and vulnerability QUNO has since 2012 worked to raise awareness of the impact on children of a parental death sentence or execution. This focus evolved from our long-term work on children of prisoners. Whilst many of the same challenges apply to children of parents sentenced to death or executed there are specific impacts arising from capital punishment. A common refrain in the early days of our work on this issue was “I had never thought about that”. This led to a series of publications exploring the issues and encouraging people to take notice of these children and take account of their rights.

We brought together the handful of people working on this issue, resulting in *Lightening the Load* by Oliver Robertson and Rachel Brett. That report considers the effect on the welfare of children whose parents are sentenced to death or executed and how they can be supported.

These reports helped in ensuring this issue received attention from the international community which led to a Panel in the Human Rights Council in 2013. Despite this international attention, children around the world continue to suffer the impacts of the sentencing to death and execution of a parent. Therefore, we continue to raise awareness of this issue and seek to support the implementation of the recommendations of this Panel. The first recommendation in the report on the Human Rights Council Panel was for an expert seminar to provide a “full examination of the applicable human rights framework, to enable all relevant international human rights treaty bodies and special procedures to engage with the issues, as well as to provide guidance to States and other bodies”.

Because the expert seminar has not yet taken place we have commissioned this expert legal analysis to fill the gap by providing an authoritative analysis of the protections in existing international law of the rights of children of parents sentenced to death or executed. Coupled with our earlier study of the harms a parental death sentence can cause, this legal analysis is intended to motivate and guide the changes needed to end this particular harm to children.

by Laurel Townhead

About the Author

Professor Stephanie Farrow is Distinguished Lecturer and Human Rights Scholar at the Roosevelt House Public Policy Institute of Hunter College in New York, USA, and former legal director of Amnesty International. She has been a Visiting Fellow of the University of Oxford, Kellogg College, Visiting Scholar at Georgetown University Law Center, and professor in Oxford’s summer programme in International Human Rights Law. She has served as Chair of the Section on International Law of the American Association of Law Schools (AALS); as Counsellor and member of the Executive Council of the American Society of International Law (ASIL); and as a founding Board member of the Center for Justice and Accountability, which helps survivors of torture and other severe human rights abuses hold the perpetrators accountable.

Professor Farrow’s publications focus on issues of discrimination; state responsibility for human rights abuses by non-state actors; the work of international human rights monitoring bodies; and issues at the intersection of human rights and the environment. Her work has been published in Oxford, Harvard, Columbia, and Berkeley law journals, and her most recent book is *Equality and Non-Discrimination under International Law* (Ashgate, 2015). She holds a JD degree from the American University Washington College of Law, and an LLM from Harvard Law School.

Introduction

This paper presents a legal analysis of the protection of the human rights of children of parents sentenced to death or executed. An earlier legal analysis by the Quaker United Nations Office explored the effects of parental imprisonment on the rights of the child.¹ The present analysis will not repeat the points made there regarding the effects on children when a parent is imprisoned, but will instead focus on the particular impact on the rights of the child of a parent's death sentence or execution. Many of the human rights impacts noted in the earlier papers are compounded or magnified when the parent is not just imprisoned, but is sentenced to die, or does in fact die at the hand of the State. The present analysis is grounded in studies of the experience of these children as reported in earlier publications of the Quaker United Nations Office (QUNO)² and in statements of United Nations and regional human rights bodies. As the UN Special Representative of the Secretary-General on Violence against Children has written:

The loss of a parent is traumatic and irreversible in any circumstance. But, unlike a natural death, when it is officially performed by the authorities of a country it becomes particularly confusing and frightening for a child. ... Children whose parents are facing the death penalty may feel anger and a deep sense of uncertainty. ... Traumatized and with low self-esteem, they can suffer from constant nightmares or loss of sleep, and eating disorders; they can lose concentration and interest in school, as well as willingness to play. Some of them feel pressed to become economically active because the family breadwinner is in prison or has been executed. Post-traumatic stress disorder, aggressive behavior and self-harm often go hand in hand. Overall, children often endure this experience in deep loneliness and hopelessness.

In addition, the serious stigma associated with people sentenced to death often makes it difficult to find alternative caregivers for the child. This further exacerbates the pain and in turn, increases the risk of becoming homeless and ending up living on the street, at risk of violence and exploitation, and manipulated into crime. Girls are at particular risk of sexual violence. At the same time, relatives may not have financial resources to take care of the child, and in cases where both the offender and the victim are the child's parents, families may be divided and the child left on his or her own.³

The sentencing to death or execution of a parent can be so traumatic that it infringes the human rights of the child. This impact would be avoided if States were to honour a fundamental obligation proclaimed in the Convention on the Rights of the Child: 'In all actions concerning children ... the best interests of the child shall be a primary consideration.' In light of the devastating impact on a child when a parent is sentenced to death or executed, the child's best interests are harmed, not protected, by the imposition of capital punishment.

Research on what children experience when a parent is sentenced to death or executed shows that numerous human rights are affected. These rights can include the right to be free from cruel, inhuman or degrading treatment; the right to non-discrimination; the rights to health, to education, and to information; the right to have the State ensure to the maximum extent possible the development of the child; and the right to a standard of living adequate for a child's physical, mental, spiritual, moral and social development. As the Human Rights Committee has indicated in a General Comment, the right to life itself is implicated.⁴

1 Jean Tomkin, *Orphans of Justice: In search of the best interests of the child when a parent is imprisoned: A Legal Analysis* (Quaker United Nations Office, 2009).

2 Helen Kearney, *Children of parents sentenced to death* (2012); Oliver Robertson and Rachel Brett, *Lightening the Load of the Parental Death Penalty on Children* (2013).

3 Introductory Essay of the United Nations Special Representative of the Secretary-General on Violence against Children, Marta Santos Pais, in OSCE Office for Democratic Institutions and Human Rights (ODIHR), *The Death Penalty in the OSCE Area, Background Paper 2017 -- Special Focus: Children of Parents Sentenced to Death or Executed*, p. 6.

4 UN Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018), para. 49.

Recognition of the human rights impacts on the children of parents sentenced to death or executed

There is increasing recognition at the international level that children can experience impairment of their human rights when a parent is sentenced to death or executed. Those addressing this impact on children include the UN General Assembly, the UN Human Rights Council, the Special Representative of the Secretary-General on Violence against Children, the Committee on the Rights of the Child, the Human Rights Committee, and the UN Special Rapporteur on the independence of judges and lawyers, as well as the OSCE Office for Democratic Institutions and Human Rights (ODIHR). With a few exceptions, they have usually based their statements on the ‘best interests of the child’ without addressing the specific rights affected. The analysis in this paper will discuss the rights infringed in addition to the fundamental right of children to have their best interests be a primary consideration in all actions affecting them.

There has also been recognition that family members are themselves victims of rights violations when a death sentence or execution is surrounded by secrecy. This has been raised during the Universal Periodic Review, and has been recognized by the Committee against Torture, the Human Rights Committee, the UN Special Rapporteur on torture, and the Special Rapporteur on extrajudicial, summary or arbitrary executions. They have determined that the agony and severe distress experienced by family members from this secrecy violates the prohibition of inhuman treatment. As the analysis in this paper will show, an application of existing jurisprudence on the prohibition of cruel and inhuman treatment leads to the conclusion that even when not surrounded by secrecy, the execution of a parent can amount to cruel and inhuman treatment of the child, as can the sentencing of a parent to death.

The Human Rights Council initially recognized in 2012 the negative impact on the rights of children whose parents are executed when the execution is surrounded by secrecy. In a resolution on the rights of the child, the Human Rights Council called upon States ‘to ensure that children whose parents or parental

caregivers are on death row, the inmates themselves, their families and their legal representatives are provided, in advance, with adequate information about a pending execution, its date, time and location, to allow a last visit or communication with the convicted person, the return of the body to the family or to inform on where the body is located, unless this is not in the best interests of the child.’⁵

The following year, the Human Rights Council adopted a resolution in which it acknowledged more broadly ‘the negative impact of a parent’s death sentence and his or her execution on his or her children’ and called upon States ‘to provide those children with the protection and assistance they may require.’⁶ The Council reiterated its call to end secrecy surrounding executions, and decided to convene a panel to address the human rights of children of parents sentenced to the death penalty or executed.

In September 2013, the Human Rights Council held a panel discussion on ‘the human rights of children of parents sentenced to the death penalty or executed, with a particular focus on the ways and means to ensure the full enjoyment of their rights.’⁷ The panelists, noting that the trauma such children experience can be so great that their rights are violated, concluded that the best option would be to abolish the death penalty, but where that did not take place, measures should be adopted to minimize the harm suffered by children of parents sentenced to death or executed.⁸

5 UN Human Rights Council, Resolution adopted by the Human Rights Council: Rights of the Child, UN Doc. A/HRC/RES/19/37 (19 April 2012), para 69(f).

6 UN Human Rights Council, Panel on the human rights of children of parents sentenced to the death penalty or executed, UN Doc. A/HRC/RES/22/11 (15 March 2013), para. 1.

7 See UN Human Rights Council, Summary of the panel discussion on the human rights of children of parents sentenced to the death penalty or executed, UN Doc. A/HRC/25/33 (18 Dec. 2013).

8 UN Human Rights Council, Summary of the panel discussion on the human rights of children of parents sentenced to the death penalty or executed, UN Doc. A/HRC/25/33 (18 Dec. 2013), para. 30.

In a resolution in 2015 on the death penalty, the Human Rights Council again called on States to ensure that children of parents or parental caregivers are given advance notice of an execution's time and place, and to allow a last visit or communication unless not in the best interests of the child.⁹ It also decided to hold a high-level panel on 'the human rights violations related to the use of the death penalty, in particular with respect to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment'.

At the high-level panel, held in 2017, the trauma and long-term consequences suffered by children of family members sentenced to death or executed was discussed.¹⁰ Several representatives also pointed out the existing international human rights jurisprudence holding that when secrecy surrounds executions it violates the family's right to freedom from torture or other cruel, inhuman or degrading treatment.¹¹

The UN General Assembly has also given attention to the human rights impact on children of a parent's death sentence. In its 2014 resolution on the rights of the child, the General Assembly acknowledged the 'serious impact on children's development' of a parent being sentenced to death, and urged States 'to provide the assistance and support these children may require'.¹² In 2016 a high-level panel was held during the Ministerial week of the 71th session of the UN General Assembly, *The Death Penalty and Victims*, to bring 'a particular focus on the impact capital punishment has on a broad array of victims, including ... the "hidden" third parties, including the children of the condemned'.¹³

UN human rights treaty bodies have also raised concerns about the impact on a child of the capital punishment of a parent. The Committee on the Rights of the Child has begun asking States during review of their periodic reports about children whose parents are under sentence of death or have been executed, grounding its questions in the 'best interests of the child'. In reviewing China in 2013, for example, the Committee recommended to the delegation that it 'should indicate whether courts took into account the best interests of the child when imposing the death penalty on a parent'.¹⁴

Similarly, in reviewing Kuwait in 2013, the Committee asked 'how the best interests of the child were determined and evaluated ... in criminal proceedings, especially when an adult with children was about to be sentenced to long imprisonment or death'.¹⁵ The Committee inquired whether the State party 'applied procedural guarantees such as those advocated in the Committee's general comment No. 14, on the right of the child to have his or her best interests taken as a primary consideration, and, if not, whether it had contemplated amending its laws to provide such guarantees'.¹⁶ The Committee also asked 'how many imprisoned parents had been sentenced to death, and how many had been executed', and 'what measures were taken on behalf of children whose parents had been incarcerated or executed'.¹⁷ In addition, the Committee asked whether 'the courts took into consideration the best interests of the child when sentencing a parent to death, and whether images of executions, — often disturbing to

9 UN Human Rights Council, Resolution 30/5, UN Doc. A/HRC/30/L.11/Rev.1 (30 Sept. 2015), para. 4.

10 UN Human Rights Council, High-level panel discussion on the question of the death penalty, UN Doc. A/HRC/36/27 (2017), para. 45.

11 UN Human Rights Council, High-level panel discussion on the question of the death penalty, UN Doc. A/HRC/36/27 (2017), para. 37.

12 UN General Assembly, Rights of the Child, UN Doc. A/RES/68/147 (7 Feb. 2014), para. 57.

13 *The Death Penalty and Victims*, Side event at the 71th Session of the United Nations General Assembly, Wednesday, 21 September 2016, <http://www.un.org/webcast/pdfs/160921am-death-penalty.pdf>.

14 UN Committee on the Rights of the Child, Consideration of report of States parties: China; Summary record of meeting held 2 Oct. 2013, UN Doc. CRC/C/SR.1833 (2013), para. 21.

15 UN Committee on the Rights of the Child, Consideration of report of States parties: Kuwait; Summary Record of meeting held 17 September 2013, UN Doc. CRC/C/SR.1819 (2013), para. 21.

16 UN Committee on the Rights of the Child, Consideration of report of States parties: Kuwait; Summary Record of meeting held 17 September 2013, UN Doc. CRC/C/SR.1819 (2013), para. 21.

17 UN Committee on the Rights of the Child, Consideration of report of States parties: Kuwait; Summary Record of meeting held 18 September 2013, UN Doc. CRC/C/SR.1820 (3 Nov. 2013), para. 42.

children, — were indeed published in the media.¹⁸ The delegation responded that ‘The courts did take into account the best interests of a child before sentencing a parent to death’¹⁹, but provided no information on this other than stating that the courts ‘could commute the death sentence of a pregnant or nursing mother into a prison term.’²⁰

In its Concluding Observations, the Committee expressed concern to Kuwait that ‘the right of children to have their best interests assessed and taken as a primary consideration...is disregarded in the case of... judicial proceedings where parents are involved, and especially when sentencing parents to death.’²¹ The Committee urged the State to ‘assess and fully take into account the best interests of the child in judicial proceedings where parents are involved and when sentencing parents to death.’²²

When the United Arab Emirates came up for review in 2015, even though the Committee on the Rights of the Child did not raise this matter in the List of Issues it sent, the State itself addressed it in responding to questions the Committee posed regarding the applicability to children of the penalties of capital punishment and flogging. The State wrote:

With regard to the human rights of children on whose parents a sentence of capital punishment has been imposed or enforced, the State provides such children with health, social and educational care in the same way as their peers and they enjoy

all the rights to which other children in the State are entitled; they are paid financial allowances until they are able to work or have completed their university education and the State provides them with decent accommodation. The rule is that no one should suffer detriment as a result of an act committed by another person, even if the latter is one of his or her parents.²³

In its Concluding Observations, although the Committee said it took note of ‘the measures taken with regard to children whose parents are imprisoned or executed’, it was nonetheless concerned about ‘the impact on children when the death penalty is imposed on their parents and the lack of attention paid to providing psychological support for such children.’²⁴ The Committee recommended that the State ‘Take into consideration the existence of children and their best interests when considering the death penalty and provide psychological and other support necessary to children whose parents have been sentenced to death.’²⁵

The Human Rights Committee has directly addressed the human rights impact on children when a parent is sentenced to death or executed, stating in its General Comment on the right to life:

States parties must refrain from imposing the death penalty on... persons whose execution would be exceptionally cruel or would lead to exceptionally harsh results for them and their families, such as... parents to very young or dependent children...²⁶

In her recommendations to prosecutors and judges in 2015, the UN Special Rapporteur on the independence

18 UN Committee on the Rights of the Child, Consideration of report of States parties: Kuwait; Summary Record of meeting held 17 September 2013, UN Doc. CRC/C/SR.1820 (2013), para. 55.

19 UN Committee on the Rights of the Child, Consideration of report of States parties: Kuwait; Summary Record of meeting held 17 September 2013, UN Doc. CRC/C/SR.1820 (2013), para. 58.

20 UN Committee on the Rights of the Child, Consideration of report of States parties: Kuwait; Summary Record of meeting held 18 September 2013, UN Doc. CRC/C/SR.1820 (3 Nov. 2013), para. 59.

21 UN Committee on the Rights of the Child, Concluding Observations: Kuwait, UN Doc. CRC/C/KWT/CO/2 (29 October 2013), para. 31.

22 UN Committee on the Rights of the Child, Concluding Observations: Kuwait, UN Doc. CRC/C/KWT/CO/2 (29 October 2013), para.32.

23 UN Committee on the Rights of the Child, Consideration of reports of States parties: United Arab Emirates, Replies of the United Arab Emirates to the list of issues, UN Doc. CRC/C/ARE/Q/2/Add.1(6 July 2015), para. 12.

24 UN Committee on the Rights of the Child, Concluding Observations: United Arab Emirates, UN Doc. CRC/C/ARE/CO/2 (30 Oct. 2015), para. 51.

25 UN Committee on the Rights of the Child, Concluding Observations: United Arab Emirates, UN Doc. CRC/C/ARE/CO/2 (30 Oct. 2015), para. 52.

26 UN Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018), para. 49.

of judges and lawyers raised the severe trauma a child experiences when a parent is sentenced to death. ‘Children of parents sentenced to death often suffer a particularly devastating ordeal’, she wrote.²⁷ She noted that research ‘has consistently connected a parent’s death sentence or execution with major psychological and emotional implications for children and families’, and ‘some children even present post-traumatic stress disorder symptoms.’²⁸ Consequently, she wrote, before requesting or imposing the death penalty on defendants with children, prosecutors and judges should take into account ‘the trauma caused by both the anxiety relating to the anticipation of the execution and the actual execution itself’. She stated that ‘Despite the particular emotional and psychological distress of children of parents sentenced to death—who also often experience social isolation and stigmatization,’ she was ‘extremely concerned’ about the lack of attention and support these children receive. In a recommendation on ‘Child-sensitive adjudication’, she stated that ‘When sentencing parents, in particular to the death penalty, judges should also consider the effect of their sentences on the well-being of the child and the child’s best interests. Prosecutors should apply the same consideration when requesting sanctions against parents.’²⁹

As noted in the 2018 Report of the Secretary-General on the Question of the death penalty, the Special Representative of the Secretary-General on Violence against Children has stated that while more research was urgently needed on the issue, the evidence available was sufficiently sound and convincing to recognize the urgency of ensuring a protective environment for such children.³⁰ She concluded that States should therefore

take appropriate steps in that regard so as to prevent discrimination against children and provide them with the services and the recovery and reintegration measures they urgently required.³¹ In light of the grave nature of the impact on children of the sentencing to death or execution of a parent, however, it is time to recognize in more detail the rights affected.

27 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Doc. A/HRC/29/26 (1 April 2015), para. 77.

28 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Doc. A/HRC/29/26 (1 April 2015), para. 77, *citing* Working Group on Children of Incarcerated Parents, “Children of parents sentenced to death or executed”, August 2013, p. 3.

29 Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, UN Doc. A/HRC/29/26 (1 April 2015), para. 109.

30 Report of the Secretary-General: Question of the death

penalty, UN Doc. A/HRC/39/19 (14 Sept. 2018), citing www.osce.org/odihr/343116?download=true, pp. 8–9.

31 Report of the Secretary-General: Question of the death penalty, UN Doc. A/HRC/39/19 (14 Sept. 2018), citing www.osce.org/odihr/343116?download=true, pp. 8–9.

Human rights affected when a child's parent is sentenced to death or executed

Children of parents sentenced to death or executed experience impairment of a number of human rights, all of which are undergirded by the best interests of the child principle. This section of the paper explains and applies the best interests principle as it relates to the imposition of capital punishment on the parent of a child, and then discusses other rights impaired when a child's parent is sentenced to death or executed. The term 'child' in this paper refers to someone under the age of 18, per the definition of 'child' in the UN Convention on the Rights of the Child.

Respect for the best interests of the child

The best interests of the child principle is central in analyzing the protection under international law of the rights of children when a parent is sentenced to death or executed. It is solidly established in international human rights law that the best interests of the child shall be 'a primary consideration', or in some human rights jurisprudence, 'the primary consideration', in all actions taken by a government concerning children. As Philip Alston has pointed out, 'the best interests principle is placed on par with the non-discrimination principle' in the Vienna Programme of Action adopted at the 1993 World Conference on Human Rights,³² which declares: 'In all actions concerning children, non-discrimination and the best interests of the child should be primary considerations and the views of the child given due weight'.³³

As shown earlier in this paper, concern expressed by human rights bodies over the human rights impact on children when a parent is sentenced to death or executed has been broadly grounded in protecting the best interests of the child. Though these bodies have invoked

this principle they have conveyed little detailed analysis in applying it. The discussion below provides an overview of the best interests of the child principle and the extent to which it is recognised in international human rights jurisprudence. It then applies the analysis set forth in the detailed General Comment on best interests issued by the UN Committee on the Rights of the Child.

The Convention on the Rights of the Child provides in Article 3 that 'In all actions concerning children, ... the best interests of the child shall be a primary consideration'. The best interests of the child principle appears in several additional provisions of the treaty as well.³⁴ As the Committee on the Rights of the Child has explained, 'The principle of best interests applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and wellbeing'.³⁵ The 'ultimate purpose of the child's best interests', the Committee has explained, 'should be to ensure the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child'.³⁶ Though the drafters of the Convention decided to make the child's best interests 'a primary consideration rather than 'the' primary consideration, the aim of the drafters was to make the child's best interests the first consideration among others.³⁷ Indeed, the Committee on the Rights of the Child has emphasised that "The expression "primary

³² Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, International Journal of Law and the Family, Vol. 8, p16 (1994).

³³ Vienna Declaration, World Conference on Human Rights, U.N. Doc. A/CONF.157/24 (1993).

³⁴ Article 9: separation from parents; article 10: family reunification; article 18: parental responsibilities; article 20: deprivation of family environment and alternative care; article 21: adoption; article 37(c): separation from adults in detention; article 40(2)(b)(iii): procedural guarantees, including presence of parents at court hearings for penal matters involving children in conflict with the law.

³⁵ UN Committee on the Rights of the Child, General Comment No. 7 on implementing rights in early childhood (2005), UN Doc. CRC/C/GC/7/Rev.1, para 13.

³⁶ UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1) (2013), para. 51.

³⁷ See Michael Freeman, Article 3: The Best Interests of the Child (Doredrecht:Nijhoff, 2007), p.60.

consideration” means that the child’s best interests may not be considered on the same level as all other considerations.³⁸ Perhaps it is this thought that led a judge on the International Court of Justice to refer in the *DRC v. Uganda* case to the best interests of the child in the children’s convention as ‘the’ primary consideration in all actions concerning children.³⁹

The best interests of the child principle is a bedrock not only of the Convention on the Rights of the Child but also of other international and regional human rights jurisprudence. The Convention on the Rights of Persons with Disabilities explicitly incorporates the best interests of the child in its text (art. 7). Although a child’s best interests do not appear explicitly in either of the two Covenants, the Human Rights Committee has referred to this principle in General Comments,⁴⁰ as has the Committee on Economic, Social and Cultural Rights.⁴¹ United Nations special rapporteurs have also invoked the best interests of the child principle in carrying out their mandates, including the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,⁴² the UN Special Rapporteur on trafficking in persons, especially women and children,⁴³ the UN Special Rapporteur on toxic

waste,⁴⁴ and the UN Special Rapporteur on the human rights of migrants.⁴⁵

A regional instrument explicitly incorporating the best interests of the child is the African Charter on the Rights and Welfare of the Child. This treaty goes further than the Convention on the Rights of the Child, providing in article 4 that in all actions concerning the child, the best interests of the child shall be ‘the primary consideration’ rather than ‘a primary consideration’. The Charter is also explicit about a measure to carry out this obligation: Article 30 on Children of Imprisoned Mothers provides that States parties shall ‘ensure that a death sentence shall not be imposed on ... mothers of infants and young children’ (art. 30(e)). The African Committee of Experts on the Rights and Welfare of the Child stated in its General Comment on Article 30 that ‘children of incarcerated parents/primary caregivers may find a number of their rights violated as a result of this incarceration.’⁴⁶ In detaining a parent, ‘the court reshapes the child’s family ... and as a result there is often an acute need for special treatment, and support services, which will vary depending on the child’s particular family circumstances and the stage of the criminal proceedings’ (para. 7). This of course is especially relevant when the parent is being permanently removed from the child’s life through capital punishment.

Article 30 prohibiting the death penalty on mothers of infants and young children has been deemed to include fathers or other primary carer. Although the clause refers specifically to children of mothers who are imprisoned, the African Committee of Experts on the Rights and Welfare of the Child has determined in its General Comment that it also applies to children who

38 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1) (2013), para. 37.

39 International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005, Declaration of Judge Koroma, para. 6 (‘according to Article 3 of the 1989 Convention on the Rights of the Child, to which Uganda is also a party, in all actions concerning children, the primary *consideration* must be the *best interests* of the child’. (emphasis in original)

40 E.g. UN Human Rights Committee, General Comment No. 36 on the right to life (2018); No. 17 on the rights of the child (1989); No. 19 on protection of the family (1990).

41 UN Committee on Economic, Social and Cultural Rights, General Comment No. 14 on the right to the highest attainable standard of health (2000).

42 E.g., Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/22/53 (5 March 2015).

43 E.g., Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc. A/HRC/20/18 (18 May 2012).

44 E.g., Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, UN Doc. A/HRC/33/41 (2 August 2016).

45 E.g., Report of the Special Rapporteur on the human rights of migrants, UN Doc. A/HRC/11/7 (14 May 2009).

46 African Committee of Experts on the Rights and Welfare of the Child, General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/01 (2013), para. 7.

are ‘affected by the incarceration of their sole or primary caregiver’ (para. 10). The word ‘mother’ in Article 30 ‘should be understood not only a “mother” but also to include a “father” and any “caregiver” under whose custody a child is placed either under recognized formal arrangements or informal mechanisms available in a given society’ (para. 13.1). This may include someone who, under ‘circumstances like death or illness of the child’s parents, becomes the primary caregiver or main supporter of the child’ (para. 13.1). The Committee explained that ‘This is because large numbers of children in Africa are orphaned or living separated from their parents but may still require the protections guaranteed in Article 30 when their sole or primary caregiver is deprived of their liberty’ (para. 10).

The best interests principle is incompatible with a mandatory death penalty. The African Committee of Experts on the Rights and Welfare of the Child has indicated that in States that retain the death penalty, it is of the ‘utmost importance’ that a death sentence never be mandatory, ‘as this prevents, inter alia, consideration of the child’s best interests when sentencing a parent or caregiver.’⁴⁷ In addition, States should consider enacting legislation ‘to commute the sentences of prisoners who have spent more than a certain number of years on death row, without any final outcome of the appeals process or application for commutation or pardon, to an appropriate alternative sentence’ (para. 40).

The inter-American human rights system has also recognized the central importance of the best interests of the child. The Inter-American Commission on Human Rights has referenced the best interests principle since at least 1997, when it recommended to States in its Annual Report that ‘all decisions affecting the life, freedom, physical or moral integrity, development, education, health or other rights of children, be made with a view to ensuring that their best interests are taken into account.’⁴⁸ The Inter-American Court of

Human Rights has determined that the best interests of the child is a ‘regulating principle regarding children’s rights based on the very dignity of the human being, on the characteristics of children themselves, and on the need to foster their development, making full use of their potential, as well as on the nature and scope of the Convention on the Rights of the Child.’⁴⁹ This principle is ‘a reference point to ensure effective realization of all rights.’⁵⁰ Indeed, the Inter-American Court has applied the legal framework of the Convention on the Rights of the Child as a source of law to establish ‘the content and scope’ of obligation to protect the rights of the child in article 19 of the American Convention on Human Rights, and to identify the ‘measures of protection’ called for in that article.⁵¹

As human beings, children have all the rights in the American Convention on Human Rights as well as the right to special measures of protection as laid out in Article 19. That article, the Inter-American Court of Human Rights has stated, ‘must be construed as an added right which the Convention establishes for those who, because of their physical and emotional development, require special protection.’⁵² The special

Annual Report, Chapter VII. Recommendations to member states in areas where they should adopt measures to ensure full observance of human rights, in accordance with the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, OEA/Ser.L/V/II.98, doc. 6 rev. (13 April 1998), section 5.

49 Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 56.

50 Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 56.

51 Inter-American Court of Human Rights, Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17; *Villagrán Morales et al. (The “Street Children” Case)*. November 19, 1999 Judgment. Series C No. 63, para. 194. Article 19 of the American Convention on Human Rights, provides: ‘Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state’.

52 Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17; Inter-American Court of Human Rights, Case of the Gómez Paquiyauri Brothers, Judgment of July 8, 2004, para. 164; Inter-American Court of Human Rights, Case of the ‘Juvenile Reeducation Institute’ v. Paraguay, Judgment of September 2, 2004, para. 147.

47 African Committee of Experts on the Rights and Welfare of the Child, General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/01 (2013), para. 58.

48 Inter-American Commission on Human Rights, 1997

measures required under Article 19 'are of fundamental importance inasmuch as the children are at a critical stage in their physical, mental, spiritual, moral, psychological and social development that will impact, in one way or another, their life plan'.⁵³ Significantly, the Inter-American Commission on Human Rights has indicated that in accordance with Article 19, 'states have a duty to observe a particularly high standard in all matters related to the guarantee and protection of the human rights of children'.⁵⁴ In applying this 'particularly high standard' it is highly questionable whether a death sentence or execution of a parent of a child can be justified in light of the severely negative impact the child experiences as a result, when alternatives to capital punishment exist that will still hold a parent who has committed a crime to account.

The European Court of Human Rights has also emphasised the importance of the best interests of the child in decisions affecting them, stating that 'there is currently a broad consensus – including in international law – in support of the idea that in all decisions concerning children, their best interests must be paramount'.⁵⁵ The Court has ruled that 'to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by that solution ... it must have regard to the essential principle according to which, whenever the situation of a child is in issue, the best interests of that child are paramount'.⁵⁶ In examining whether a fair balance has been struck among competing interests, the

Court has stated that 'whenever a child's situation is at stake, the best interests of the child must prevail',⁵⁷ and as expressed in another case, 'the child's best interests must be the primary consideration'.⁵⁸ The Court has also noted that the European Union's Charter of Fundamental Rights also declares that 'in all actions relating to children, ... the child's best interests must be a primary consideration'.⁵⁹

The most detailed analysis of what measures States should take to meet their obligations regarding the best interests of the child is set forth in the General Comment of the Committee on the Rights of the Child on this issue.⁶⁰ Several provisions in this General Comment are particularly relevant in assessing whether the execution or imposition of a death sentence on the parent of a child violates the rights of the child under the Convention. The procedural steps set out in the General Comment for conducting a best interests assessment are key in conducting this assessment.

The Committee's General Comment on the best interests of the child begins with rules of procedure for applying this principle. 'Assessing and determining the best interests of the child require procedural guarantees' the Committee explains (para 6). First, 'Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general', the Committee states, 'the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned' (para. 6(c)). The assessment of a child's best

53 Inter-American Court of Human Rights, *Case of the 'Juvenile Reeducation Institute' v. Paraguay*, Judgment of September 2, 2004, para. 172.

54 IACHR, Report N° 33/04, Jailton Neri Da Fonseca (Brazil), Case 11.634 of March 11, 2004, para. 80.

55 European Court of Human Rights, *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07), Judgment of the Grand Chamber of 6 July 2010, para. 135; *Jansen v. Norway* (Application no. 2822/16), Judgment of 6 Sept. 2018, para. 91.

56 European Court of Human Rights, *Mennesson v. France* (Application no. 65192/11), Judgment of 26 June 2014, para. 81. See also *Mandet v. France* (Application no. 30955/12), Judgment of 14 January 2016, para. 53 (in determining whether a fair balance has been struck between the interests involved, the decision-maker 'must have regard to the essential principle that, whenever a child's situation is at stake, the best interests of the child must prevail'); *Labassee v. France* (Application no 65941/11) Judgment of 26 June 2014.

57 European Court of Human Rights *Mandet v. France* (Application no. 30955/12), Judgment of 14 January 2016, para. 53; see also *Labassee v. France* (Application no 65941/11) Judgment of 26 June 2014.

58 European Court of Human Rights, *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07), Judgment of the Grand Chamber of 6 July 2010, para. 136.

59 European Court of Human Rights, *Neulinger and Shuruk v. Switzerland* (Application no. 41615/07), Judgment of the Grand Chamber of 6 July 2010, para. 135, citing European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, art. 24(2).

60 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (Art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013).

interests should be conducted ‘by professionals trained in, inter alia, child psychology, child development and other relevant human and social development fields, who have experience working with children’ (para. 94).

Thus, there is a legal obligation whenever a decision is made to sentence a parent of a child to death, or to execute that parent, that the State must evaluate the impact of this decision on the child or children concerned.

In addition, ‘the justification of a decision must show that the right has been explicitly taken into account’:

States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child’s best interests; what criteria it is based on; and how the child’s interests have been weighed against other considerations, be they broad issues of policy or individual cases’ (para 6(c)).

In meeting this obligation, ‘States must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children’ (para. 87).

The Committee next explains in its General Comment that the term ‘all actions concerning children’ applies to ‘all decisions and actions that directly or indirectly affect children, ... even if they are not the direct targets of the measure’ (para. 19). When it comes to criminal cases, ‘the best interests principle applies to ... children affected by the situation of their parents in conflict with the law’ (para. 28). The indirect impact on children of a parent’s death sentence or execution is therefore encompassed within Article 3.

Additional steps are required of States to fulfill their obligations under Article 3: ‘Ensuring that the best interests of the child are a primary consideration in legislation and policy development’ requires States to conduct a ‘child rights impact evaluation’ in order to ‘evaluate the actual impact of implementation’ of legislation and policies (para. 35). Any State that has

a law or policy allowing the sentencing or execution of a parent of a child, therefore it must conduct an evaluation of the actual impact on the child of the implementation of any legislation or policy that allows for such a decision.

The requirement that the best interests of the child be ‘a primary consideration’ in all actions concerning children means ‘that the child’s best interests may not be considered on the same level as all other considerations’ (para. 37). As the Committee remarked, ‘If the interests of children are not highlighted, they tend to be overlooked’ (para. 37). Treating the child’s best interests as ‘primary’ requires ‘a willingness to give priority to those interests in all circumstances, ... especially when an action has an undeniable impact on the children concerned’ (para. 40), which the sentencing to death or execution of the parent of a child surely does.

To ensure that the child’s best interests are not overlooked, but were in fact considered, assessed, and given primary consideration, any decision concerning a child or children ‘must be motivated, justified and explained’ (para. 97). ‘The motivation should state explicitly:

- all the factual circumstances regarding the child,
- what elements have been found relevant in the best-interests assessment,
- the content of the elements in the individual case, and
- how they have been weighted to determine the child’s best interests’ (para. 97).

This should be done any time a death sentence is imposed or carried out on the parent of a child. If the decision differs from the views of the child, the reason for this must be stated (para. 97). In the event a decision is reached that is not in the best interests of the child, which would apply if a decision is made to impose capital punishment on a parent, ‘it is not sufficient to state in general terms that other considerations override

the best interests of the child'. Instead, the reason why considerations other than the best interests of the child 'must be explicitly specified', and 'the reason why they carry greater weight in the particular case must be explained'. Furthermore, that 'reasoning must also demonstrate, in a credible way, why the best interests of the child were not strong enough to outweigh the other considerations' (para. 97).

The General Comment next lists elements that should be taken into account when assessing the child's best interests. These include the child's views; preservation of the family environment and maintaining relations; the care, protection and safety of the child; the situation of vulnerability of the child; the child's right to health; and the child's right to education (paras. 52-79). The General Comment references Article 12 of the Convention in pointing out the right of children to express their views 'in every decision that affects them' (para. 53); 'Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity', the General Comment states, 'does not respect the possibility for the child or children to influence the determination of their best interest' (para. 53).

The General Comment next highlights the importance of 'Preservation of the family environment and maintaining relations'. It characterizes as 'indispensable' the requirement of assessing the child's best interests in the event that the child might be separated from his or her parents (para. 58). The Convention on the Rights of the Child does contemplate that separation may result from the detention of one or both parents (art. 9(4)). The General Comment states in this context that alternatives to detention should be made available where possible: 'In cases where the parents or other primary caregivers commit an offence, alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child or children' (para. 69). It stands to reason that refraining from imposing a death sentence on or executing a parent would be a minimum step in meeting a States obligation to respect the best interests

of the child given what the Committee recognizes as 'the gravity of the impact on the child of separation from his or her parents' (para. 61).

The section of the General Comment addressing 'Care, protection and safety of the child' explains that the obligation of the State to ensure the child such protection and care as is necessary for his or her well-being (art. 3(2)) does not just mean to protect the child from harm. Instead, it should be understood as an obligation to 'ensure the child's well-being and development', which 'includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety' (para. 71). In addition, 'the precautionary principle also requires assessing the possibility of future risk and harm' (para. 74). Application of the precautionary principle would militate against imposing a death sentence on the parent of a child or executing the parent, in light of the harm that studies show children experience to their health, educational and emotional needs as a result of such action. An additional element in assessing the best interests of the child is consideration of a child's situation of vulnerability, such as being a member of a minority group (paras. 75-76).

The impact of a decision on the best interests of the child with respect to their rights to health (paras. 77-78) and education (paras. 79) are additional elements to consider, the General Comment states. These will be discussed in the sections on those rights later in this paper.

Because the issue here is the impact of a State's actions on a child's well-being, it is apt that this General Comment calls for strict scrutiny of those actions if one is to apply the principle that the best interest of the child must be a primary consideration, if not the primary consideration, in determining whether to impose capital punishment on a child's parent. It is evident from studies of the trauma, stigma, health problems, difficulties at school, isolation, and other experiences of children with a parent sentenced to death or executed that it is not in the child's best interests to impose capital punishment on a parent.

States retaining the death penalty might argue that their competing interest in using this sanction for crime is an overriding interest. However, States have less onerous alternatives to the death penalty they may impose on those who commit crimes, alternatives that do not have the finality of killing the parent of a child and all the grave consequences of that action the child must endure. Imprisonment or, where possible, alternatives to detention, avoid the finality of an execution with its permanent removal of the parent from the child's life. The obligation to make the best interests of the child a *primary* consideration in the event of competing interests would require the State to refrain from imposing a death sentence on or carrying out an execution of a parent of a child.

The right to freedom from torture and other ill-treatment

There is a strong argument that the anguish and severe emotional distress that children are reported to experience when a parent is sentenced to death or executed amounts to an infringement of their right to freedom from torture and other ill-treatment. The UN Human Rights Committee has recognized in its General Comment on the right to life that imposing the death penalty on a parent of 'very young or dependent children' would be 'exceptionally cruel or would lead to exceptionally harsh results' for the children.⁶¹ The OSCE-ODIHR recognized this impact when its 2017 report on the death penalty located its 'thematic focus on children of parents sentenced to death or executed' specifically 'in relation to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment' and other relevant aspects of the death penalty.⁶²

61 UN Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018): 'States parties must refrain from imposing the death penalty on ... persons whose execution would be exceptionally cruel or would lead to exceptionally harsh results for them and their families, such as ... parents to very young or dependent children ...' (para. 49).

62 OSCE Office for Democratic Institutions and Human Rights (ODIHR), *The Death Penalty in the OSCE Area, Background Paper 2017, Special Focus: Children of Parents Sentenced to Death or Executed*, p. 5.

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is well-established in international law, appearing in international and regional human rights treaties.⁶³ These treaties provide that this prohibition is absolute; no state may derogate from it even war, public danger or emergency that threatens the security of the nation. The American Convention on Human Rights even specifies in its derogations clause (art. 27) that such circumstances do not authorize the suspension of article 19 on the rights of the child.

As the UN Human Rights Committee has emphasised, 'no justification or extenuating circumstances may be invoked to excuse a violation of article 7 for any reasons.'⁶⁴ The UN Committee against Torture 'rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety'.⁶⁵ In addition, as Matt Pollard has pointed out, 'the right to freedom from torture and other ill-treatment cannot be "balanced" against other rights, including rights related to the security and safety of other individuals,' according to judicial decisions, treaty texts and other international instruments, and international experts.⁶⁶

63 UN Convention on the Rights of the Child, article 37(1); International Covenant on Civil and Political Rights, art. 7; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; African Charter on Human and Peoples' Rights, art. 5; American Convention on Human Rights, art. 5; European Convention on Human Rights, art. 3; and additional specialized human rights treaties.

64 UN Human Rights Committee, General Comment No. 20, Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment (1992), para. 3.

65 UN Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, (2008), para. 4.

66 Matt Pollard, *The Absolute and Comprehensive Prohibition of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Nov. 2005), available at https://www.apr.ch/content/files_res/TortureProhibition_SFHR.pdf, citing: See, inter alia, European Court of Human Rights, *Chahal v. United Kingdom*, Judgment, 15 November 1996, paras 76-80; UN Human Rights Committee, Concluding Observations on the 5th Periodic Report of Canada (2 November 2005), UN Doc. CCPR/C/CAN/CO/5, para. 15; UN Committee against Torture, *Paez v. Sweden* (1997), Communication No. 63/1997, para. 14.5; Supreme Court of Israel, *Judgment concerning the legality of the General Security Service's interrogation methods*, (6 September 1999), para. 23; 1975 UN Declaration on Torture, article 3; 1984 Convention against Torture, article 2(2); European Court of Human Rights, *Aksoy v. Turkey* (1996), paragraph 62; 1993 Vienna Declaration and Programme of Action, A/CONF.157/23, paragraph 60.

It is important to note in an analysis of the impact on children when a parent is sentenced to death or executed that it is not just the prohibition of torture that is non-derogable, but also the prohibition of other ill-treatment.⁶⁷ Because both torture and cruel, inhuman or degrading treatment are equally prohibited in international law, it is not necessary to assess which of the two categories might describe the experience of children when capital punishment is imposed on a parent.

Also relevant to this inquiry is that emotional injury and mental suffering and anguish, not just physical pain, can constitute cruel, inhuman or degrading treatment.⁶⁸ The UN Committee against Torture has underscored in a General Comment that the word ‘victims’ within the meaning of the Article 14 obligation to provide redress includes those who have ‘emotional injury’ and ‘mental suffering’.⁶⁹ In addition, it has long been understood that ‘the term “cruel, inhuman or degrading treatment” should be interpreted so as to extend *the widest possible protection* against abuses, whether physical or mental.’⁷⁰

Children can be more vulnerable to experiences that violate their human rights by virtue of their young age. This understanding is why the International Covenant on Civil and Political Rights, for example, requires that a every child has ‘the right to such measures of protection as are required by his status as a minor’ (art. 24). In the specific context of torture and ill-treatment, the Inter-American Court of Human Rights

has declared that when alleged victims are children, this ‘requires applying *the highest standard* in determining the seriousness of actions that violate their right to humane treatment.’⁷¹ The Inter-American Commission on Human Rights has likewise recognised the relevance of young age in making this determination, stating that ‘in defining whether a specific act constitutes torture, in the case of children the highest standard must be applied in determining the degree of suffering, taking into account factors such as age, sex, the effect of the tension and fear experienced, the status of the victim’s health, and his maturity, for instance.’⁷² The European Court of Human Rights has also ruled that age can be relevant in assessing whether ill-treatment has attained the ‘minimum level of severity’ to fall within the scope of the prohibition.⁷³ Application of this ‘highest standard’ makes it difficult to conclude that a child does not experience the severity of mental suffering and anguish constituting ill-treatment when a parent is killed by the State.

Specific intent to cause ill-treatment ‘a factor’, but not required

One need not be the direct target of State action or inaction to be considered a victim of a violation of the prohibition of torture and other ill-treatment. As discussed below, this has been recognised by the UN Human Rights Committee, the Inter-American Court of Human Rights, the European Court of Human Rights, UN Special Rapporteurs on torture, and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions. An application of the legal analysis of these bodies shows that the sentencing to death or execution of a parent may cause the child to be a victim of ill-treatment as a result. In light of the high standard needed to protect the child against inhumane treatment, States should apply the precautionary principle

See also N. Rodley, *The Treatment of Prisoners Under International Law*, 2nd ed., Oxford University Press, Oxford, 1999, pp. 54-55, 64-65, 73-74, 78-84.

67 UN Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN Doc. CAT/C/GC/2 (24 January 2008): ‘the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure’ (para. 3).

68 E.g., UN Convention against Torture, art.1; UN Human Rights Committee, General Comment No. 20 on Article 7, Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment (1992), paras. 2 and 6.

69 UN Committee against Torture, General Comment No. 3 on the implementation of article 14, UN Doc. CAT/C/GC/3 (2012), para. 3.

70 UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. GA Res. 173, UN Doc. A/RES/43/173 (9 Dec. 1988), Principle 6 (emphasis added).

71 Inter-American Court of Human Rights, Case of the Gómez Paquiyauri Brothers. Judgment of July 8, 2004. Series C No. 110, para. 170 (emphasis added).

72 Inter-American Commission on Human Rights, Report N° 33/04, *Jailton Neri Da Fonseca (Brazil)*, Case 11.634 of March 11, 2004, para. 64.

73 European Court of Human Rights, *Raninen v. Finland* (Application no. 152/1996/771/972), Judgment of 16 December 1997, para. 55.

called for in the best interests principle and avoid imposing capital punishment on the parent of a child.

The lack of specific intent to cause the child of an executed parent to experience ill-treatment is not an obstacle to a finding of a violation; intent is a factor to be taken into account, but not a requirement. Both UN Special Rapporteurs on torture Manfred Nowak and Juan Méndez have stated that ‘Purely negligent conduct lacks the intent required under article 1 [of the Convention against Torture], but may constitute ill-treatment if it leads to severe pain and suffering.’⁷⁴ Juan Méndez has pointed out that:

Authoritative interpretations of international human rights law by international bodies have established that a violation of the Convention against Torture may occur “where the purpose or intention of the State’s action or inaction was not to degrade, humiliate or punish the victim, but where this nevertheless was the result.”⁷⁵

Similarly, the European Court of Human Rights has ruled that when there is ‘no evidence that there was a positive intention of humiliating or debasing the applicant’, this will not preclude a finding of a violation. The question whether the purpose ‘was to humiliate or debase the victim’ is ‘a factor to be taken into account’, but ‘the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3’.⁷⁶

74 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/22/53 (1 Feb. 2013), para. 20, citing Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/63/175 (28 July 2008), para. 49 (‘Purely negligent conduct lacks the intent required under article 1, and may constitute ill-treatment if it leads to severe pain and suffering’).

75 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Observations on communications transmitted to Governments and replies received, UN Doc. A/HRC/22/53/Add.4 (12 March 2013), p. 85. See also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/22/53 (1 Feb. 2013), para. 18, citing *Peers v. Greece*, Application No. 28524/95 (2001), paras. 68 and 74; *Groni v. Albania*, Application No. 25336/04 (2009), para. 125.

76 European Court of Human Rights, *Peers v. Greece* (28524/95), Judgment of 19 April 2001, para. 75 (citing *V. v. the United Kingdom* [GC], no. [24888/94](#), § 71, ECHR 1999-IX).

The approach taken by the European Court is that treatment can be humiliating or degrading even when there was no intent to humiliate the victim, if it is shown that the conduct ‘affect[s] the applicant in a manner incompatible with’ the prohibition of torture and inhuman or degrading treatment.⁷⁷ In such cases, the Court will examine whether the treatment reached ‘the level of severity’ required to result in a violation.⁷⁸ Whether it meets the required level of severity, the Court has stated, ‘depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.’⁷⁹

An additional factor to keep in mind is whether the child is a member of a minority or marginalised group. The UN Special Rapporteur on torture has highlighted that ‘a critical component of the obligation to prevent torture and ill-treatment’ entails ‘ensuring special protection’ of members of minority or marginalised groups. The State has ‘a heightened obligation’ to protect them from torture, he has noted, as both the Committee against Torture and the Inter-American Court of Human Rights have determined that ‘such individuals are generally more at risk of experiencing torture and ill-treatment.’⁸⁰

The severe suffering of family members as a violation

It is not just persons held in custody who have been found to be victims of the prohibition of torture or other cruel, inhuman or degrading treatment or punishment. Persons in non-custodial settings, such as parents of detained and mistreated children, family members of disappeared persons, and families from whom an execution and place of burial have been kept secret, have

77 European Court of Human Rights, *Peers v. Greece* (Application no. 28524/95), Judgment of 19 April 2001, para. 75.

78 European Court of Human Rights, *Raninen v. Finland* (Application no. 152/1996/771/972), Judgment of 16 December, para. 55.

79 European Court of Human Rights, *Groni v. Albania* (Application no. 25336/04), Judgment of 7 July 2009, para. 125.

80 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, UN Doc. A/HRC/22/53 (1 Feb. 2013), para. 26, citing Committee against Torture, general comment No. 2, para. 21; *Ximenes Lopes v. Brazil*, para. 103.

been recognized as having suffered a violation due to the severe anguish and stress caused. Such claims have been recognized by the UN Human Rights Committee⁸¹, the European Court of Human Rights⁸², the Inter-American Court of Human Rights⁸³, the African Commission on Human and Peoples' Rights⁸⁴, and the Human Rights Chamber for Bosnia and Herzegovina⁸⁵.

The Inter-American Court of Human Rights has long recognized that family members who are indirectly affected by a State's acts can themselves be victims of a violation of the right to be free from ill-treatment. As the Court has noted:

On many occasions, the Court has considered that the right to mental and moral integrity of the direct victims' next of kin has been violated, owing to the additional suffering they have

endured as a consequence of the circumstances arising from the violations perpetrated against the direct victims, and owing to the subsequent acts or omissions of the State authorities in dealing with the facts; for example, with regard to the search for the victims or their remains, and also with regard to how the latter have been treated.⁸⁶

Relatives of disappeared, for example, have been determined to be victims of inhumane treatment due to their own anguish and severe pain and suffering caused by the disappearance of their loved one.⁸⁷ As articulated by the Court in the case of *19 Tradesmen v. Colombia*, 'the next of kin suffered profound grief and anguish which negatively impacted their mental and moral integrity as a result of the State's conduct following' the disappearance of their loved one.⁸⁸

The ill-treatment of family members has also been found by the Inter-American Court of Human Rights to give rise to the family's own claim of ill-treatment. In the *Case of the 'Street Children'*, for example, the Court concluded that the families of 'street children' who had been subjected to torture and killed 'were, themselves, subjected to cruel, inhuman and degrading treatment'.⁸⁹ The Court found that the extreme violence to which the children were subjected and the way their bodies had been abandoned constituted 'cruel and inhuman treatment' of the families (para. 174).

The treatment of children in a detention centre also led the Court to find that their family members were themselves victims of ill-treatment. In the *Case of the*

81 See, e.g., UN Human Rights Committee, *Quinteros v. Uruguay* (1983) Communication No. 107/1981, UN Doc. CCPR/C/OP/2 at 138 (1990) para. 14.

82 See, e.g., *Kurt v. Turkey* (Application no. 15/1997/799/1002), Judgment of 25 May 1998, paras. 133-4; European Court of Human Rights, *Orhan v. Turkey* (Application no. 25656/94), Judgment of 18 June 2002; *Çakici v. Turkey* (Application no. 23657/94), Judgment of 8 July 1999 (existence of a claim by family members 'depends on the existence of special factors'); *Cyprus v. Turkey*, Judgment of 10 May 2001 ('the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3' para. 157).

83 Inter-American Court of Human Rights, *Blake v. Guatemala*, Judgment of January 24, 1998, paras. 112-116; Inter-American Court of Human Rights, *19 Tradesmen v. Colombia*, Judgment of July 5, 2004.

84 African Commission on Human and Peoples' Rights, in addressing together a set of four complaints filed against Sudan: *Amnesty International v. Sudan* (communication 48/90), *Comité Loosli Bachelard v. Sudan* (communication 50/91), *Lawyers Committee for Human Rights v. Sudan* (communication 52/91), and *Association of Members of the Episcopal Conference of East Africa v. Sudan* (89/93), in *African Commission on Human and Peoples' Rights, 13th Annual Activity Report* p. 39 (2003), para. 54 ('holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned.').

85 E.g. Human Rights Chamber for Bosnia and Herzegovina, *Palić v. the Republika Srpska*, (case no. CH/99/3196, Decision on Admissibility and Merits of 9 December 2000); *Pašović and Others v. Republika Srpska (Foča Missing Persons cases)*, CH/01/8569 et al., Decision on Admissibility and Merits, 7 November 2003; *Smajić and Others v. Republika Srpska (Višegrad Missing Persons cases)*, CH/02/8879 et al., decision on Admissibility and Merits, 5 Dec. 2003), *inter alia*.

86 Inter-American Court of Human Rights, *19 Tradesmen v. Colombia* (sometimes translated as *19 Merchants v. Colombia*), Judgment of July 5, 2004, para. 210 (citing *Case of Juan Humberto Sánchez*, Judgment of June 7, 2003. Series C No. 99, para. 101; *Case of Bámaca Velásquez*, Judgment of November 25, 2000. Series C No. 70, para. 160; and *Case of Blake*, Judgment of January 24, 1998. Series C No. 36, para. 114).

87 See, e.g., Inter-American Court of Human Rights, *Blake v. Guatemala*, Judgment of January 24, 1998, paras. 112-116; *19 Tradesmen v. Colombia*, Judgment of July 5, 2004.

88 Inter-American Court of Human Rights, *19 Tradesmen v. Colombia*, Judgment of July 5, 2004, para. 211.

89 Inter-American Court of Human Rights, *Case of the 'Street Children' (Villagran-Morales et al.) v. Guatemala*, Judgment of November 19, 1999 (Merits), para. 156.

Juvenile Reeducation Institute, the Inter-American Court of Human Rights found that, due to ‘the affective ties and kinship’ with the juvenile inmates, the human rights violations committed against juveniles ‘allows the Court to assume’ that the violations committed against those inmates caused the family members ‘tremendous grief, anguish and a sense of powerlessness.’⁹⁰ The next of kin, the Court found, ‘had to endure the cruel treatment to which the deceased and injured were subjected while inmates at the Center’ (para. 192).

The UN Human Rights Committee has also found the mother of a direct victim to herself be a victim of a rights violation. In *Quinteros v. Uruguay*, the Committee acknowledged ‘the deep sadness and anxiety that the author of the communication suffer[ed] owing to the disappearance of her daughter and the continuing uncertainty about her fate and her whereabouts.’⁹¹ The Committee found that she was a victim of the violation of Article 7 of the International Covenant on Civil and Political Rights that was also suffered by her daughter.

The European Court of Human Rights has also found a family member to be a victim when another family member’s rights were violated. In one case, for example, the circumstances of a State’s violation of a child’s rights caused the mother of a child to herself be the direct victim of a violation of the prohibition of ill-treatment. The mother’s five-year-old daughter was detained and held for two months in a detention centre for adults, and was then deported without the mother’s knowledge.⁹² The Court ruled that ‘whether a parent qualifies as a “victim” of the ill-treatment of his or her child will depend on the existence of special factors which give the applicant’s suffering a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation.’⁹³ Among the relevant factors, the Court stated,

are ‘the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond’ as well as ‘the particular circumstances of the relationship’ and the way in which the authorities respond when contacted by the parent. Under the facts of the case the Court concluded that the mother ‘suffered deep distress and anxiety’ reaching the level of severity proscribed by the prohibition of ill-treatment (para. 62), and unanimously found a violation of the European Convention.

A child of a parent sentenced to death or executed may therefore be a victim of ill-treatment even if the State did not intend to cause the child severe mental pain or suffering, so long as the severity of the anguish meets the level of severity proscribed by the prohibition of ill-treatment. The anguish and agony described in studies of these children,⁹⁴ particularly when their young age is taken into account, suggests that their right to be free from torture and cruel, inhuman or degrading treatment has indeed been violated.

Secret execution and burial: ‘A clear human rights violation’

Families are sometimes informed only after the fact that their family member has been executed; they are sometimes not even informed where the body is buried. The Convention on the Rights of the Child requires States, in the event a parent dies in its custody, to provide the child or, as appropriate, another member of the family, ‘with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child’ (art (9)(4)). The African Committee of Experts, understanding the serious impact that a death sentence as well as a secret execution of a parent can have on a child, has indicated in a General Comment that States have an obligation to ‘provide a child with information about whether a parent/ primary caregiver is in detention with the possibility of being executed, and also what has happened to the remains of

90 Inter-American Court of Human Rights, *Case of the “Juvenile Reeducation Institute” v. Paraguay*, Judgment of September 2, 2004, para. 191.

91 UN Human Rights Committee, *Quinteros v. Uruguay*, July 21, 1983 (19th session) Communication N° 107/1981, para. 14.

92 See, e.g., European Court of Human Rights, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* (Application no. 13178/03), Judgment of 12 October 2006.

93 European Court of Human Rights, *Mubilanzila Mayeka*

and *Kaniki Mitunga v. Belgium* (Application no. 13178/03) Judgment of 12 October 2006, para. 61.

94 See Helen Kearney, *Children of parents sentenced to death* (2012); Oliver Robertson and Rachel Brett, *Lightening the Load of the Parental Death Penalty on Children* (2013).

an executed mother/ parent.⁹⁵ Nonetheless, some states retaining the death penalty continue to carry out secret executions and burials, and the impact on children can be severe.

A State's failure to provide information to the family of the date of execution or the place of burial after an execution violates the prohibition of torture and other ill-treatment, as it causes severe mental anguish and suffering. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has declared secret executions to be 'a clear human rights violation'.⁹⁶ This is the conclusion reached by the UN Committee against Torture, the UN Human Rights Committee, the UN Special Rapporteur on torture, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, and the UN Special Rapporteur on Belarus; it has also been raised during the Universal Periodic Review.

The depth of concern over the practice of secret executions merits attention, as the impact on the child of a parent executed in secret can be very severe indeed.

Since at least 1993, the UN Human Rights Committee has found the failure to notify the family of a family member's execution to be 'incompatible with the Covenant'.⁹⁷ The Committee has continued to make this observation in subsequent reviews,⁹⁸ and continues to ask States that have not previously complied to report on whether measures have now been taken to 'provide individuals on death row and their families with reasonable advance notice of the scheduled date and time of execution'.⁹⁹ At a minimum, the State should

give advance notice to the family of when an execution is scheduled 'with a view to reducing the psychological suffering caused by the lack of opportunity to prepare themselves for this event'.¹⁰⁰

In addition to raising this concern in the periodic review of State reports, the Human Rights Committee has also found in its consideration of individual complaints that secrecy surrounding an execution or burial constitutes inhuman treatment. In two cases in 2003, for example, the Human Rights Committee found that these practices had put the mother of a condemned prisoner in a state of anguish and mental stress amounting to inhuman treatment in violation of article 7 of the International Covenant on Civil and Political Rights.¹⁰¹ The Committee noted 'the continued anguish and mental stress caused' to the mother by 'the persisting uncertainty' surrounding execution and location of the gravesite. Commenting that this has 'the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress', the Committee determined that this 'amounts to inhuman treatment of the author, in violation of article 7 of the Covenant', meriting 'compensation for the anguish suffered'.¹⁰² The Committee has found in cases many times since that secretly executing a prisoner and concealing from the family the place of burial constitutes inhuman treatment under article 7.¹⁰³

The Human Rights Committee has linked this concern not only to the right to be free from inhuman treatment, but also to the right to life. It stated in its General Comment on the right to life that 'failure to provide relatives with information on the circumstances of the

95 African Committee of Experts, General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child, ACERWC/GC/01 (2013), para. 58.

96 UN Special Rapporteur on Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Philip Alston, *Transparency and Imposition of the Death Penalty*, UN Doc. E/CN.4/2006/53/Add.3 (24 March 2006), para. 32.

97 UN Human Rights Committee, Concluding Observations: Japan, UN Doc. CCPR/C/79/Add.28 (5 Nov. 1993), para. 12.

98 E.g., UN Human Rights Committee, Concluding Observations: Japan, UN Doc. CCPR/C/79/Add.102 (19 Nov. 1998), para. 21.

99 UN Human Rights Committee, List of Issues: Japan, UN Doc. CCPR/C/JPN/QPR/7 (11 December 2017), para. 11(b).

100 UN Human Rights Committee, Concluding Observations Japan, UN Doc. CCPR/C/JPN/CO/5 18 Dec. 2008), para. 16.

101 UN Human Rights Committee, *Schedko v. Belarus*, Communication No. 886/1999, UN Doc. CCPR/C/77/D/886/1999 (28 April 2003), para. 10.2; *Staselovich v. Belarus*, UN Doc. CCPR/C/77/D/887/1999 (24 April 2003), para. 9.2.

102 *Schedko*, para. 12; *Staselovich*, para. 11.

103 E.g. *Khalilov v. Tajikistan*, UN Doc. U.N. Doc. CCPR/C/83/D/973/2001 (2005), para. 7.7; *Aliboeva v. Tajikistan*, UN Doc. CCPR/C/85/D/985/2001 (2005), para. 6.7; *Shukurova v. Tajikistan*, UN Doc. CCPR/C/86/D/1044/2002 (2006), para. 8.7; *Kovaleva and Kozyar v. Belarus*, UN Doc. CCPR/C/106/D/2120/2011 (2015), para. 11.10.

death of an individual may violate their rights under article 7,¹⁰⁴ as could failure to inform them of the location of the body,¹⁰⁵ and, where the death penalty is applied, of the date in which the carrying out of the death penalty is anticipated.¹⁰⁶ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has similarly found that these practices ‘undermine the procedural safeguards surrounding the right to life.’¹⁰⁷

The Committee against Torture has declared it agrees with the Special Rapporteur on extrajudicial, summary or arbitrary executions that keeping an execution secret from the family constitutes ‘a clear human rights violation.’¹⁰⁸ The Committee has recognized for over a decade that the suffering families experience from secret executions falls within the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. In reviewing Uzbekistan in 2007, for example, the Committee expressed concern about ‘the failure to inform families of persons sentenced to death about the time and place of executions and the location of the bodies, which causes them distress.’ The Committee called on the State to treat the relatives ‘in a humane manner to avoid further suffering due to the secrecy surrounding executions.’¹⁰⁹

The Committee against Torture has also expressed concern over secret executions in Belarus, ‘including

reports that the families of persons sentenced to the death penalty are only informed days or weeks after the execution has taken place, that they are not given the opportunity for a last visit to the prisoner, that the body of the executed prisoner is not handed over to the family and the place of burial is not disclosed to them.’¹¹⁰ Family members should not have this ‘added uncertainty and suffering,’ the Committee has declared.¹¹¹ The Committee has expressed similar concerns in reviewing Japan, saying it was ‘deeply concerned’ over ‘the unnecessary secrecy and uncertainty surrounding the execution of prisoners sentenced to death,’ and in reviewing Mongolia, stating that ‘not even the families of executed persons are informed about the date of execution or given their mortal remains.’¹¹² The Committee has said the State ‘should provide the relevant information to the families of persons who were executed,’¹¹³ demonstrating that States parties have a duty under the treaty to prevent such suffering by ending this secrecy.

The UN Special Rapporteur on torture has also found secret executions to fall within his mandate, stating that they ‘violate the rights of the convict and family members to prepare for death,’¹¹⁴ and that the secrecy surrounding an execution and the refusal to hand over remains to families are ‘especially cruel features of capital punishment.’¹¹⁵

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions in 2006, Philip Alston, has declared: post-conviction secrecy ‘constitutes inhuman

104 UN Human Rights Committee, General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life (2018), para. 56 (citing *Eshonov v. Uzbekistan* (Communication No. 1225/2003), Views adopted on 22 July 2010, para. 9.10.

105 Citing *Kovalev v Belarus* (Communication No. 2120/2011), Views adopted on 29 Oct. 2012, para. 11.10.

106 Citing Concluding Observations: Japan (2014), para. 13.

107 UN Special Rapporteur on extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Philip Alston, *Transparency and Imposition of the Death Penalty*, UN Doc. E/CN.4/2006/53/Add.3 (24 March 2006), para. 32.

108 UN Committee against Torture, Concluding Observations: Japan, UN Doc. CAT/C/JPN/CO/2 (28 June 2013), para. 15, citing E/CN.4/2006/53/Add.3, para. 32.

109 UN Committee against Torture, Concluding Observations: Uzbekistan, UN Doc. CAT/C/UZB/CO/3 (26 Feb. 2008), para. 26.

110 UN Committee against Torture, Concluding Observations: Belarus, UN Doc. CAT/C/BLR/CO/4 (7 Dec. 2011), para. 27.

111 UN Committee against Torture, Concluding Observations: Belarus, UN Doc. CAT/C/BLR/CO/4 (7 Dec. 2011), para. 27.

112 UN Committee against Torture, Concluding Observations: Mongolia, UN doc. CAT/C/MNG/CO/1 (20 Jan. 2011), para. 19.

113 UN Committee against Torture, Concluding Observations: Mongolia, UN doc. CAT/C/MNG/CO/1 (20 Jan. 2011), para. 19.

114 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. 40.

115 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. 52.

and degrading treatment or punishment.¹¹⁶ As indicated earlier, he has stated that ‘Refusing to provide convicted persons and family members advance notice of the date and time of execution is a clear human rights violation.’¹¹⁷ Dismissing any argument by States that it is better to keep an execution date secret from the family, he said: ‘States do not have any interest that justifies keeping persons on death row and their families in the dark regarding their fate.’¹¹⁸

The Special Rapporteur on the situation in Belarus has likewise stated that not informing the relatives of those facing the death penalty of the scheduled date of execution or where the body is buried constitutes ‘inhuman treatment’.¹¹⁹

The issue of failure to inform the family of an execution has come up during the Universal Periodic Review. In the review of Japan in 2012, the State was urged to ensure that ‘families and their legal representatives are provided with adequate information about a pending execution and to allow a last family visit or communication with the convicted person.’¹²⁰ The State responded that its policy was based on concern that the inmate could ‘suffer serious emotional distress’ if notified in advance.¹²¹ This response, of course, is contrary to the finding of the UN Special Rapporteur on torture that not informing the convict violates the right

of the convict to prepare for death, and it fails to address the severe distress and suffering that the treaty bodies and special procedures have recognised is caused to families when they have no opportunity for a final visit or communication and find out with a shock afterward that their relative is already dead.

As the UN Committee against Torture stated in a General Comment: ‘States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented.’¹²² Secret executions are clearly an obstacle impeding the eradication of ill-treatment. Just as ‘it is inhuman treatment to surprise a mother with news of her child’s execution’¹²³, and a ‘clear human rights violation’ of the right of family members to humane treatment if an execution date is kept secret, so it is for the child to learn after the fact that a parent has been executed, with no opportunity for final visits or personal preparation. At a bare minimum, in those States that retain the death penalty, the State should inform adults caring for the child of an impending execution so that they may decide how best to inform the child.

The prohibition of discrimination

Children of parents sentenced to death or executed may also experience the impairment of their right to non-discrimination. If, as is often the case in countries where the death penalty is retained, it is imposed in a discriminatory manner, the children of those sentenced to death or executed become indirect victims of this discrimination. As the UN Special Representative of the Secretary-General on Violence against Children has pointed out, ‘the penalty disproportionately affects the poor and people belonging to ethnic, racial and religious

116 Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Philip Alston, *Transparency and Imposition of the Death Penalty*, UN Doc. E/CN.4/2006/53/Add.3 (24 March 2006), para. 37.

117 UN Special Rapporteur on Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Philip Alston, *Transparency and Imposition of the Death Penalty*, UN Doc. E/CN.4/2006/53/Add.3 (24 March 2006), para. 32.

118 Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Philip Alston, *Transparency and Imposition of the Death Penalty*, UN Doc. E/CN.4/2006/53/Add.3 (24 March 2006), para. 27.

119 Report of the Special Rapporteur on the situation in Belarus, UN Doc. A/HRC/23/52 (18 April 2013), para. 45.

120 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Japan, UN Doc. A/HRC/22/14 (12 Dec. 2012), para. 147.144.

121 UN Human Rights Council, Report of the Working Group on the Universal Periodic Review: Japan, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/22/14/Add.1 (8 March 2013), para. 147.144(b).

122 UN Committee against Torture, General Comment No. 2, Implementation of article 2 by States parties, UN (2008), para. 4.

123 Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur, Philip Alston, *Transparency and Imposition of the Death Penalty*, UN Doc. E/CN.4/2006/53/Add.3 (24 March 2006), para. 43.

minorities. Children whose parents have been sentenced to death may thus face multiple discriminations.¹²⁴ The Deputy High Commissioner for Human Rights has also recognised that ‘a child could feel discrimination on grounds of race, religion or economic condition, as well as owing to the stigma due to the death sentence faced by their parents.’¹²⁵

The right to non-discrimination lies at the very heart of international human rights law. It is so central that it appears in the UN Charter and near the beginning of every core international and regional human rights instrument. Because prejudice is often the motivation underlying other rights violations, measures that protect against manifestations of that prejudice serve to protect a broad array of human rights.¹²⁶ The UN Committee on the Rights of the Child has recognised that ‘Discrimination related to ... personal circumstances ... excludes children from full participation in society. ... It affects children’s opportunities and self esteem, as well as encouraging resentment and conflict among children and adults.’¹²⁷

The prohibited grounds of discrimination outlined in article 2 of the Child Convention include ‘birth or other status.’ Included in ‘other status’ are conditions that one is not able to change (as in ethnic origin, for example) or that one should not be forced to change in order to avoid discrimination (as in political opinion, for example). The ‘other status’ relevant here is the status of being the child of someone sentenced to death or executed. In addition to bearing the consequence of discrimination in the application of the death penalty to a parent by virtue of losing that parent, the stigma experienced by

children of parents sentenced to death or executed leads in many instances to discrimination against them. As noted earlier in this paper, the UN Special Representative of the Secretary-General on Violence against Children has expressed concern that ‘the serious stigma associated with people sentenced to death often makes it difficult to find alternative caregivers for the child. This further exacerbates the pain and in turn, increases the risk of becoming homeless and ending up living on the street, at risk of violence and exploitation, and manipulated into crime.’¹²⁸ The experience of discrimination can also impair a child’s health and the ability to learn, thus impairing the right to education. There is therefore a serious multiplier effect on the rights of a child of parents sentenced to death or executed. The availability of alternatives to the death penalty, the importance of preventing children from experiencing discrimination, and the application of the best interests of the child principle lead to the conclusion that States retaining the death penalty should refrain from imposing it on a parent.

The right to health

Studies show that having a parent sentenced to death or executed can have a serious negative impact on mental and sometimes the physical health of that person’s child caused by the extreme stress and anguish experienced.¹²⁹ The right to health is a fundamental human right.¹³⁰ When conducting a best interests assessment in determining whether to impose capital punishment on the parent of a child, States should consider the impact of that decision on a child’s health.

124 Introductory Essay of the United Nations Special Representative of the Secretary-General on Violence against Children, Marta Santos Pais, in OSCE Office for Democratic Institutions and Human Rights (ODIHR), *The Death Penalty in the OSCE Area, Background Paper 2017, Special Focus: Children of Parents Sentenced to Death or Executed*, p. 6.

125 UN Human Rights Council, Panel on the human rights of children of parents sentenced to the death penalty or executed, UN Doc. A/HRC/RES/22/11 (15 March 2013), para. 7.

126 See Stephanie Farrior, *Equality and Non-discrimination under International Law*, in Farrior, ed., *EQUALITY AND NON-DISCRIMINATION UNDER INTERNATIONAL LAW: VOLUME II (THE LIBRARY OF ESSAYS ON INTERNATIONAL HUMAN RIGHTS, Farrior, ed.)* (Routledge 2015), p. xi.

127 UN Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood (2005), para. 11(b)(iv).

128 Special Representative of the Secretary-General on Violence against Children, Marta Santos Pais, in OSCE Office for Democratic Institutions and Human Rights (ODIHR), *The Death Penalty in the OSCE Area, Background Paper 2017, Special Focus: Children of Parents Sentenced to Death or Executed*, p. 6.

129 See sources cited in note 1.

130 The right to health is recognized in the International Covenant on Economic, Social and Cultural Rights (article 24); International Convention on the Elimination of All Forms of Racial Discrimination (article 5(e)(iv)); UN Convention on the Elimination of All Forms of Discrimination against Women (articles 11.1(f) and 12); UN Convention on the Rights of the Child (article 24); and in several regional human rights instruments including the European Social Charter (art. 11); the African Charter on Human and Peoples’ Rights (article 16); the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (art. 10).

As the UN Committee on the Rights of the Child has stated: ‘The child’s right to health (art. 24) and his or her health condition are central in assessing the child’s best interest.’¹³¹ Both direct and indirect impacts on the child’s health should be considered. The World Health Organization has noted that the obligation of States to consider the best interests of the child as a primary consideration ‘includes actions taken that indirectly impact on a child’s health.’¹³²

An understanding of just what ‘health’ means is important in conducting a best interests analysis. As the UN Committee on the Rights of the Child has pointed out, States agreed in the Constitution of the WHO that health ‘is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.’¹³³ The Committee on Economic, Social and Cultural Rights interprets the right to health ‘as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health.’¹³⁴ The obligation of States requires them ‘to refrain from interfering directly *or indirectly* with the enjoyment of the right to health.’¹³⁵

The full development of the child is another aspect of a child’s right to health. The UN Committee on the Rights of the Child has stated that ‘approaching children’s health from a child-rights perspective’ entails understanding that ‘all children have the right to opportunities to survive, grow and develop, within the context of physical, emotional and social well-being, to each child’s full potential.’¹³⁶

131 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (2013), para. 77.

132 World Health Organization, *Health & Human Rights: African Charter on the Rights and Welfare of the Child*, available at <https://www.who.int/hhr/African%20Child%20Charter.pdf>.

133 Preamble to the Constitution of the World Health Organization (WHO) as adopted by the International Health Conference, New York, 22 July 1946.

134 UN Committee on Economic Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, article 12 (2000), para. 11.

135 UN Committee on Economic, Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, article 12 (2000), para. 33 (emphasis added).

136 UN Committee on the Rights of the Child, General

The right to health is a right in and of itself, but in addition, as the Committee on the Rights of the Child has pointed out, the realization of this right ‘is indispensable for the enjoyment of all the other rights in the Convention,’ and ‘achieving children’s right to health is dependent on the realization of many other rights outlined in the Convention.’¹³⁷ Similarly, the UN Committee on Economic, Social and Cultural Rights has emphasised that ‘Health is a fundamental human right indispensable for the exercise of other human rights.’¹³⁸

The right to non-discrimination is a key component in realising the right to health. The discrimination children may experience when a parent is sentenced to death or executed has been discussed earlier in this paper. States have a duty ‘to ensure that children’s health is not undermined as a result of discrimination,’ which the Committee on the Rights of the Child has stated ‘is a significant factor contributing to vulnerability’ regarding their health.¹³⁹ In the context of the right to health, the Committee on the Rights of the Child has stated that ‘Particular attention must be given to identifying and prioritizing marginalized and disadvantaged groups of children, as well as children who are at risk of any form of violence and discrimination.’¹⁴⁰

Also relevant to children’s health is the particular vulnerability of younger children when deprived of the parental relationship. The Committee on the Rights of the Child has emphasised that young children, defined by the Committee as those under age eight, ‘are especially vulnerable to the harm caused by unreliable, inconsistent relationships with parents’

Comment No. 14 on the right of the child to the enjoyment of the highest attainable standard of health, article 24 (2013), para. 1.

137 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to the enjoyment of the highest attainable standard of health, article 24 (2013), para. 7.

138 UN Committee on Economic Social and Cultural Rights, General Comment No. 14, The right to the highest attainable standard of health, article 12 (2000), para. 1.

139 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to the enjoyment of the highest attainable standard of health, article 24 (2013), para. 8.

140 UN Committee on the Rights of the Child, General Comment No. 14 on the right of the child to the enjoyment of the highest attainable standard of health, article 24 (2013), para. 98.

and by ‘any number of other adversities prejudicial to their wellbeing.’¹⁴¹ A reason for concern is that ‘Young children are less able to comprehend these adversities or resist harmful effects on their health, or physical, mental, spiritual, moral or social development.’¹⁴² Moreover, the Committee on the Rights of the Child has noted, young children ‘are especially at risk where parents or other caregivers are unable to offer adequate protection’ due to death or other circumstances. ‘Whatever the difficult circumstances,’ the Committee has stated, ‘young children require particular consideration because of the rapid developmental changes they are experiencing; they are more vulnerable to disease, trauma, and distorted or disturbed development, and they are relatively powerless to avoid or resist difficulties and are dependent on others to offer protection and promote their best interests.’¹⁴³ A significant factor in creating these risks—the sentencing to death or killing by the State of a parent—can and should be eliminated in light of the serious consequences for the child.

In addition to experiencing the prospect or fact of a parent being killed by the State, these children may also experience bullying, isolation, ostracism, and other degrading treatment by others in the community due to stigma. This, too, impairs the right to the health of the child. The Committee on the Rights of the Child has noted that ‘There is growing recognition of the need for increased attention for behavioural and social issues that undermine children’s mental health, psychosocial wellbeing and emotional development.’¹⁴⁴ Not all determinants of a child’s health are within the control of the State, but this one is. States can remove this risk factor from harming a child by refraining from imposing a death sentence on or executing the parent of a child.

141 UN Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood (2005), UN Doc. CRC/C/GC/7/Rev.1 (2006), para. 36.

142 UN Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood (2005), UN Doc. CRC/C/GC/7/Rev.1 (2006), para. 36.

143 UN Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood (2005), UN Doc. CRC/C/GC/7/Rev.1 (2006), para. 36.

144 UN Committee on the Rights of the Child, General Comment No. 15 on the right of the child to the enjoyment of the highest attainable standard of health (2013), para. 38.

It is worth noting that States have recognised in the Child Convention ‘the right of the child to the enjoyment of the highest attainable standard of health’ (art. 24). The standard is therefore ‘the *highest* attainable standard of health.’ In light of the negative health consequences for a child, States that allow imposition of a death sentence on the parent of a child or execution of the parent are not fulfilling the obligation to respect and ensure the highest attainable standard of health for the child.

The right to education

The severe emotional distress and torment experienced by a child whose parent is slated to be killed by the State, or has been killed by the State, hinders the ability of that child to learn and to fully realise the right to education. In addition, the social isolation, bullying, and other discrimination in schools and other educational settings that such children are reported to experience can severely impair their ability to learn, and can contribute to truancy and absenteeism. It creates an environment that impedes rather than enhances learning. In addition, in the event of the execution of a parent, an older child might assume the role of carer for younger children in the family. This sense of duty to take on parental responsibilities can increase the stress factors for the older child, and in some cases may cause that child to leave school in order to provide for the family. This, too, impairs the child’s right to education.

The right to education is a fundamental human right,¹⁴⁵ and its importance cannot be stressed enough. As the Committee on Economic, Social and Cultural Rights stated in its General Comment on the right to education: ‘education is both a human right in itself and an indispensable means of realizing other human rights.’ The aim of education, the Committee on the

145 Convention on the Rights of the Child (art. 28); International Covenant on Economic, Social and Cultural Rights (art. 13); Convention on the Elimination of All Forms of Racial Discrimination (art. 5(e)(v)); Convention on the Elimination of All Forms of Discrimination against Women (art. 10); American Convention on Human Rights; American Declaration on the Rights and Duties of Man (art. XII); African Charter on Human and Peoples’ Rights (art. 17); European Convention on Human Rights, Protocol I (art. 2).

Rights of the Child has explained, is to ‘empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence’ and that this must be achieved in ways that are child-centred, child-friendly and reflect the rights and inherent dignity of the child.¹⁴⁶ When a child’s right to education is impaired, the child does not just lose book-learning; that child loses all that education brings.

Education is vital in both adolescence and early childhood. Citing a UNICEF report, the Committee on the Rights of the Child has stated: Education ‘is the single most important policy investment that States can make to ensure the immediate and long-term development of adolescents.’¹⁴⁷ And the right to education during early childhood is ‘closely linked to young children’s right to maximum development’ provided for in the Convention on the Rights of the Child, (article 6(2)).¹⁴⁸ The Committee on the Rights of the Child adopted its General Comment on education in order to address obstacles impeding the full implementation of the right to education in the Covenant. States can refrain from placing an obstacle in the way of education by refraining from imposing a death sentence on or executing the parent of a child.

The right to information

The secrecy surrounding sentences of death and executions that exists in a number of countries violates not only Article 9(4) of the Convention on the Rights of the Child as well as the prohibition of ill-treatment, as discussed earlier in this paper, but also the right to receive information, a right protected in Article 13 of the Convention on the Rights of the Child and numerous

other human rights treaties.¹⁴⁹ As the UN Human Rights Committee noted in its General Comment on Article 19 of the International Covenant on Civil and Political Rights, the right to information ‘embraces a right of access to information held by public bodies.’¹⁵⁰ This would include information regarding the date and time of an execution and place of burial of the body.

Though under international human rights law, the right of access to information may be restricted by the State, the failure to provide information to the families of those sentenced to death or executed does not meet the requirements for restricting this right. Human rights treaties specify three requirements that must be met for a restriction on the right to information to be justified. The restriction must be provided by law, it must be done for one of the objectives set out in the treaty provision on the right to information, and it must be ‘necessary’ in order to meet that objective.

The permissible objectives set out in human rights treaties are respect of the rights or reputations of others, the protection of national security or of public order (*ordre public*), and protection of public health and morals. Though in some countries the secrecy around executions might be provided in law, that secrecy is far from necessary to meet any of the permissible objectives. In addition, as discussed earlier, human rights bodies have rejected State justifications for keeping an execution secret from the family. Even if a State were to proffer a claim that it has a significant interest in maintaining this secrecy, the claim would fail in light of the consensus among human rights bodies that this secrecy is a clear violation of human rights and subjects the family members to inhuman treatment. This is because the prohibition of ill-treatment is non-derogable; no objective is sufficient to justify a violation of that prohibition.

146 UN Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood (2005), para. 28.

147 UN Committee on the Rights of the Child, General Comment No. 20 on the implementation of the rights of the child during adolescence (2016), para. 68 (citing www.unicef.org/adolescence/files/SOWC_2011_Main_Report_EN_02092011.pdf).

148 UN Committee on the Rights of the Child, General Comment No. 7, Implementing child rights in early childhood (2005), para. 28.

149 Article 19 of the International Covenant on Civil and Political Rights; Article 13 of the American Convention Human Rights; Article 9 of the African Charter on Human and Peoples’ Rights; and Article 10 of the European Convention on Human Rights.

150 UN Human Rights Committee, General Comment No. 34 on Article 19, Freedoms of opinion and expression (2011), para. 18.

The principle of non-separation of a child from the parents

The principle of non-separation of a child from the parents is reflected in both the UN Convention on the Rights of the Child (article 9) and the African Charter on the Rights and Welfare of the Child (article 19). It is a qualified right, as there may be conditions of abuse or neglect, for example, that may justify separating a child from a parent. Imprisonment of the parent may also be a reason that separation occurs.¹⁵¹ In the event of separation, these treaties provide that the child has the right to ‘maintain personal relations and direct contact’ with the parent(s) on a regular basis, unless deemed contrary to the child’s best interests.¹⁵² The Convention on the Rights of the Child also recognises that separation of child from parent may result from an ‘action initiated by a State Party, such as ... death (including death arising from any cause while the person is in the custody of the State)’, in which case the State must provide information on the whereabouts of the parent if requested, unless detrimental to the child (art. 9(4)).

The importance of non-separation is such that the Committee on the Rights of the Child addressed it in its General Comment on the best interests of the child: ‘Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child.’¹⁵³

Separation of a child from a parent who is executed is, of course, permanent. A less intrusive means of separating a child from a parent than killing the

parent, imprisonment or, where possible, alternatives to detention, avoid the finality of an execution with its permanent removal of the parent from the child’s life.

When a child is orphaned by the state

When a child is orphaned by the State, the consequences are even more dire, as it results in the permanent deprivation of family life with one’s parents. Due to the stigma that children of the executed can experience, this can result in total deprivation of family life, as the child may be rejected by other family members. The UN Special Representative of the Secretary-General on Violence against Children has remarked that ‘the serious stigma associated with people sentenced to death often makes it difficult to find alternative caregivers for the child’.¹⁵⁴

In addition, a child will end up orphaned if a perpetrator father, for example, is put to death after murdering the mother. As the UN Special Representative of the Secretary-General on Violence against Children has noted, ‘homicide statistics show that 40 to 70 per cent of homicides of women are perpetrated by an intimate partner or family member’, which affects a significant number of children.¹⁵⁵ Sometimes a State puts a perpetrator parent to death even when the children plead with the State not to do so. This happened, for example, when the state of Georgia in the United States carried out its first execution of a woman in 70 years despite pleas not to do so from her children, who had been very close with their father, whose murder she had arranged.¹⁵⁶

151 For an analysis of the international legal standards that apply in this regard, see Laurel Townhead, Briefing Paper: Children of Incarcerated Parents -- International Standards and Guidance (Quaker United Nation's Office, 2013), available at <https://quino.org/resource/2015/4/children-incarcerated-parents-international-standards-and-guidance>.

152 UN Convention on the Rights of the Child, art. 9(3); African Charter on the Rights and Welfare of the Child, article 19(2).

153 UN Committee on the Rights of the Child, General Comment No. 14, UN Doc. No. CRC/C/GC/14, (May 29, 2013), para. 61.

154 Introductory Essay of the United Nations Special Representative of the Secretary-General on Violence against Children, Marta Santos Pais, in OSCE Office for Democratic Institutions and Human Rights (ODIHR), *The Death Penalty in the OSCE Area, Background Paper 2017, Special Focus: Children of Parents Sentenced to Death or Executed*, p. 7.

155 Introductory Essay of the United Nations Special Representative of the Secretary-General on Violence against Children, Marta Santos Pais, in OSCE Office for Democratic Institutions and Human Rights (ODIHR), *The Death Penalty in the OSCE Area, Background Paper 2017 -- Special Focus: Children of Parents Sentenced to Death or Executed*, p. 7 (citing Office on Drugs and Crime (UNODC)).

156 See CNN, [Clemency board to review decision as children plead for death row woman's life](#) (28 Sept. 2015). She was executed two days later.

The UN Human Rights Committee indicated in its General Comment on the rights of the child that ‘reports by States parties should provide information on the special measures of protection adopted to protect children who are abandoned or deprived of their family environment in order to enable them to develop in conditions that most closely resemble those characterizing the family environment.’¹⁵⁷ Children deprived of their family environment, the Convention on the Rights of the Child provides, are ‘entitled to special protection and assistance provided by the State’ (art. 20). Depending on circumstances, such assistance might be necessary upon detention of a parent by the State, but could be needed for the rest of the person’s childhood if the child is rendered an orphan by the State.

The right to protection from mental violence

The UN Special Representative of the Secretary-General on Violence against Children has expressed concern that the imposition of capital punishment on a parent infringes the right of the child to protection from mental violence, a right provided in article 19 of the Convention on the Rights of the Child.¹⁵⁸ Her detailed remarks indicate it is apparent that she sees this as falling within her mandate. States should include this concern in conducting a best interests assessment if considering the imposition of capital punishment on the parent of a child.

¹⁵⁷ UN Human Rights Committee, General Comment No. 17 on Article 24, Rights of the child (1989), para 6.

¹⁵⁸ Introductory Essay of the United Nations Special Representative of the Secretary-General on Violence against Children, Marta Santos Pais, in OSCE Office for Democratic Institutions and Human Rights (ODIHR), *The Death Penalty in the OSCE Area, Background Paper 2017, Special Focus: Children of Parents Sentenced to Death or Executed*, p. 7.

The right to an adequate standard of living

The UN Special Representative of the Secretary-General on Violence against Children also recognised that when a parent is sentenced to death or executed, this can also infringe the child’s right ‘to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’, provided in article 27(1). The family might use its resources to try to prevent an execution, and the family may experience permanent loss of someone who had provided for the family.¹⁵⁹ These considerations should also be examined in any assessment of the best interests of the child if the State contemplates imposing capital punishment on the parent of a child.

Children of nationals who face the death penalty abroad

In fulfilling their obligation to protect the best interests of the child, States should also take measures to protect children of nationals who face the death penalty abroad. This may involve engaging consular assistance to help the child receive information about the parent’s situation and communicate with the parent. If the child is abroad with the parent at the time, this may also involve helping to repatriate the child, depending on circumstances. The African Committee of Experts on the Rights and Welfare of the Child has recognised the needs of children of nationals who face the death penalty abroad. In a General Comment, the Committee indicates that States ‘should provide assistance to the children of their nationals who are deprived of their liberty in another country, including when under death sentence.’¹⁶⁰ In addition, States are to report to the Committee on legislative and other measures taken to implement this obligation (para. 66).

¹⁵⁹ Introductory Essay of the United Nations Special Representative of the Secretary-General on Violence against Children, Marta Santos Pais, in OSCE Office for Democratic Institutions and Human Rights (ODIHR), *The Death Penalty in the OSCE Area, Background Paper 2017, Special Focus: Children of Parents Sentenced to Death or Executed*, p. 7.

¹⁶⁰ African Committee of Experts on the Rights and Welfare of the Child, General Comment No. 1 on Article 30 of The African Charter on the Rights and Welfare of the Child, ACERWC/GC/01 (2013), para. 63.

Conclusion

International human rights law recognizes the particular vulnerabilities of children to the risk of a violation of their rights. The sentencing to death and execution of a parent can have a devastating impact on a child. The serious consequences of such punishment for the parent's child are foreseeable and preventable. Though sentencing a parent to a term in prison will affect a child, the killing by the State of the parent magnifies the suffering of the child, as the deprivation of the parental relationship is permanent and irreversible. States can use alternatives to the death penalty to ensure accountability for committing a crime. The obligation for the best interests of the child to be a *primary* consideration in all actions affecting the child leads to the conclusion that States should refrain from imposing capital punishment on the parent of a child.

Recommendations

To avoid the extreme suffering experienced by children when a parent is sentenced to death or executed, States should avoid seeking and imposing the death penalty on the parent. States should instead implement ways to deal with crime without resorting to capital punishment. Alternatives exist for sanctioning crime that do not have the irreversible finality of execution.

In States that retain the death penalty:

States

States should impose a moratorium on the imposition of death sentences and the carrying out of executions on the parent of a child.

States should never allow the death penalty to be mandatory in sentencing the parent of a child, as a mandatory death sentence precludes an assessment of the best interests of the child, in violation of the State's obligation under the Convention on the Rights of the Child.

Before reaching a decision to impose capital punishment on the parent of a child, States should, as part of the duty to treat the best interests of the child as a *primary* consideration in all actions concerning children, conduct a detailed assessment of the impact on the child of such a decision, following each step set out in the General Comment on the best interests of the child of the Committee on the Rights of the Child.

As recommended in the Report of the Secretary-General to the UN Human Rights Council in September 2018: 'States that still use the death penalty should recognize the urgency of ensuring a protective environment for the children of parents sentenced to death or executed, thereby preventing discrimination and stigma, and of providing them with assistance for their recovery and reintegration. States should also take measures to assist children of their nationals who may face the death penalty abroad.'¹⁶¹

In the event an execution of a parent is carried out, States should provide support and advice to the remaining parent, caregivers and civil society groups.

In their periodic reports to the United Nations and regional human rights bodies, States should provide information on the special measures of protection taken to protect children deprived of their parent(s) due to capital punishment in order to enable them to develop in conditions most closely resembling the family environment.

States should ensure that educational institutions take steps to protect the child of a parent sentenced to death or executed from actions arising from that status, such as discrimination, bullying, and isolation. States should make information available to the child, or a family member if in the best interests of the child, regarding

¹⁶¹ UN Human Rights Council, *Report of the Secretary-General: Question of the death penalty*, UN Doc. A/HRC/39/19 (14 Sept. 2018), para. 51.

a date of execution of the parent, to allow the child a final visit or communication and time for personal preparation. States should return the body of a person executed and any personal effects to the family for burial, without payment by the family, inform them where the body is buried and allow them reasonable access to that location.

Prosecutors

In states where prosecutors have discretion to decide whether to charge a capital crime or an offence not carrying the death penalty, they should opt for the latter when the accused is a parent of a child under 18.

In such states, the ministry or agency responsible should issue a Guideline to this effect, and ensure its dissemination to all prosecutors.

If a prosecutor nonetheless considers charging a crime that can carry the death penalty, the prosecutor should conduct an assessment of the best interests of the child following the procedure set out in the General Comment on the child's best interests of the Committee on the Rights of the Child. The assessment should show that the right has been explicitly taken into account, and shall explain what has been considered to be in the child's best interests; what criteria the decision is based on; and how the child's interests have been weighed against other considerations.

Judges

Judges should refrain from sentencing the parent of a child to death. If a judge nonetheless considers imposing a death sentence on such a parent, the judge should conduct an assessment of the possible sentence in light of the best interests of the child, following each step in the best interests procedures set out in the General Comment on the child's best interests of the Committee on the Rights of the Child. The assessment should show that the right has been explicitly taken into account, and shall explain what has been considered to be in the child's best interests; what criteria the decision is based

on; and how the child's interests have been weighed against other considerations.

Parliamentarians

Parliamentarians should enact legislation to ensure that those officials with responsibility for charging criminal suspects and sentencing those convicted of crimes are aware of the requirement to conduct an assessment of the best interests of the child in the event capital punishment is being considered. Such legislation should require and set forth the detailed procedural steps for conducting such an assessment outlined in the General Comment on the child's best interests of the Committee on the Rights of the Child.

In States with legislation that provides for keeping from the family the date or place of an execution of a family member or keeping the location of the burial site from them, Parliamentarians should repeal such legislation.

National Human Rights Institutions

National Human Rights Institutions should monitor the State's compliance with human rights obligations relating to the rights of children of parents sentenced to death or executed, speak up on behalf of these children and, to the extent possible, provide assistance in the implementation of these obligations.

International and regional human rights courts and treaty monitoring bodies

International and regional human rights courts and treaty monitoring bodies should call for a moratorium on death sentences and executions of parents of children under 18, and ask States that still consider imposing such sentences to provide a detailed assessment of their consideration of the best interests of the child as a primary consideration in any case where the death penalty is imposed.

QUNO offices:

In Geneva:
13 Avenue du Mervelet
1209 Geneva
Switzerland

Tel: +41 22 748 4800
Fax: +41 22 748 4819
quno@quno.ch

In New York:
777 UN Plaza
New York, NY 10017
United States

Tel: +1 212 682 2745
Fax: +1 212 983 0034
qunony@afsc.org

quno.org

The Quaker United Nations Office

The Quaker UN Office, located in Geneva and New York, represents Friends World Committee for Consultation (Quakers), an international non-governmental organization with General Consultative Status at the UN.

QUNO works to promote the peace and justice concerns of Friends (Quakers) from around the world at the UN and other global institutions. It is supported by the American Friends Service Committee, Britain Yearly Meeting, the worldwide community of Friends, other groups and individuals.

