



children: unseen victims of the death penalty

Why this matters:

The impact of the parental death sentence on children

The psychological and emotional trauma experienced by a child when their parent is sentenced to death or executed is well-evidenced to have long term and often devastating impacts. This trauma can occur at any and all stages of the capital punishment of a parent, from arrest through to the aftermath of execution, and the effects manifest in differing ways depending on circumstances like gender and age, and the broader familial and community reaction to the situation. Children are commonly found to suffer physical symptoms like loss of concentration, loss of appetite and insomnia, and typical behavioural reactions include anger, low self-esteem, and violence, including to themselves. Severe mental health problems, including delusional beliefs and post-traumatic stress disorder, can occur, as well as the development of alcohol or drug dependencies, or involvement in criminal activity.¹ The cycles of hope and disappointment during appeals processes, and the repeated need to anticipate and prepare for the possible execution, can be highly emotionally distressing. The impact on the child is often long term, whether or not the parent is eventually executed. The stigma surrounding the death penalty, especially with cases that garner notoriety and press scrutiny, can increase confusion for the child. They may find it challenging to hold feelings of love for a parent when those feelings are shown to conflict with the public opinion of their parent's actions, and the State's belief that those actions warrant their death.

As a defence lawyer, you can seek to reduce this harm by drawing on international legal standards to advocate against capital sentences for your clients, by exposing the potential impact on their children and highlighting the State's legal obligation to take this impact into account when sentencing.

What does international law say?

The UN Human Rights Committee, which oversees the implementation of the International Covenant on Civil and Political Rights, has said: 'States parties...should...refrain from executing parents to very young or dependent children.'² This creates a presumption against the execution of those with dependent children.

What does international law say? (continued)

The best interests of the child principle is central to the protection of the rights of the child in international law. The Convention on the Rights of the Child establishes that this principle must be a primary consideration in *all* State decisions that impact children,³ including children who are 'affected by the situation of their parent in conflict with the law', such as in the sentencing to death or execution of a parent.⁴ Central to the best interests of the child principle is the requirement that the State conduct a best interests assessment for each child who might be affected by a decision made by the State.⁵ In the case of a parent's potential sentencing to death, therefore, the State must conduct 'an evaluation of the possible impact (positive or negative) of the decision on the child', and its decision must include justification that shows 'that the right has been explicitly taken into account'.⁶

In its General Comment on the best interests principle, the UN Committee on the Rights of the Child lays out detailed rules of procedure for this process, including that the assessment 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'.⁷ The assessment must take into account the importance of preserving the family environment and maintaining relations; the care, protection and safety of the child; the child's right to health; and the child's right to education'.⁸ In a best interests assessment, States must explicitly set out '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 weighed to determine the child's best interests'.⁹ The child's opinion must be taken into account, and if the decision differs from the child's view, the reason for this must be explained.¹⁰ If the State's final decision is not in the best interests of the child – which, given the documentation of the impact of the parental death sentence on children, most if not all decisions to execute a parent would surely not be – the reasons for this 'must be explicitly specified' and 'must also demonstrate, in a credible way, why the best interests of the child were not strong enough to outweigh the other considerations'.¹¹

In the event your client is sentenced to death, it is important that you advocate regarding the family's right to information, a right protected in Article 13 of the Convention on the Rights of the Child and numerous other human rights treaties.¹² The information the family is entitled to includes information regarding the date and time of an execution, and the place of burial of the body. Though the right to information may be legally restricted by States if the restriction is necessary to meet certain objectives, a failure to provide information to the families of those sentenced to death or executed does not meet the requirements for restricting this right, as the secrecy will never be necessary to meet any of the permissible

objectives.¹³ There is consensus among human rights bodies that secrecy around such information for family members amounts to inhuman treatment, the prohibition of which is a human right that may not be suspended under any circumstances.

Further detail and sources can be found in *Protection of the Rights of Children of Parents Sentenced to Death or Executed: An Expert Legal Analysis* by Stephanie Fariior.¹⁴

As a defence lawyer, what can you do?

- Raise the presumption against the death penalty for parents of dependent children as articulated in the UN Human Rights Committee's General Comment 36.
- When representing a defendant who is a parent facing the death penalty, bring to the sentencer's attention the obligation to undertake a best interests of the child assessment. Highlight the requirement for this assessment to:
 - a) be carried out by professionals trained in child psychology and other aspects of children's welfare,
 - b) uphold the child's full human rights,
 - c) take into account the child's opinion,
 - d) and explicitly explain how this assessment will be considered in the sentencing decision.
- In the sentencing phase, present expert testimony from clinical psychologists and/or other experts regarding the impact on the child when a parent is sentenced to death or executed. Note to the court that the convicted person can still be held accountable for a crime without causing the child to experience the trauma that comes with a parent's execution.
- Ensure that the authorities keep the family informed about developments in the case in order to prevent a withholding of information from amounting to a violation of the prohibition of torture, cruel, inhuman or degrading treatment or punishment.

For those working in **Europe**: The European Court of Human Rights has ruled that 'to determine whether a best balance has been struck between the competing interests of the State and those directly affected by the situation...it must have regard to the essential principle according to which, whenever the situation of a child is in issue, the best interests of the child are paramount', and that 'whenever a child's situation is at stake, the best interests of the child must prevail'.¹⁵

For those working in **Africa**: The African Charter on the Rights and Welfare of the Child explicitly states that States parties should 'ensure that a death sentence shall not be imposed on... mothers of infant and young children'.¹⁶ In a General Comment, the African Committee of Experts on the Rights and Welfare of the Child declares that this prohibition applies in sentencing not only to mothers, but also to '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'.¹⁷

For those working in the **Americas**: The Inter-American Court of Human Rights 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.¹⁸ Moreover, the Court 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'.¹⁹

Endnotes

1 For a compilation of research on the effects of the parental death sentence on children, please see Brett, Rachel, Robertson, Oliver (2013), 'Lightening the Load of the Parental Death Sentence on Children' (Quaker United Nations Office, Geneva). Available at: quno.org/resource/2013/6/lightening-load-parental-death-sentence-children

2 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

3 The Convention on the Rights of the Child, article 3 (1990)

4 UN Committee on the Rights of the Child, General Comment No.14 in the right of the child to have his or her best interests taken as a primary consideration, UN Doc. CRC/C/GC/14 (2013) (para.28). All but one State has ratified the Convention on the Rights of the Child, and are all therefore bound to the best interests of the child principle. The United States has signed but not ratified the treaty; there are nevertheless cases in which the CRC has been used effectively in US courts in the defence of children's rights

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

6 Ibid

7 Ibid, para. 94

8 Ibid, para. 52-79

9 Ibid, para. 97

10 Ibid

11 Ibid

12 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

13 The restriction must also be provided by law, it must be done for one of the objectives set out in the treaty provision on the right to information – the respect of the rights or reputations of others, the protection of national security or of public order, and protection of public order - and it must be 'necessary' in order to meet that objective

14 Stephanie Fariior (2019), Protection of the Rights of Children of Parents Sentenced to Death or Executed: An Expert Legal Analysis (Quaker United Nations Office, Geneva). Available at: quno.org/resource/2019/2/protection-rights-children-parents-sentenced-death-or-executed-expert-legal-analysis

15 European Court of Human Rights, Neulinger and Shuruk v. Switzerland, Judgement of the Grand Chamber of 6 July 2010, para.135; Mandet v. France, Judgement of 14 January 2016, para. 53

16 African Charter on the Rights and Welfare of the Child, Article 30 on Children of Imprisoned Mothers (art.30(e))

17 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. 10)

18 Inter-American Court of Human Rights, *Juridical Condition and Human Rights of the Child*, Advisory Opinion OC-17/02 of August 28, 2002

19 Inter-American Court of Human Rights, *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 170