



General Assembly

Distr.: General
20 August 2019

Original: English

Seventy-fourth session

Item 72 (b) of the provisional agenda*

Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Extrajudicial, summary or arbitrary executions

Note by the Secretary-General**

The Secretary-General has the honour to transmit the report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions, Agnes Callamard, submitted in accordance with General Assembly resolution [71/198](#).

* [A/74/150](#).

** The present report was submitted after the deadline in order to reflect the most recent developments.



Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions

Application of the death penalty to foreign nationals and the provision of consular assistance by the home State

Summary

The present report focuses on the application of death penalty to foreign nationals and the provision of consular assistance by the home State. It argues that consular access is a human right which imposes distinct but complementary obligations on both the prosecuting State and the home State and that the failure of the home State to provide adequate consular assistance amounts to a violation of its responsibility to protect the right to life. The final section of the report provides guidelines on adequate consular assistance.

I. Introduction

1. The present report is submitted by the Special Rapporteur of the Human Rights Council on extrajudicial, summary or arbitrary executions pursuant to General Assembly resolution [71/198](#) and Human Rights Council resolution [35/15](#). Her thematic report focuses on the application of the death penalty to foreign nationals and the provision of consular assistance.¹

II. The death penalty and consular assistance

A. The abolitionist character of international law

2. The death penalty falls within the scope of the mandate of the Special Rapporteur because its imposition constitutes an arbitrary execution in violation of article 6 (1) of the International Covenant on Civil and Political Rights where it is imposed in breach of any provisions of the Covenant.²

3. The Special Rapporteur shares the individual opinion in the case of *Judge v. Canada* addressed by the Human Rights Committee in 2003:³

“The Covenant permits them [retentionist States] to continue applying the death penalty. This ‘dispensation’ for States parties should not be construed as a justification for the deprivation of the life of individuals, albeit lawfully sentenced to death, and does not make the execution of a death sentence strictly speaking legal”.

4. In 2018, the Human Rights Committee clearly concluded that “the death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights”.⁴ Therefore, the death penalty does violate the right to life under article 6 of the International Covenant on Civil and Political Rights and does amount to cruel or inhuman treatment under article 7. There are exemptions for retentionist States parties, provided that the death penalty is applied within stringent parameters, that is, it is carried out only for the most serious crimes and by a method causing the least possible suffering.⁵ The category of “most serious crimes” is now understood to cover intentional killing only, namely, murder ([A/67/275](#), para. 35).

5. The Special Rapporteur is of the view that international law should be regarded, at a minimum, as progressively abolitionist, in the sense that it requires States to move away from the death penalty, if not immediately then, at least, over time (see [A/67/275](#), paras. 39–42, and [A/69/265](#), para. 90).

6. It is an accepted principle of the International Covenant on Civil and Political Rights that all States parties (including retentionist ones) must not increase the rate

¹ The Special Rapporteur would like to thank Zara Brawley and Kyan Pucks of the legal firm QEB Hollis Whiteman; the human rights organization Reprieve; and Sofia Jaramillo Otoy and Conall Mallory for their support; she would also like to thank all those who participated in the expert meeting held on the topic on 17 July 2019.

² See Human Rights Committee, general comment No. 36 (2018), [CCPR/C/GC/36](#), sect. IV.

³ See [CCPR/C/78/D/829/1998](#), appendix, individual opinion A.

⁴ [CCPR/C/GC/36](#), para. 50.

⁵ See Supreme Court of the United Kingdom of Great Britain and Northern Ireland, The Death Penalty Project (intervening), *El Gizouli (AP) (Appellant) v. Secretary of State for the Home Department (Respondent)*, Case No. UKSC 2019/0057.

or extent of the application of the death penalty⁶ and, in fact, are required at the very least to gradually reduce the crimes for which the death penalty may be imposed. Moreover, article 6 (6) of the Covenant states that nothing in that article “shall be invoked to delay or to prevent the abolition of capital punishment by any State party”.

7. At regional level, in 2010, the European Court of Human Rights emphasized that since the European Convention on Human Rights was drafted 60 years ago, there has been an evolution towards the complete abolition of the death penalty in law and practice within all 47 member States of the Council of Europe. The momentum towards abolition confirms that, by present day standards, capital punishment breaches article 3 of the European Convention. Consequently, the Council of Europe is now an entirely death penalty-free zone.⁷

8. In paragraph 50 of its general comment No. 36, adopted in 2018, the Human Rights Committee concluded that “Article 6, paragraph 6, reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future ... It is contrary to the object and purpose of article 6 for States parties to take steps to increase de facto the rate and extent in which they resort to the death penalty, or to reduce the number of pardons and commutations they grant”.

9. It is a matter of utmost concern that some countries are contemplating the reinstatement of the death penalty, including the Philippines, which abolished the death penalty in 2016 and has ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights. It is well established that States parties that have abolished the death penalty, through becoming parties to the Second Optional Protocol, are barred from reintroducing it.⁸ Sri Lanka, despite having had a moratorium on the death penalty since 1976, is planning to resume executions for drug-related offences, a position incompatible with commitments Sri Lanka has expressed on a number of occasions and contrary to the object and purposes of article 6 of the Covenant.

10. It is equally concerning that States are often failing to protect their nationals detained abroad against the imposition of the death penalty, treating the provision of adequate consular assistance as “discretionary”, and thus, in practice, arbitrary.

11. The report argues that: (a) consular access is a human right, and includes the right to be notified and the right to receive consular assistance; (b) the right places distinct but complementary obligations on both the prosecuting State and the home State of the detainees; and (c) the failure of the home State to provide adequate consular assistance when notified that one of its nationals is facing the death penalty amounts to a violation of its responsibility to protect the right to life.

B. Foreign nationals on death row

12. The application of the death penalty, as confirmed by available data, affects foreign nationals, including migrants, disproportionately.⁹ In Indonesia, of the 48 recorded new death sentences in 2018, 15 were allegedly imposed on foreign nationals, all for drug-related offences.¹⁰ In Malaysia, as at December 2018,

⁶ [CCPR/C/GC/36](#), para. 50.

⁷ European Court of Human Rights, Fourth Section, *Al Saadoon and Mufdhi v. the United Kingdom*, Application No. 61498/08, Judgment, 2 March 2010, para. 120.

⁸ [CCPR/C/GC/36](#), para. 34.

⁹ Carolyn Hoyle and Giada Girelli, “The Death Penalty for Drug Offences: Foreign Nationals”, Harm Reduction International, Briefing Paper, March 2019.

¹⁰ *Ibid.*

568 foreign nationals were reportedly under sentence of death, comprising 45 per cent of all those held on death row.¹¹ At the end of 2017, there were reportedly five foreign nationals under the sentence of death in Sri Lanka. In 2018, at least 24 foreign nationals were executed in Thailand and 4 in Viet Nam.¹² Reports also indicated that, in 2017, there may have been approximately 600 Nigerian nationals awaiting execution in countries in South-East Asia, the majority on drug-related offences. In Saudi Arabia, during 2018, 78 foreign nationals were reportedly executed, mostly for drug offences, compared with 71 nationals.¹³ In Iraq, a number of death sentences were pronounced on foreign nationals on charges of membership in terrorist organization. In the United Arab Emirates, eight of the nine women known to be on death row were migrant domestic workers. In Mauritania, at the end of 2016, it was reported that 11 of the 77 prisoners on death row were foreign nationals. By the end of 2017, four foreign nationals in Nigeria, three in Zambia, six in Japan and five in Kuwait had been executed.¹⁴ In the United States of America, the death penalty has been applied against a number of foreign nationals, including the Mexican citizens Roberto Ramos Moreno and Rubén Cárdenas Ramírez, both of whom were denied their right to consular assistance after arrest.

13. In its general comment 36, the Human Rights Committee states that any discriminatory application of the death penalty is arbitrary and amounts to a breach of the right to life under the International Covenant on Civil and Political Rights.¹⁵ The discriminatory application of the death penalty to foreign nationals was highlighted by the Secretary-General in his 2017 report on capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (A/HRC/36/26). In that report, it was noted that persons facing the death penalty abroad can be disproportionately affected by the death penalty and that access to consular assistance, as provided for in the Vienna Convention on Consular Relations, is an important aspect for their protection. This position was further clarified in 2018 by the Human Rights Committee, which noted that “a failure to promptly inform detained foreign nationals of their right to consular notification pursuant to the Vienna Convention on Consular Relations resulting in the imposition of the death penalty [...] would violate article 6, paragraph 1, of the Covenant”.¹⁶ In this regard, the General Assembly, in its resolution 71/187 on the moratorium on the use of the death penalty, also called upon all States to comply with their obligations under the Vienna Convention, particularly the right to receive information on consular assistance.

14. The notion that the prosecuting State is obligated under international law to notify foreign detainees of their right to access consular assistance is settled in international law (although not always in practice). This is not the case as far as the obligations of the home State are concerned. The present report addresses this gap by showing that home States have an obligation to provide consular assistance under international human rights law, particularly, but not only, where there is a risk of a violation of the right to life. The analysis herein also applies to other rights that may pertain in cases where consular assistance is not provided. Such an approach is consistent with the rulings of the European Court of Human Rights and the European

¹¹ Amnesty International, *Death Sentences and Executions 2018* (London, 2018).

¹² Amnesty International, *Death Sentences and Executions 2016* (London, 2016).

¹³ Ibid.

¹⁴ Amnesty International, *Death Sentences and Executions 2017* (London, 2017).

¹⁵ CCPR/C/GC/36, para. 44.

¹⁶ Ibid., para. 42; see also “The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law”, Inter-American Court of Human Rights, Advisory Opinion of 1 October 1999, para. 137.

Commission on Human Rights, both of which have recognized the applicability of human rights obligations to diplomatic and consular agents.¹⁷

C. Duty to protect the right to life

15. The right to life is a universally recognized, foundational right, applicable at all times and in all circumstances, including during armed conflict or other public emergency. It is a norm of *jus cogens*, and is protected by international and regional treaties, customary international law and domestic legal systems.

16. International human rights law imposes on States a duty to respect, protect and ensure human rights “by law”. This includes the obligation to establish adequate institutions and procedures for preventing arbitrary deprivation of life: States parties are under a due diligence obligation to undertake reasonable positive measures that do not impose on them disproportionate burdens, in response to credible foreseeable threats to life.

17. The principle of due diligence applied to the protection against unlawful death has been articulated by a range of courts around the world and its implementation assessed on the basis of: (a) how much the State knew or should have known; (b) the risks or likelihood of foreseeable harm; and (c) the seriousness of the harm.¹⁸

18. The obligation of States to protect applies to all governmental organs and institutions¹⁹ and thus to consular officials. In relation to upholding international human rights extraterritorially, consular officials are in a unique position. The provisions of the Vienna Convention on Consular Relations empower consulates to offer invaluable assistance to their nationals in navigating the complexities of unfamiliar foreign systems. This assistance is particularly important in cases where fundamental human rights are at risk, such as a potential application of the death penalty.

19. As the Special Rapporteur stated in her report submitted to the Human Rights Council in June 2019, the duty of States to protect may apply extraterritorially. This was also made clear by the Human Rights Committee in its general comment No. 36, in which it concluded that the duty of the State to protect applies to “all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control. This includes persons located outside any territory effectively controlled by the State, whose right to life is nonetheless impacted by its military or other activities in a direct and reasonably foreseeable manner”.²⁰

D. Access to consular assistance as a human right

20. Prisoners and detainees are particularly vulnerable to human rights violations. However, people facing charges outside their own country confront additional challenges because of their lack of familiarity with the legal system, culture, language and environment.²¹ Foreign nationals may be unaware of their rights when arrested,

¹⁷ See *X v. Federal Republic of Germany* (1965), European Commission on Human Rights; see *X v. United Kingdom* (1977), European Commission on Human Rights; see *V v. Denmark* (1993), European Commission on Human Rights; see *Case of Al-Skeini and Others v. The United Kingdom* (2011), European Court of Human Rights; see also [A/38/40](#), annex XIV, para. 6.1.

¹⁸ European Court of Human Rights, *Osman v. The United Kingdom*, Case No. 87/1997/871/1083, Judgment, 28 October 1998, paras. 32–33.

¹⁹ [CCPR/C/GC/36](#), para. 19.

²⁰ *Ibid.*, paras. 63 and 66.

²¹ *Ibid.*; and Giada Girelli, *The Death Penalty for Drug Offences: Global Overview 2018* (London, Harm Reduction International, 2019).

such as the privilege against self-incrimination or the right to remain silent, or their right to counsel and consular assistance. They may be asked to sign confessions written in a language they do not read. Oftentimes, they are not provided with access to interpretation services needed to ensure their meaningful participation in the trial proceedings. They may lack a local support network, such as family members, to help navigate the legal processes, cover the cost of effective legal defence or provide emotional support. Friends who are also foreigners or migrants may be unwilling or fearful to provide support or to testify on their behalf; a problem compounded when witnesses are “irregular” migrants. If executed, the last rights of foreign nationals may also be violated, including the right of their families to be notified of their execution and to receive their remains.

21. These realities combine to place foreign nationals at a natural disadvantage.²² It is not enough to merely state that foreign nationals have the same rights as nationals of the State in which the trial is being conducted. These rights must be combined with others to enable foreigners to stand before a court “on an equal footing with nationals”.²³

22. International and regional tribunals and experts have repeatedly held that consular notification and assistance is a minimum fair trial guarantee in death penalty cases and that foreign detainees have a right to consular assistance.²⁴

23. Consular information has been recognized as an individual right by the International Court of Justice. In its rulings on the *LaGrand*, *Avena* and *Jadhav* cases, the Court stated that article 36 of the Vienna Convention on Consular Relations created individual rights for those detained or facing charges outside their own country. In the *LaGrand* case, the Court determined “that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State”.²⁵ In the *Avena* decision, the Court also addressed the inter-relationship between the rights of the individual and the sending State: “violations of the rights of the individual under article 36 may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual”.²⁶

24. In 2019, in a case involving India and Pakistan, the International Court of Justice, for the first time, directly linked denials of consular access and assistance in death penalty cases to fair trial rights, thus suggesting that access to consular assistance constitutes a human right:

“The Court considers that the violation of the rights set forth in Article 36, paragraph 1, of the Vienna Convention, and its implications for the principles of a fair trial, should be fully examined and properly addressed during the review and reconsideration process. In particular, any potential prejudice and the implications for the evidence and the right of defence of the accused should receive close scrutiny during the review and reconsideration.”²⁷

²² See S. Adele Shank and John Quigley, “Foreigners on Texas’s death row and the right of access to a consul”, *St. Mary’s Law Journal*, vol. 26, No. 3 (1995).

²³ Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, see concurring opinion of Judge Sergio Garcia Ramirez, p. 2.

²⁴ Quigley, John, *Foreigners on America’s Death Rows: the legal combat over access to a consul* (Cambridge University Press, 2018), “The Obligation of Countries of Origin”, pp. 222–225.

²⁵ *LaGrand Case (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 466, para. 89.

²⁶ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, *I.C.J. Reports 2004*, para. 40.

²⁷ International Court of Justice, *Jadhav (India v. Pakistan)*, Judgment of 17 July 2019, *I.C.J. Reports 2017*, para. 145.

25. The Inter-American Court of Human Rights has recognized the right to consular information as a human right in an advisory opinion of 1999, in which it concluded that “Article 36 of the Vienna Convention on Consular Relations endows a detained foreign national with individual rights that are the counterpart of the host State’s correlative duties”. It recognized the right to consular information as part of the body of international human rights law and concluded that “non-observance of a detained foreign national’s right to information, recognized in Article 36 (1) (b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be ‘arbitrarily’ deprived of one’s life”.²⁸

26. Recognizing the significance of consular assistance to foreign nationals detained overseas, the General Assembly has called upon States to comply with their obligations under the Vienna Convention on Consular Relations and to respect the right of foreign nationals to receive information on consular assistance when legal proceedings are initiated against them.²⁹ The European Union Guidelines on the death penalty also state that when considering whether legal proceedings provide all possible safeguards to ensure a fair trial, due attention should be given to whether anyone suspected of or charged with a crime for which capital punishment may be imposed has been informed of the right to contact a consular representative.³⁰

27. The General Assembly endorsed the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) in its resolution [70/175](#) as rules that should be observed in all countries. Rule 62 addresses the situation of inmates who are foreign nationals: “Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong”, adding that “prisoners who are nationals of States without diplomatic or consular representation in the country and refugees and stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons”.

28. In 2014, the Secretary-General also concluded that: “Under international law, the denial of the right to consular notification leads to the violation of due process and the execution of a foreign national deprived of his or her right to consular services constitutes an arbitrary deprivation of life, in contravention of articles 6 and 14 of the International Covenant on Civil and Political Rights”.³¹

29. The right to consular assistance in death penalty cases has been recognized by domestic courts, including courts in Brazil, Germany and Malawi, which have also found that individuals possess justiciable rights under article 36 of the Vienna Convention. In 2013, citing the judgments of the International Court of Justice in the *LaGrand* and *Avena* cases, the German constitutional court determined that article 36 “creates a right of the accused” whose violation may frustrate the defendant’s right to a fair trial.³² The Supreme Federal Court of Brazil has also interpreted article 36 as conferring an individual right to consular information and notification, and that compliance with article 36 was essential to guarantee respect for due process. The

²⁸ Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, 1 October 1999, paras. 84 and 137.

²⁹ Resolution [69/186](#), para. 5 (b); see also [A/70/304](#).

³⁰ [A/HRC/24/18](#), para. 52.

³¹ [A/HRC/27/23](#), para. 55.

³² Federal Constitutional Court of the Federal Republic of Germany, First Chamber of the Second Senate, Order No. 2 BvR 1579/11, 5 November 2013.

High Court of Malawi has similarly concluded on two occasions that the right to consular assistance requires strict protection.³³

30. Mexican courts have consistently and repeatedly held that foreign nationals convicted of criminal offenses have a right to consular assistance and judicial remedies for violations of their rights under article 36: “The fundamental right to consular assistance for foreign nationals cannot be conceived as merely a procedural requirement. When an authority prevents a foreign national from supplementing their [legal] deficiencies through the means Article 36 ... places at their disposal, that authority not only limits, but makes it impossible to fully satisfy the rights to a proper defence”.³⁴ The Court noted that consular assistance serves a function distinct from that of the defence lawyer or interpreter, as consular officers ensure that their nationals fully understand their legal rights in the context of their culture and society.³⁵ Thus, although the title of the Vienna Convention does not indicate that the treaty addresses human rights, the rights conferred by article 36 nevertheless constitute “fundamental rights”.³⁶

31. It is considered to be settled in international law that consular assistance is a human right and that the denial of that right by the prosecuting State renders the imposition of the death penalty an arbitrary deprivation of life.

E. Provision of consular assistance: an obligation of the sending State

32. The present report, having recalled or established that (a) the imposition of the death penalty is an arbitrary deprivation of life, (b) retentionist States may apply the death penalty under strict limitations, (c) access to consular assistance is a human right, and (d) the failure to notify foreign detainees of their right to consular assistance breaches the detaining State’s obligations under international human rights and the Vienna Convention on Consular Relations, focuses on the obligation of the home State, arguing that it is under a human rights law to provide consular assistance for the reasons set out below.

33. First, in cases where specific actions are required for a right to have meaningful effect, such actions are corollary obligations. The fact of the right to receive consular assistance is consequent on at least two actions: the obligation of the detaining State to inform detainees of their right to consular assistance and the obligation on the sending or home State to provide detainees with adequate consular assistance.

34. Second, as demonstrated above, the provision of consular assistance constitutes a fair trial guarantee, helping to balance out the difficulties confronted by all foreign detainees and compounded by multiple forms of discrimination, such as race, immigration status, gender or class. The responsibility of States to protect may be invoked extraterritorially in circumstances where a particular State has the capacity to protect the right to life against an immediate or foreseeable threat to life.³⁷ The determination as to whether States have acted with due diligence to protect against unlawful death is based on an assessment of: (a) how much the State knew or should

³³ High Court of Malawi, *The Republic v. Lameck Bandawe Phiri*, 2017.

³⁴ Suprema Corte de Justicia de México, *Amparo Directo en Revisión 517/2011 Florence Marie Cassez Crepin*, January 2013.

³⁵ *Ibid.*, pp. 88–89.

³⁶ *Ibid.*, p. 81.

³⁷ See [CCPR/C/GC/36](#).

have known of the risks; (b) the risks or likelihood of foreseeable harm; and (c) the seriousness of the harm.³⁸

35. Thus, the home State may be said to have jurisdiction over its nationals detained abroad because its actions to provide adequate consular assistance have a direct influence on their right to life. Furthermore, no home State can argue convincingly that it does not know that such risks, including the risk of the death penalty: (a) exist; (b) bring likely foreseeable harm; or, in the case of the death penalty itself, (c) being irreparable absolutely, is grave in the extreme.

36. The Special Rapporteur recognizes that the primary obligation not to arbitrarily kill resides with the detaining State. However, she stresses that, by its very nature, the responsibility of the State to protect is invoked in response to harmful acts by others who may be non-State or other State actors.

37. The next question is one of assessing the adequacy and effectiveness of consular assistance in relation to the burden it imposes on the home State.³⁹ While provision of the full spectrum of consular support may not always be possible, there are reasonable steps that all States can take to provide effective assistance that do not constitute a disproportionate burden. The final section of the report sets out minimum requirements, based on the assistance currently provided by middle-income countries.

38. Third, the Special Rapporteur does not subscribe to the notion that the provision of consular assistance may be legally interventionist or may violate the prohibition against enforcing national laws on the territory of another State without its consent. Procedurally, the consent of the prosecuting State should be sought and the provision of consular assistance should follow clear procedures. However, from a substantive stand point, given that the Vienna Convention on Consular Relations places a clear obligation on the prosecuting State to notify the home State, consent for the provision of consular assistance ought to be assumed. Furthermore, the provision of adequate consular assistance reduces the burden on the prosecuting State that adherence to due process norms entails. By funding lawyers, facilitating family visits and conducting mitigation investigation, inter alia, consular assistance also provides a benefit to detaining States.

39. International law on diplomatic protection provides an exception to the concept of non-State interference if a State acts to prevent the denial of justice in relation to its own nationals.⁴⁰ While diplomatic protection is distinct from consular protection in that it concerns the rights of States and not of individuals, there is a persuasive body of law arguing that this exception may also be applied in cases where a foreign national faces a denial of justice.⁴¹

40. Fourth, the International Court of Justice has made it clear that national security considerations cannot override the obligation of the detaining State, under article 36 (1) of the Vienna Convention on Consular Relations, to notify the individual of the right to consular assistance without delay.⁴² The only possible interpretation of the

³⁸ European Court of Human Rights, *Osman v. The United Kingdom*, Case No. 87/1997/871/1083, Judgment, 28 October 1998, paras. 32–33.

³⁹ CCPR/C/GC/36, para. 21: “States parties are thus under a due diligence obligation to undertake reasonable positive measures, which do not impose on them disproportionate burdens”.

⁴⁰ *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Judgment, P.C.I.J., Series A, No. 2, 30 August 1924, 12; *Factory at Chorzów (Germany v. Poland)*, Judgment, P.C.I.J., Series A, No. 17, 13 September 1928; *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, Judgment, P.C.I.J., Series A/B, No. 76, 28 February 1939; *Barcelona Traction, Light and Power Company Limited*, Judgment, I.C.J. Reports 1970, p. 3, paras. 78–79.

⁴¹ Alex Mills, “Rethinking jurisdiction in international law”, *British Yearbook of International Law*, vol. 84, No. 1 (2014), pp. 187–239.

⁴² Ibid.

intention of the Court is that foreign nationals, in all cases, must have access to consular protection upon request. It follows logically that, in order for the ruling of the Court to have effect, the provision of consular assistance by the home State cannot be curtailed by way of a national security argument.

41. In the case of *Jadhav (India v. Pakistan)*, the International Court of Justice ordered Pakistan to provide “effective review and reconsideration of the conviction and sentence” of Kulbhushan Sudhir Jadhav, an Indian national sentenced to death for espionage. The purpose of that judicial review was to determine if Mr. Jadhav was prejudiced by the denial of his rights to consular information, notification and access, which had been withheld by reason of a national security argument. The Court ordered that, as part of the remedy, Pakistan must allow Indian consular officers “to have access to him and to arrange for his legal representation, as provided by Article 36, paragraph 1 (a) and (c)”. The Court further held that continuing of the stay of execution it imposed on Pakistan at the outset of the proceedings constituted “an indispensable condition for the effective review and reconsideration of the conviction and sentence of Mr. Jadhav”.⁴³

42. The Special Rapporteur is aware of the practice of certain home States of stripping defendants detained abroad of their citizenship, thereby removing their obligation to protect, including through the provision of consular assistance. While a discussion of this practice is beyond the scope of the present report, the Special Rapporteur believes that it may be a breach of the right to life where it foreseeably and directly impacts the individual’s right to life, a highly likely circumstance if the defendants are charged with crimes punishable by death, such as under counter-terrorism provisions.

43. Fifth, it is the view of the Special Rapporteur that the responsibility of home States to provide consular assistance constitutes an emerging norm of customary international law as demonstrated through the application of the test of the International Law Commission for customary international law (general practice and its acceptance as law or *opinio juris*).⁴⁴

F. An emerging customary international norm

General practice of States

44. The provision of a certain standard of consular protection to nationals facing the death penalty overseas is general practice among many States, that is to say, this is what they actually do. For instance, 28 States have recognized a constitutional right to consular protection,⁴⁵ and other States recognize the right to consular assistance in their policies for nationals detained abroad.⁴⁶

⁴³ International Court of Justice, *Jadhav (India v. Pakistan)*, *Judgement of 17 July 2019*, paras. 134 and 138–148.

⁴⁴ A/73/10, para. 66 (3).

⁴⁵ Constitution of Bulgaria, article 25(5); Constitution of Estonia, article 13; Constitution of Hungary, article 69 (3); Constitution of Latvia, article 98; Constitution of Lithuania, article 13; Constitution of Poland, article 36; Constitution of Portugal, article 14; Constitution of Romania, article 17; Constitution of China, article 50; Constitution of the Republic of Korea, article 2(2); and Constitution of Guyana, article 31.

⁴⁶ John Quigley, *Foreigners on America’s Death Rows*, (New York, Cambridge University Press, 2018), “Consular Access as a Human Right”, pp. 211–222.

45. A number of States have made it clear that there should be enhanced consular protection in cases involving the death penalty⁴⁷ and there are high profile instances of both retentionist and abolitionist States offering significant and impactful assistance to nationals facing the death penalty overseas.

46. In Nigeria, a retentionist State, the attorney general intervened on the orders of the President in the case of a Nigerian national, Ms. Zainab Aliyu, who faced the death penalty for drug trafficking in Saudi Arabia in 2018.⁴⁸

47. Indonesia also provides consular protection to its nationals overseas facing a risk of arbitrary deprivation of life. In March 2018, the Director of the Protection of Indonesian Nationals and Legal Entities said that the case of Eti binti Toyib, an Indonesian migrant worker, sentenced to death for allegedly murdering her employer in Saudi Arabia in 2002, was one of two critical cases out of the 20 cases involving Indonesian nationals in Saudi Arabia facing the death penalty. The Indonesian Government led fundraising efforts to raise blood money to pay the victims in the case, securing her release from prison.

48. Mexico is an example of an abolitionist State with an excellent standard of consular assistance offered to its nationals facing the death penalty. In 2000, the Foreign Ministry of Mexico established the Mexican Capital Legal Assistance Programme, which, as of 2017, had assisted 1,014 out of 1,150 Mexicans in United States prisons to avoid the death penalty, meaning that the ruling was reversed in 88 per cent of the cases.⁴⁹

49. There are also high-profile instances in which States failed to provide any, or only inadequate, consular assistance to their nationals abroad facing the death penalty and/or a risk of a breach of the right to a fair trial and freedom from torture.

50. The Special Rapporteur reiterates her concern that consular assistance provided by Governments to their nationals sentenced to death under counter-terrorism laws in Iraq is of markedly poor quality.⁵⁰ As set out below, adequate consular protection includes overseeing the effective assistance of defending counsel and ensuring that trials meet internationally recognized fair trial standards, something that countries of origin of so-called “foreign fighters” appear not to have sought.

Opinio juris

51. No clear consensus has yet been reached as to the quality of consular assistance to be provided in order to meet a State’s obligation under law, with some States

⁴⁷ See United Kingdom Foreign and Commonwealth Office, “Support for British nationals abroad: A guide”, updated February 2019, p. 20: “We oppose the death penalty in all circumstances. If you are facing a charge that carries the death penalty, or if you have been sentenced to death, we will normally raise your case at whatever stage and level we judge to be appropriate. We can also put you in touch with The Death Penalty Project (www.deathpenaltyproject.org) who provide free legal assistance and advice to British nationals facing the death penalty, and Reprieve (www.reprieve.org.uk), who work to prevent the execution of any British national detained overseas”.

⁴⁸ Enioluwa Adeniyi, “Onochie speaks on how Zainab Aliyu was incriminated in Saudi Arabia”, *Naija News*, 30 April 2019.

⁴⁹ Government of Mexico, “The Foreign Ministry Reports on Mexican Capital Legal Assistance Program in the U.S.”, press release, 6 November 2017.

⁵⁰ Lara Marlowe, “France accused of ‘subcontracting’ execution of jihadists in Iraq”, *Irish Times*, 6 June 2019.

actively and publicly rejecting the requirement to provide certain types of consular assistance.⁵¹

52. In the case of *Vélez Looz v. Panama*, the Inter-American Court of Human Rights stated that from the standpoint of the rights of a detained person, there are three essential components of the right due to a person by the State Party: (a) the right to be informed of his [or her] rights under the Vienna Convention; (b) the right to have effective access to communicate with the consular official; and (c) the right to the assistance itself.⁵²

53. In 2004, the Constitutional Court of South Africa found that there may well be “a duty on government, consistent with its obligations under international law, to take action to protect one of its citizens against a gross abuse of international human rights norms”.⁵³ The Court further noted that a request to the Government for assistance “in such circumstances where the evidence is clear would be difficult, and in extreme cases possibly impossible, to refuse”.⁵⁴

54. Courts of South Africa,⁵⁵ Canada⁵⁶ and Pakistan⁵⁷ have characterized the nature of the responsibility of States to provide consular assistance in death penalty cases as a duty.⁵⁸

G. Abolitionist and retentionist States

55. The Special Rapporteur has thus far argued that all States that have ratified the International Covenant on Civil and Political Rights or other human rights treaties that preserve the right to life have an obligation to protect the right to life, including to provide (adequate) consular assistance to their nationals facing the death penalty abroad. Both retentionist and abolitionist States are bound under the Covenant to uphold this positive obligation.

56. This positive obligation is stronger for abolitionist States that have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, whose article 1(2) states that “Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction”. As highlighted above, the direct and foreseeable impact of consular assistance on the right to life brings the individual facing the death penalty within the abolitionist home State’s jurisdiction and triggers the duty to provide adequate consular assistance in all death penalty cases.

⁵¹ United Kingdom, Foreign and Commonwealth Office, “Support for British nationals abroad: A guide” (updated 27 February 2019), states that: “In no circumstances will we pay your legal or interpretation costs”. This differs significantly from the practice of Germany: “Cases in which German nationals are facing the death penalty are of most concern to the German government. In those circumstances, [...] the Federal Republic of Germany would provide as much [money] as needed”, as cited in United States Court of Appeals for the Sixth Circuit, *Ronald Michael Cauthern v. Roland Colson, Warden*, Case No. 10-5759, Brief of *amicus curiae*, 2011, p. 11.

⁵² Inter-American Court of Human Rights, *Case of Vélez Looz v. Panama*, Judgment of 23 November 2010, para. 153.

⁵³ Constitutional Court of South Africa, *Samuel Kaunda and Others v. President of the Republic of South Africa*, Case No. CCT 23/04, Judgment, 4 August 2004, para. 69.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ Federal Court of Canada, *Khadr v. Canada (Prime Minister)*, 2009 FC 405, 341 F.T.R. 300, para. 64.

⁵⁷ *The News International* (Pakistan), “LHC orders protection policy for Pakistanis detained abroad” (14 January 2017).

⁵⁸ A/HRC/40/52/Add.4, para. 47.

57. It also may be argued that a decision by de jure and de facto abolitionist States⁵⁹ not to provide adequate consular assistance to their nationals detained abroad and facing a possible death sentence exposes them to death penalty and thus amounts to a violation of their obligation to respect the right to life. The decision to withhold consular assistance makes the home State complicit in an arbitrary killing.

58. The Human Rights Committee concluded, in *Judge v. Canada* (para. 10.4), that “For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application”. The Committee stated: “Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out”. The Special Rapporteur suggests that “removal, deportation or extradition” should be seen as examples of methods of “exposure” to the death penalty but that the list is non-exhaustive. It is the view of the Special Rapporteur that, given the known challenges faced by foreign detainees charged with a crime carrying the death penalty, and the credible and foreseeable risk of death, the failure to provide consular assistance can also be said to expose them to death penalty.

59. The Human Rights Committee has reiterated that abolitionist States have an obligation to seek credible and effective assurances from retentionist States that the death penalty will not be carried out.⁶⁰ While the provision of consular assistance does not constitute an assurance against the death penalty, the Special Rapporteur suggests that the State act of providing such assistance and the State act of demanding and obtaining effective assurances may both be understood as ensuring that the State abides by its obligation regarding the right to life of a detainee.

H. Principle of non-discrimination and consular assistance

60. It goes without saying that the provision of consular assistance to nationals facing the death penalty overseas, and the quality of that assistance, should be applied without discrimination. The Human Rights Committee understands the term “discrimination” to “imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms”.⁶¹

61. Should a State party to the International Covenant on Civil and Political Rights decide to withhold consular protection from an individual on the grounds of their purported crime, this would violate both the State’s obligation to protect the right to life and the prohibition against discrimination. The Special Rapporteur suggests that the “other status” reference in the Covenant anti-discrimination provision should cover the alleged crimes committed by foreign nationals since a “flexible approach to the ground of ‘other status’ is needed to capture other forms of differential treatment”.⁶²

62. The Special Rapporteur insists that, contrary to the current conduct of some States, foreign nationals detained abroad who are accused of a most serious or heinous

⁵⁹ These include States that have abolished the death penalty, as well as those that are abolitionist in practice, for example where an official moratorium on executions exists or if a State has signed the Second Optional Protocol to the International Covenant on Civil and Political Rights, but not yet abolished the death penalty in law.

⁶⁰ CCPR/C/GC/36, para. 34.

⁶¹ HRI/GEN/1/Rev.1, Human Rights Committee, general comment No. 18, para. 7.

⁶² E/C.12/GC/20, Committee on Economic, Social and Cultural Rights, general comment No. 20, para. 27.

crime demand heightened diligence on the part of the home State, not less. For instance, she has noted with alarm that foreign nationals detained in Iraq charged with membership in a terrorist organization are at very high risk of being condemned to death and yet have remained largely without adequate consular assistance from their home States. She has repeatedly denounced both the lack of accountability afforded to the victims of the Islamic State in Iraq and the Levant and the absence of due process for the alleged perpetrators.

III. Guidelines for adequate consular assistance

63. All States are under an international human rights duty to provide an adequate level of consular assistance to their nationals facing the death penalty. In order for an international human right to be enjoyed by individuals, States must ensure that the activities undertaken to realize the right are substantial and effective. The steps set out below do not constitute an unreasonable burden on the State and are the minimum required to fulfil this duty, regardless of the specific circumstances of the detainee or the detaining State.

A. Initial steps: preparing to provide adequate assistance

Training of consular officers: international and local law

64. The home State must train its consular officers so that they are equipped to deliver adequate consular assistance to detainees by providing them with information and instruction on the key provisions of: the Vienna Convention on Consular Relations;⁶³ bilateral consular agreements between the home State and the detaining State, highlighting points of divergence between such agreements and the Vienna Convention; and the detaining State's legal system and its criminal law provisions, especially where these differ from those of the home State.⁶⁴

Provision of information for detainees

65. To assist detainees, consulates must prepare an easily understood, country-specific information sheet, in the national language(s) of the home State, covering such matters as: prison conditions and rules; an overview of criminal procedures in the detaining State; the detainee's legal rights under local laws; how to secure legal representation (attaching a list of reputable local lawyers); and details of organizations that can support the detainees and their case.⁶⁵

66. Clear information about the nature of available consular support and about how to notify the consulate of new cases must also be readily accessible on the consulate's website.

⁶³ United Kingdom, Foreign and Commonwealth Office, Diplomatic Academy, launch brochure, January 2015, p. 9.

⁶⁴ International Court of Justice, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, *Memorial of Mexico*, 20 June 2003, para. 53: "Mexican consular officers are specifically trained in United States law to provide information that could prevent a detained national from waiving important legal rights and from making poor decisions with adverse legal consequences".

⁶⁵ Canadian Consular Services Charter, Ottawa, 2015 (<https://travel.gc.ca/assistance/emergency-info/consular/canadian-consular-services-charter>).

B. Immediate steps when a State is notified of a new detention

67. The home State must engage immediately it becomes aware of a new detention, whether notified formally (e.g. by detaining authorities) or informally (e.g. by a relative of the detainee).⁶⁶

68. Consular officers must follow an established initial contact procedure whereby they:

(a) Visit the detainee as soon as possible and, at minimum, arrange a private telephone call if an immediate visit cannot be organized;⁶⁷

(b) Provide basic necessities for the detainee (including food, medicine and reading/writing materials) in cases where it is known that these are not provided by the detaining authorities;

(c) Provide the detainee with, and explain the contents of, the country-specific information sheet (see para. 65 above);⁶⁸

(d) Seek the detainee's consent to the provision of consular assistance;

(e) Where relevant, also seek the detainee's written consent to receive assistance from a credible non-governmental or charity organization (including Prisoners Abroad, Reprieve, Redress (the Redress Trust) and The Death Penalty Project);

(f) Offer to inform the detainee's family or friends about their detention;⁶⁹

(g) Provide the detainee with contact details for the consulate.

69. If assistance is refused at this initial visit, consular officers must repeat the offer over multiple visits, during which they should aim to build rapport and trust.

70. Consular officers should not take a communication from the detaining authorities stating that a detainee has waived his/her right to consular assistance at face value. They must make efforts to verify this directly from the detainee.

71. During each visit, consular officers must monitor for signs of torture or mistreatment of the detainee. This should be recorded on the spot in visit notes to be taken by the consular officers. Where any indication is observed or complaint raised by the detainee, consular officers should consider whether expert medical assessment is required, or engage with, an appropriately qualified non-governmental organization to assess the situation. Consular officers should also consider directly intervening with the detaining authorities and, if this does not have immediate effect, consider escalating the issue to the national or international level.⁷⁰

⁶⁶ India issued 13 notes verbales to Pakistan requesting consular access to its national: see International Court of Justice, *Jadhav (India v. Pakistan)*, *Verbatim Record No. CR 2019/3*, 20 February 2019, para. 45.

⁶⁷ United States Court of Appeals for the Sixth Circuit, *Ronald Michael Cauthern v. Roland Colson, Warden*, Brief of *amicus curiae*, p. 10.

⁶⁸ In so doing, the consul assists the national to overcome the "multitude of linguistic, cultural and conceptual barriers that render it difficult [for a detained foreign national] to understand, in a comprehensive manner, [their legal rights]"; see Suprema Corte de Justicia de México, *Amparo Directo en Revisión 517/2011 Florence Marie Cassez Crepin*, p. 83.

⁶⁹ See American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, February 2003.

⁷⁰ See Canadian Consular Services Charter; Federal Court of Canada, *Khadr v. Canada (Prime Minister)*, para. 64; see also United Kingdom, Foreign and Commonwealth Office, "Support for British nationals abroad", p. 4.

72. Consular officers must insist that the detainee's right to private consular communication is respected. Any concerns about attempts to monitor or record conversations, deny consular access or otherwise violate the detainee's consular right must be reported to the local authorities and escalated, as necessary. Moreover, consulates should determine the protection risks associated to each national and implement a programme of visits to meet the needs of the national in each case. A high-risk case may merit a consular visit once every 8 weeks, while a lower risk death penalty case could be once every 12 weeks.

C. Pre-conviction detention

Contact with the detaining authorities

73. Once a detainee has consented to receive consular assistance, the home State must immediately make formal contact with the detaining authorities. At a minimum, it must request that the authorities: record that the detainee is a foreign national in receipt of consular assistance; provide the detainee with the means of privately contacting consular officers; and keep the consulate updated about the detainee's status (for example any prison transfers, updates on the case or medical issues).

Contact with the detaining and/or prosecuting authorities

74. In some cases, the home State should consider making informal or formal representations against detention at an early stage.⁷¹ Depending on the circumstances, consular and/or governmental officers should make:

(a) **Representations that the detainee should not be in detention or facing charges at all:** for instance, where the detainee is detained on spurious grounds, as a political statement or in circumstances of clear human rights violations;

(b) **Representations that the detainee should not face a charge which carries the death penalty:** for instance, where there are grounds for arguing that manslaughter, not murder, is the appropriate charge;

(c) **Representations that the death penalty should not be sought, where this is at the discretion of the prosecuting authorities:** for instance, where there are grounds for arguing, on the basis of the facts of the alleged offence or the detainee's personal circumstances, that the threshold for seeking the death penalty is not met.

Contact with the detainee

75. Throughout the period of detention, consular officers must remain in regular contact with the detainee and, if desired by the detainee, visit as regularly as possible. They must continue to monitor for torture or mistreatment, ensure that the detainee has basic necessities and endeavour to address any issues or concerns which arise.

Contact with the detainee's legal team

76. If the detainee instructs or is appointed a lawyer not on the list of reputable local lawyers prepared by the consulate, consular officers must make efforts to ascertain the lawyer's reputation.

⁷¹ In one case of a British national facing capital charges, the Prime Minister of the United Kingdom made diplomatic and political representations at the pretrial stage to ensure that the prosecution did not pursue a death sentence; see Reprieve, *EC Project Manual*, 2011, p. 28 (https://reprieve.org.uk/wp-content/uploads/2015/01/2014_08_07_INT-EC-Project-Manual-FINAL-KEY-DOC.pdf).

77. In all cases, consular officers must recognize the importance of collaboration with the detainee's legal team and, with the detainee's consent, make early, direct contact with the team. They must explain to the lawyer that they are providing consular assistance to the detainee and, if the lawyer is not familiar with representing foreign nationals, explain the role of the consulate and the forms of assistance it can (and cannot) provide.

78. Consular officers must subsequently maintain regular contact with the defence lawyer, establishing an arrangement whereby each keeps the other informed of developments in their respective efforts.

79. As part of their ongoing communication, consular officers must report to the defence lawyer any issues they have identified which may be of relevance to the detainee's case, including, in particular, any concerns about the detainee's mental health or intellectual ability or mistreatment by the detaining authorities.

Where there are concerns about the detainee's legal representation

80. Consular officers will monitor the detainee's legal representation, noting, in particular, any indication that the lawyer is refusing to engage, is inexperienced or lacks the competence to handle the detainee's case, is not devoting the necessary time or effort or is failing to act on potentially important issues.⁷²

81. If any such circumstances arise, consular officers, as necessary and appropriate, and with the detainee's consent, must take one or more of the following steps:

(a) Raise their concerns with the lawyer and ask that they be immediately addressed;

(b) Request that the lawyer accept assistance from another lawyer practising in that jurisdiction whom the consular officers know to be competent;

(c) Request that the lawyer withdraw from the case and be replaced by a lawyer known to be competent;

(d) Instruct a competent lawyer to facilitate the removal of the previous lawyer and take over the conduct of the detainee's case.⁷³

Assisting in the preparation of the detainee's defence

82. The home State must assist in the preparation of the defence case, including, in particular, by:

Funding

(a) Providing funding for a lawyer where there is no State appointed lawyer and where pro bono legal representation is not an option;⁷⁴

⁷² Mexico declared that its role is to draw attention to issues such as race discrimination in its interactions with counsel, see ICJ, *Case concerning Avena and other Mexican Nationals (Mexico v. USA)*, Memorial of Mexico, 20 June 2003, paras. 43–48 (available at: <https://www.icj-cij.org/files/case-related/128/8272.pdf>).

⁷³ The United Kingdom seeks to secure better counsel where there are concerns over ineffective provision of counsel, see *Linda Anita Carty v. Rick Thaler, Director, Texas Department of Justice, Correctional Institutions Division*, Brief of the United Kingdom as *amicus curiae* in support of the petitioner, 2010, p. 19.

⁷⁴ Supreme Court of the United Kingdom, *R (on the application of Sandiford) v. The Secretary of State for Foreign and Commonwealth Affairs*, Case No. UKSC 2013/0170, Judgment, 16 July 2014, paras. 74–75.

(b) Providing funding for resource counsel where a State-appointed or pro bono lawyer is engaged in order to provide support.⁷⁵

Investigation (fact/mitigation)⁷⁶

(c) Facilitating investigation by the detainee’s legal team, including by providing translation or interpretation services, hiring an experienced local individual to assist investigators and assisting with the collection of records (for example, educational or medical) by contacting the relevant institutions, providing letters of introduction or expediting the release of centrally-held documents;

(d) Supporting an application to the court for investigation funding, where this is available; where it is not, providing the necessary funding itself;

Expert witnesses⁷⁷

(e) Helping to identify linguistically and culturally competent experts who may be instructed to assist with the defence case;

(f) Supporting an application to the court for the provision of funding for the expert, where this is available; where it is not, providing the necessary funding itself.

D. Pretrial court hearings

83. A consular officer must attend every significant pretrial hearing in the detainee’s case. The officer must maintain a record of proceedings and immediately report on any concerns about the hearing or the detainee’s legal representation. The consulate must ensure that these concerns are addressed and escalated, as necessary.⁷⁸

84. As possible and appropriate, consular officers and other State actors must continue to make representations and other interventions against the imposition of the death penalty.⁷⁹ In relevant jurisdictions, this includes making efforts to facilitate the offer of a “plea bargain” by the prosecuting authorities, whereby the detainee pleads guilty on terms which exclude the death penalty. Where a plea bargain is a possibility, consular officers must ensure that the detainee understands its terms and consequences and that he/she makes a fully informed decision as to whether to accept it.⁸⁰

E. Trial

85. A consular officer must attend each day of trial. As with the pretrial hearings, the officer must maintain a record of proceedings and immediately report any

⁷⁵ United States Court of Appeals for the Sixth Circuit, *Ronald Michael Cauthern v. Roland Colson, Warden*, Brief of *amicus curiae*, 2011.

⁷⁶ Practice of Serbia in Supreme Court of Nevada, *Avram Vineto Nika v. Renee Baker, Warden, and Catherine Cortez Masto, Attorney General of the State of Nevada*, Case No. 59776, amicus brief of the Republic of Serbia as *amicus curiae* in support of appellant, 2012, in particular, see pp. 10–11 (https://reprieve.org.uk/wp-content/uploads/2014/10/2011_08_10_PUB_Nika_Serbia_Amicus_Brief.pdf).

⁷⁷ Practice of Germany, in United States Court of Appeals for the Sixth Circuit, *Ronald Michael Cauthern v. Roland Colson, Warden*, Brief of *amicus curiae*, p. 11.

⁷⁸ ICJ, *Case concerning Avena and other Mexican Nationals (Mexico v. USA)*, Memorial of Mexico, 20 June 2003, paras. 75–78 (available at: <https://www.icj-cij.org/files/case-related/128/8272.pdf>).

⁷⁹ Practice of Spain, described in: Mark Warren, “Death, dissent, and diplomacy: the U.S. death penalty as an obstacle to foreign Relations”, *The William and Mary Bill of Rights Journal*, Vol. 13 [2], pp. 309–337.

⁸⁰ ICJ, *Case concerning Avena and other Mexican Nationals (Mexico v. USA)*, Memorial of Mexico, 20 June 2003, paras. 61–69 (available at: <https://www.icj-cij.org/files/case-related/128/8272.pdf>).

concerns that the consulate may want to escalate, as necessary, to the national and international level.

F. Sentencing

86. If the detainee is sentenced to death (whether after a guilty plea or following conviction at trial), consular officers must continue to facilitate any further mitigation investigation by the defence team.

87. Where mitigation witnesses are located overseas, in particular in the home State, consular officers must facilitate their attendance to give evidence at sentencing, including by helping to locate them and providing expedited travel documents. The home State must assist with any application to the court for the provision of funding for travel, interpreters and other related expenses and, where needed, at minimum, consider providing the necessary funding itself.

88. Where consular officers themselves have come to have relevant knowledge of the detainee or the circumstances of the case, they must accept a request to provide written or oral evidence in support of the detainee at sentencing. Where relevant, consular officers must also be willing to provide written or oral evidence regarding any violations of the detainee's right to consular assistance and the impact of such violations on the detainee's rights.

89. Throughout this period, the home State must continue, as possible and appropriate, to make further informal and formal representations against the seeking of the death penalty.

90. Where the death penalty is sought, the home State, as appropriate, must make formal submissions to the court against its imposition, instructing – and, if necessary, funding – a legal team with standing in the prosecuting State to draft and file the submissions.

G. Assistance after the imposition of the death penalty

91. Where the detainee is sentenced to death, consular officers must continue to provide the same range of assistance as during the pretrial and trial periods, including in support of any post-conviction appeal.⁸¹

92. In addition to the steps outlined at above,⁸² if the home State has been notified of the detainee's case only after the death penalty has already been imposed, two additional measures must be taken in order to compensate for the detriment suffered by the victim:

(a) First, it must raise a complaint with the authorities about the lack of consular notification and escalate the complaint to the regional court or appropriate body;

(b) Second, the home State must offer to provide a written statement or amicus brief in support of any appeal by the detainee on grounds of the violation of the Vienna Convention on Consular Relations, ineffective assistance of counsel at trial, issues

⁸¹ ICJ, *Case concerning Avena and other Mexican Nationals (Mexico v. USA)*, Memorial of Mexico, 20 June 2003, para. 80, footnote 97 (available at: <https://www.icj-cij.org/files/case-related/128/8272.pdf>).

⁸² See, inter alia, the practice of Serbia in submitting an amicus curiae brief in support of their national Avram Nika, *Avram Nika v. Att. Gen State of Nevada*, Supreme Court of Nevada, Case No. 59776, Amicus brief of the Republic of Serbia as *amicus curiae* in support of appellant, 2012.

such as mental health, intellectual disability or juvenile status or other human rights or fair trial violations.⁸³

93. Throughout the post-conviction period, consular officers must continue to support the detainee through regular visits and, where required, the provision of basic necessities.

94. Where relevant, consular officers must make consular and governmental representations in support of the detainee's inclusion in any executive sentence commutations. They must also inform the detainee about and, if requested by the detainee, work to facilitate, a transfer of the detainee to the home State.

H. Release of the detainee

95. If the detainee is released from detention, the home State must provide the necessary consular and humanitarian assistance to facilitate, as per the detainee's wish:

(a) Return to the home State: consular officers must provide expedited travel documents and, where necessary, financial support for travel costs: consular officers should also assist with the detainee's immediate practical needs, such as food and accommodation, until they can travel home, including ensuring that the detainee receives any urgent medical treatment required;

(b) Reintegration into the community in the prosecuting State: consular officers must address the detainee's immediate practical needs, such as facilitating travel to the detainee's home area and, where necessary, connecting the detainee with local support services.

I. Pre-execution period

96. If an execution date is scheduled, consular officers must provide written and oral support, as required, for any application for stay of execution or petition for clemency prepared by the detainee's legal team. As exemplified in the jurisprudence of the International Court of Justice, in trial and post-conviction proceedings, consular officers must assist with the identification and, where necessary, the funding of local or overseas lawyers required for this purpose.

97. In parallel with formal clemency proceedings, the home State must make all possible informal and formal representations against the carrying out of the execution, from the local consular level up to the very highest levels of government.

J. Escalation

98. The home State must consider all possible forms of consular and political pressure to hold the prosecuting State accountable for breaches of international and domestic law, including, for example, the initiation of proceedings in the international courts, the expulsion of the prosecuting State's consular officers, withdrawal from bilateral agreements and the imposition of trade and other sanctions. The home State must also consider seeking similar interventions from other States, in support of the detainee.

⁸³ See, for example, ICJ, *Case concerning Avena and other Mexican Nationals (Mexico v. USA)*, Memorial of Mexico, 20 June 2003, paras. 273–274 (<https://www.icj-cij.org/files/case-related/128/8272.pdf>).

99. These interventions must continue up to and after the carrying out of the execution.

K. Relationship with the detainee's family

100. Throughout the period of detention, consular officials must ensure that detainees are able to communicate with their families. If such contact is made difficult, consular officials must, with the authorization of the detainees, provide information to the families.

101. If the detainee has children in the country of detention, consular officials must assess their situation and level of care, provide assistance, assist with regular prison visits and help repatriate the children, depending on circumstances.

102. Detainees and family members have a right to prepare for death ([A/67/279](#), para. 40). In the event that the death penalty is imposed, consular officials must, with the consent of the detainees, immediately inform the families of the date of the execution.

103. Consular officials must ensure that the last rights of the detainee are fully respected by the detention State. The home State must organize the repatriation of the body of the deceased if this was the desire of the detainee and the detention State fails to do so.

104. If repatriation is not possible, they must ensure the body is properly buried according to the religion, rites or beliefs of the deceased, ascertain the location of the gravesite and assist family members who may wish to travel to pay their respects.

IV. Conclusions

105. It is well established in law that detaining States are under an obligation to notify foreign detainees of their right to consular assistance. The report of the Special Rapporteur has shown that access to consular assistance is a human right and thus that its implementation imposes a complementary obligation on the home States of detainees. Given that the application of the death penalty disproportionately affects foreign nationals, the failure by home States to provide adequate consular assistance in such cases amounts to a violation of their responsibility to protect the right to life.

106. The Special Rapporteur was prompted to write the present report not only because of the large number of foreign nationals on death rows around the world and the multitude of victims of unfair trials in prosecuting States, but also because of her wish to highlight the indifference of too many home States to this situation. Her examination of this global pattern led her to conclude that such indifference is rooted in a grave bias. The decision to withhold or to provide sub-standard consular assistance can only be described as arbitrary. In so doing, home States violate the fundamental principle of non-discrimination, deprive their nationals of equality before the law and act in complicity with the violation of their nationals' rights at the hands of prosecuting States.

107. Even States that are strongly abolitionist have adopted a tolerance for the imposition of capital punishment on their nationals abroad, in contravention of their legal obligations and moral positions, and they would appear to be imposing the death penalty by proxy, subcontracting its use for some of their nationals who are deemed to be unworthy of equal human rights protection. This is tantamount to importing the brutality of death penalty to the home society,

normalizing it and everything attached to it, including its inequality, arbitrariness and cruelty.

108. **Human rights are rights inherent to all human beings. They are not earned. They cannot be arbitrarily “cancelled”, no matter how repugnant the crime.⁸⁴ Where a State has committed to uphold the prohibition against the death penalty, that obligation must be applied universally, including for their nationals abroad. Heinous crimes may be the toughest tests of a State’s commitment to abolitionism, but to allow such acts to vanquish that commitment corrodes the very foundation of human rights, eating away at the State’s human rights guarantees domestically, and, by example, sending a chilling message about the commitment to human rights internationally.**

V. Recommendations

109. **States that have not yet abolished the death penalty should establish a moratorium on executions and consider steps to move towards abolition. Where death sentences continue to be handed down, safeguards with respect to the imposition of the death penalty must be fully respected. Death sentences should be imposed only for the most serious crimes, namely, those involving intentional killing, and only after a trial that meets the highest standards of fairness.**

110. **States that have abolished the death penalty are absolutely prohibited from forcibly transferring a person to States where they face a genuine risk of the death penalty, unless adequate, effective and credible assurances are obtained. States with long-standing moratorium on the imposition of the death penalty (and as such are considered de facto abolitionist) should consider amending national laws on extradition and deportation in line with this prohibition.**

111. **All States should:**

(a) **Enshrine in their constitution or law the right of their nationals to consular assistance if detained abroad and specifically when facing death penalty;**

(b) **Enter bilateral agreements with Governments of countries where consular access is frequently delayed or denied in order to provide for mandatory consular notification and regular consular access;**

(c) **Take steps to ensure prompt and effective access for consular officials to their nationals facing death sentences or executions abroad (as detailed in the guidelines contained in sect. III above);**

(d) **Formulate and implement a unified policy on consular support for imprisoned foreign nationals, specifically including those facing execution;**

(e) **If relevant, immediately provide forceful representation on behalf of foreign nationals detained abroad to secure access to due process and ensure extradition;**

(f) **Review existing regulatory frameworks for the emigration of foreign nationals to accord adequate safeguards for protection of fundamental rights, including in case of detention;**

⁸⁴ Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and other covenants (see <https://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx>).

(g) Amend legislation so that national police forces are required not to share information with other international agencies in cases where to do so would potentially result in suspected perpetrators facing the death penalty;

(h) Uphold the individual rights set out in the Vienna Convention on Consular Relations in relation to foreign nationals detained under their jurisdiction;

(i) Provide information on whether and what quality of consular assistance is being provided to foreign nationals in cases of capital punishment;

(j) Provide data on the numbers of foreign nationals facing capital charges across the world;

(k) Establish an assistance/information mechanism so that foreign nationals and their families can be provided with details of organizations that are able to assist them with their cases.

112. The Secretary-General should add requests for information on whether and what quality of consular assistance is provided in capital cases to the periodic death penalty surveys.

113. The Office of the United Nations High Commissioner for Human Rights should refer any cases of foreign nationals facing the death penalty to relevant civil society organizations so that they may assist them in securing adequate consular assistance.
