

**EXPERT DECLARATION OF PROFESSOR PHILIP ALSTON, UNITED NATIONS SPECIAL
RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS**

I, Philip Alston, declare as follows:

Experience and qualifications of expert

1. I make this declaration based on my experience and knowledge gained from over 30 years of researching, writing, teaching, and working in the field of international and human rights law. If called to testify about the issue addressed in this declaration, I could and would do so.

2. I am the John Norton Pomeroy Professor of Law at the New York University School of Law, and am currently the James Barr Ames Visiting Professor of Law at Harvard Law School. I am also the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions.

3. The UN created the mandate of the Special Rapporteur on extrajudicial executions in 1982. I was appointed to this position in July 2004. The role of the mandate-holder is to respond to cases of extrajudicial executions around the world by holding Governments to account. The Special Rapporteur carries out this mandate through correspondence with governments and through fact-finding visits to countries where significant problems of extrajudicial executions are alleged or identified (past missions have included Guatemala, Israel, Lebanon, Sri Lanka, the Philippines, Nigeria, the Central African Republic, Brazil, Afghanistan, and the United States of America). Country fact-finding missions and correspondence serve to clarify past violations, alert Governments to their legal obligations, and provide guidance on the measures required to prevent future violations.

4. As a UN Special Rapporteur, I regularly report to the UN Human Rights Council and to the UN General Assembly on the practice and law of extrajudicial executions around the world. As a professor of international law, I have also published widely on human rights and international law topics, including on extrajudicial executions.

Summary of declaration

5. I have been asked to provide an expert opinion on whether extrajudicial executions are prohibited by international law. In particular, I have been asked to provide an opinion on whether executions carried out following a trial that fails to observe basic fair trial guarantees is a violation of international law.

6. The law on these issues is unambiguous.

7. Customary international law prohibits extrajudicial executions. This includes a specific prohibition against capital punishment when carried out by a State in the absence of the final judgment of a competent, impartial and independent court observing all fundamental due process guarantees.

8. Customary international law is the general practice of States (“state practice”) conducted pursuant to a belief that such practice is legally required (“*opinio juris*”). State practice and the *opinio juris* of States universally indicate the existence of the norm against extrajudicial executions – obligatory for States in all circumstances.

9. There are many different “forms” of extrajudicial execution proscribed by customary international law. Broadly speaking, the term “extrajudicial executions” covers killings which violate human rights or humanitarian law. Common forms include, for instance: killing as a result of the excessive use of force by police; indiscriminate killings of civilians during an armed conflict; or murder by State security forces or paramilitary groups, when these are not adequately investigated, prosecuted or punished.

10. Capital punishment *per se* is not an extrajudicial execution, and is not at present prohibited by customary international law. But States that provide for the death penalty must observe strict guidelines in order to ensure the lawfulness of any execution. Importantly, for the death penalty to be permitted by international law, due process must be observed in the trial of the accused. If due process norms are not observed, then the execution is prohibited at international law and is considered an “extrajudicial execution”. It is this specific form of extrajudicial execution upon which the evidence provided in this expert declaration focuses.

11. The underlying rationale for this norm is clear. The right to life is the most basic of all rights. The death penalty is final. If states provide for the death penalty, they must ensure that innocent people are not executed. Due process norms constitute a safeguard

against the risk of executing innocent persons, and are designed to ensure that all persons are provided a fair trial.

12. The minimum safeguards required for an execution to be lawful at customary international law are reflected in Articles 6 and 14 of the International Covenant on Civil and Political Rights. They include the following: (a) capital punishment must not be imposed except pursuant to a final judgment of a competent, independent and impartial court established by law; (b) the accused has the right to be presumed innocent until proven guilty; (c) the accused has the right to be informed promptly and in detail in a language he or she understands of the nature and cause of the charge; (d) the accused has the right to have adequate time and facilities to prepare a defence and to communicate with counsel of the accused's choosing; (e) the accused has the right to be tried without undue delay; (f) the accused has the right to be tried in his or her presence, and to defend him or herself in person or through legal assistance of the accused's own choosing; to be informed of this right; and to be provided legal assistance where the interests of justice require; (g) the accused has the right to examine or have examined witnesses against the accused, and to obtain the attendance and examine witnesses on the accused's behalf; (h) the accused has the right to have the free assistance of an interpreter as needed; and (i) the accused has the right to have his or her conviction and sentence reviewed by a higher tribunal according to law.

13. In demonstrating the status and content of a norm of customary international law, regard must be had to the accepted evidence of customary international law. The Restatement (Third) of Foreign Relations Law of the United States §103(2)(a)-(d) lists the following as evidence of customary international law which is accorded "substantial weight": judgments and opinions of international judicial and arbitral tribunals; judgments and opinions of national judicial tribunals; the writings of scholars; pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states. Professor Ian Brownlie's *Principles of Public International Law* 6 (6th ed. 2003) provides the following list of sources of evidence:

[D]iplomatic correspondence, policy statements, press releases, the opinions of official legal advisors, official manuals on legal questions, e.g. manuals of military law, executive decisions and practices, orders to naval forces etc.,

comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.

14. Accordingly, this declaration sets out the evidence of State practice and *opinio juris* of States that demonstrates the existence of the clear norm against executions carried out without respect for basic fair trial guarantees.

15. International and regional treaties provide for the right to life, and require States parties to observe due process guarantees (see Part I below). The jurisprudence of regional and international courts, commissions, and committees (such as the International Court of Justice, the Nuremburg tribunal, the Inter-American Court, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, and the United Nations Human Rights Committee) further confirms the existence of this norm, and provides detail on how it is to be interpreted in specific cases (see Part II below). The decisions of national courts (including the US Supreme Court and US district courts, the UK Privy Council, and the Human Rights Chamber for Bosnia and Herzegovina) similarly affirm the prohibition against extrajudicial executions (see Part III below). Resolutions have been consistently adopted by the United Nations General Assembly, the Economic and Social Council, and the Human Rights Council calling on States to apply internationally recognized due process standards in death penalty cases (see Part IV below). The writings of renowned jurists of international and human rights law consistently confirm that international law prohibits extrajudicial executions (see Part V below). Reports of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, as consistently endorsed by governments and other actors, also provide evidence for the existence of the norm (see Part VI below). The Restatement (Third) of the Foreign Relations Law of the United States further provides evidence of the customary status of the prohibition against extrajudicial executions (see Part VII below). In its Country Reports on Human Rights Practices, the US Department of State has repeatedly condemned executions carried out as a result of tribunal or court processes that fail to observe basic due process guarantees (see Part VIII below). Importantly, this declaration also records the statements of over 100 States recognizing that States have a

legal obligation to respect due process before an execution can be lawful at international law (see Part IX below). As of October 2008, 60 countries were considered retentionist in both practice and law (ie., their laws provided for the death penalty for ordinary crimes, and they had carried out executions in the last ten years). The constitutions and statutes of most of these countries provide for the right to life, and for fundamental due process guarantees (see Part X below). Further, the vast majority of retentionist states have specifically stated that they consider extrajudicial executions to be prohibited and that their national practice conforms to international standards (see Parts IX and X below).

16. The evidence clearly demonstrates that customary international law prohibits extrajudicial executions, including executions carried out without respect for basic due process guarantees.

Evidence for the existence of the norm against extrajudicial executions

I. INTERNATIONAL AND REGIONAL TREATIES EVIDENCE THE EXISTENCE OF THE NORM AGAINST EXTRAJUDICIAL EXECUTIONS

International treaties

17. International agreements constitute the “practice of states and as such can contribute to the growth of customary law”. Restatement (Third) of Foreign Relations Law of the United States, §102, comment i. Article 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, provides that “[n]o-one shall be arbitrarily deprived of his life.” Article 6(2) provides that capital punishment may be carried out subject to certain restraints:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

18. The requirement that any capital sentence be imposed “in accordance with the law ... and not contrary to the provisions of the present Covenant” means that the fair trial

guarantees contained in Article 14 of the ICCPR are incorporated into Article 6. *Reid v Jamaica*, Communication No. 355/1989, U.N. Doc. CCPR/C/51/D/355/1989, ¶11.5 (1994) (“The Committee is of the opinion that the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant.”). *See also* Human Rights Committee, General Comment No. 6, 16th Session, U.N. Doc. CCPR/C/21/Add.1, ¶7 (1982) (“Procedural guarantees [in the ICCPR] must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal.”).

19. The right to a fair trial in Article 14 of the ICCPR includes a number of specific rights. These include the right to a trial before a “competent, independent and impartial tribunal established by law”. Article 14(1), ICCPR. (In almost identical fashion, Article 40 (2) (b) (iii) of the Convention on the Rights of the Child (CRC), 20 Nov. 1989, 1577 UNTS 43, entry into force 2 September 1990, which has 193 states parties and is therefore almost universally ratified, provides for a “competent, independent and impartial authority or judicial body in a fair hearing according to law.”)

20. The accused also has the specific right to “have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”. Article 14(3)(b), ICCPR. During criminal proceedings, Article 14 (3) (d) of the ICCPR entitles an accused to defend himself in person or through legal assistance of his own choosing. Especially in capital cases, an accused must be effectively assisted by a lawyer at all stages in the proceedings. Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, 23 August 2007, ¶38. Further, Article 67(1)(b) of the Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, entry into force 1 July 2002, Article 21(4)(b) of the Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993, U.N. Security Council Resolution 827, U.N. Doc. S/RES/827, Article 20(4)(b) of the Statute of the International Criminal Tribunal for Rwanda, 8 Nov. 1994, U.N. Security Council Resolution 955, U.N. Doc. S/RES/955, and Article 17(4)(b) of the Statute of the Special Court for Sierra Leone, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a

Special Court for Sierra Leone, Annex, 16 Jan. 2002, contain the right of the accused to communicate freely with counsel.

21. The ICCPR also provides that the accused has the right to have any sentence “reviewed by a higher tribunal according to law”. Article 14(5), ICCPR. The Convention on the Rights of the Child similarly provides in Article 40(2)(b)(v) that review must take place “by a higher competent, independent and impartial authority or judicial body according to law.” In addition, all international criminal tribunals provide for appellate proceedings. See, Article 25, Statute of the International Criminal Tribunal for the former Yugoslavia; Article 24, Statute of the International Criminal Tribunal for Rwanda; Articles 81-83, Statute of the International Criminal Court; Article 20, Statute of the Special Court for Sierra Leone.

22. The effect of the incorporation of the Article 14 right to a fair trial into Article 6 is to make those rights non-derogable in capital cases. William A. Schabas, *The Abolition of the Death Penalty in International Law* 113 (3rd ed., 2002). These standards are thus mandatory in times of emergency, such as international and non-international armed conflicts, as well as internal disturbances, riots and tensions. Article 4(2), ICCPR (“No derogation from article[] 6 ... may be made ...”).

23. International humanitarian law (law applicable during international or non-international armed conflicts) also requires basic due process guarantees. The imposition of the death penalty in non-international armed conflicts is regulated by Common Article 3 of the Geneva Conventions. See, e.g., *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 75 U.N.T.S. 135, entered into force Oct. 21, 1950 (The Geneva Conventions have 194 State parties). Common Article 3(I)(d) prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilized peoples.” Common Article 3 reflects a “minimum yardstick” and “elementary considerations of humanity”, and is a “fundamental general principle[] of humanitarian law”, applicable in all conflicts and obligatory for all States. *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. U.S.) (Merits), Judgement of 27 June 1986, 1986 ICJ Reports 14, at ¶218.

Although “judicial guarantees ... recognised as indispensable by civilized people” are not defined in the Geneva Conventions, the US Supreme Court stated that it “must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law”. *Rumsfeld v Hamdan* 548 US 557, 633 (2006).

24. The Court went on to say that “many of these” guarantees were contained in 75(4) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, June 8, 1977, 1125 U.N.T.S. 3, entered into force Dec. 7, 1978. *Id.* The Court also implied that Article 14 of the ICCPR might be a source of minimum “judicial guarantees”. *Id.*, 633 n 66. See also Schabas, *supra* at 213 (suggesting sources that might give content to Common Article 3(I)(d), including both Article 75(4) of Protocol I and Article 14 of the ICCPR).

Regional Treaties

25. Article 2 of the *European Convention on Human Rights (ECHR)*, Nov. 4, 1950, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8 and 11, entered into force Sept. 21, 1970, Dec. 20, 1971, Jan. 1, 1990, and Nov. 1, 1998 respectively, provides that “[n]o-one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” Although Article 2 does not expressly refer to procedural guarantees, the term “court” in Article 2 has been interpreted as imposing them. See *Damjanovic v Bosnia and Herzegovina*, Case no. CH/96/30, 5 September 1997 (Bosnia and Herzegovina).

26. This view is consistent with the authoritative interpretation of “court” in Article 5 of the ECHR by the European Court of Human Rights in *De Wilde, Ooms and Versyp v Belgium*, 12 Eur. Ct. H.R. (ser. A), ¶76 (1971).

27. As such, Article 2 of the ECHR has been interpreted as incorporating the procedural guarantees in Article 6 of the ECHR. Article 6 of the ECHR contains a number of due process rights, including the right “to have adequate time and facilities for the preparation of his defence” and the right “to defend himself in person or through legal assistance of his own choosing.” It also requires that a tribunal or court be “independent and

impartial” and “established by law.” The effect of incorporating Article 6 of the ECHR into Article 2 of the ECHR makes the procedural guarantees in Article 6 non-derogable in capital cases. R. Sapienza, ‘International Legal Standards on Capital Punishment’ in B.G. Ramcharan (ed.), *The Right to Life in International Law*, 290 (1983).

28. Article 4(1) of the *American Convention on Human Rights* (American Convention), Nov. 22, 1969, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, provides:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of life.

29. Article 4(2) provides:

In countries that have not abolished the death penalty, it may be imposed only from the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

30. In its jurisprudence, the Inter-American Court of Human Rights (IACHR) has held that a person will be “arbitrarily” deprived of life within the meaning of Art 4(1) if they are not afforded due process. *Fermin Ramirez v Guatemala*, Inter-Am Ct. H.R. (ser. C) No. 126, ¶103 (2005). Article 8 of the American Convention gives content to the due process rights guaranteed under Article 4, providing the right to a “competent, independent, and impartial tribunal, previously established by law”; the right to “adequate time and means for the preparation of his defense”; the right “to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel”; and “the right to appeal the judgment to a higher court.”

31. Article 4 of the *African Charter on Human and Peoples’ Rights*, 26 June 1981, 1520 UNTS 217, entry into force 21 October 1986, provides that “[h]uman beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.” Article 7 requires an “impartial court or tribunal”; provides for the right to be defended by counsel of one’s own choice; and protects the “right to appeal to competent national organs.”

32. The *Arab Charter on Human Rights* (Arab Charter), May 22, 2004, reprinted in 12 *Int’l Hum. Rts. Rep.* 893 (2005), *entered into force* March 15, 2008, was agreed to by the

22 member States of the Council of the League of Arab States. It provides in Article 5 that every “human being has the inherent right to life”, that the right “shall be protected by law” and that no one shall be “arbitrarily deprived of his life.” Article 5 is non-derogable. *Id.*, Article 4(2). The right to life must, however, be read subject to Article 6 which provides for the death penalty only “pursuant to a final judgment rendered by a competent court.” Fair trial guarantees are contained in Article 16. These include the right to be “presumed innocent until proved guilty by a final judgment rendered according to law”; to have “adequate time and facilities for the preparation of his defense”; to “defend himself in person or through a lawyer of his own choosing with whom he can communicate freely and confidentially”; the right to “examine or have his lawyer examine the prosecution witnesses”; and the right to “file an appeal in accordance with the law before a higher tribunal.” Article 16 does not expressly deal with capital cases, but it is expressed to apply to “[e]veryone charged with an offence.”

Other Regional Instruments

33. A number of additional regional instruments express international opinion on the implementation of the death penalty. Such statements are significant as evidence of custom. Ian Brownlie, *Principles of Public International Law* 6 (6th ed., 2003).

34. In the *Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference of Security and Co-operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-up to the Conference* (19 January 1989). <http://www.osce.org/documents/mcs/1989/01/16059_en.pdf>, the participating States of the Organisation for Security and Cooperation in Europe (OSCE) stated:

With regard to the question of capital punishment, The [sic] participating States note that capital punishment has been abolished in a number of them. In participating States where capital punishment has not been abolished, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to their international commitments. This question will be kept under consideration. In this context, the participating States will co-operate within the relevant international organisations.

35. Subsequently, in the *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (29 June 1990), <http://www.osce.org/documents/odihr/1990/06/13992_en.pdf>, the participating States declared:

17. The participating States

recall the commitments undertaken in the Vienna Concluding Document to keep the question of capital punishment under consideration and to co-operate within relevant international organisations;

...

note the restrictions and safeguards regarding the use of the death penalty which have been adopted by the international community, in particular Article 6 of the International Covenant on Civil and Political Rights [...]

36. To similar effect are the *Guidelines to EU Policy Towards Third Countries on the Death Penalty* (updated 2008). These guidelines, agreed to by the EU States, advocate “minimum standards” for the imposition of the death penalty, including:

Capital punishment must only be carried out pursuant to a final judgement rendered by an independent and impartial competent court after legal proceedings, including those before special tribunals or jurisdictions, which gives all possible safeguards to ensure a fair trial, at least equal to those contained in Article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, and where appropriate, the right to contact a consular representative.

37. Article I of the *American Declaration of the Rights and Duties of Man* (American Declaration), OAS Doc. OEA/Ser.L/V/I.4, provides that “[e]very human being has the right to life, liberty and the security of his person.” This provision has been interpreted by the Inter-American Commission on Human Rights as follows:

[I]nherent in the construction of Article I, is a requirement that before the death penalty can be imposed and before the death sentence can be executed, the accused person must be given all the guarantees established by pre-existing laws, which includes guarantees contained in its Constitution, and its international obligations, including those rights and freedoms enshrined in the American Declaration... [the rights contained in the American declaration include] the right to due process.”

Andrews v United States (Case No. 11.139), Precautionary Measures Decision of 28 July 1992, ¶177.

38. The *Cairo Declaration on Human Rights in Islam*, 5 August 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993), declared by the 57 member States of the Organization of the Islamic Conference, also provides for the right to life and due process rights. Article 2 provides: “the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to safeguard this right against any violation, and it is prohibited to take away life except for a shari’ah prescribed reason.” Article 19 provides a number of due process rights, including that, a “defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence.”

II. THE JURISPRUDENCE OF REGIONAL AND INTERNATIONAL COURTS, COMMISSIONS, AND COMMITTEES EVIDENCES THE EXISTENCE OF THE NORM AGAINST EXTRAJUDICIAL EXECUTIONS.

The Nuremburg Trials

39. The decisions of international and regional courts and commissions are an important source of evidence for determining the content of customary international law. As the Restatement (Third) of Foreign Relations Law of the United States, §103, comment b states, “to the extent that decisions of international tribunals adjudicate questions of international law, they are persuasive evidence of what the law is.” The Nuremburg trials are particularly important for the development of the international norm against extrajudicial killings for two reasons.

40. First, during the negotiations of the Nuremburg Charter, what was then called the “judicial option” (use of fair trials against alleged Nazi war criminals) was chosen over the “political option” (use of summary execution against those confirmed to be high ranking Nazi officials and who committed war crimes). The judicial option encompassed the idea of granting the accused a fair trial with protection of rights. This option was favored by the Americans after an internal debate led to the conclusion that a fair trial would be the proper way to maintain a system of fairness that was contrary to the judiciary system under the Nazi regime. *Memorandum of Proposals For The Prosecution And Punishment Of Certain War Criminals And Other Offenders, American*

Memorandum Presented at San Francisco, April 30, 1945, [hereinafter San Francisco Memorandum], reprinted in Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials (U.S. Dep't of State 1949) (1945), available at <http://avalon.law.yale.edu/imt/jack05.asp>.

41. In the 1945 San Francisco Memorandum, the United States argues, “No principle of justice is so fundamental in most men’s minds as the rule that punishment will be inflicted by judicial action...This principle is applied in greater or less degree by all nations, and historically its recognition is the first step in the approach to the democratic standard of liberty under law.” *Id.*, at IV.D. The United States continues to explain that the punishment adopted for the Nuremberg trials cannot undermine the moral force behind the Allied Cause. The negotiations concluded that due process should prevail over the use of summary executions. The reasoning was that the process of trying war crimes must be seen as fair and transparent in order to create a true system of justice. The recognition that the Nuremberg trials could serve as a model for future tribunals made it all the more important that due process was established and the trial was done in good faith.

42. Second, summary execution or extrajudicial killings were considered a crime against humanity. The Nuremberg Charter identified “Crimes against Humanity” as crimes within the jurisdiction of the Nuremberg Tribunal. Crimes against Humanity were defined as “...murder...committed against any civilian population, before or during the war, whether or not in violation of the domestic law of the country where perpetrated.” Charter of the International Military Tribunal, Aug. 8, 1945, 82 UNTS 279, 59 Stat. 1544, Article 6(c) (1945).

43. In *U.S.A. v. Alstoetter*, U.S. Military Tribunal at Nuremberg, 3 Trials of War Criminals 966 (1948) former judges and lawyers under the Nazi regime were found guilty of crimes against humanity for not providing judicial guarantees during trials which resulted in the execution of individuals. These former judges and lawyers were found to be complicit in murder and other atrocities.

44. The Nuremberg tribunal’s decision to punish defendant Schlegelberger for his role in supporting a “justice” system that handed down summary executions to Jewish and Polish people, although he ultimately resigned, illustrates Nuremberg’s unyielding

decision to punish those who obstructed justice with summary executions. Schlegelberger “invited Hitler to inform him of verdicts with which the Fuhrer disagreed so that Schlegelberger might educate judges into the ‘correct way of thinking’.” Matthew Lippman, *The Prosecution of Josef Alstoetter et al.: Law, Lawyers and Justice in the Third Reich*, 16 Dick. J. Int’l L. 343 (1998). In this way Schlegelberger interfered with the justice system in favor of pushing verdicts in one direction. In its decision the tribunal states, “The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes... If the judiciary could slay their thousands, why couldn’t the police slay their tens of thousands?” *Id.* The tribunal posed this last question to reflect the unique significance of the judiciary in maintaining justice and its special role in ensuring the rights of individuals. Summary executions undermine the justice system, and the Nuremberg trials recognized this far-reaching implication. Thus defendant Schlegelberger was found guilty and punished accordingly.

45. Furthermore, with regard to defendant Oswald Rothaug, the Nuremberg tribunal found him guilty of crimes against humanity. Evidence used against Rothaug involved his participation in a trial during the Nazi regime in which he manipulated the judicial process, resulting in the execution of the defendants in that case. *Id.* Rothaug encouraged witnesses to make incriminating remarks during the trial, and defendants were rarely given the opportunity to be heard by the court. Furthermore, Rothaug clearly told the prosecutor to request the death penalty and gave him advice on what to include within his arguments. *Id.* In all parts of the trial, Rothaug had a hand in moving the court against the defendants. In reference to the execution of the defendants during the trial, the Tribunal states. “Their execution was in conformity with the policy of the Nazi State of persecution, torture, and extermination of these races. The defendant Rothaug was the knowing and willing instrument in the program of persecution and extermination...From the evidence it is clear that these trials lacked the essential elements of legality...His acts were more terrible in that those who might have hoped for a last refuge in the institutions of justice found these institutions turned against them and a part of the program of terror and oppression.” *Id.* Extrajudicial killing was seen as a form of murder and persecution.

Therefore, summary executions were a crime against humanity under the Nuremberg Charter, and Rothaug was punished for his involvement in extrajudicial killings.

International Court of Justice

46. The opinions of the International Court of Justice (ICJ) are “accorded great weight” as evidence of the content of international law. Restatement (Third) of Foreign Relations Law of the United States §103, comment b. In *The Corfu Channel Case (U.K. v Albania)*, 1949 I.C.J. 4, ¶215 (April 9), stated that States have certain obligations that are based on “general and well-recognized principles, namely: elementary considerations of humanity.”

47. The ICJ expanded on what the content of these general and well-recognized principles were in *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27). The ICJ held that Common Article 3 of the Geneva Conventions (which prohibits “violence to life and person, in particular murder of all kinds” and “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilized peoples”) was the “specific expression” of “the general principles of humanitarian law.” *Id.*, ¶220. The Court stated that the rules expressed in Common Article 3 constituted a “minimum yardstick” and reflected “elementary considerations of humanity.” *Id.*, ¶218.

Inter-American Court of Human Rights

48. The Inter-American Court of Human Rights has the authority to interpret the *American Convention on Human Rights*. *American Convention on Human Rights*, Article 62. Its jurisprudence frequently affirms the importance of due process rights, especially in capital cases. See *Hilaire, Constantine and Benjamin et al. v. Trinidad y Tobago*, Inter-Am. Ct. H.R. (ser. C) No. 94, at ¶148 (June 21, 2002) (“Taking into account the exceptionally serious and irreparable nature of the death penalty, the observance of due process, with its bundle of rights and guarantees, becomes all the more important when human life is at stake.”).

49. Summarising its own jurisprudence on due process, the Court has repeatedly held that:

With respect to the criminal proceeding, it is necessary to state that the Court, when it refers to the right to fair trial, also known as procedural guarantees, has established that for said guarantees to truly exist in a proceeding, pursuant to the provisions of Article 8 of the Convention, it is necessary for all requirements to be fulfilled that are “designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof,” in other words, the “prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination.”

Myrna Mack Chang Case, Inter-Am. Ct. H.R. (ser. C) No. 101, at ¶202 (Nov. 25, 2003).

50. The Court has had occasion to rule on the meaning of “competent, independent and impartial” in the context of special and military tribunals. In *Castillo Petruzzi et al. v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 52, at ¶130 (May 30, 1999), the Court stated that:

Under Article 8(1) of the American Convention, a presiding judge must be competent, independent and impartial. In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have. Moreover, under the Statute of Military Justice, members of the Supreme Court of Military Justice, the highest body in the military judiciary, are appointed by the minister of the pertinent sector. Members of the Supreme Court of Military Justice also decide who among their subordinates will be promoted and what incentives will be offered to whom; they also assign functions. This alone is enough to call the independence of the military judges into serious question.

51. The Court has also ruled that “where it was shown that defense attorneys had difficulty conferring in private with their clients”, there is a violation of due process rights. *Id.*, ¶148. Also see *Suárez Rosero Case*, Inter-Am. Ct. H.R. (ser. C) No. 35, at ¶¶79, 83 (Nov. 12, 1997).

52. With respect to the right to appeal, the Court has ruled that this right is not satisfied merely by the existence of a “higher” court or tribunal. The appellate body must also be competent, independent, and impartial. See *Id.*, *Castillo Petruzzi*, ¶161 (“Therefore, whereas remedies, albeit very restrictive ones, did exist of which the accused could avail themselves, there were no real guarantees that the case would be reconsidered by a higher court that combined the qualities of competence, impartiality and independence that the Convention requires.”).

European Court of Human Rights

53. The European Court of Human Rights has the authority to interpret the *European Convention on Human Rights*. *European Convention on Human Rights*, Article 19. The Court has stated that a court or tribunal that imposes a death sentence must be independent, impartial and apply “rigorous standards of fairness both at first instance and on appeal” if it is to constitute a “court” for the purpose of Article 2(1) of the European Convention. *Ocalan v Turkey*, 41 Eur. Ct. H.R. 45, ¶166 (2005). In interpreting Article 2, the Court has stated:

It must be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the taking of life may be justified, Article 2 ranks as one of the fundamental provisions in the Convention... Together with Article 3 of the Convention, it also enshrines one of the most basic values of the democratic societies making up the Council of Europe ...”
McCann and Others v. United Kingdom, 324 Eur. Ct. H.R. (ser. A) at ¶147 (2005).

54. In judging the independence of courts, the European Court of Human Rights has found that the presence of military judges or use of special “State Security Courts” will generally give rise to an inference that the court lacks the requisite degree of independence from the executive. *Ocalan*, ¶112; *see also Incal v Turkey*, 78 Eur. Ct. H.R. (ser. A), at ¶68 (1998). In *Ocalan*, even though the military judge on a panel of three judges was replaced by a civilian judge before the end of the proceedings in question, the European Court found that this was not sufficient to dispose of the defendant’s reasonably held concerns about the court’s independence and impartiality. *Id.*, ¶¶112-18. The Court considered that “the question of whether a court is seen as independent does not depend solely on its composition when it delivers its verdict. In order to comply with the requirements of art 6 regarding independence, the court concerned must be seen to be independent of the executive and legislature at the three stages of the proceedings, namely the investigation, the trial and the verdict.” *Id.*, ¶114.

55. With respect to the requirement of fairness at trial, the European Court has affirmed the statement of the Inter-American Court of Human Rights that “the strictest and most rigorous enforcement of judicial guarantees is required” to guard against the arbitrary deprivation of life in cases in which the death sentence may be imposed. *The Right to*

Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Inter-Am Ct. H.R. (Ser. A) No. 16, at ¶136 (Oct. 1, 1999), cited in *Ocalan*, ¶60.

56. This standard has been elaborated upon to require open, unrestricted communication with legal counsel; access to the case file relied upon by the prosecution; and sufficient time to prepare for trial. *Ocalan*, ¶¶130-148.

57. The European Court has specifically held that “an accused’s right to communicate with his legal representative out of the hearing of a third person is part of the basic requirements of a fair trial in a democratic society ... If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness ...”. *Ocalan*, ¶133. (quoting and affirming the decision of the Chamber below); see also *Brennan v the United Kingdom*, App. No. 39846/98, Eur. Comm’n H.R. (16 October 2001), ¶58.

United Nations Human Rights Committee

58. The Human Rights Committee is a United Nations treaty monitoring body, authorized to issue general comments on the interpretation of the ICCPR, make observations on the observance of States of their ICCPR obligations, and to examine individual complaints where it is alleged a State party has violated the ICCPR. ICCPR, Articles 40 and 41. Its comments, observations and jurisprudence assist with the interpretation of ICCPR rights and obligations.

59. The Committee has repeatedly noted the importance of fair trial rights in capital punishment cases. *Francis v. Jamaica*, Human Rights Committee, Comm. No. 320/1988, U.N. Doc. A/48/40 (24 March 1993), ¶14 (“In capital punishment cases, the obligation of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant admits of no exception.”); *Reid v. Jamaica*, Human Rights Committee, Comm. No. 250/1987, U.N. Doc. A/45/40 (20 July 1990), ¶12.2 (“It is the view of the Committee that, in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant is even more imperative.”); *Kelly v. Jamaica*, Human Rights Committee, Comm. No. 253/1987, U.N. Doc. A/46/40 (8 April 1991), ¶7 (“It is the view of the Committee that, in capital

punishment cases, States parties have an imperative duty to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant.”)

Competent, independent and impartial court established by law

60. The requirements of “competent” and “established by law” are to ensure “that the jurisdictional power of a tribunal is determined generally and independent of the given case, i.e. not arbitrarily by a specific administrative act.” Manfred Nowak, *CCPR Commentary* 321 (2d ed. 2005). “Independence” means that a tribunal must be able to perform its functions independently of any branch of government, especially the executive. *Bahamonde v. Equatorial Guinea*, Human Rights Committee, Comm. No. 468/1991 (1993), ¶9.4. “Impartiality” implies “that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties,” as well as that the tribunal must also appear impartial to a reasonable observer. *Karttunen v. Finland*, Human Rights Committee, Comm. No. 387/1989 (1992), ¶7.2. It is a “cardinal aspect of a fair trial ... that the tribunal must be, and be seen to be, independent and impartial.” *Polay Campos v. Peru*, Human Rights Committee, Comm. No. 577/1994, U.N. Doc. A/53/40 (6 November 1997), ¶8.8.

61. With regard to the specific question of military or special courts which try civilians, the Human Rights Committee noted that the ICCPR did not prohibit trials before such courts *per se*; however, such trials “may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned” and that they “should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.” Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (23 August 2007), ¶22.

62. The notion of “fairness” of criminal proceedings especially precludes any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive. *Id.*, ¶25.

Right to a defence and preparation of defence

63. As the Human Rights Committee has specified, the right to “have adequate time and facilities for the preparation of the accused’s defence and to communicate with counsel of the accused’s own choosing” is important to ensure the principle of equality of arms between the accused and the prosecution. The accused has the right to legal representation at all stages of criminal proceedings. *Smartt v. Guyana*, Human Rights Committee, Comm. No. 867/1999, U.N. Doc. A/59/40 (6 July 2004), ¶6.3 (“The Committee recalls its jurisprudence that legal representation must be available at all stages of criminal proceedings, particularly in cases involving capital punishment.”). It is “axiomatic” that legal assistance be available in death penalty cases. *Robinson v. Jamaica*, Human Rights Committee, Comm. No. 223/1987 (30 March 1989), ¶10.3.

64. In *Domukovsky, Tsiklauri, Gelbakhiani and Dokvadze v. Georgia*, the Committee noted that it was uncontested that the accused were forced to be absent during long periods of their trial, and that Mr. Domukovsky was unrepresented for part of the trial, and that both Mr. Tsiklauri and Mr. Gelbakhiani were represented by lawyers whose services they had refused, and were not allowed to conduct their own defense or to be represented by lawyers of their choice. Finding a violation of Article 14 for each accused, the Committee affirmed “that at a trial in which the death penalty can be imposed, which was the situation for each author, the right to a defense is inalienable and should be adhered to at every instance and without exception. This entails the right to be tried in one's presence, to be defended by counsel of one's own choosing, and not to be forced to accept ex-officio counsel.” *Domukovsky, Tsiklauri, Gelbakhiani and Dokvadze v. Georgia*, Human Rights Committee, Comm. No. (623, 624, 626 and 627/1995), U.N. Doc. A/53/40 (6 April 1998), ¶18.9.

65. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons in criminal proceedings “without restrictions, influence, pressure or undue interference from any quarter.” Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (23 August 2007), ¶¶32, 34.

Right to Appeal

66. The Human Rights Committee has stated that the right to have one's conviction and sentence reviewed by a higher tribunal "imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the nature of the case. A review that is limited to the formal or legal aspects of the conviction without consideration whatsoever of the facts is not sufficient under the Covenant." Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32 (23 August 2007), ¶48. Moreover, the term "according to law" is not intended "to leave the very existence of the right of review to the discretion of the States parties, since this right is recognised by the Covenant, and not merely by domestic law." *Id.*, ¶45. Finally, the Human Rights Committee emphasised that the "right of appeal is of particular importance in death penalty cases." *Id.*, ¶51.

67. In many cases, the Committee has found violations of Article 6 of the ICCPR for failures to provide an appeal. See, for example: *Francis v. Jamaica*, Human Rights Committee, Comm. No. 320/1988, U.N. Doc. A/48/40 (24 March 1993), ¶12.3 ("In the present case, the final sentence of death was passed without there having been any possibility of appeal. Accordingly, there has also been a violation of article 6"); *Mansaraj et al. v. Sierra Leone, Gborie et al. v. Sierra Leone, and Sesay et al. v. Sierra Leone*, Human Rights Committee, Comm. No. 839/1998, 840/1998, 841/1998, U.N. Doc. A/56/40 (16 July 2001), ¶5.6 ("The Committee's prior jurisprudence is clear that under article 6, paragraph 2, of the Covenant the death penalty can be imposed inter alia only, when all guarantees of a fair trial including the right to appeal have been observed.").

The African Commission on Human and Peoples' Rights

68. The African Commission on Human and Peoples' Rights, which has the authority to interpret the African Charter on Human and Peoples' Rights and to receive communications alleging violations of the Charter (see Article 45), has repeatedly upheld the necessity for States to observe basic fair trial standards in death penalty cases. In its Resolution on the Right to Recourse Procedure and Fair Trial (1992), the Commission stated that it:

“2. CONSIDERS FURTHER that the right to fair trial includes, among other things, the following;

[...]

(e) In the determination of charges against individuals, the individuals shall be entitled in particular to:

(i) Have adequate time and facilities for the preparation of their defence and to communicate in confidence with the counsel of their choice;

(ii) Be tried within a reasonable time;

(iii) Examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;

(iv) [...]

3. Persons convicted of an offence shall have the right to appeal to a higher court; ACHPR Res. 49(XI) 92.

69. In the case of *Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi*, the defendant, Gaëtan Bwampamye, was convicted of a capital offense and sentenced to death without the presence of his attorney who had reported ill on the day when the trial was scheduled to conclude. Despite the defendant’s repeated requests to adjourn the proceedings, the court insisted that the defendant represent himself in closing arguments. The verdict sentencing him to death was rendered that same day at the end of the submissions. On appeal, the Supreme Court held *inter alia* that the lower court was not obliged to appoint a new lawyer for the defendant. The African Commission:

[E]mplicitly recalls that the right to legal assistance is a fundamental element of the right to fair trial. More so where the interests of Justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of Justice for him to have the benefit of the assistance of a lawyer at each stage of the case.

Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi, African Comm’n Hum. & Peoples’ Rights, Comm. No. 231/99 (2000), ¶30.

70. The Commission further stated that:

[The right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of Justice, as well as the obligation on the part of Courts and Tribunals to conform to international standards in order to guarantee a fair trial to all.

Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi, African Comm’n Hum. & Peoples’ Rights, Comm. No. 231/99 (2000), ¶26.

71. In *Centre For Free Speech v. Nigeria*, the complainant alleged the unlawful arrest, detention, trial and conviction of four Nigerian journalists, by a Military Tribunal. The

complaint further alleged that the journalists were tried in secret, were not allowed access to counsel of their choice and were not allowed to appeal their sentences because of various decrees promulgated by the Military Regime that prohibited regular courts from hearing appeals on cases decided by a Military Tribunal. The complaint further alleged that the arraignment, trial and conviction by a Special Military Tribunal, presided over by a serving military officer, violated the guarantee to a fair trial by an impartial and independent judiciary. The Commission found that these facts violated the fair trial guarantees provided for in the African Charter on Human and Peoples' Rights. It specifically held that the denial of the right to "communicate in confidence with counsel of their choice" was a violation of the "right to defence" guarantee contained in Article 7. *Centre For Free Speech v. Nigeria*, African Comm'n Hum. & Peoples' Rights, Comm. No. 206/97 (1999), ¶14.

72. In the *Forum of Conscience v. Sierra Leone* case, 24 soldiers were executed following the orders of a Court Martial. They were not provided the right to appeal. The Commission held that the denial of the right to appeal was a serious denial of fair trial standards, and a denial of their right not to be arbitrarily deprived of life:

The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life. Having found above that the trial of the 24 soldiers constituted a breach of due process of law as guaranteed under Article 7(1)(a) of the Charter, the Commission consequently finds their execution an arbitrary deprivation of their rights to life provided for in Article 4 of the Charter.

Forum of Conscience v. Sierra Leone, African Comm'n Hum. & Peoples' Rights, Comm. No. 223/98 (2000), ¶19.

73. In another case where executions were ordered by a special tribunal, the Commission found a host of violations of fair trial standards. In *Amnesty International and Others v Sudan*, African Comm'n Hum. & Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999), 28 army officers were executed on the orders of a special tribunal, and allegedly had no access to counsel during their trials. The Commission stated that it was the duty of Sudan to ensure the accused's right to defence was "scrupulously respected." *Id.*, ¶66. Further, because national legislation allowed the President, his deputies or senior military officers to appoint the tribunal members, the Commission found that the "composition alone creates the impression, if not the reality, of lack of impartiality and as a consequence, violates Article 7.1(d). The government has

a duty to provide the structures necessary for the exercise of this right. By providing for courts whose impartiality is not guaranteed, it has violated [the obligation to guarantee the independence of the Courts].” *Id.*, ¶68.

III. THE JURISPRUDENCE OF NATIONAL COURTS EVIDENCES THE EXISTENCE OF THE NORM AGAINST EXTRAJUDICIAL EXECUTIONS

Human Rights Chamber for Bosnia and Herzegovina

74. The judgments and opinions of national judicial tribunals are accorded “substantial weight” in “determining whether a rule has become international law.” Restatement (Third) of Foreign Relations Law of the United States, §103, comment b. Where national courts make pronouncements on the content of international law, their views “generally have the weight due to bodies of presumed independence, competence, impartiality, and authority.” *Id.*, §103, comment b. The decisions of national courts can also constitute evidence of the practice of states with respect to a particular norm (that is, evidence of whether States observe the norm). The Human Rights Chamber for Bosnia and Herzegovina was established by the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement). (The Chamber has now been succeeded by the Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina). Under Article II of the Agreement, the Chamber had jurisdiction to consider violations of human rights as provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

75. In *Damjanovic v Bosnia and Herzegovina*, Case no. CH/96/30, 5 September 1997, the applicant, Stretko Damjanovic, was sentenced to death by a military court in Sarajevo in 1993. The question before the Chamber was, *inter alia*, whether the carrying out of the death penalty on the application would involve a violation of the European Convention by Bosnia and Herzegovina. After discussing relevant European Court of Human Rights jurisprudence, the Chamber held:

It follows, therefore, that a death sentence cannot be carried out under Article 2(1) of the Convention unless it was imposed by a “court” which was independent of the executive and the parties to the case and which offered procedural guarantees appropriate to the circumstances. In relation to the latter requirement the

Chamber considers that the guarantees required in a case involving the death penalty must be of the highest order. The Chamber further points out that no derogation from this particular requirement of Article 2 is permissible in time of war ... If circumstances prevailing in time of war make it impossible to provide an appropriate procedure the death penalty cannot therefore be imposed or carried out. *Id.*, 9.

76. The Chamber considered whether the military court which tried Damjanovic was “independent”:

As to the present case, the Chamber notes that Article 20 of the Law on District Military Courts ... provided that both professional and law members of the District Military Courts were normally appointed and dismissed by the Presidency of the Republic of Bosnia and Herzegovina on the proposal of the Minister of Defence. No minimum period of office was laid down and no grounds or procedure for dismissal were specified. There was thus no legal protection of the judge’s tenure of office... in the context of a case such as the present one, where a strict approach to the requirements of independence and impartiality must be taken, legal protection against removal of the judges must normally be considered an essential requirement of independence. At the very least, the clearest evidence that the irremovability and independence of the judges was recognized in practice would be required. The Chamber does not find such evidence before it in the present case. The Chamber notes furthermore that the District Military Court was operating in a situation of conflict where outside pressure on its members was likely. In such a situation [there are] legitimate doubts as to whether they met the high standard of independence required in a case where life was at stake. *Id.*, 10.

77. The Chamber thus held that the District Military Court lacked sufficient independence, and so was not a “court” for the purposes of Article 2(1) of the Convention. *Id.*, 10.

US Alien Torts Statute jurisprudence

78. In *Forti v Suarez-Mason* 672 F. Supp 1531 (1987), the US District Court for the Northern District of California allowed a claim for extrajudicial killing. The Court found that “[t]he proscription of summary execution or murder by the state appears to be universal, is readily definable, and is of course obligatory.” *Id.*, 1542.

79. In *Xuncax v Gramajo* 886 F.Supp 162, 184 (1995) the US District Court for the District of Massachusetts accepted that summary executions by members of the Guatemalan military “constitute fully recognized violations of international law.” The District Judge concluded, “[c]onsequently, this Court clearly has jurisdiction under §1350

to hear the plaintiffs' claims for recovery in tort in connection with injuries suffered as a result of the acts of torture, summary execution, disappearance and arbitrary detention perpetrated or commanded by the defendant." *Id.*, 185.

80. In *Kadic v Karadzic* 70 F.3d 232, 243 (2nd Cir. 1995), the court stated that "[i]n *Filartiga*, we held that official torture is prohibited by universally accepted norms of international law ... and the Torture Victim Act confirms this holding and extends it to cover summary execution." [citation omitted]. See also, e.g., *Hilao v Estate of Marcos* 25 F.3d 1467 (9th Cir. 1994) (The prohibition against summary execution is universal, definable, and obligatory); *Doe v Saravia* 348 F. Supp. 2d 1112 (2004) (Holding commander of death squad liable for, among other things, extrajudicial killings); *Estate of Roquiquez v Drummond Co.* 256 F. Supp. 2d. 1250, 1260 (2003) ("[D]efendants do not dispute that the trade union's claim in Count One for extrajudicial killing under the ATCA alleges an actionable tort").

US death penalty jurisprudence

81. The US Supreme Court has repeatedly recognised that death is "qualitatively different" from other sentences. *Zant v Stephens* 462 US 862, 883 (1983). For this reason, the Supreme Court "has always insisted that the need for procedural safeguards is particularly great where life is at stake." *Barefoot v Estelle* 463 US 880, 913 (1983) (Marshall J., dissenting). In *Reid v Covert* 354 US 1, 77 (1955), Harlan J (concurring) stated:

So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for that procedural fairness which inheres in a civilian trial where the judge and trier of fact are not responsive to the command of the convening authority. I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case.

82. See also *Ake v Oklahoma* 470 US 68, 87 (1985) (Burger CJ, concurring) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases"); *Woodson v North Carolina* 428 US 280, 305 (1976) (plurality opinion) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference,

there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”). This emphasis on the particular importance of procedural safeguards in capital cases is consistent with, and replicated in, the international case law described above.

The Requirement of a Regularly Constituted Tribunal

83. In *Hamdan* the US Supreme Court considered whether military tribunals convened by the United States met the requirement of Common Article 3 of the Geneva Conventions that persons be tried by a “regularly constituted court”. The plurality adopted the view that “regularly constituted court” definitively excluded any special tribunal, noting, “one of the Red Cross’ own treatises defines ‘regularly constituted court’ as used in Common Article 3 to mean ‘established and organized in accordance with the laws and procedures already in force in a country’.” *Id.*, 632.

The Requirement that a Tribunal be “Competent, Independent and Impartial”

84. “Competent” in international jurisprudence means possessed of jurisdiction to try the case. Schabas states that “[t]he word ‘competent’ must surely mean that the court must have jurisdiction under applicable law, and not that it must be ‘competent’ in respect of its abilities. The term is superfluous, because a court which is not competent cannot render any sentence, let alone a death sentence.” Schabas, *supra*, 119. If a US court did not have jurisdiction to try a person, any sentence passed by that court on that person would be invalid. *See, e.g., McElroy v United States* 361 US 281 (1959) (where the US Supreme Court invalidated the conviction of a civilian employee of the Armed Forces by a court-martial, on the basis that court-martials do not have jurisdiction over civilians employed by the Armed Forces); *Grisham v Hagan* 361 US 278 (1959) (a companion case to *McElroy*, applying in the capital context).

85. The question of independence and impartiality are related, but raise distinct concerns. In *Hamdan* 548 US, Justice Kennedy observed, in the context of Common Article 3, that:

An acceptable degree of independence from the Executive is necessary to render a commission “regularly constituted” by the standards of our Nation’s system of justice. And any suggestion of executive power to interfere with an ongoing judicial process raises concerns about the proceedings’ fairness.

86. Impartiality is a necessary requirement of US courts:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavoured to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.

In re Murchison 349 US 133, 136 (1955).

87. That case did not concern a capital sentence, but the same minimum standards apply. *See, e.g., Bracy v Gramley* 520 US 899, 904 – 905 (1997).

The Right to Appeal

88. In *Pulley v Harris* 465 US 37, 59 (1984), Stevens J stated that “some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges.” *See also Parker v Dugger* 498 US 308, 321 (1991) (“We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.”).

The Right to Counsel

89. “The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.” *Strickland v Washington* 466 US 668, 684 (1984). “[L]awyers in criminal courts are necessities, not luxuries.” *Gideon v Wainwright* 372 US 335, 344 (1963).

90. The right to counsel acquires particular significance in the capital context. Compare *Powell v Alabama* 287 US 45 (1932), holding that counsel was constitutionally required for capital defendants, and *Betts v Brady* 316 US 455 (1942), holding that counsel was not constitutionally required for non-capital cases. *See Covert* 354 US, *Id.*, at 77. The holding in *Betts v Brady* was ultimately overturned in *Gideon*.

91. The right to counsel has two elements. First, that the accused be permitted to retain counsel. Second, that counsel be able to provide adequate assistance in testing the evidence led by the prosecution. “The right to counsel is the right to the effective assistance of counsel.” *McMann v Richardson* 397 US 759, 771, n. 14 (1970).

92. The US Supreme Court has recognised that restrictions on counsel’s communication with his client may violate a person’s right to counsel. In *Geders v United States* 425 US 80 (1976), the Supreme Court held that an order by a court prohibiting counsel from speaking to his client overnight was an impermissible violation of the right to counsel. In *United States v DiDomenico* 78 F.3d 294 (7th Cir. 1996), *cert. denied* 519 US 1006 (1996), the 7th Circuit Court of Appeals stated that systematic surveillance of attorney-client communications “would, because of its pervasiveness and publicity, greatly undermine the freedom of communication between defendants and their lawyers and with it the efficacy of the right to counsel.” *Id.*, 299.

Torture and the right to a fair Trial

93. In *Brown v Mississippi* 297 US 278 (1936), a group of defendants were whipped by police until they confessed to the crimes they were accused of. The US Supreme Court, in a brief judgment, held that this was a violation of the defendant’s due process rights. The Court stated that “[t]he rack and torture chamber may not be substituted for the witness stand.” *Id.*, 285 – 286.

Perjured testimony and the right to a fair trial

94. The US Supreme Court has held that knowing acceptance of perjured testimony constitutes a violation of the due process rights of an accused. In *Mooney v Holohan* 294 US 103, 112 (1935), the Supreme Court stated that a violation of due process occurs “if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.” The Court described “such a contrivance” as being “inconsistent with the rudimentary demands of justice”. *Id.* See also *Giglio v United States* 405 US 150, 154 (1972) (“[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with ‘rudimentary demands of justice.’”).

Secret evidence and the right to a fair trial

95. The US Supreme Court has held that a death sentence will be invalid where it is based on secret evidence not available to the defendant. In *Gardner v Florida* 430 US

349, 362 (1977), the death penalty was imposed by a judge who relied, in part, on evidence contained in a pre-sentence report. The contents of that report were not disclosed to the defendant. Florida argued that it had good reasons for withholding the information, but these were rejected by the Court which concluded that “petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.” *Id.* See also *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (Frankfurter J, concurring, observing that “the plea that evidence of guilt must be secret is abhorrent to free men”), quoted in *Hamdan* 548 U.S. at 634-635.

Judicial Committee of the Privy Council (United Kingdom)

96. The Judicial Committee of the Privy Council (the highest court of appeal for a number of Commonwealth countries, as well as overseas territories and dependencies of the United Kingdom) has repeatedly affirmed the principle that the right to life must not be deprived “except by due process of law”. It has done so in the context of appeals from courts in Jamaica, Trinidad and Tobago, and the Bahamas. See *Lewis v Attorney General of Jamaica* [2001] 2 AC 50; *Thomas v Baptiste* [2000] 2 AC 1; *Lincoln Anthony Guerra and others* [1996] AC 397; *Higgs v Minister of National Security* [2000] 2 AC 228.

97. In *Thomas*, the Privy Council (Lord Millet, who gave the judgment of the majority) stated that due process, which is accorded by the common law and reflected in s 4(a) of the Constitution of Trinidad and Tobago (which upheld the right not to be deprived of life except by due process of law) “invokes the concept of the rule of law itself and the universally accepted standards of justice observed by civilised nations.” *Thomas v Baptiste, Id.*, 22. The Privy Council also stated that this included the right to a fair appellate process. *Id.*

98. The Privy Council has emphasised the importance of the right to a fair appellate process to the achievement of due process and has stayed executions on occasions when the outcome of a defendant’s petition to an international body (to which the defendant had a right to appeal under the law of his country) was unresolved at the time of the scheduled execution (*Lewis v Attorney General of Jamaica; Thomas v Baptiste*). Further, in the case of *Lincoln Anthony Guerra and others* [1996] AC 397, the Privy Council held that executing a condemned man without sufficient notice would deprive him of the

opportunity to seek any outstanding legal relief, and would amount to deny his right not to be deprived of his life except by due process of law. *Id.*, 420.

IV. UNITED NATIONS GENERAL ASSEMBLY, ECONOMIC AND SOCIAL COUNCIL, AND HUMAN RIGHTS COUNCIL RESOLUTIONS EVIDENCE THE EXISTENCE OF THE NORM AGAINST EXTRAJUDICIAL EXECUTIONS

99. The United Nations General Assembly, the UN Economic and Social Council, and the UN Human Rights Council (formerly the Commission on Human Rights) are UN bodies composed of States, and regularly pass resolutions – evidence of both state practice and *opinio juris* – on issues concerning extrajudicial executions, due process, and the application of the death penalty. The resolutions provide evidence of what the States voting for the resolution “regard the law to be”. Restatement (Third) of Foreign Relations Law of the United States §103, comment c.

General Assembly Resolutions

100. The United Nations General Assembly has persistently condemned extrajudicial executions. In the period 1980–1990, a resolution was passed every year condemning the practice. Resolutions have been passed every two years from 1992–2006. The 1980 and 2006 resolutions are typical of these and are extracted below:

G.A. Res 35/172, Preamble and ¶ 1, U.N. Doc. A/RES/35/172 (Dec. 15, 1980)
(Adopted without a vote)

The General Assembly:

Having regard to the provisions bearing on capital punishment in the International Covenant on Civil and Political Rights, particularly its articles 6, 14 and 15,

Recalling its Resolution 2393 (XXIII) of 26 November 1968, in which it invited Governments of Member States, *inter alia*, to ensure the most careful legal procedures and the greatest possible safeguards for the accused in capital cases in countries where the death penalty obtains,

Alarmed at the incidence in different parts of the world of summary executions as well as arbitrary executions,

Concerned at the occurrence of executions which are widely regarded as being politically motivated,

1. *Urges* Member States concerned
 - (a) To respect as a minimum standard the content of articles 6, 14 and 15 of the International Covenant on Civil and Political Rights and, where necessary, to review their legal rules and practices so as to guarantee the most careful legal procedures and the greatest possible safeguards for the accused in capital cases;
 - (b) To examine the possibility of making automatic the appeal procedure, where it exists, in cases of death sentences, as well as the consideration of an amnesty, pardon or commutation in these cases;
 - (c) To provide that no death sentence shall be carried out until the procedures of appeal and pardon have been terminated and, in any case, not until a reasonable time after the passing of the sentence in the first instance [...]

G.A. Res 61/173, Preamble, ¶ 1, 2 and 4, U.N. Doc. A/RES/61/173 (Dec. 19, 2006) (Adopted 137 to 0, 43 Abstentions)

The General Assembly:

Mindful of all its resolutions on the subject of extrajudicial, summary or arbitrary executions and the resolutions of the Commission on Human Rights on the subject, [...]

Convinced of the need for effective action to prevent, combat and eliminate the abhorrent practice of extrajudicial, summary or arbitrary executions, which represent a flagrant violation of the right to life,

1. *Strongly condemns* once again all the extrajudicial, summary or arbitrary executions that continue to occur throughout the world;
2. *Demands* that all States ensure that the practice of extrajudicial, summary or arbitrary executions is brought to an end and that they take effective action to prevent, combat and eliminate the phenomenon in all its forms [...]
4. Calls upon all States in which the death penalty has not been abolished to comply with their obligations under relevant provisions of international human rights instruments, including in particular articles 6, 7 and 14 of the International Covenant on Civil and Political Rights and articles 37 and 40 of the Convention on the Rights of the Child, bearing in mind the safeguards and guarantees set out in Economic and Social Council resolutions 1984/50 of 25 May 1984 and 1989/64 of 24 May 1989 [...]

101. *See also* G.A. Res. 59/197, U.N. Doc. A/RES/59/197 (Dec. 20, 2004) (Adopted 142 to 0, 43 abstentions); G.A. Res. 57/214, U.N. Doc. A/RES/57/214 (Dec. 18, 2002);

G.A. Res. 55/111, U.N. Doc. A/RES/55/111 (Dec. 4, 2000); G.A. Res. 53/147, U.N. Doc. A/RES/53/147 (Dec. 9, 1998); G.A. Res. 51/92, U.N. Doc. A/RES/51/92 (Dec. 12, 1996); G.A. Res. 49/191, U.N. Doc. A/RES/49/191 (Dec. 23, 1994) (Adopted without vote); G.A. Res. 47/136, U.N. Doc. A/RES/47/136 (Dec. 18, 1992) (Adopted without vote); G.A. Res. 45/162, U.N. Doc. A/RES/45/162 (Dec. 18, 1990) (Adopted without vote); G.A. Res. 44/159, U.N. Doc. A/RES/44/159 (Dec. 15, 1989) (Adopted without vote); G.A. Res. 43/151, U.N. Doc. A/RES/43/151 (Dec 8., 1988) (Adopted without vote); G.A. Res. 42/141, U.N. Doc. A/RES/42/141 (Dec 7, 1987) (Adopted without vote); G.A. Res. 41/144, U.N. Doc. A/RES/41/144 (Dec. 4, 1986) (Adopted without vote); G.A. Res. 40/143, U.N. Doc. A/RES/40/143 (Dec. 13, 1985) (Adopted without vote); G.A. Res. 39/110, U.N. Doc. A/RES/39/110 (Dec. 14, 1984) (Adopted without vote); G.A. Res. 38/96 U.N. Doc. A/RES/38/96 (Dec. 16, 1983) (Adopted without a vote); G.A. Res. 37/182, U.N. Doc. A/RES/37/182 (Dec. 17, 1982) (Adopted without a vote); G.A. Res. 36/22, U.N. Doc. A/RES/36/22 (Nov. 9, 1982) (Adopted without vote).

102. The General Assembly has also repeatedly passed resolutions expressing concern about extrajudicial executions committed in specific countries, including on the Democratic People's Republic of Korea, the Democratic Republic of Congo, Iran, Iraq and the Sudan.

103. In its 60th (2005), 61st (2006) and 62nd (2007) sessions, the General Assembly passed resolutions expressing its "serious concern" or its "very serious concern" at:

The persistence of continuing reports of systematic, widespread and grave violations of civil, political, economic, social and cultural rights in the Democratic People's Republic of Korea, including:

- (i) Torture and other cruel, inhuman or degrading treatment or punishment, including inhuman conditions of detention, public executions, extrajudicial and arbitrary detention; the absence of due process and the rule of law, including fair trial guarantees and an independent judiciary; the imposition of the death penalty for political and religious reasons; and the existence of a large number of prison camps and the extensive use of forced labour;

G.A. Res. 62/167, ¶1(b)(i), U.N. Doc. A/RES/62/167 (Dec. 18, 2007) (Adopted 101 to 22, 59 abstentions).

104. *See also* G.A. Res. 61/174, ¶1(b)(i), U.N. Doc. A/RES/61/174 (Dec. 19, 2006) (Adopted 99 to 21, 56 abstentions) (Expressing concern at, among other things, “public executions, extrajudicial and arbitrary detention, the absence of due process and the rule of law, the imposition of the death penalty for political reasons”); G.A. Res. 60/173, ¶1(b)(i), U.N. Doc. A/RES/60/173 (Dec. 16, 2005) (Adopted 88 to 21, 22 abstentions) (in the same form as the 2006 resolution).

105. The General Assembly has passed resolutions in 2000, 2001, 2002, 2003, 2004 and 2005 commenting on the human rights situation in the Democratic Republic of Congo. In the first four of these, the General Assembly either expressed concern over or actively condemned summary or arbitrary executions that had taken place in the Congo. For example, in G.A. Res. 56/173, ¶2(c)(ii) and (v), U.N. Doc. A/RES/56/173 (Dec. 19, 2001) (Adopted 90 to 3, 69 abstentions), the Assembly expressed its concern at:

- (ii) The occurrences of cases of summary and arbitrary execution, disappearance, torture, arbitrary arrest and detention without trial of, among others, journalists, opposition politicians, human rights defenders and people who have cooperated with the United Nations mechanisms [...]
- (v) The sentencing to death of civilians tried before the Military court, in violation of the obligations assumed by the Democratic Republic of Congo under the International Covenant on Civil and Political Rights, as well as the prolonged and arbitrary detentions ordered by the Court.

106. *See also* G.A. Res 55/117, ¶ 2(c)(v) and (vi), U.N. Doc. A/RES/55/117 (Dec. 4, 2000); G.A. Res 57/233, ¶(2)(d), U.N. Doc. A/RES/57/233 (Dec. 18, 2002); G.A. Res. 58/196, ¶2(e), U.N. Doc. A/RES/58/196 (Dec. 22, 2003). In its fifth resolution, G.A. Res. 59/207, ¶6(e), U.N. Doc. A/RES/59/207 (Dec. 20, 2004), the General Assembly did not expressly refer to the issue of arbitrary or summary executions, but did call upon the Congolese government:

To put an end to the use of the death penalty in a manner contrary to its obligations assumed under the relevant provisions of the International Covenant on Civil and Political Rights and other human rights instruments, whilst recalling its commitment to progressively abolish the death penalty and not to impose it on juvenile offenders.

107. The General Assembly has passed eight resolutions on the human rights situation in the Islamic Republic of Iran. Resolutions were passed every year between 1993 and 2001. These resolutions take a similar form and include criticism of Iran for its application of the death penalty and its failure to observe due process. The 1999 Resolution, G.A. Res. 54/177, ¶11, U.N. Doc. A/RES/54/177 (Dec. 17, 1999) is typical.

[The General Assembly] *Expresses its serious concern* at the continuing violations of human rights in the Islamic Republic of Iran, as reported by the Special Representative, in particular executions in the apparent absence of respect for internationally recognised safeguards ... as well as the failure to meet international standards in the administration of justice and the absence of due process of law ...

108. *See also* G.A. Res. 47/146, ¶3, U.N. Doc. A/RES/47/146 (Dec. 18, 1992); G.A. Res. 48/145, ¶3, U.N. Doc. A/RES/48/145 (Dec. 20, 1993); G.A. Res. 49/202, ¶3, U.N. Doc. A/RES/49/202 (Dec. 23, 1994); G.A. Res. 50/188, ¶1, U.N. Doc. A/RES/50/188 (Dec. 22, 1995); G.A. Res. 51/107, ¶1, U.N. Doc. A/RES/51/107 (Dec. 12, 1996); G.A. Res. 52/142, ¶3(a), U.N. Doc. A/RES/52/142 (Dec. 12, 1997); G.A. Res. 53/185, ¶7, U.N. Doc. A/RES/53/185 (Dec. 9, 1998); G.A. Res. 55/114, ¶3(c) and (d), U.N. Doc. A/RES/55/114 (Dec. 4, 2000); G.A. Res. 56/171, ¶3(d) and (e), U.N. Doc. A/RES/56/171 (Dec. 19, 2001).

109. The two most recent resolutions, G.A. Res. 55/114 and G.A. Res. 56/171, go beyond merely generally condemning Iran's behaviour and specifically exhort it to abide by the ICCPR and the UN safeguards in ESC Res. 1984/50, in the application of the death penalty. *See* G.A. Res. 55/144, *supra*, at ¶4(e).

To ensure that capital punishment will not be imposed for crimes other than the most serious and will not be pronounced in disregard of the provisions of the International Covenant on Civil and Political Rights and United Nations safeguards and to provide the Special Representative with relevant statistics on this matter;

110. *See also* G.A. Res. 56/171, *supra*, at ¶4(f):

To end the imposition of the death penalty for crimes committed by persons under the age of eighteen, and to ensure that capital punishment will not be imposed for crimes other than the most serious and will not be pronounced in disregard of the obligations it has assumed under the International Covenant on Civil and Political Rights and the provisions of United Nations safeguards, and to provide the Special Representative with relevant statistics on this matter

111. The General Assembly has passed resolutions on the human rights situation in Iraq on four occasions: annually in 1998–2000 and then again in 2002. Each resolution criticises the widespread use of the death penalty and summary or arbitrary executions. The latest resolution, G.A. Res. 57/232, ¶4(d) and (e), U.N. Doc. A/RES/57/232 (Dec. 18, 2002), is typical, with the resolution strongly condemning:

- (d) The widespread use of the death penalty in disregard of the provisions of the International Covenant on Civil and Political Rights and the United Nations safeguards;
- (e) Summary and arbitrary executions, including political killings and the continuing prison cleansing, the use of rape as a political tool, as well as enforced or involuntary disappearances, routinely practised arbitrary arrests and detention and consistent and routine failure to respect due process and the rule of law; [...]

112. See G.A. Res. 53/157, ¶6 and 7, U.N. Doc. A/RES/53/157 (Dec. 9, 1998); G.A. Res. 54/178, ¶3(c) and (d), U.N. Doc. A/RES/54/178 (Dec. 17, 1999); G.A. Res. 55/115, ¶2(c) and (d), U.N. Doc. A/RES/55/115 (Dec. 4, 2000).

113. With respect to the Sudan, G.A. Res 57/230, ¶¶2(d) and (i), A/RES/57/230 (Dec. 18, 2002) expressed “deep concern” at, among other things,

The cases of torture and ill-treatment of civilians, extrajudicial summary or arbitrary execution, arbitrary arrest, detention without trial and corporal punishment in its cruellest forms; [...]

The extensive use of the death penalty, contrary to the obligations assumed by the Government of the Sudan under the provisions of the International Covenant on Civil and Political Rights and other human rights instruments, the use of special courts, especially in Darfur, with military personnel appointed as judges and a lack of legal representation, the occurrence of group sentencing and the imposition of the death penalty on persons below 18 years of age at the time of the commission of their crime, contrary to the obligations assumed by the Government of the Sudan under the Convention on the Rights of the Child, all of which raises serious doubts regarding the validity of the legal processes;

UN Economic and Social Council Resolutions

114. The Economic and Social Council has passed many resolutions on due process guarantees and the death penalty. Importantly, it has also set out the widely cited “Safeguards guaranteeing protection of the rights of those facing the death penalty”:

E.S.C. Res 1574 (L) of 20 May 1971

Considers that [in capital cases] further efforts should be made by Member States to ensure the full and strict observance anywhere of the principles contained articles 5, 10 and 11 of the Universal Declaration of Human Rights, reaffirmed by articles 7, 14 and 15 of the International Covenant on Civil and Political Rights, and in particular the principles ... that everyone is entitled to a fair public hearing by an independent and impartial tribunal ... and that every accused has the right to enjoy all the guarantees necessary for his defence.

E.S.C. Res 1984/50, Preamble, ¶¶2, 3, Annex ¶¶5 and 6, U.N. Doc. E/RES/84/50 (May 25, 1984).

Having regard to the provisions bearing on capital punishment in the International Covenant on Civil and Political Rights, in particular article 2, paragraph 1, and articles 6, 14 and 15 thereof” and “[e]xpressing its concern at the tragic incidence of arbitrary or summary executions in the world”,

2. *Again strongly condemns and deplors* the brutal practice of arbitrary or summary executions in various parts of the world;
3. *Approves* the safeguards guaranteeing protection of the rights of those facing the death penalty ...

115. The “Safeguards guaranteeing protection of the rights of those facing the death penalty” are annexed to the resolution. The safeguards include:

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.
6. Anyone sentenced to death shall the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

116. The Economic and Social Council passed a resolution on the implementation of the conclusions of the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders. Section X, ¶1 “[u]rges” Member States to adopt the safeguards annexed to ESC Res. 1984/50 of 25 May 1980. E.S.C. Res 1986/10, Section X, ¶1, U.N. Doc. E/RES/1986/10 (May 21, 1986).

117. In E.S.C. Res 1989/64, Preamble, ¶¶1(a), 1(b) and 4, U.N. Doc. E/RES/1989/64 (May 24, 1989), the Economic and Social Council declares itself “[a]larmed at the continued occurrence of practices incompatible with the safeguards guaranteeing the rights of those facing the death penalty”. The Resolution:

Recommends that Member States take steps to implement the safeguards and strengthen further the protection of the rights of those facing the death penalty, where applicable, by:

- (a) Affording special protection to persons facing charges for which the death penalty is provide by allowing time and facilities for the preparation of their defence, including the adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases;
- (b) Providing for mandatory appeals or review with provisions for clemency or pardon in all cases of capital offence [...]

118. In E.S.C. Res. 1996/15, ¶¶3 – 5, U.N. Doc. E/RES/1996/15 (July 23, 1996), the Economic and Social Council “[c]alls upon” or “[e]ncourages” retentionist states to observe safeguards in the application of the death penalty including “all the guarantees to ensure a fair trial, as contained in article 14 of the International Covenant on Civil and Political Rights” and “to allow adequate time for the preparation of appeals to a court of higher jurisdiction and for the completion of appeal proceedings, as well as petitions for clemency”.

United Nations Human Rights Council

119. Between 1997 and 2005, the Human Rights Commission passed an annual resolution on “[t]he question of the death penalty”. The 2005 resolution is a typical example. In Human Rights Commission Resolution 2005/59, ¶¶1 and 6, UN Doc E/CN.4/RES/2005/59 (April 20, 2005), the Commission:

1. *Expresses its concern* at the continuing use of the death penalty around the world, alarmed in particular at its application after trials that do not conform to international standards of fairness and that several countries impose the death penalty in disregard of the limitations set out in the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child and of the safeguards guaranteeing protection of the rights of those facing the death penalty; [...]
7. *Urges* all States that still maintain the death penalty: [...]
- (d) Not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgement rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;
- (e) To ensure that all legal proceedings, including those before special tribunals or jurisdictions, and particularly those related to capital offences, conform to the minimum procedural guarantees contained in article 14 of the International Covenant on Civil and Political Rights; [...]
- (g) To withdraw and/or not to enter any new reservations under article 6 of the Covenant that may be contrary to the object and purpose of the Covenant, given that article 6 enshrines the minimum rules for the protection of the right to life and the generally accepted standards in this area;
- (h) To observe the safeguards guaranteeing protection of the rights of those facing the death penalty and to comply fully with their international obligations, in particular with those under article 36 of the Vienna Convention on Consular Relations, particularly the right to receive information on consular assistance within the context of a legal procedure, as affirmed by the jurisprudence of the International Court of Justice and confirmed in recent relevant judgements; [...]
- (j) Not to execute any person as long as any related legal procedure, at the international or at the national level, is pending; [...]

120. *See further* Human Rights Commission Resolution 2004/67, ¶4, U.N. Doc. E/CN.4/RES/2004/67 (April 21, 2004); Human Rights Commission Resolution 2003/67, ¶4, U.N. Doc. E/CN.4/RES/2003/67 (April 24, 2003); Human Rights Commission Resolution 2002/77, ¶4, U.N. Doc. E/CN.4/RES/2002/77 (April 25, 2002); Human Rights Commission Resolution 2001/68, ¶4, U.N. Doc. E/CN.4/RES/2001/68 (April 25, 2001); Human Rights Commission Resolution 2000/65, ¶3, U.N. Doc.

E/CN.4/RES/2000/65 (April 26, 2000); Human Rights Commission Resolution 1999/61, ¶3, U.N. Doc. E/CN.4/1999/61 (April 28, 1999); Human Rights Commission Resolution 1998/8, ¶3, U.N. Doc. E/CN.4/1998/8 (April 3, 1998); Human Rights Resolution 1997/12, ¶¶ 2 and 3, U.N. Doc. E/CN.4/1997/12 (April 3, 1997).

121. The Sub-Commission on the Promotion and Protection of Human Rights (the main subsidiary body of the Commission on Human Rights, composed of experts elected by the Commission) has specifically stated that customary international law requires fair trial guarantees in death penalty cases. In Sub-Commission on the Promotion and Protection of Human Rights Resolution 2004/25, Preamble, ¶¶1-3, U.N. Doc. E/CN.4/Sub.2/RES/2004/25 (Aug. 12, 2004), the Commission stated:

Reaffirming that under customary international law the death penalty cannot be imposed except after proceedings that provide all the guarantees required for a fair trial, including a competent, independent and impartial tribunal,

Mindful of articles 3, 5, 8, 9 and 10 of the Universal Declaration of Human Rights and articles 2, 4, 7, 10, 14, 15 and 26 of the International Covenant on Civil and Political Rights,

Recalling the views of the human rights bodies that proceedings against civilians should not be conducted by a military tribunal or a tribunal whose composition includes one or more members of the armed forces because such a tribunal is not competent, independent and impartial in relation to civilians,

Recalling the concluding observations, comments and decisions of the Human Rights Committee, the recommendations of the Working Group on Arbitrary Detention, and the reports by thematic and country Special Rapporteurs that conclude that military tribunals and a tribunal whose composition includes one or more members of the armed forces are not competent, independent and impartial in relation to civilians,

Recalling also, at the regional level, the judgements and opinions of the African Commission on Human and Peoples' Rights, the Inter-American Court of Human Rights and the European Court of Human Rights that military tribunals and a tribunal whose composition includes one or more members of the armed forces are not competent, independent and impartial in relation to civilians [...]

Referring to the specific safeguards for independent and impartial tribunals guaranteeing protection of the rights of those facing the death penalty, set out in the annex to Economic and Social Council resolution 1984/50 of 25 May 1984,

1. *Confirms* that the imposition of the death penalty on a civilian tried by a military tribunal or a tribunal whose composition includes one or more members of the armed forces is contrary to customary international law;
2. *Calls upon* all States in which the death penalty has been imposed on a civilian tried by a military tribunal or a tribunal whose composition

included one or more members of the armed forces to re-try the suspect before a competent, independent and impartial tribunal;

3. *Urges* all States that still maintain the death penalty to ensure that it cannot be imposed on civilians tried by military courts or by courts in which one or more of the judges is a member of the armed forces [...]

V. THE WRITING OF JURISTS EVIDENCES THE EXISTENCE OF THE NORM AGAINST EXTRAJUDICIAL EXECUTIONS

122. The works of jurists and commentators are evidence of the content of customary international law. *Siderman de Blake v Republic of Argentina*, 965 F.2d 699, 715 (9th Cir. 1992); *The Paquete Habana*, 185 US 677, 700 (1900).

123. Eminent and renowned jurists of human rights law and of international law have stated that extrajudicial executions are amongst the clearest of customary international law violations. Such executions have variously been described as “an egregious violation”, a “peremptory norm”, “widely recognized”, “non-derogable”, “fundamental”, “universally recognized”, “settled and central”, “forbidden under all circumstances”, “of paramount importance”, “core”, and “a fundamental right”.

124. For example, see: Sonia B. Starr, Rethinking “Effective Remedies”: Remedial Deterrence in International Courts, 83 N.Y.U. L. REV. 693, 732 (2008) (Acknowledging extrajudicial killing as an example of “egregious violations of uncontroversial provisions of human rights law”); Beth Stephens, Judicial Deference and the Unreasonable Views of the Bush Administration, 33 BROOK. J. INT’L L. 773, 777 (2008) (Acknowledging summary execution as “an egregious violation of international law norms”); Lucien J. Dhooge, A Modest Proposal to Amend the Alien Torts Statute to Provide Guidance to Transnational Corporations, 13 U.C. DAVIS J. INT’L L. & POL’Y 119, 145 n.145 (2006) (Acknowledging that “the prohibition upon extrajudicial killing has been identified as part of the customary international law of human rights” and citing Restatement (Third) of Foreign Relations Law § 702(d) in support of same); William R. Castro, The New Federal Common Law of Tort Remedies for Violations of International Law, 37 RUTGERS L.J. 635, 648 (2006) (Stating that “[t]oday’s international norms ... surely protect individuals from extrajudicial killing” and citing Restatement (Third) of Foreign

Relations Law § 702(d) in support of same); Laurence R. Helfer, Constitutional Analogies in the International Legal System, 37 LOY. L.A. L. REV. 193, 214 (2003) (Acknowledging prohibition against extrajudicial killing as an example of “peremptory norms concern[ing] the most serious human rights abuses” under *jus cogens* doctrine); Deena R. Hurwitz, Lawyering for Justice and the Inevitability of Human Rights Clinics, 28 YALE J. INT’L L. 505, 510 n.19 (2003) (Identifying prohibition against extrajudicial killing as a “widely recognized *jus cogens* norm”); William A. Schabas, Punishment of Non-State Actors in Non-International Armed Conflict, 26 FORDHAM INT’L L.J. 907, 916 (2003) (Identifying prohibition against summary execution as one of the “non-derogable norms of the major human rights treaties,” as well as one of the “norms of customary international law ... sometimes described as peremptory or *jus cogens* norms”); Sarah H. Cleveland, Norm Internalization and U.S. Economic Sanctions, 26 YALE J. INT’L L. 1, 9 (2001) (Acknowledging prohibition against summary execution as a “fundamental customary international law norm”); Kathryn Lee Boyd, The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation, 29 VA. J. INT’L L. 41, 52 (1998) (Identifying “freedom from ... extrajudicial killing” as a “universally recognized human rights norm”); Curtis A. Bradley & Jack L. Goldsmith, The Current Illegitimacy of International Human Rights Litigation, 66 FORDHAM L. REV. 319, 366 (1997) (Describing prohibition against extrajudicial killing as a “settled and central” human rights norm under customary international law); Joan Fitzpatrick, The International Dimension of U.S. Refugee Law, 15 BERKELEY J. INT’L L. 1, 16 (1997) (Describing summary execution as one of a set of “egregious violations of international human rights law under both customary law and treaties ratified by the United States ... forbidden under all circumstances”); Kenneth C. Randall, Federal Questions and the Human Rights Paradigm, 73 MINN. L. REV. 349, 394-95 (1988) (Acknowledging that “customary law recognizes each individual’s right to be free from summary execution.”); Beth Stephens & Michael Ratner, International Human Rights Litigation in U.S. Courts 57 n.42 (1996) (Identifying summary execution as a *jus cogens* norm, a violation of which the Alien Tort Claims Act “would clearly encompass jurisdiction over”); Nihal Jayawickrama, The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence 276 (2002) (Recounting observations by the U.N. Human

Rights Committee that “the protection against arbitrary deprivation of life ... is of paramount importance,” “a matter of utmost gravity,” and “a fundamental right”); Jane Stromseth, David Wippman & Rosa Brooks, Can Might Make Rights? Building the Rule of Law After Military Interventions 78 (2006) (Acknowledging “prohibitions against ... extrajudicial killings” as a “fundamental human rights norm”); Eva Brems, Human Rights: Universality and Diversity 322 (2001) (Acknowledging that “[e]very human right may be analysed in a core and a periphery,” that “gross human rights violations may be defined as attacks on the core of human rights,” and that “the core of the right of life is the protection against arbitrary killing”).

125. Jurists have also specifically stated that executions committed without respect for basic due process norms are a clear violation of a “widely accepted” customary international law norm.

126. See, for example: Lucien J. Dhooge, Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act, 28 LOY. L.A. INT’L & COMP. L. REV. 393, 448 (2006) (Noting the “universality” of Geneva Convention IV and recognizing its provisions prohibiting the “passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are recognized as indispensable by civilized people” as “a classic restatement of the widely accepted definition of summary or extrajudicial execution”); L. Elizabeth Chamblee, Post-War Iraq: Prosecuting Saddam Hussein, 7 Cal. Crim L. Rev. 1, 19-20 (2004) (Acknowledging the conclusion of the United Nations Special Rapporteur of the Commission on Human Rights on the situation of human rights in Iraq that “Iraq continues to be in violation of its obligations under the [ICCPR] ... because of the sheer numbers of executions that are taking place and what appear to be extrajudicial executions on political grounds and in the absence of due process of law”) (Citing Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives: Situation of Human Rights in Iraq, U.N. GAOR, 55th Sess., Annex, Agenda Item 116(c), at 20, U.N. Doc. A/55/294 (2000)); Orna Ben-Naftali & Keren R. Michaeli, “We Must Not Make a Scarecrow of the Law”: A Legal Analysis of the Israeli Policy of Targeted Killings, 36 CORNELL INT’L L. J. 233, 286 (2003) (Positing that to the extent Israel’s policy of

targeted killings “obstructs the possibility of resorting to an available judicial process, a right provided for by [A]rticle 14 of the ICCPR,” it would, “[f]rom a human rights point of view,” be “an unjustified and illegal infringement of the right to life”); Matthew Lippman, Government Sanctioned Summary and Arbitrary Executions, 4 FLA. INT’L L.J. 401, 419 (1989) (Citing United Nations General Resolution calling on nations to provide “the right to appeal [and] to petition for pardon or reprieve” and “adequate legal assistance to indigents” in capital cases, and stating that “[t]hese procedural protections, together with the due process requirements set forth in the [ICCPR] for criminal proceedings in general, clearly indicate that summary executions are in violation of the recognized principles of international law”) (Citing G.A. Res. 2393, ¶23 U.N. GAOR, 23rd Sess., Supp. No. 18, 41, U.N. Doc. A/7303 (1968)); Beth Stephens & Michael Ratner, International Human Rights Litigation in U.S. Courts 67 (1996) (Citing line of U.S. opinions concluding that summary execution claims fall within the jurisdiction of the Alien Tort Claims Act, and further stating that “[a] challenge to an execution committed after an unfair trial or with other denials of due process would also constitute a violation of the international norm”).

VI. REPORTS OF THE UN SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, ARBITRARY OR SUMMARY EXECUTIONS EVIDENCES THE EXISTENCE OF THE NORM AGAINST EXTRAJUDICIAL EXECUTIONS

127. The United Nations Special Rapporteur on extrajudicial, summary, or arbitrary executions has a mandate to report on executions which violate international human rights or humanitarian law. Specifically, the Special Rapporteur intervenes in cases where the death penalty is carried out without respect for minimum fair trial standards. *See* Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶6, U.N. Doc. E/CN.4/1999/39 (6 January 1999) (“The Special Rapporteur intervenes when capital punishment is imposed after an unfair trial or in the case of a breach of the right to appeal...”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶76, U.N. Doc. E/CN.4/1998/68 (23 December 1997) (“The Special Rapporteur undertakes action in cases of capital punishment in which international

restrictions ... are not respected.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶77, U.N. Doc. E/CN.4/1998/68 (23 December 1997) (“As in previous years, the Special Rapporteur's action in response to allegations of violations of the right to life in connection with capital punishment continued to be guided by ... the need to ensure the highest possible standards of independence, competence, objectivity and impartiality of judges and full respect of guarantees for a fair trial; and the observance of special restrictions on the application of the death penalty.”)

128. In reports to the United Nations Human Rights Council and the General Assembly, the Special Rapporteur has frequently outlined the law as relevant to extrajudicial executions. Reports of the Special Rapporteur consistently state that capital punishment is only permitted where due process is observed. *See* Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶10, U.N. Doc. A/HRC/4/20/Add.2 (19 February 2007) (“In general, the State may kill only in the form of capital punishment pursuant to the final judgement of a court. This requirement of due process is not a mere formality but, instead, a crucial safeguard on the use of violence by the State designed to avoid mistakes and abuses where life and liberty are at stake.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶76, U.N. Doc. E/CN.4/1998/68 (23 December 1997) (“The Special Rapporteur notes that the death penalty is an exception to the fundamental right to life and, as an exception, it must be interpreted restrictively. The Special Rapporteur believes that because of the irreparability of the loss of life, the imposition of a capital sentence must fully respect all restrictions imposed by the pertinent international instruments on this matter. In addition, the application of these restrictions must be guaranteed in each and every case.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶11, U.N. Doc. E/CN.4/1998/68/Add.3 (22 January 1998) (“The right to life is the supreme right, because without it, no other rights can be enjoyed. International law recognizes the right to life as a fundamental and non-derogable right. The death penalty is an exception to the right to life and, like any exception, it must be interpreted restrictively and carried out with the most scrupulous attention to fundamental principles of non-discrimination, fair trial standards and equal protection before the law.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶55, U.N. Doc. E/CN.4/1999/39 (6

January 1999) (“Legal proceedings in relation to capital offences must conform to the highest standards of impartiality, competence, objectivity and independence of the judiciary, in accordance with the pertinent international legal instruments. It is, therefore, imperative that defendants facing the imposition of capital punishment are able to benefit fully from the right to a competent defence counsel at every stage of the proceedings. Defendants must also be presumed innocent until their guilt has been proved beyond a reasonable doubt. The Special Rapporteur shares the opinion expressed by her predecessor that the execution of a death sentence passed after a trial in which basic fair trial standards, as provided for in article 14 of the International Covenant on Civil and Political Rights, were not respected constitutes a violation of the right to life.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶295, U.N. Doc. E/CN.4/2000/3/Add.1 (20 February 2000) (“The Special Rapporteur shares the view expressed on numerous occasions by the Human Rights Committee, that the imposition of a death sentence upon conclusion of a trial in which the provisions of the Covenant have not been respected constitutes a violation of article 6 of the Covenant, if no further appeal against the sentence is possible.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶32, U.N. Doc. A/55/288 (11 August 2000) (“Various provisions of international law and resolutions of the United Nations stipulate that capital punishment shall only be allowed as an extreme measure for the most serious crimes and only in cases where the highest standards of fair trial are observed.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶46, U.N. Doc. E/CN.4/2003/3 (13 January 2003) (“While capital punishment is not abolished under international law, it must under all circumstances be regarded as an extreme exception to the fundamental right to life, and as such must be applied in the most exceptional and restrictive manner possible. It is also imperative that all restrictions and fair trial standards pertaining to capital punishment contained in international human rights instruments be fully and consistently respected in legal proceedings relating to capital offences ... When imposing or executing the death penalty, the safeguards and restrictions contained in international guidelines and customary law must be respected in each and every case.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Summary, U.N. Doc. E/CN.4/2004/7 (22 December 2003)

(“Safeguards and restrictions contained in international guidelines and customary law must be respected in each and every case when imposing or executing the death penalty.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶51, U.N. Doc. E/CN.4/2003/3/Add.4 (3 February 2003) (“In particular, the death penalty should only be awarded with due regard to the United Nations guidelines on safeguards and restrictions relating to the imposition of capital punishment.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶36, U.N. Doc. A/61/311 (5 September 2006) (“Human rights standards on the use of force derive from the understanding that the irreversibility of death justifies stringent safeguards for the right to life, especially in relation to due process. A judicial procedure, respectful of due process and arriving at a final judgement, is generally the sine qua non without which a decision by the State and its agents to kill someone will constitute an “arbitrary deprivation of life” and, thus, violate the right to life.”)

129. In reports on specific countries, the Special Rapporteur has often criticised the relevant Government for failing to observe due process guarantees, and has noted that a failure to do so constitutes a violation of the right to life. The work of the Special Rapporteur has highlighted the importance of, for example, the following due process guarantees: adequate legal representation; right to appeal to a higher tribunal; presumption of innocence; independence, competence, objectivity and impartiality of judges and juries; and the right not to be interrogated and tortured during pre-trial detention. *See* Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶ 24, U.N. Doc. A/HRC/8/3/Add.6 (29 May 2008) (Regarding Afghanistan, the Special Rapporteur stated, “The Supreme Court recently submitted some 100 existing death sentences covering the past six years to President Karzai. However, the criminal justice system is deeply flawed and is incapable of ensuring respect for due process rights... Under such circumstances, there should be a moratorium on carrying out any death sentences in order to avoid violating international legal standards.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶73, U.N. Doc. A/HRC/8/3/Add.3 (14 May 2008) (Regarding Nigeria, the Special Rapporteur stated, “The Special Rapporteur found during his 2005 visit that torture was routinely used by the police to obtain confessions, and that these forced confessions played an important

role in securing convictions. Many defendants on trial for capital offences did not have legal representation. In fact, many of the death row inmates who the Special Rapporteur met were tried when during Nigeria's military era when some constitutional rights were suspended. Some cases were heard by military tribunals, and due process was not observed. He found that the average period spent on death row was 20 years, and that prison conditions were horrendous. Because of the due process concerns, and the cruel and inhuman treatment caused by leaving inmates on death row for so long, the Special Rapporteur recommended that Nigeria commute to life the sentences of those prisoners currently on death row.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶32, U.N. Doc. A/HRC/8/3/Add.2 (16 April 2008) (Regarding the Philippines, the Special Rapporteur stated, “insofar as the CPP/NPA/NDF does conduct trials, international humanitarian law (IHL) unambiguously requires it to ensure respect for due process rights... NDF representatives were unable to provide me with any concrete details on the operation of the people's court system. This suggests that little or no judicial process is involved. In some cases, the use of people's courts would appear to amount to little more than an end run around the principle of non-combatant immunity. In other words, it seeks to add a veneer of legality to what would better be termed vigilantism or murder. Failure to respect due process norms constitutes a violation of IHL for the NPA/ CPP/NDF and may constitute a war crime for participating cadres.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶104, U.N. Doc. E/CN.4/2006/53/Add.4 (7 January 2006) (Regarding Nigeria, the Special Rapporteur recommended, “All persons sentenced to death or life imprisonment under martial law should have their convictions reviewed in recognition of the highly unsatisfactory due process protections applied at the time.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶172, U.N. Doc. E/CN.4/1999/39/Add.1 (6 January 1999) (Regarding Nigeria, the Special Rapporteur stated, “It has been brought to the attention of the Special Rapporteur that the death penalty in Nigeria is being used on a regular basis by military tribunals that deny defendants rights guaranteed to them by international law. Such rights include adequate legal representation and the right to appeal to a higher tribunal.”)

130. The Special Rapporteur has also had occasion to report specifically on special or military tribunals, and the threats these pose to due process guarantees. *See* Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶122, U.N. Doc. E/CN.4/2002/74 (9 January 2002) (“The practice of setting up special tribunals or jurisdictions in response to situations of internal conflict or other exceptional circumstances may also have serious implications for the defendants’ right to a fair trial. The judges appointed to such tribunals are often closely connected and at times directly accountable to the law enforcement authorities or the military. Such tribunals are often established in order to expedite trials, which may result in hastily imposed death sentences. There are reports of serious violations of fair trial standards in connection with proceedings before special tribunals, particularly with regard to the independence and impartiality of the judiciary.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶98, U.N. Doc. E/CN.4/2002/74/Add.1 (18 December 2001) (“The Special Rapporteur notes that military judges are no longer appointed to the State Security Court following a judgement of the European Court of Human Rights in the case *Incal v. Turkey*. The presence of a military judge in the State Security Court was found to be contradictory to the principle of a fair trial.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶59, U.N. Doc. E/CN.4/1999/39 (6 January 1999) (“Another cause for concern is the practice of establishing special tribunals and jurisdictions as a response to situations of internal conflict or other exceptional circumstances. Such tribunals are often set up with the intention of speedy trials, which often result in hastily imposed death sentences. There are reports of serious violations of fair trial standards in connection with proceedings before special tribunals, particularly as concerns the independence and impartiality of the judiciary, since the judges are often closely connected and at times directly accountable to the law enforcement authorities or the military.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶72, U.N. Doc. E/CN.4/1999/39/Add.1 (6 January 1999) (Regarding Egypt, the Special Rapporteur “continued to receive reports of death sentences imposed by military and criminal tribunals that fall short of international standards and fail to respect safeguards established by the International Covenant on Civil and Political Rights. Reports claimed that since October 1992, military courts that

do not allow for the right to appeal have handed down 58 death sentences. It was asserted that the impartiality and independence of judges sitting on these courts is questionable and that defendants' rights to a fair trial and appeal are not being satisfied within the judicial system.”); Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions ¶88, U.N. Doc. E/CN.4/1998/68 (23 December 1997) (“The Special Rapporteur also remains concerned about the imposition of the death penalty by special jurisdictions. These jurisdictions are often set up as a response to acts of violence committed by armed opposition groups or in situations of civil unrest, in order to speed up proceedings leading to capital punishment. Such special courts often lack independence, since sometimes the judges are accountable to the executive, or are military officers on active duty. Time limits, which are sometimes set for the conclusion of the different trial stages before such special jurisdictions, gravely affect the defendant's right to an adequate defence. Limitations on the right to appeal are also of concern in the context of special jurisdictions.”)

VII. THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES EVIDENCES THE EXISTENCE OF THE NORM AGAINST EXTRAJUDICIAL EXECUTIONS

131. The Restatement (Third) of Foreign Relations Law of the United States §702 outlines what the authors of the Restatement consider to be the content of the customary law of human rights. Comment f states that:

[I]t is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officials in line of duty in defense of themselves or of other innocent persons, or to prevent serious crime.

132. Comment n notes that comment f states a peremptory norm (*jus cogens*).

VIII. US DEPARTMENT OF STATE COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES EVIDENCE THE EXISTENCE OF THE NORM AGAINST EXTRAJUDICIAL EXECUTIONS

133. The United States Department of State has repeatedly condemned executions that follow a tribunal or court process that fails to observe basic due process norms or fair trial guarantees in its Country Reports on Human Rights Practices.¹ The Department of State considers executions that fit the above description to be extrajudicial executions. In its introduction to the most recently published 2007 Country Reports, the Department of State's Bureau of Democracy, Human Rights, and Labor writes, "Respect for the human rights and fundamental freedoms reflected in the Universal Declaration of Human Rights, is, as President Bush has said, "the foundation of freedom, justice and peace in the world." U.S. DEP'T OF STATE, *Country Reports on Human Rights Practices*, Introduction, (March 11, 2008).

134. The Department of State country reports highlights serious problems concerning extrajudicial killings in numerous countries. While "extrajudicial killing" includes government sponsored executions without any trial whatsoever, the definition also includes executions resulting from a trial that fails to observe internationally recognized basic due process norms. The Department of State country reports indicate that the United States believes a denial of due process in a death penalty case to constitute a violation of customary international law, and indicates the due process guarantees considered to be, at a minimum, guaranteed. What follows extracts the relevant statements made by the Department of State's reports on Afghanistan, Iran, China, Eritrea, Burma, and the Sudan.

135. The State department criticized trial procedures and the lack of due process in Afghanistan in its 2007 country report:

Trial procedures rarely met internationally accepted standards. The administration and implementation of justice varied in different areas of the country. Trials were usually public, and juries were not used. Defendants have the right to be present and to appeal; however, these rights were rarely applied. Defendants also have the right to consult with an advocate or counsel at public expense when resources allowed. This right was inconsistently applied, mainly due to a lack of trained personnel and funding. Defendants were not allowed to confront or question

¹ The United States Department of States has published its Country Reports from 1999 to 2007. "The reports cover internationally recognized individual, civil, political, and worker rights, as set forth in the Universal Declaration of Human Rights" and are available at <http://www.state.gov/g/drl/rls/hrrpt/>.

witnesses. Citizens were often unaware of their constitutional rights, and there was no functioning public defender system. Defendants and attorneys were entitled to examine the documents related to their case and the physical evidence before trial; however, NGOs noted that court documents often were not available for review before cases went to trial. Defendants were presumed innocent until evidence proved otherwise. The courts reportedly heard cases in sessions that lasted only a few minutes. U.S. DEP'T OF STATE, 2007 Country Reports on Human Rights Practices, Afghanistan (March 11, 2008).

136. The Department of State highlighted the case of Asadullah Sarwari, a communist-era intelligence chief and alleged human rights abuser. The Department of State reported, "In February 2006 the court sentenced Sarwari to death in a summary, one-day trial without legal representation, which observers deemed seriously flawed." U.S. DEP'T OF STATE, 2007 Country Reports on Human Rights Practices, Afghanistan (March 11, 2008).

137. The Department of State cited a 2006 Amnesty International (AI) report that condemned extrajudicial killings because of a lack of due process. The country report states:

President Karzai's chief of staff told the Secretary General of AI that there would be a moratorium on executions while judicial reform was carried out. However, on October 7, 15 prisoners were executed at Pol-e-Charkhi prison by executive order The European Union (EU), UN, and numerous human rights NGOs condemned this execution, noting that the lack of due process in the judicial system did not guarantee a fair trial for those executed. U.S DEP'T OF STATE, 2007 Country Reports on Human Rights Practices, Afghanistan (March 11, 2008).

138. The Department of State noted explicitly what constituted a fair trial in its 2006 Country Report for Afghanistan:

Court procedures generally did not meet internationally accepted standards for fair trials. The administration and implementation of justice varied in different areas of the country. Trials were usually public, and while juries were not used, decisions made through the shura system were made collectively by groups of local elders. Defendants have the right to be present and to appeal; however these rights were inconsistently applied. Defendants also have the right to consult with an attorney at public expense when resources allowed. This right was inconsistently applied mainly due to a lack of trained personnel. Defendants were not allowed to confront or question witnesses. Citizens' lack of awareness of their

constitutional rights was a problem, and there was no functioning public defender system. Defendants and attorneys were entitled to examine the documents related to their case and the physical evidence before trial. Defendants were presumed innocent until evidence proved otherwise. The courts reportedly heard cases in sessions that lasted only a few minutes. In cases involving murder and rape, judges generally sentenced convicted prisoners to execution, although relatives of the victim could instead choose to accept other restitution or could choose to enforce the verdict themselves; however, under the new constitution, capital punishment is conditional upon approval of the president. Local elders and shuras sentenced persons to unsanctioned punishment. In contrast to previous years there were no confirmed reports of flogging or death by stoning. The practice of ordering the defendant to provide compensation in the form of young girls in marriage to a victims' family continued. In such proceedings, the accused typically had no right to legal representation, bail, or appeal. In cases lacking a clearly defined legal statute, or cases in which judges, prosecutors, or elders were simply unaware of the law, courts and informal shuras enforced Shari'a law; this practice often resulted in outcomes that discriminated against women.

U.S. DEP'T OF STATE, Country Reports on Human Rights Practices, Afghanistan, 2006 (March 6, 2007).

139. In addition to Afghanistan, the Department of State condemned extrajudicial killings lacking due process in Iran. In its 2007 report, the Department of State states unequivocally that due process rights include "having the right to be promptly charged; having access to legal counsel; being tried before a competent, independent, and impartial court in a public hearing; and having the right of appeal." U.S. DEP'T OF STATE, Country Reports on Human Rights Practices, Iran, 2007 (March 11, 2008). In its report, the Department of State stresses that due process rights must exist in practice and not merely in codified law. Iran's 2007 Country Report states in part:

Human rights groups reported that the judiciary suppressed political dissent and in practice violated due process rights at every level, including having the right to be promptly charged; having access to legal counsel; being tried before a competent, independent, and impartial court in a public hearing; and having the right of appeal. Detainees were often not informed of their legal status. Numerous observers considered Tehran Public Prosecutor Saeed Mortazavi the most notorious persecutor of political dissidents and critics...

The government also continued to sentence individuals to execution after reportedly unfair trials. During the year six Ahvazi Arabs were scheduled for execution after trials not considered fair, one of whom was granted refugee status by UN High Commissioner for Refugees (UNHCR)...

According to the law, defendants are entitled to a presumption of innocence, but this often does not occur in practice. Trials are supposed to be open to the public; however, frequently they are closed and defendants often were not given access to a lawyer. The right to appeal is often denied. In practice, defendants are often denied access to legal representation until initial investigations are completed and charges are brought; the period of initial investigation often lasted weeks or months. "Confessions" were often reportedly coerced during investigations. There were also reports during the year that people who were not detained but summoned for interrogation by security or judiciary officials were threatened with repercussions--inferring either detention or charges--if they sought legal representation.

UN representatives, including UNSRs, the UN Working Group on Arbitrary Detention, and independent human rights organizations noted the absence of procedural safeguards in criminal trials.

Baluchi groups in the southeastern province of Sistan va Baluchestan alleged numerous executions during the year after reportedly unfair trials for attacks against government officials. A September Amnesty International (AI) report estimated that authorities executed at least 50 Baluchis since the beginning of the year, almost all following the February 14 bombing in Zahedan of a bus carrying members of the Islamic Revolutionary Guard Corps (IRGC). . . . Many of those executed following the bombing made televised "confessions" of responsibility, which Baluchi groups alleged were extracted under torture. According to AI, Baluchi groups alleged that authorities sought to dispel the appearance of ethnic targeting by taking Baluchis to other provinces to execute them after human rights groups drew attention to the rise in executions of Baluchis...

During the year the government executed at least 11 Ahvazi Arabs in Khuzestan province in connection with bombings in that province in 2005 and 2006. NGOs and human rights groups outside the country condemned the executions, stating that the accused did not receive fair trials. On January 10, three UN independent experts released a joint statement condemning the executions. Philip Alston, the UN Special Rapporteur (UNSR) on extrajudicial, summary, or arbitrary executions; Leandro Despouy, the UNSR on the independence of judges and lawyers; and Manfred Nowak, the UNSR on torture, jointly called on the government to halt the imminent executions of seven Ahvazi Arabs and grant them fair and public hearings. The UNSRs alleged that authorities used torture to extract the confessions of the accused, and that defense lawyers were not allowed access to the accused during trial and were themselves threatened with charges of "acting against national security."... NGOs and international newspapers estimate that authorities executed approximately 298 individuals during the year following unfair trials. Exiles and human rights monitors alleged that many of those supposedly executed for criminal offenses, such as narcotics trafficking, were political dissidents.

U.S. DEP'T OF STATE, Country Reports on Human Rights Practices, Iran, 2007 (March 11, 2008).

140. The Department of State also criticized China for its lack of due process in extrajudicial executions in 2007. The Country Report states:

Trials involving capital offenses sometimes took place under circumstances involving severe lack of due process and with no meaningful appeal. Some executions took place on the day of conviction or failed appeal. Executions of Uighurs whom authorities accused of separatism, but which some observers claimed were politically motivated, were reported...

The law gives most suspects the right to seek legal counsel shortly after their initial detention and interrogation, although police frequently interfered with this right... The government expanded the scope of legal aid and required authorities to notify criminal defendants of their right to apply for legal aid. Both criminal and administrative cases remained eligible for legal aid, although 70 percent or more of criminal defendants still went to trial without a lawyer.

Government-employed lawyers often refused to represent defendants in politically sensitive cases, and defendants frequently found it difficult to find an attorney. When defendants were able to retain counsel in politically sensitive cases, government officials sometimes prevented effective representation of counsel. Officials deployed a wide range of tactics to obstruct the work of lawyers representing sensitive clients, including unlawful detentions, disbarment, intimidation, refusal to allow a case to be tried before a court, and physical abuse... In some sensitive cases, lawyers had no pretrial access to their clients, and defendants and lawyers were not allowed to speak during trials...

The mechanism that allows defendants to confront their accusers was inadequate; the percentage of witnesses who came to court in criminal cases was less than 10 percent and as low as 1 percent in some courts... Approximately 95 percent of witnesses in criminal cases did not appear in court to testify, in part due to hardship or fear of reprisals...

There was an appeals process, but appeals rarely resulted in reversed verdicts. Appeals processes failed to provide sufficient avenue for review, and there were inadequate remedies for violations of defendants' rights...

Police and prosecutorial officials often ignored the due process provisions of the law. Because of the lack of due process, the consequences were particularly egregious in death penalty cases...

U.S. DEP'T OF STATE, Country Reports on Human Rights Practices, China, 2007 (March 11, 2008).

141. In addition, the Department of State criticized Eritrea for trials that lacked due process in 2007:

The executive-controlled special courts issue directives to other courts regarding administrative matters, although their domain was supposed to be restricted to criminal cases involving capital offenses, theft, embezzlement, and corruption. The Office of the Attorney General decides which cases are to be tried by a special court. No lawyers practice in the special courts. The judges serve as the prosecutors and may request that individuals involved in the cases present their positions. The special courts, which do not permit defense counsel or the right of appeal, allowed the executive branch to mete out punishment without regard for due process. Most trials in special courts were not open to the public.

Judges of courts in both branches included former senior military officers with no formal legal training. They generally based their decisions on "conscience," without reference to the law. There was no limitation on punishment, although the special courts did not hand down capital punishment sentences during the year.

U.S. DEP'T OF STATE, Country Reports on Human Rights Practices, Eritrea, 2007 (March 11, 2008).

142. Similarly, the State Department's 2007 country report on Burma provides:

Although the regime denied holding any political prisoners, there is a fundamental difference between criminal trials involving political prisoners and defendants charged with common crimes. Some basic due process rights, including the right to be represented by a defense attorney, are generally respected in common criminal cases but not in political cases that the government deem especially sensitive. By law the government is not obligated to provide an attorney at public expense except in death penalty cases. Juries are not used in any criminal trials. In common criminal cases, defense attorneys generally are permitted 15 days to prepare for trial, may call and cross examine witnesses, examine evidence, and be granted a 15 day delay for case preparation. However, their primary function is not to disprove their client's guilt, which is usually a foregone conclusion, but rather to bargain with the judge to obtain the shortest possible sentence for their clients. Political trials are normally not open to family members or the public, and often defense attorneys are not permitted to attend. Reliable reports indicated that senior government authorities dictated verdicts in political cases, regardless of the evidence or the law. The law provides those convicted of crimes with a right of appeal; however, in most cases verdicts were upheld without consideration of the legal merits of the appeal.

NLD members and other prodemocracy activists generally appeared to be able to retain the counsel of lawyers without fear that the lawyers might be imprisoned; however, lawyers were not always told when trials would begin, and authorities often refused to allow them to attend their clients' trials. In December authorities removed the trials of prodemocracy activists Su Su Nwe and Htin Kyaw from a public court to specially convened closed courts in Insein Prison. Authorities did not permit their

families or attorneys to attend any proceedings in the closed court or otherwise participate in their defense. Requests to hold their trials in open court were denied. Reliable reports indicated that numerous other political prisoners were tried and convicted in closed courts without the assistance of counsel.

U.S. DEP'T OF STATE, Country Reports on Human Rights Practices, Burma, 2007 (March 11, 2008).

143. The State Department's 2007 report on the Sudan provides:

The interim constitution and law provide for fair and prompt trials; however, this was often not respected. Trials were open to the public at the discretion of the judge. In cases of national security and offenses against the state, trials were usually closed. Juries are not used. The accused normally have the right to an attorney, and the courts are required to provide free legal counsel for indigent defendants accused of crimes punishable by death or life imprisonment; however, there were reports that defendants frequently did not receive legal counsel and that counsel in some cases could only advise the defendant and not address the court. There were reports that the government sometimes denied defense counsel access to the courts or did not allow the calling of defense witnesses... According to the interim constitution and law, there is a presumption of innocence; however, this was not respected in practice. Defendants have a right to appeal, except in military trials, where there is no appeal...

During the year, due process was suspended in several cases. For example, on January 23, the Damazin General Court convicted and sentenced to death a young man claiming to be under 18 years of age; the youth was convicted of murder... The youth was not represented by defense counsel.

U.S. DEP'T OF STATE, Country Reports on Human Rights Practices, Sudan, 2007 (March 11, 2008).

IX. STATES HAVE EXPLICITLY AFFIRMED THEIR BELIEF IN THE EXISTENCE OF THE NORM AGAINST EXTRAJUDICIAL EXECUTIONS

144. States regularly and consistently affirm their belief (*opinio juris*) in the norm against extrajudicial executions. Appendix A to this declaration includes the statements of over 100 States specifically recognizing that States have an international legal obligation to respect due process before an execution can be lawful at international law. See Appendix A, ¶¶5, 6, 7, 10, 11, 13, 16, 22, 30, 31, and 33. This includes statements by, for example: Algeria, Antigua and Barbuda, Bahrain, Bangladesh, Belgium, Botswana, Chad, Denmark, Egypt, Finland, France, Germany, India, Indonesia, Iran,

Italy, Jamaica, Kazakhstan, Lebanon, Morocco, Niger, Pakistan, Portugal, Senegal, Spain, Saudi Arabia, Romania, Thailand, Turkey, Uganda, the United Kingdom, and the United States of America.

145. For instance, the United States of America has stated that, “customary international law did not prohibit the death penalty ... It recognized the rights of States to impose the death penalty under certain circumstances and consistent with protections that ensured due process.” *See* Appendix A, ¶33. Likewise, the 56 member States of the Organization of the Islamic Conference (many of whom retain the death penalty) stated that, “[i]t was the responsibility of all states who retained the death penalty to see that it was applied pursuant to the judgment of a competent court according to due process of law and the application of all legal remedies.” *See* Appendix A, ¶22.

146. The statements have been made by States from all regions and representing a variety of legal systems. The Appendix includes explicit statements on the duties of States at international law by the vast majority of the 60 retentionist States (those States whose law provides for the death penalty for ordinary crimes, and who have carried out executions within the last ten years).

X. THE CONSTITUTIONS AND DOMESTIC LAWS OF RETENTIONIST STATES EVIDENCE THE EXISTENCE OF THE NORM AGAINST EXTRAJUDICIAL EXECUTIONS

147. State legislation is one source of evidence of state practice. Sixty States have legislation providing for the death penalty and have carried out a death sentence in the past decade. These “retentionist” States are listed in Appendix C.

148. The domestic laws of the vast majority of these states comply with the international prohibition against extrajudicial executions, and specifically with the obligation to provide due process in capital cases. A survey of the constitutions of retentionist countries shows that most of them expressly recognize the right to life, and due process rights in death penalty cases. In addition to these express constitutional protections, many retentionist states have made public statements that their legal systems (constitutional, as well as statutory protections) protect due process rights and fair trial

safeguards in death penalty cases. (Constitutional provisions are extracted in Appendix B, and statements by States as to their state practice is extracted in Appendix A.)

149. Forty-six of the constitutions of retentionist nations specifically recognize the right to life or the inviolability of the person. *See, e.g., Constitution of Chad*, Article 17 (“The human person is sacred and inviolable. Each individual has the right to life, personal integrity, security, freedom, the protection of private life and possessions.”) Of the 14 retentionist countries whose constitutions do not explicitly recognise the right to life, 13 have made express statements to the General Assembly that it is “the duty of States to protect that right by law”. *See Appendix A, ¶22.*

150. Forty of the constitutions of retentionist countries expressly provide for a “fair trial”, a “fair hearing”, a “just trial”, or the “right of defense”. *See, e.g., Bahamian Constitution*, s. 20(1) (“If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”); *The Constitution of Bahrain*, Article 20(c) (“An accused person shall be presumed innocent until proved guilty in a legal trial in which the necessary guarantees for the exercise of his right of defense in all the stages of investigation and trial are ensured in accordance with the law.”). Among the twenty retentionist countries that do not explicitly guarantee a fair trial or a right to a defense, fifteen provide for punishment only in accordance “with law”. *See, e.g. The Constitution of Singapore* (Singapore Constitution), s. 9(1) (“No person shall be deprived of his life or personal liberty save in accordance with law.”). In a number of these countries, courts have specifically held that “law” carries a substantive content, and incorporates due process rights. *See, e.g. Mithu v. State of Punjab* 2 S.C.R. 690, 698 (1983) (“No person shall be deprived of his life or personal liberty except according to fair, just, and reasonable procedure established by valid law.”); *Organisations Control Ordinance Case 1956 (A)* 3,636 (interpreting Article 31 of *The Constitution of Japan*, Justice D. Kawamura stated “[i]n light of the historical fact that Article 31 of the Constitution was adopted under the influence of the ‘due process’ clause of the 5th Amendment of the United States Constitution”, “it is appropriate to understand ‘procedure established by law’ as implying the requirement of ‘due process of law’”); *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 670 (“Law” in s. 9(1) of the

Singapore Constitution incorporates rules of natural justice from English common law as at the adoption of the Constitution); *Ani Che Bin Itam v Public Prosecutor* [1984] 1 *Malaysian Law Journal* 113 (applying the interpretation of “law” in *Ong Ah Chuan* to s. 5(1) of *The Federal Constitution of Malaysia* (Malaysian Constitution), which prohibits deprivation of life or liberty other than “in accordance with the law”). Although the constitution of China does not appear to specifically recognise this right, the Chinese *Criminal Procedure Law 1997* (CPL) does provide that “[n]o person shall be found guilty without being judged as such by a People’s Court according to law”. *Id.*, Article 12. The CPL also provides that “[t]he People’s Courts, the People’s Procuratorates and the public security organs shall safeguard the procedural rights to which participants in proceedings are entitled according to law.” *Id.*, Article 14.

151. The constitutions of 46 countries specifically require that the tribunal hearing a criminal charge be impartial and independent, or have constitutional provisions that recognise the independence of the judicial arm of government. *See, e.g. The Constitution of Sierra Leone*, s. 23(1) (“Whenever any person is charged with a criminal offence he shall unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”); *The Constitution of the Hashemite Kingdom of Jordan*, Articles 97 (“Judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law.”), 101(i) (“The courts shall be open to all and shall be free from any interference in their affairs.”). Additionally, although the constitutions of India, Malaysia, and Singapore do not expressly provide for judicial independence, they do contain provisions intended to protect the independence of the judiciary. Appointments are made by the President on the advice of the Chief Judge. *See* s. 124(2), *Indian Constitution*; s. 122B, *Malaysian Constitution*; and s. 95, *Singapore Constitution*. Judges have tenure until a defined age, subject to good behaviour and their conditions of employment cannot be adversely varied. *See* ss. 124(2), 125, *Indian Constitution*; s. 125, *Malaysian Constitution*; s. 98, *Singapore Constitution*. Moreover, politicians are prohibited from criticising judges in Parliament unless the speaker is moving for an impeachment. *See* s.121, *Indian Constitution*; s. 127, *Malaysian Constitution*; s. 99, *Singapore Constitution*.

152. Forty-one retentionist nations expressly provide for a right to counsel. *See, e.g., The Constitution of Lesotho*, Article 2(2) (“Every person who is charged with a criminal offence ... shall be permitted to defend himself before the court in person or by a legal representative of his own choice”). In China, the right to counsel is provided for by statute.

153. The constitutions of 32 retentionist countries expressly provide for some form of review of a trial court’s decision. *See, e.g. The Constitution of Mongolia*, Article 16(14) (“The citizens of Mongolia shall be guaranteed the privilege to enjoy the following rights and freedoms ... to appeal against a court judgement”). A number of countries (for example, Sudan and Uganda) specifically provide for mandatory reviews of any death sentences. In China, the CPL provides for both a right of appeal in all cases (Article 180) and, in the case of death sentences, mandatory review of the sentence by the higher courts (Article 199).

154. In addition to these express constitutional protections, it is important to note that many States have made statements to the General Assembly that their domestic legislation provides for and protects “due process” or “fundamental safeguards”. States have stressed that the death penalty was only imposed after due process of law. *See* Appendix A (statements by, for example, Antigua and Barbuda, the Bahamas, Barbados, Belize, China, Cuba, Dominica, Egypt, Guyana, India, Indonesia, Iran, Jamaica, Jordan, Libya, Nigeria, Pakistan, Singapore, Syria, and Thailand).

Conclusion

155. Customary international law prohibits executions carried out without respect for basic due process guarantees.

156. This expert declaration has set the content of this norm, and the evidence for its existence. Evidence has been provided from the following sources, all considered to be of substantial weight in indicating state practice and *opinio juris*: international and regional treaties; the jurisprudence of regional and international courts, commissions, and committees; decisions of national courts; United Nations General Assembly, Economic

and Social Council, and Human Rights Council resolutions; the writing of renowned jurists of international and human rights law; the Restatement of the Foreign Relations Law of the United States; US Department of State Country Reports on Human Rights Practices; the statements of States; reports of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions; and national constitutions and laws.

157. As the above sources clearly demonstrate, executions carried out without respect for basic due process guarantees are a violation of a clear, specific, and obligatory norm of international law.

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Philip Alston". The signature is written in a cursive, flowing style.

Philip Alston

21 November 2008

New York, NY

Appendix A: Statements of States

1. Antigua and Barbuda: “The Governments of the Caribbean which retained the death penalty complied with various regional and international human-rights conventions ... Moreover, persons accused of capital crimes were protected by a number of safeguards in Caribbean States, including due process of law ...” (Statement of Ms. Akbar, Representative of Antigua and Barbuda, General Assembly, Official Records, Third Committee, Summary record of the 30th meeting, UN Doc A/C.3/54/SR.30, 22 November 1999, p. 7)
2. Algeria: “Algeria’s criminal code provided for the death penalty only in the case of very serious crimes. It was imposed very rarely, not systematically, and there were various appeals procedures. The President had a right to grant a pardon or postpone or commute the sentence and frequently exercised it ...” (Statement of Miss Aiquaze, Representative of Algeria, General Assembly, Official Records, Third Committee, 52nd meeting, 22 November 1989, UN Doc A/C.3/44/SR.52, p. 3.)
3. Bahamas: “The Bahamas recognized the sovereign and inalienable right of a State to determine the best way to maintain internal order and stability, and retained the death penalty as one of the means of achieving those objectives, consistent with internationally agreed principles of good governance. That sentence was, however, imposed only for the most serious offences and after due process of law.” (Statement of Mr. Ferguson, representative of the Bahamas, General Assembly, Official Records, Fifty-fourth session, Third Committee, Summary record of the 31st meeting, 22 December 1999, UN Doc A/C.3/54/SR.31, p. 4.)
4. Bangladesh: “The application of capital punishment was restricted to very selected cases of the most heinous crimes. Bangladesh had safeguards in place and exercised restraint.” (Statement of Bangladesh, on “Draft resolution I on a “Moratorium on the use of the death penalty”. Sixty-second General Assembly, Plenary, 76th and 77th Meetings.); “Bangladesh had the death penalty but used it only rarely, with due process and as a deterrent, and only for heinous crimes that have been proved beyond a shadow of a doubt. Ample appeals procedures and

other safeguards were available to prevent abuse, and commutation and clemency were also available as a last resort.” (Statement of Mr. Chowdhury, Representative of Bangladesh, General Assembly, Official Records, Third Committee, 52nd meeting, 22 November 1989, UN Doc A/C.3/44/SR.52, p. 6.); “[Bangladesh] imposed the death penalty only for the most serious crimes and subject to provisions designed to avoid miscarriage of justice. Extreme caution was exercised throughout that transparent process. Opportunities for redress were available at all legal stages and presidential clemency was available.” (Statement of Mr. Islam, Representative of Bangladesh, General Assembly, Official Records, Third Committee, 62nd session, UN Doc A/C.3/62/SR.46, 24 December 2007, p. 9.)

5. Barbados: “As long as the death penalty is not applied arbitrarily or summarily and is subject to a system of due process by competent courts, Barbados believes that it is both lawful under international law and must be seen as an internal matter ...” (Statement Mr. Degia, Representative of Antigua and Barbuda, on behalf of 13 CARICOM states, General Assembly, 62nd session, Reports of the Third Committee, UN Doc A/62/PV.76, 18 December 2007, p. 14.); “[The] death penalty in Barbados was not mandatory in the sense of being arbitrary, or imposed without due process. In cases involving capital offences in Barbados, every opportunity was provided during a trial or from the time of arrest of the person in question to ensure access to legal representation. Full legal assistance was provided to those who could not afford to pay for the legal representation, including throughout any appeals process which might occur. The accused was always given a fair hearing.” (Statement of Sir Louis Tull, Representative of Barbados, Human Rights Committee, Summary record of the 2439th meeting, Consideration of reports submitted by States parties under article 40 of the Covenant and of country situations, Third period report of Barbados, UN Doc CCPR/C/SR.2439, 16 April 2007, pp. 3-4.)
6. Botswana: “Capital punishment was permitted under international law provided that due process and proper judicial safeguards were observed.” (Statement of Mr. Hetanang, Representative of Botswana, General Assembly, Official Records,

Third Committee, 62nd meeting, UN Doc A/C.3/62/SR.43, 18 December 2007, p. 3.)

7. Caribbean Community (CARICOM) (Statement made on behalf of Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Kitts and Nevis, Saint Lucia, St Vincent and the Grenadines, Suriname, Trinidad and Tobago): “We are fully committed to the rule of law at both the national and international levels. Consequently, we have integrated into our domestic laws our legal obligations under the various international human rights instruments to which we are States parties... The Caribbean States that are parties to the International Covenant on Civil and Political Rights do not contravene that Covenant when a capital sentence is adjudged. Article 6, paragraph 2, of the Covenant applies specifically to countries that have not abolished the death penalty. It provides that a sentence of death may be imposed only for the most serious crimes and pursuant to a final judgement rendered by a competent court... We uphold the independent of the judiciary as a bulwark of our democracy and as a guardian against any deprivation of the fundamental and inalienable rights and freedoms of our citizens. That is supported through the observance and enforcement of the sacred legal principle that no citizen, including those accused of capital offences, can be deprived of their human rights, except through due process of law... We regret any implication that we arbitrary apply capital punishment for insignificant crimes and without regard for the human rights of the prosecuted.”(Statement Ms. Akbar, Representative of Antigua and Barbuda, on behalf of 13 CARICOM states, General Assembly, 62nd session, Reports of the Third Committee, UN Doc A/62/PV.76, 18 December 2007, p. 12)
8. China: “[China is] very strict and prudent with execution policy to make sure that it only applies to a small number of criminals who committed extremely serious crimes. In the future practice, we will continue to safeguard human rights through judiciary procedures.” (Foreign Ministry Spokesperson Jiang Yu, Ministry of Foreign Affairs of the People’s Republic of China, 15 April 2008, at <http://www.fmprc.gov.cn/eng/xwfw/s2510/t425858.htm>); “Let me make it clear that China is a country under the rule of law... We are working actively to

advance reform in the political system, including reform of the judicial system. The basic goal in advancing the judicial system reform is to achieve judicial justice. In this process, it is important to ensure judicial independence... [T]he Supreme People's Court has taken back the power to examine and approve death penalty, and its use is strictly restricted." (Statement of Premier Wen Jiabao, Press Conference, 18 March 2008, Ministry of Foreign Affairs of the People's Republic of China at <http://www.fmprc.gov.cn/eng/zxxx/t416935.htm>); In respect to due process regarding the rights of the accused, the Chinese Ministry of Foreign Affairs has noted that, "The accused has the right to defense. According to the Law of Criminal Procedure, the accused, besides exercising his right to defend himself, can also entrust a lawyer, or close relatives, or other citizens to take up the defense on his behalf. When the public prosecutor institutes a case before the court, if the accused does not entrust his defense to a lawyer, the people's court can appoint one for him. During the trial, the accused has the right to terminate a lawyer's action in his defense and entrust another to take it up... After the people's court decides to hear a case, a duplicate copy of the indictment should be made available to the accused at least seven days before the opening session of the court in order that he may learn what crime or crimes he is being prosecuted for and the reasons why he is being prosecuted, and that he has enough time to prepare his defense and get in touch with his lawyer.... The procuratorate and the court shall independently exercise their respective procuratorial and judicial authority. They shall only obey the law and not be interfered with by any administrative organ, social organization or person... Capital punishment is applied only to criminals who are guilty of the most heinous crimes... China's Law of Criminal Procedure provides for a special review procedure in cases of capital punishment. That is, the judgment in cases of capital punishment, except for those made by the Supreme People's Court according to law, should be reported to the Supreme People's Court or to a high people's court authorized by it after the second, or final, instance; only after all the facts, evidence, convictions, sentences and trial procedures are comprehensively investigated and checked and approved can the judgment take legal effect. After the examination and approval,

if a lower people's court finds that there may be mistakes in a judgment, it should stop enforcement of the punishment and immediately report to a higher people's court with the authority of examination and approval, or to the Supreme People's Court, in order that a ruling may be made by it. (Information Office of the State Council of the People's Republic of China, "Guarantee of Human Rights in China's Judicial Works", in *Human Rights in China (White Papers of the Government)*, 9 September 2002, at <http://www.fmprc.gov.cn/eng/topics/3711/t18997.htm#5>.)

9. Cuba: "Cuba respects and strictly complies with safeguards established by the United Nations to guarantee the protection of the rights of death row inmates (Resolution 1984/50 ECOSOC), at the legislative and practical levels. In this regard, it suffices to review the essential characteristics of this penalty and its application procedure, as reflected in Cuban legislation... Cuba's criminal proceedings, so much at the level of law as in judicial practice, are organized such that all criminal acts, in order to be punished, must be proven with ample and incontrovertible evidence... In treating facts surrounding a crime for which the death penalty is envisaged, this process of verification is taken to its most rigorous extent. The process consists of a hearing and a trial. The trial is oral and public and is conducted before a previously assembled court made up of 5 judges. In the event the defendant has not designated a defense attorney, one is appointed to him by the State. The first death sentence handed down by the court may be appealed by the convicted; if the latter does not appeal it, the sentence is considered appealed by default. That is to say, the appeal does not only constitute a right of the defendant, it is also a duty imposed by law which automatically comes into force. The appeal is heard by the highest judicial authority in the nation, that is, the People's Supreme Court. Once the appeal is received by the Supreme Court, a new trial is held. That is, every crime punishable with death is tried by two judicial authorities, including the nation's highest judicial authority... In both trials, the defendant designates a defense attorney, or one is appointed for him." (Ministry of Foreign Affairs of Cuba, *Cuba and Its Defense of Human Rights for All*, "Chapter VII – The Death Penalty, The Exceptional Nature of Its Application

in Cuba”, available at <http://www.cubaminrex.cu/English/libro%20blanco/paginas%20ingles/parte%202cap%207%20ingl%E9s.htm>.)

10. Egypt: “The death penalty is only imposed according to due process of law and the provisions of Islamic law. This was done in such a way as to ensure that the punishment was in line with legal and religious obligations... [Egypt] recognized that it was the responsibility of States, in the case of serious crimes, to execute the death penalty in a system based on due process of law.” (Statement of Egypt, on “Draft resolution I on a “Moratorium on the use of the death penalty”. Sixty-second General Assembly, Plenary, 76th and 77th Meetings.); “[R]espect of human dignity and the sanctity of life were highly revered in Islam and other religions, and the death penalty was restricted to the most serious crimes in Islamic jurisprudence. It could only be imposed within the due process of law.” (Statement of Mr. Attiya, Representative of Egypt, General Assembly, Official Records, Third Committee, 62nd meeting, UN Doc A/C.3/62/SR.43, 18 December 2007, p. 6.); “In accordance with international law, the death penalty should be reserved for the most serious crimes. International efforts should focus on guaranteeing due process of law and ensuring that extrajudicial or arbitrary executions were prohibited.” (Statement of Mr. Attiya, Representative of Egypt, General Assembly, Official Records, Third Committee, 62nd session, UN Doc A/C.3/62/SR.46, 24 December 2007, pp. 9.)
11. European Union and associated countries (Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Republic of Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom): “The European Union was concerned that, in some States where [the death penalty] had not been abolished, the death penalty was frequently being applied in violation of the minimum safeguards set out in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Vienna Convention on Consular Relations and the Economic and Social Council safeguards guaranteeing protection of the rights of

those facing the death penalty. States that had not yet abolished the death penalty should comply with those safeguards.” (Statement of Ms. Nyroos, Representative of Finland, speaking on behalf of the EU and associated countries, General Assembly, Official Records, Third Committee, Summary Record of the 29th meeting, UN Doc A/C.3/54/SR.29, 10 February 2000, p. 4.)

12. Germany: (In response to reports that two Tibetans, Tenzin Deleg Rinpoche and Lobsang Dhondup, were to be executed in China following trials in which due process was allegedly not observed) – “I therefore appeal urgently to the Chinese Government to guarantee due process and give the accused a fair chance to defend themselves.” (Statement of Mr. Gerd Poppe, Federal Government Commissioner for Human Rights Policy and Humanitarian Aid at the Federal Foreign Office of Germany, extracted in: Written Statement submitted for Society for Threatened Peoples, Commission on Human Rights, UN Doc E/CN.4/2003/NGO/255, 20 March 2003, p. 4.)
13. India: “In India, the death penalty was an exceptional punishment imposed only in rare cases where the crime committed was so heinous as to shock the conscience of society. Since 1995, there had been only one instance of the death penalty being used in India, and the legislation provided for all the requisite procedural safeguards.” (Statement of Mr. Machotra, Representative of India, General Assembly, Official Records, Third Committee, 62nd session, UN Doc A/C.3/62/SR.46, 24 December 2007, pp. 7.); “[The Government of India] concurred that only the most serious crimes should carry the death sentence, which should be carried out solely after due legal process and a trial in accordance with the strictest human rights standards... In [India], the death penalty was the exception, not the rule and was reserved for crimes that shocked the conscience of society. Death sentences had to be confirmed by a superior court. The accused had the right of appeal, or to file a mercy petition ...” (Statement of Mr. Saha, Representative of India, Commission on Human Rights, 59th session, Summary Record of the 61st meeting, UN Doc E/CN.4/2003/SR.61, 26 May 2003, p.15).
14. Indonesia: “Although the death penalty existed under Indonesian law, it was used only in extreme cases and in accordance with due process of law. People on trial

were provided with legal counsel and, in the event of a death sentence, had the legal right of appeal for pardon or for the sentence to be commuted.” (Statement of Ms. Syahrudin, Representative of Indonesia, General Assembly, Official Records, Third Committee, 52nd meeting, 22 November 1989, UN Doc A/C.3/44/SR.52, p. 4.)

15. Iran: “Iran therefore imposed the death penalty for [the most serious] crimes, in conformity with article 6(2) of the International Covenant on Civil and Political Rights, and provided appropriate safeguards to ensure that its application was subject to due process of law.” (Statement of Mr. Rezvani, Representative of the Islamic Republic of Iran, General Assembly, Official Records, Summary Record of the 43rd meeting, UN Doc A/C.3/49/SR.43, 12 December 1994, pp. 15-16.)
16. Jamaica: “The International Covenant on Civil and Political Rights also affirmed the right to life, but very carefully avoided the suggestion that the death penalty was contrary to international law. The basic premise of its article 6, paragraph 2, was that the death penalty was compatible with international law provided it was carried out in keeping with certain conditions.” (Statement of Ms. Bowen, Representative of Jamaica, General Assembly, Official Records, Third Committee, 62nd meeting, UN Doc A/C.3/62/SR.43, 18 December 2007, p. 6.)
17. Japan: “Under the Japanese legal system, the death penalty was applied only heinous crimes like mass murder, and always in the accordance with the strictest judicial procedures.” (Statement of Mr. Umeda, Representative of Japan, General Assembly, Official Records, Third Committee, Summary record of the 30th meeting, UN Doc A/C.3/54/SR.30, 22 November 1999, p. 2)
18. Jordan: “In line with the International Covenant on Civil and Political Rights, the death penalty as imposed in [Jordan] only for rape, murder and terrorist acts, subject to a number of legal safeguards. Amnesty was possible.” (Statement of Ms. Al-Zibdeh, Representative of Jordan, General Assembly, Official Records, Third Committee, 62nd session, UN Doc A/C.3/62/SR.46, 24 December 2007, p. 9.)
19. Libya: “[Libya] is a State governed by the rule of law and where penalties cannot be imposed without reference to law, i.e. outside the jurisdiction of the courts.

The judiciary is the only authority with competence for delivering judgement of any kind. The right to life of citizens is protected by the law and the courts. The death penalty may only be imposed for the most serious crimes [...] In the Libyan Arab Jamahiriya, executions are not carried out outside of the judicial framework or without a verdict having been rendered by a competent court... The legislature, taking account of the gravity of the death penalty, not only prescribes this penalty for the most serious crimes but also provides condemned persons with fundamental guarantees that are consistent with the relevant international treaties. (Consideration of reports submitted by states parties under Article 40 of the Covenant, Fourth periodic reports of States parties due in 2002, Libyan Arab Jamahiriya. UN Doc CCPR/C/LBY/4, 10 May 2007, ¶¶6-10.); “The death penalty was on the statute book of [Libya] but it was only applied after an exhaustive legal process and its use was restricted by existing legislation and by judicial precedent.” (Statement of Mr. Sarrah, Representative of Libya, Commission on Human Rights, 59th session, Summary Record of the 61st meeting, UN Doc E/CN.4/2003/SR.61, 26 May 2003, p.17).

20. Mexico: “Where [the death penalty] still existed, it should not be applied to minors, the numbers of crimes for which it was applicable should be kept to a minimum, and the persons liable to it should be given a proper trial.” (Statement of Mr. De Alba, Representative of Mexico, General Assembly, Official Records, Third Committee, Summary Record of the 42nd meeting, UN Doc A/C.3/54/SR.42, 2 February 2000, p. 7.)
21. Nigeria: “The death penalty existed in Nigeria, but it was applied only after due process of law.” (Statement of Mr. Ajewole, representative of Nigeria, General Assembly, Official Records, Fifty-fourth session, Third Committee, Summary record of the 31st meeting, 22 December 1999, UN Doc A/C.3/54/SR.31, p. 6.); “Capital punishment was applied in Nigeria only for the most serious criminal offences and only after exhaustive legal and judicial processes had been followed, including recourse to the Supreme Court.” (Statement of Mr. Owoseni, Representative of Nigeria, General Assembly, Official Records, Third Committee, 62nd session, UN Doc A/C.3/62/SR.46, 24 December 2007, p. 5.); “[Nigeria] was

fully committed to safeguarding the safety of its citizens while honoring its obligations under international human rights instruments, particularly with respect to the right to life. While no judicial execution had taken place in recent years, the Constitution still contained provisions for imposing the death penalty in the interests of peace and security. It could, however, only be imposed for very serious crimes and in full respect of due process safeguards.”; (Statement of Mr Oweoseni, Representative for Nigeria, Commission on Human Rights, 60th session, Summary record of the 57th meeting, UN Doc E/CN.4/2004/SR.57, 27 April 2004).

22. Organization of the Islamic Conference (56 member states: Afghanistan, Albania, Algeria, Azerbaijan, Bahrain, Bangladesh, Benin, Brunei-Darassalam, Burkina-Faso, Cameroon, Chad, The Comoros, Cote d’Ivoire, Djibouti, Egypt, Gabon, The Gambia, Guinea, Guinea-Bissau, Guyana, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Kyrgyz Republic, Lebanon, Libyan Arab Jamahiriya, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Sierra Leone, Somalia, The Sudan, Suriname, Syrian Arab Republic, Tajikistan, Togo, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, Uzbekistan, Yemen): Pakistan, speaking on behalf of the Organization of the Islamic Conference (OIC), said that it “strongly believed that every human being had the inherent right to life... It was the duty of States to protect that right by law, in accordance with the Universal Declaration of Human Rights and other relevant international instruments. The OIC acknowledged the decision of some states to exercise their sovereign right to apply a moratorium on the death penalty followed by its abolition ... It was the responsibility of all states who retained the death penalty to see that it was applied pursuant to the judgement of a competent court according to due process of law and the application of all legal remedies.” (Statement of Mr. Amil, Representative of Pakistan, speaking on behalf of 56 State members of the Organization of Islamic Conference, General Assembly, Official Records, Third Committee, 62nd meeting, UN Doc A/C.3/62/SR.43, 18 December 2007, p. 5.)

23. Pakistan: “Pakistan still had the death penalty, but it was accompanied by appeals procedures to protect the rights of those sentenced.” (Statement of Mr. Qureshi, Representative of Pakistan, General Assembly, Official Records, Third Committee, 52nd meeting, 22 November 1989, UN Doc A/C.3/44/SR.52, p. 5.); “The Representative [of Pakistan] states that the issue of the death penalty relates to the criminal justice system and does not contradict any of the universally recognized human rights. Pakistani law recognizes the death penalty for a number of serious crimes, but it may only be imposed after exhaustion of all remedies, by a court of law after due process.” (General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, Second Session, Draft Report of the Working Group on Universal Periodic Review (Pakistan), UN Doc A/HRC/WG.2/L.8, 15 May 2008, p. 10.)
24. Philippines: “The International Covenant on Civil and Political Rights established the manner in which the death penalty could be imposed in a criminal justice system and a democratic civil society. As a State party to that Covenant, the Philippines imposed the death penalty only for heinous crimes and with full respect for due process and with safeguards for the rights of the accused, including the right to seek clemency or commutation of the sentence.” (Statement of Ms. Ramiro Lopez, representative of the Philippines, General Assembly, Official Records, Fifty-fourth session, Third Committee, Summary record of the 31st meeting, 22 December 1999, UN Doc A/C.3/54/SR.31, p. 2.)
25. Santa Lucia: “The Constitution of Santa Lucia considered the death penalty to be a legitimate punishment and the Criminal Code limited its use to cases of murder. The Constitution also established that a convicted person could make appeals and that the Governor-General decided on requests for clemency.” (Statement of Mr. Hunte, Representative of Santa Lucia, General Assembly, Official Records, Third Committee, Summary Record of the 29th meeting, UN Doc A/C.3/54/SR.29, 10 February 2000, p. 9.)
26. Singapore: “Singapore recognizes that the death penalty is a severe penalty and cannot be remedied in the event of any mistake in its application. That is why we have used it sparingly and only for the most heinous crimes. More importantly,

we do our utmost to ensure that any prosecution involving the death penalty is handled with the greatest care, that the investigations are thorough and fair, that the trial is conducted with due process, that the accused are given adequate legal representation and that only persons of the highest integrity are assigned as judges on such matters.” (Letter dated 27 October 1999 from the Permanent Representative of Singapore to the United Nations addressed to the President of the General Assembly, UN Doc A/C.3/54/5, 1 November 1999); “Safeguards were, indeed, essential, and Singapore, like the United States, would support any European Union move to strengthen them. Singapore agreed that it was important to prevent the execution of innocent people, which was why it intended to propose an amendment to paragraph 3 of the draft resolution [on a moratorium for the death penalty] to emphasize the need for due process.... Due process could save innocent lives ...” (Statement of Mr. Mahbubani, Representative of Singapore, General Assembly, Official Records, Third Committee, Summary record of the 30th meeting, UN Doc A/C.3/54/SR.30, 22 November 1999, p. 5); “Let me underscore that the Singapore Government is deeply conscious of and attaches the highest importance to the rights of every individual to life, liberty and security of person. This is a right enshrined in our Constitution. Article 9(1) of the Constitution of the Republic of Singapore states that “no person shall be deprived of his life or personal liberty *save in accordance with law*” [emphasis in original] ... The Singapore Government has taken all the necessary steps to ensure that everyone who is convicted by a court of law in Singapore, including those sentenced to death, is given full recourse to due legal process. This includes a fair and open trial, the right to legal assistance at all stages, the right to appeal and the right to seek pardon or commutation of sentence. In addition, every person convicted by a court of law in Singapore has a right of appeal.” (Ambassador See Chak Mun, letter to the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, in Economic and Social Council, Commission on Human Rights, UN Doc E/CN.4/1998/113, 5 December 1997, p. 2.)

27. Slovenia: “It was imperative strictly to respect international obligations relating to the death penalty, in particular the Convention on the rights of the child and the

International Covenant on Civil and Political Rights.” (Statement of Ms. Tomic, Representative of Slovenia, General Assembly, Official Records, Third Committee, Summary record of the 30th meeting, UN Doc A/C.3/54/SR.30, 22 November 1999, pp. 2-3)

28. Switzerland: “[In the context of commenting on Pakistan’s use of the death penalty, Switzerland] recall[ed] that the rules of fair trial are fundamental, [and] called on Pakistan to respect these as diligently as possible.” (General Assembly, Human Rights Council, Working Group on the Universal Periodic Review, Second Session, Draft Report of the Working Group on Universal Periodic Review (Pakistan), UN Doc A/HRC/WG.g/2/L.8, 15 May 2008, p. 9.)
29. Syrian Arab Republic: “[Syria] applied capital punishment only for the most serious crimes, in accordance with article 6 of the Covenant [ICCPR].” (Statement of Ms. Halabi, Representative of Syria, General Assembly, Official Records, Third Committee, 62nd meeting, UN Doc A/C.3/62/SR.43, 18 December 2007, p. 8.); “Syria, which had acceded to the International Covenant on Civil and Political Rights, only applied the death penalty in exceptionally serious circumstances, providing the offender with legal guarantees, including the right to self-defence.”; (Statement of Mr. Wehbe, Representative of Syria, General Assembly, Official Records, Third Committee, Summary record of the 30th meeting, UN Doc A/C.3/54/SR.30, 22 November 1999, p. 4)
30. Thailand: “Thailand had amended its domestic legislation to bring it into line with the International Covenant on Civil and Political Rights, which did not prohibit the death penalty. His country’s legislation provided extensive safeguards to ensure due process.” (Statement of Mr. Punkrasin, Representative of Thailand, General Assembly, Official Records, Third Committee, 62nd session, UN Doc A/C.3/62/SR.46, 24 December 2007, pp. 6.); “[There] had never been any international consensus that capital punishment should be abolished ... It was, however, necessary to ensure that safeguards were put in place to guarantee compliance with international human rights norms... In [Thailand] due legal process was observed and there was a full right of appeal against the death sentence.” (Statement of Mr. Chandrabha, Representative of the Thailand,

Commission on Human Rights, 59th session, Summary Record of the 61st meeting, UN Doc E/CN.4/2003/SR.61, 26 May 2003, p.17.)

31. Trinidad and Tobago: “[International] law recognized the death penalty as a legitimate mode of punishment available to States in exercise of their sovereign right to decide on the form of punishment for serious crimes. Indeed, major international and regional human rights instruments sought to limit – but not abolish – capital punishment. They did not demand that States should amend their laws in respect of the death penalty, but rather provided certain important safeguards (as in Economic and Social Council resolution 1984/50). Those safeguards were strictly observed in Trinidad and Tobago.”(Statement of Mr. McKenzie, Representative of Trinidad and Tobago, General Assembly, Official Records, Third Committee, Summary record of the 30th meeting, UN Doc A/C.3/54/SR.30, 22 November 1999, p. 5)
32. United Republic of Tanzania: “The death penalty is still lawful in [Tanzania] and was applied in a manner consistent with the International Covenant on Civil and Political Rights. It was applied only for the most serious crimes of murder and treason, and all trials in capital cases followed strict procedures to safeguard the prisoner’s rights.” (Statement of Ms. Kafanabo, Representative of United Republic of Tanzania, General Assembly, Official Records, Third Committee, 62nd session, UN Doc A/C.3/62/SR.46, 24 December 2007, p. 8.)
33. United States of America: “[It] was important to recognize that international law did not prohibit capital punishment. The International Covenant on Civil and Political Rights specifically recognized the right of countries to impose the death penalty for the most serious crimes, provided it was carried out pursuant to a final judgment rendered by a competent court and in accordance with appropriate safeguards and observance of due process. The United States urged all States that applied the death penalty to do so in conformity with their international human rights obligations and to ensure that it was not applied in an extrajudicial, summary or arbitrary matter.” (Statement of Mr. Rees, Representative of the USA, General Assembly, Official Records, Third Committee, 62nd session, UN Doc A/C.3/62/SR.46, 24 December 2007, p. 8); “[I]nternational law did not

prohibit the death penalty when due process safeguards were respected and when capital punishment was applied only to the most serious crimes... Public debate notwithstanding, the United States public was of one mind that, when the death penalty was used, due process must be rigorously observed by all governmental bodies at all levels.” (Statement of Mr. Solomon, Representative of the USA, Commission on Human Rights, 59th session, Summary Record of the 61st meeting, UN Doc E/CN.4/2003/SR.61, 26 May 2003, p.16); “While international law limited the death penalty to the most serious crimes and required certain safeguards, most notably due process, it did not prohibit capital punishment... [In the USA] the death penalty was imposed only after a lengthy appeal and judicial review.” (Statement of Mr. Southwick, Representative of the USA, General Assembly, Official Records, Third Committee, Summary Record of the 29th meeting, UN Doc A/C.3/54/SR.29, 10 February 2000, p. 5.); “[C]ustomary international law did not prohibit the death penalty ... It recognized the rights of States to impose the death penalty under certain circumstances and consistent with protections that ensured due process ... The United States Supreme Court has held that, with proper protection for due process, the death penalty did not violate the Eighth Amendment’s prohibition against cruel and unusual punishment.”; (Statement of Miss Byrne, Representative of the USA, General Assembly, Official Records, Third Committee, Summary Record of the 57th meeting, UN Doc A/C.3.43.SR.57, 5 December 1988, p. 4.); “We’ve repeatedly expressed our concern to Chinese authorities since December about Lobsang Dhondup and Tenzin Delek Rinpoche. The secrecy with which these trials were conducted, the lack of due process accorded to these two defendants, and the severity of the sentences are evidence of China’s dismal human rights record These issues raise serious questions about China’s adherence to its own criminal laws and the People’s Republic of China’s respect for the rule of law and international legal standards.” (US State Department, extracted in: Written Statement submitted for Society for Threatened Peoples, Commission on Human Rights, UN Doc E/CN.4/2003/NGO/255, 20 March 2003, p. 4.)

Appendix B: Constitutional Provisions of Retentionist Countries

Afghanistan

The Constitution of the Islamic Republic of Afghanistan, drafted 14 December 2003-4 January 2004; signed 16 January 2004, ratified 26 January 2004 by Loy Jirga. Translation from <http://www.president.gov.af/mfiles/printpage.aspx?title=Islamic%20Republic%20of%20Afghanistan%20%u2013%20Office%20of%20the%20President&url=http%3A//www.president.gov.af/english/constitution.msp> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 23 provides:

Life is the gift of God as well as the natural right of human beings. No one shall be deprived of this except by legal provision.

The Right to a Fair Trial / Right to Defense / Process of Law

Article 27 provides:

No deed shall be considered a crime unless ruled by a law promulgated prior to commitment of the offense. No one shall be pursued, arrested, or detained without due process of law. No one shall be punished without the decision of an authoritative court taken in accordance with the provisions of the law, promulgated prior to commitment of the offense.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 116 provides:

The judiciary shall be an independent organ of the state of the Islamic Republic of Afghanistan. The judiciary shall be comprised of one Supreme Court, Courts of Appeal as well as Primary Courts whose organization and authority shall be regulated by law. The Supreme Court shall be the highest judicial organ, heading the judicial power of the Islamic Republic of Afghanistan.

The Right to Counsel

Article 31 provides:

Upon arrest, or to prove truth, every individual can appoint a defense attorney. Immediately upon arrest, the accused shall have the right to be informed of the nature of the accusation, and appear before the court within the time limit specified by law. In criminal cases, the state shall appoint a defense attorney for the indigent. Confidentiality of conversations, correspondence, and communications between the accused and their attorney shall be secure from any kind of violation. The duties and powers of defense attorneys shall be regulated by law.

The Right to Appeal

The Afghan constitution does not provide for an express right to appeal. It does, however, provide that any capital sentence must be approved by the President before it becomes enforceable.

Article 129 provides:

In issuing decision, the court is obligated to state the reason for its verdict. All final decisions of the courts shall be enforced, except for capital punishment, which shall require Presidential approval.

Antigua and Barbuda

The Constitution of Antigua and Barbuda 1981, made 31 July 1981, entered into force 31 October 1981. Found at <<http://pdba.georgetown.edu/Constitutions/Antigua/antigua-barbuda.html>> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Section 4(1) provides:

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a crime of treason or murder of which he has been convicted.

The Right to a Fair Trial / Right to Defense / Process of Law

Section 15(1) provides:

If any person is charged with a criminal offence then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by a [sic] independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Section 15(1), see above.

The Right to Counsel

Section 15(2)(d) provides:

Every person who is charged with a criminal offence -
... shall be permitted to defend himself before the court in person or by a legal practitioner of his own choice;

The Right to Appeal

Section 122 provides:

Subject to the provisions of section 44 of this Constitution, an appeal shall lie from decisions of the High Court to the Court of Appeal as of right in the following cases-

- a. final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution;
- b. final decisions given in exercise of the jurisdiction conferred on the High Court by section 18 of this Constitution (which relates to the enforcement of the fundamental rights and freedom); and
- c. such other cases as may be prescribed by Parliament.

Note: The 'provisions of section 44' provide a specific procedure for dealing with electoral disputes.

The Commonwealth of the Bahamas

The Constitution of the Commonwealth of the Bahamas, made 20 June 1973, entered into force 10 July 1973. Found at

<<http://www.bahamas.gov.bs/bahamasweb2/home.nsf/vContentW/GOV-->

[About+the+Government--The+Constitution+of+the+Bahamas](#)> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Section 16(1) provides:

No person shall be deprived intentionally of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

The Right to a Fair Trial / Right to Defense / Process of Law

Section 20(1) provides:

If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Section 20(1), see above.

The Right to Counsel

Section 20(2)(d) provides:

Every person who is charged with a crime –
shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his

The Right to Appeal

Section 104(1) provides:

An appeal to the Court of appeal shall lie as of right from final decisions of the Supreme Court given in exercise of the jurisdiction conferred on the Supreme

Court by Article 28 of this Constitution (which relates to the enforcement of fundamental rights and freedoms).

Bahrain

The Constitution of the State of Bahrain, entered into force 14 Feb 2002. Translation found at <http://confinder.richmond.edu/admin/docs/Bahrain.pdf> on 17 November 2008.

The Right to Life / The Inviolability of the Person

The Bahraini Constitution does not expressly recognise either of these rights.

The Right to a Fair Trial / Right to Defense / Process of Law

Article 20(c) provides:

An accused person shall be presumed innocent until proved guilty in a legal trial in which the necessary guarantees for the exercise of his right of defense in all the stages of investigation and trial are ensured in accordance with the law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Articles 101(a) and (b) provide:

- (a). The honour of the judiciary and the integrity and impartiality of judges are the bases of rule and a guarantee of rights and liberties.
- (b). In the administration of justice judges shall not be subject to any authority. No interference whatsoever shall be allowed in the conduct of justice. The law shall guarantee the independence of the judiciary and shall state the guarantees and provisions relating to the judges.

The Right to Counsel

Article 20(e) provides:

A council for the defense of any person accused of a felony shall be appointed with the approval of the accused.

The Right to Appeal

No express right to counsel is expressly recognised by the Bahraini constitution.

Bangladesh

The Constitution of the People's Republic of Bangladesh, adopted 4 November 1972, entered into force 16 December 1972, suspended following coup of 24 March 1982, restored 10 November 1986; amended many times. Translation found at <http://www.pmo.gov.bd/constitution/> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 32 provides:

No person shall be deprived of life or personal liberty save in accordance with law.

The Right to a Fair Trial / Right to Defense / Process of Law

Article 31 provides:

To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 35(3) provides:

Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.

The Right to Counsel

Article 33(1) provides:

No person who is arrested shall be detained in custody without being informed, as soon as may be of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

The Right to Appeal

Article 103(2)(b) provides for an appeal as of right in capital cases:

An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division shall lie as of right where the High Court Division-

- (a) certifies that the case involves a substantial question of law as to the interpretation of this constitution ; or
- (b) has sentenced a person to death or to imprisonment for life, or
- (c) has imposed punishment on a person for contempt of that division; and in such other cases as may be provided for by Act of Parliament.

Barbados

The Constitution of Barbados, made 22 November 1966, entered into force 30 November 1966. Found at <<http://www.barbados.gov.bb/bdsconst.htm>> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Section 12(1) provides:

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offense under the law of Barbados of which he has been convicted.

The Right to a Fair Trial / Right to Defense / Process of Law

Section 18(1) provides:

If any person is charged with a criminal offense, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Section 18(1), see above.

The Right to Counsel

Section 18(2)(d) provides:

Every person who is charged with a criminal offence –

... shall be permitted to defend himself before the court in person or by a legal representative of his own choice

The Right to Appeal

Section 87 provides:

An appeal to the Court of Appeal shall lie as of right from final decisions of the High Court given in exercise of the jurisdiction conferred on the High Court by section 24 (which relates to the enforcement for fundamental rights and freedoms).

Belarus

Constitution of the Republic of Belarus, entered into force 15 March 1994; revised by national referendum of 24 November 1996 giving the presidency greatly expanded powers and became effective 27 November 1996; revised again 17 October 2004 removing presidential term limits. Translation found at <http://www.president.gov.by/en/press10669.html> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 24 provides:

Every person shall have the right to life.

The State shall protect the life of the individual against any illegal infringements.

Until its abolition, the death sentence may be applied in accordance with the law as an exceptional penalty for especially grave crimes and only in accordance with the verdict of a court of law.

The Right to a Fair Trial / Right to Defense / Process of Law

Article 26 provides:

No one may be found guilty of a crime unless his guilt is proven under the procedure specified in law and established by the verdict of a court of law that has acquired legal force. A defendant shall not be required to prove one's innocence

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 110 provides:

In administering justice[,] judges shall be independent and subordinate to law alone.

Any interference in judges' activities in the administration of justice shall be impermissible and liable to legal action.

Article 115 requires that justice be administered 'on the basis of ... equality of the parties involved in the trial.'

The Right to Counsel

Article 62 provides:

Everyone shall have the right to legal assistance to exercise and defend his rights and liberties, including the right to make use, at any time, of the assistance of lawyers and one's other representatives in court, other state bodies, bodies of local government, enterprises, establishments, organizations and public associations, and also in relations with officials and citizens. In the instances specified in law, legal assistance shall be rendered from public funds.

Opposition to the rendering of legal assistance shall be prohibited in the Republic of Belarus.

The Right to Appeal

Article 115 provides in relevant part:

The parties and the persons have the right to appeal rulings, sentences and other judicial decisions.

Belize

Constitution of Belize, entered into force 21 September 1981. Found at http://www.belize-law.org/e_library/constitution.html on 17 November 2008.

The Right to Life / The Inviolability of the Person

Section 4(1) provides:

A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law of which he has been convicted.

The Right to a Fair Trial / Right to Defense / Process of Law

Section 6(2) provides:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 6(2) above.

The Right to Counsel

Section 6(3)(d) provides:

Every person who is charged with a criminal offence-
... shall be permitted to defend himself before the court in person or, at his own expense, by a legal practitioner of his own choice

The Right to Appeal

Section 20(4) provides:

Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal:

Provided that no appeal shall lie from a determination of the Supreme Court under this section dismissing an application on the grounds that it is frivolous or vexatious.

Botswana

Constitution of Botswana, prepared March 1965, entered into force 30 September 1966. Translation found at <http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Section 4(1) provides:

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.

The Right to a Fair Trial / Right to Defense / Process of Law

Section 10(1) provides:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 10(1) above.

The Right to Counsel

Section 10(2)(d) provides:

Every person who is charged with a criminal offence—
... shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;

The Right to Appeal

Section 105 provides:

Where any question as to the interpretation of this Constitution arises in any proceedings in any subordinate court and the court is of the opinion that the question involves a substantial question of law, the court may, and shall, if any party to the proceedings so requests, refer the question to the High Court.

Burundi

The Constitution of the Republic of Burundi, promulgated 18 March 2005, ratified by popular referendum 28 February 2005. Found in French at http://www.accpuf.org/images/pdf/cm/burundi/031-tf-txt_const.pdf on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 24 provides:

All women, all men have the right to life.

The Right to a Fair Trial / Right to Defense / Process of Law

Article 39 provides, in relevant part:

The right to defense shall be guaranteed in all jurisdictions.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Separation of powers is guaranteed under article 209 which provides, in part:

The judicial branch is impartial and independent of the legislative and executive branches.

In the exercise of their functions, a judge is subject only to the Constitution and the law.

The Right to Counsel

No express provision for the right to counsel appears in the Constitution.

The Right to Appeal

No express right of appeal is provided for in the Burundais Constitution.

Cameroon

The Constitution of the Democratic Republic of Cameroon, approved by referendum 20 May 1972, adopted 2 June 1972; revised January 1996. Found in French at <http://www.prc.cm/instit/consti.htm> on 17 November 2008.

The Right to Life / The Inviolability of the Person

The right to life is recognised in the Preamble to the Cameroonian Constitution:

Every person has the right to life and physical and mental integrity.

The Right to a Fair Trial / Right to Defense / Process of Law

The right to a fair trial is also recognised in the Preamble:

Every person has the right to a fair trial [le droit de se faire rendre justice].

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 37(2) provides:

The judicial power is exercised by the Supreme Court, the Court of Appeal and the Tribunals. It is independent of the legislative and executive powers.

Magistrates are subject only to the Constitution and their conscience.

The Right to Counsel

The right to counsel is not expressly provided for in the Cameroonian Constitution.

The Right to Appeal

The right to appeal is not expressly provided for in the Cameroonian Constitution.

Chad

The Constitution of the Republic of Chad, passed by referendum 31 March 1996; a June 2005 referendum removed constitutional term limits. Found in French at <http://droit.francophonie.org/df-web/publication.do?publicationId=4322> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 17 provides:

The human body is sacred and inviolable.

Every person has the right to life, integrity of person, security, liberty, protection of their private lives and property.

The Right to a Fair Trial / Right to Defense / Process of Law

Article 24 provides:

Everyone is presumed innocent until proven guilty in a fair trial offering the indispensable guarantees for one's defense.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 146 provides:

The judiciary is independent of the legislature and the executive.

The Right to Counsel

No express right to counsel.

The Right to Appeal

No express right to appeal.

The People's Republic of China

Constitution of the People's Republic of China, most recent promulgation 4 December 1982. Translation found at <http://www.gov.cn/english/2005-08/05/content_20813.htm> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 37 provides in relevant part:

Freedom of the person of citizens of the People's Republic of China is inviolable.

The Right to a Fair Trial / Right to Defense / Process of Law

The Chinese Constitution does not explicitly provide a right to a fair trial. Article 12 of the *Criminal Procedure Law 1997* does provide that no person shall be found guilty of a crime except after being tried 'according to law'. Article 14 also provides that State bodies involved in the trial process shall 'safeguard the procedural rights to which participants in proceedings are entitled according to law.'

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 126 provides:

The people's courts exercise judicial power independently, in accordance with the provisions of the law, and are not subject to interference by any administrative organ, public organization or individual.

The Right to Counsel

The right to counsel is guaranteed by the CPL. Article 34 provides that ‘in cases where the accused may be sentenced to capital punishment and he does not retain any defenders, the People’s Court shall appoint a lawyer, who is voluntarily undertaking legal aid obligation, to defend him’.

The Right to Appeal

The right to appeal is provided for by the CPL. Article 180 of the CPL provides a right of appeal. In addition, articles 199 – 202 provide for mandatory review of capital sentences.

Comoros

Constitution of the Comoros Union, entered into force 23 December 2001. Found in French at http://www.accpuf.org/images/pdf/cm/comores/031-tf-txt_const.pdf on 17 November 2008.

The Right to Life / The Inviolability of the Person

The Preamble to the Constitution of the Comoros Union recognises ‘the freedom and security of every person, provided only that they do nothing likely to injure another person.’

The Right to a Fair Trial / Right to Defense / Process of Law

The Preamble also recognises the right to defense, referring to ‘equality before the law and the right of every citizen to a defense’.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 28 provides, in relevant part:

The judiciary is independent of the legislature and the executive. In the exercise of their functions, judges are responsible only to the law.

The Right to Counsel

No express right to counsel recognised.

The Right to Appeal

No express right to appeal recognised.

The Democratic Republic of Congo

Constitution of the Democratic Republic of Congo, entered into force 18 February 2006. Found in French at <<http://www.presidentrdc.cd/constitution.html>> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 16 provides:

The human person is sacred. The State must respect and protect it.

Everyone has the right to life, physical integrity and the free development of his personality while respecting the law, public order, the rights of others and public morals.

No one is to be enslaved or held in a similar condition.

No one is to be subjected to cruel, inhuman or degrading conditions.

No one is to be subject to forced labour.

The Right to a Fair Trial / Right to Defense / Process of Law

Article 19 provides, in relevant part:

No one is to be held against their will or fined except according to law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 149 provides:

Judicial power is independent of the legislature and the executive.

It is vested in the Courts which are: the Constitutional Court, the Court of Cassation, the State Council, the High Military Court, civil and military courts and tribunals as well as prosecutors attached thereto.

The Right to Counsel

Article 19 provides, in relevant part:

Everyone has the right to defend himself or be represented by a lawyer of his choice and at all levels of criminal proceedings ...

The Right to Appeal

No express right to appeal recognised.

Cuba

Constitution of Cuba, entered into force 24 February 1976; amended July 1992 and June 2002. Found at <http://www.cubanet.org/ref/dis/const_92_e.htm> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 58 provides:

Freedom and inviolability of persons is assured to all those who live in the country.

Nobody can be arrested, except in the manner, with the guarantees and in the cases indicated by law.

The persons who has been arrested or the prisoner is inviolable in his personal integrity.

The Right to a Fair Trial / Right to Defense / Process of Law

Article 59 provides, in relevant part:

Every accused person has the right to a defense.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 121 provides, in relevant part:

The courts constitute a system of state bodies which are set up with functional independence from all other systems and they are only subordinated to the National Assembly of People's Power and the Council of State.

Article 122 provides, in relevant part:

The judges, in their function of administering justice, are independent and only owe obedience to the law.

The Right to Counsel

No express right to counsel recognised.

The Right to Appeal

No express right to appeal recognised.

Dominica

Constitution of the Commonwealth of Dominica, made 25 July 1978, entered into force 3 November 1978. Found at http://www.da-academy.org/DA_Constitution.html on 17 November 2008.

The Right to Life / The Inviolability of the Person

Section 2(1) provides:

A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Dominica of which he has been convicted.

The Right to a Fair Trial / Right to Defense / Process of Law

Section 8(1) provides:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 8(1) above.

The Right to Counsel

Section 8(2)(d) provides:

Every person who is charged with a criminal offence-
... shall be permitted to defend himself before the court in person or, at his own expense, by a legal practitioner of his own choice

The Right to Appeal

Articles 103 and 104 of the Constitution permit the referral of constitutional questions to the Dominican High Court.

Egypt

Constitution of the Arab Republic of Egypt, adopted 11 September 1971; amended 22 May 1980, 25 May 2005, and 26 March 2007. Translation from <<http://constitution.sis.gov.eg/en/2.htm>> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Neither right is expressly protected in the Egyptian Constitution.

The Right to a Fair Trial / Right to Defense / Process of Law

Article 69 provides, in relevant part:

The right of defense in person or by proxy is guaranteed.

The Right to Counsel

The right to counsel is guaranteed by articles 67 and 69. Article 67 provides, in part:

Every person accused of a crime shall be provided with counsel for his defense.

Article 69 provides, in part:

The Law shall secure, for financially incapable citizens, means to resort to justice and to defend their rights.

The Right to Appeal

Article 71 provides, in part:

Any person may lodge an appeal to the courts against any measure taken to restrict his individual freedom.

Equatorial Guinea

Constitution of Equatorial Guinea, approved by national referendum 17 November 1991, amended January 1995. Translation found at <<http://guinea-equatorial.com/government/index.cfm?PageID=26>> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 13(a) provides that every citizen shall enjoy ‘[t]he respect of his person, life, integrity and physical and moral dignity. Capital punishment shall only be applied for crimes condemned by the law’.

The Right to a Fair Trial / Right to Defense / Process of Law

Article 13(j) provides that every citizen shall enjoy ‘the right to a fair hearing before the courts’.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 83 provides:

The judicial power shall be independent of the executive and legislative powers. It shall exercise the legal functions of the state.

The Right to Counsel

No express right to counsel recognised.

The Right to Appeal

No express right to appeal recognised.

Ethiopia

Constitution of the Federal Democratic Republic of Ethiopia, ratified 8 December 1994, effective 22 August 1995. Translation found at <<http://www.ethiopiafirst.com/Election2008/Constitution.pdf>> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 15 provides:

Every person has the right to life. No person may be deprived of his life except as a punishment for a serious criminal offence determined by law.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 20(3) provides:

During proceedings accused persons have the right to be presumed innocent until proved guilty according to law and not to be compelled to testify against themselves.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Articles 79(2) and (3) provide:

(2) Courts of any level shall be free from any interference of influence of any governmental body, government official or from any other source.

(3) Judges shall exercise their functions in full independence and shall be directed solely by the law.

The Right to Counsel

Article 20(6) provides:

Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense.

The Right to Appeal

Article 20(7) provides:

All persons have the right of appeal to the competent court against an order or a judgment of the court which first heard the case.

Guatemala

Constitution of the Republic of Guatemala (1985), at <http://pdba.georgetown.edu/Constitutions/Guate/guate93.html> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 6 provides:

The right to life. The state guarantees and protects human life from conception, as well as the integrity and security of person.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 12 provides:

No one shall be convicted or deprived of his rights without having been charged, and heard in legal proceedings before a competent court.

No person can be tried by Special Courts or in secret, nor by proceedings not lawfully established.

The Right to Appeal

Article 18 provides for the specific right to appeal in death penalty cases.

Guinea

Constitution of Guinea, enacted 23 December 1990. Found in French at <http://droit.francophonie.org/df-web/publication.do?publicationId=4279> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 6 provides:

Man has the right to freely develop his personality.

He has the right to life and physical integrity. He is not to be the object of torture or cruel, inhuman or degrading treatment.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 9 provides:

Everyone is entitled to a fair trial, in which the right to defence is respected.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 80 provides:

The judicial power is independent from the executive power and the legislative power.

It is exercised solely by the courts and tribunals.

The Right to Counsel

No express right to counsel recognised.

The Right to Appeal

No express right to appeal recognised.

Guyana

Constitution of the Co-operative Republic of Guyana, made 14 February 1980, entered into force 6 October 1980. Found at <http://www.parliament.gov.gy/constitution/Content.html> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Section 138(1) provides:

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law of Guyana of which he has been convicted.

The Right to a Fair Trial / Right to Defence / Process of Law

Section 144(1) provides:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 144(1) above.

The Right to Counsel

Section 144(2)(d) provides:

It shall be the duty of a court to ascertain the truth in

every case provided that every person who is charged with a criminal offence -
... shall be permitted to defend himself before the court in person or by a legal representative of his own choice

The Right to Appeal

Section 153 provides a right to apply to the High Court in respect of any actual or probably constitutional contravention. Section 133 allows an appeal as of right from such decisions.

India

Constitution of India, adopted 26 November 1949, entered into force 26 January 1950; amended many times. Found in English at http://india.gov.in/govt/constitutions_india_bak.php#eng on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 21 provides:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

The Right to a Fair Trial / Right to Defence / Process of Law

See article 21 above. 'Law' in this context has been understood as providing substantive 'due process' protection. See

The Right to an Independent and Impartial Tribunal / Separation of Powers

The Indian Constitution does not expressly provide for the separation of powers. A number of provisions are intended to shield the judiciary from political pressures, however. See arts. 124, 125(2) and 121, providing protection similar to Art. III, § 1 of the *United States Constitution*.

The Right to Counsel

Article 22(1) provides:

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

The Right to Appeal

Article 134(1) provides:

An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court—

- (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or
- (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death

Indonesia

Constitution of the Republic of Indonesia, entered into force August 1945; abrogated by Federal Constitution of 1949 and Provisional Constitution of 1950, restored 5 July 1959; series of amendments concluded in 2002. Found in English at <http://www.us-asean.org/Indonesia/constitution.htm> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 28A provides:

Every person shall have the right to live and to defend his/her life and existence.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 28D(1) provides::

Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 24(1) provides:

The judicial power shall be independent and shall possess the power to organise the judicature in order to enforce law and justice.

The Right to Counsel

The Constitution of Indonesia does not provide for an express right to counsel.

The Right to Appeal

The Constitution of Indonesia does not provide for an express right of appeal.

Iran

Constitution of the Islamic Republic of Iran, entered into force 2-3 December 1979; revised 1989 to expand powers of the presidency and eliminate the prime ministership. Found in English at <http://www.iranonline.com/iran/iran-info/Government/constitution.html> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 22 provides:

The dignity, life, property, rights, residence, and occupation of the individual are inviolate, except in cases sanctioned by law.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 36 provides:

The passing and execution of a sentence must be only by a competent court and in accordance with law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 156 provides, in part, that the judiciary 'is an independent power'.

The Right to Counsel

Article 35 provides:

Both parties to a lawsuit have the right in all courts of law to select an attorney, and if they are unable to do so, arrangements must be made to provide them with legal counsel.

The Right to Appeal

No express right to appeal is recognised in the Iranian Constitution.

Iraq

Republic of Iraq Constitution, approved by referendum 15 October 2005. Found in English at http://confinder.richmond.edu/admin/docs/Iraqi_Constitution_Final_-_30_JAN_06.pdf on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 15 provides:

Every individual has the right to enjoy life, security and liberty. Deprivation or restriction of these rights is prohibited except in accordance with the law and based on a decision issued by a competent judicial authority.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 19 (4th) and (5th) provide:

Fourth The right to a defense shall be sacred and guaranteed in all phases of investigation and the trial.

Fifth The accused is innocent until proven guilty in a fair legal trial. The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 19 (1st) provides:

The judiciary is independent and no power is above the judiciary except the law.

The Right to Counsel

Article 19 (11th) provides:

The court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanor who does not have a defense lawyer.

The Right to Appeal

Article 93 (3rd) appears to guarantee some sort of right of appeal, but the exact meaning is unclear. It provides:

The Federal Supreme Court shall have jurisdiction over ...

Settling matters that arise from the application of the federal laws, decisions, regulations, instructions, and procedures issued by the federal authority. The law shall guarantee the right of direct appeal to the Court to the Council of Ministers, those concerned individuals, and others.

Jamaica

The Constitution of Jamaica, made 23 July 1962, entry into force 25 July 1962 and 6 August 1962. Found at <<http://pdba.georgetown.edu/Constitutions/Jamaica/jam62.html>> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Section 14(1) provides:

No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

The Right to a Fair Trial / Right to Defence / Process of Law

Section 20(1) provides:

Whenever any person is charged with a criminal offense he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 20(1) above.

The Right to Counsel

Section 20(6)(c) provides:

Every person who is charged with a criminal offence -

... shall be permitted to defend himself in person or by a legal representative of his own choice

The Right to Appeal

Section 25 grants a right to apply to the High Court in respect of an actual or anticipated violation of the rights contained in sections 14 – 24 inclusive. Appeal from the decision of the High Court to the Supreme Court lies as of right under s. 25(3).

Japan

Constitution of Japan, entered into force 3 May 1947. Found in English at <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html> on 17 November 2008.

The Right to Life / The Inviolability of the Person

Article 31 provides:

No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

The Right to a Fair Trial / Right to Defence / Process of Law

See article 31 above. Article 31 has been interpreted to provide substantive ‘due process’ protection. See *Organisations Control Ordinance Case* 1956 (A) 3,636.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 37(1) provides:

In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

The Right to Counsel

Article 37(3) provides:

At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

The Right to Appeal

No constitutional right of appeal exists. A statutory right of appeal is available under the *Code of Criminal Procedure*.

Jordan

The Constitution of the Hashemite Kingdom of Jordan, entered into force 1 January 1952; amended many times. Found in English at http://www.kinghussein.gov.jo/constitution_jo.html on 17 November 2008.

The Right to Life / The Inviolability of the Person

Neither right is expressly protected in the Jordanian Constitution.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 8 provides:

No person may be detained or imprisoned except in accordance with the provisions of the law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 97 provides:

Judges are independent, and in the exercise of their judicial functions they are subject to no authority other than that of the law.

The Right to Counsel

No express right to counsel exists under the Jordanian Constitution.

The Right to Appeal

No express right to appeal exists under the Jordanian Constitution.

Democratic People's Republic of Korea (North Korea)

Constitution of the Socialist Republic of Korea, adopted 5 September 1998. Found in English at http://www.novexc.com/dprk_constitution_98.html on 18 November 2008.

The Right to Life / The Inviolability of the Person

Article 79 provides, in relevant part:

Citizens are guaranteed inviolability of the person and the home and privacy of correspondence.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 158 provides, in relevant part:

Court cases are heard in public and the accused is guaranteed the right of defence.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 160 provides:

In administering justice, the Court is independent, and judicial proceedings are carried out in strict accordance with the law.

The Right to Counsel

The North Korean Constitution does not expressly recognise a right to counsel.

The Right to Appeal

The North Korean Constitution does not expressly recognise a right to appeal.

Kuwait

Constitution of Kuwait, adopted and promulgated 11 November 1962. Found in English at http://www.servat.unibe.ch/law/icl/ku00000_.html on 18 November 2008.

The Right to Life / The Inviolability of the Person

Neither right is expressly recognised by the Kuwaiti Constitution.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 34(1) provides:

An accused person is presumed innocent until proved guilty in a legal trial at which the necessary guarantees for the exercise of the right of defence are secured.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 163 provides:

In administering justice, judges are not subject to any authority. No interference whatsoever is allowed with the conduct of justice. Law guarantees the independence of the Judiciary and states the guarantees and provisions relating to judges and the conditions of their irremovability.

The Right to Counsel

The Kuwaiti Constitution does not expressly recognise a right to counsel.

The Right to Appeal

The Kuwaiti Constitution does not expressly recognise a right to appeal.

Lebanon

Constitution of Lebanon, adopted 23 May 1926; amended a number of times, most recently Charter of Lebanese National Reconciliation (Ta'if Accord) of October 1989. Found in English at http://www.servat.unibe.ch/law/icl/le00000_.html on 18 November 2008.

The Right to Life / The Inviolability of the Person

Neither right is expressly recognised in the Lebanese Constitution.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 8 provides:

Individual liberty is guaranteed and protected by law. No one may be arrested, imprisoned, or kept in custody except according to the provisions of the law. No offense may be established or penalty imposed except by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 20 provides:

Judicial power is to be exercised by the tribunals of various levels and jurisdictions. It functions within the limits of an order established by the law and offering the necessary guarantees to judges and litigants. The limits and conditions for the protection of the judges are determined by law. The judges are independent in the exercise of their duties. The decisions and judgments of all courts are rendered and executed in the name of the Lebanese People.

The Right to Counsel

The Lebanese Constitution does not appear to guarantee the right to counsel.

The Right to Appeal

The Lebanese Constitution does not appear to guarantee the right to appeal.

Lesotho

Constitution of Lesotho, ratified 5 Feb 1993, amended 27 Mar 1993. Found at http://www.lesotho.gov.ls/documents/Lesotho_Constitution.pdf on 18 November 2008.

The Right to Life / The Inviolability of the Person

Section 5(1) provides:

Every human being has an inherent right to life. No one shall be arbitrarily deprived of his life.

The Right to a Fair Trial / Right to Defence / Process of Law

Section 12(1) provides:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 12(1) above.

The Right to Counsel

Section 12(2)(d) provides;

Every person who is charged with a criminal offence –
... shall be permitted to defend himself before the court in person or by a legal representative of his own choice;

The Right to Appeal

Section 22 provides for a right to apply to the High Court in the event of an actual or threatened contravention of sections 4 – 21 (the fundamental rights). Under section 22(4), an appeal lies, as of right, from the decision of the High Court in such cases.

Libya

Constitutional Proclamation, adopted 11 December 1969. Found in English at http://www.servat.unibe.ch/law/icl/ly00000_.html on 18 November 2008.

The Right to Life / The Inviolability of the Person

The Constitutional Proclamation does not appear to recognise either of these rights.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 31(c) provides:

The defendant shall be presumed innocent until proven guilty. All necessary guarantees for the exercise of his defense shall be provided. The accused or imprisoned shall not be subjected to mental or physical harm.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 28 provides:

Judges shall be independent. In the exercise of their functions, they shall be free from any authority except that of the law and their conscience.

The Right to Counsel

The Constitutional Proclamation does not expressly recognise the right to counsel.

The Right to Appeal

The Constitutional Proclamation does not expressly recognise the right to appeal.

Malaysia

Constitution of the Federation of Malaysia, entered into force 31 August 1957, amended many times, most recently in 2007. Found in English at http://www.parliament.go.th/parcy/sapa_db/cons_doc/constitutions/data/Malaysia/malaysia.pdf on 18 November 2008.

The Right to Life / The Inviolability of the Person

Article 5(1) provides:

No person shall be deprived of his life or personal liberty save in accordance with law.

The Right to a Fair Trial / Right to Defence / Process of Law

See above section 5(1). Section 5(1) has been held by the Malaysian Courts to include 'fundamental rules of natural justice' known to the English common law in 1957. See *Ani Che Bin Itam v Public Prosecutor* [1984] 1 *Malaysian Law Journal* 113 and Jack Lee Tsen-Ta, 'Rediscovering the Constitution' 16 *Sing L R* 157 (1995).

The Right to an Independent and Impartial Tribunal / Separation of Powers

See above. 'Natural justice' in 1957 would incorporate the right to a fair hearing. See, e.g., *R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 (holding that even the appearance of bias may invalidate a trial). In addition, the Constitution provides various indicia of judicial independence including fixed tenure and removal only for cause. See ss. 122B, 125.

The Right to Counsel

Section 5(3) provides:

Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

The Right to Appeal

The right to appeal does not appear to be expressly provided for by the Malaysian Constitution.

Mongolia

Constitution of Mongolia, adopted on January 13, 1992, put into force on February 12, and amended in 1999 and 2001. Found in English at http://www.mongolianembassy.us/eng_foreign_policy/the_constitution_of_mongolia.php at 18 November 2008.

The Right to Life / The Inviolability of the Person

Article 16(1) provides that every person shall have:

Right to life. Deprivation of human life shall be strictly prohibited unless capital punishment is imposed by due judgement of the court for the most serious crimes, constructed by Mongolian Penal Law.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 16 (14) provides that every person shall have, among other procedural guarantees, the right 'to a fair trial'.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 49 provides:

Judges shall be independent and subject only to law.

The Right to Counsel

Article 16 (14) provides that every person shall have, among other procedural guarantees, the right 'to receive legal assistance'.

The Right to Appeal

Article 16 (14) provides that every person shall have, among other procedural guarantees, the right 'to appeal against a court judgement'.

Nigeria

Constitution of the Federal Republic of Nigeria, adopted 5 May 1999; effective 29 May 1999. Found at <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria.htm> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Section 33(1) provides:

Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

The Right to a Fair Trial / Right to Defence / Process of Law

Section 36(4) provides:

Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal:

Provided that -

- (a) a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;
- (b) if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a commissioner of the government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Section 17(2)(e) provides that, 'in furtherance of the social order' 'the independence, impartiality and integrity of courts of law, and easy accessibility thereto shall be secured and maintained.'

The Right to Counsel

Section 33(6)(c) provides:

Every person who is charged with a criminal offence shall be entitled to –
... defend himself in person or by legal practitioners of his own choice

The Right to Appeal

Section 241(1)(e) of the Constitution specifically provides for a right to appeal to the Court of Appeal where a death sentence is imposed. Section 233(2)(d) provides for a further right of appeal to the Supreme Court if the Court of Appeal affirms the death sentence.

Oman

The Basic Law of the Sultanate of Oman, adopted 6 November 1996. Found in English at <http://www.servat.unibe.ch/icl/mu00000_.html> on 18 November 2008.

The Right to Life / The Inviolability of the Person

The Basic Law of Oman does not recognise either of these rights.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 22 provides:

An accused person is innocent until proven guilty in a legal trial which ensures him the essential guarantee to exercise his right of defence according to the Law. It is prohibited to harm the accused either bodily or mentally.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 59, 60 and 61 provides for the independence of the judiciary:

Article 59 [Rule of Law, Impartiality]

The sovereignty of the Law is the basis of governance in the State. Rights and freedoms are guaranteed by the dignity of the judiciary and the probity and impartiality of the judges.

Article 60 [Independence of the Courts]

Judicial power is independent and vested in the Courts of Law, of whatever type or status, which issue judgements in accordance with the Law.

Article 61 [Independence of Judges]

There is no power over the judges in their rulings except the Law. Judges can only be dismissed in cases specified by the Law. No party may interfere in a law suit or in matters of justice; such interference shall be a crime punishable by law. The Law shall specify the conditions to be fulfilled for those administering justice, the conditions and procedures for the appointment of judges, their transfer and promotion, the security offered to them, the cases in which they are not liable for dismissal, and other relevant provisions.

The Right to Counsel

Article 23 provides:

The accused has the right to appoint a person who has the ability to defend him during the trial. The Law defines the circumstances which require the presence of a lawyer on behalf of the accused and guarantees those without the financial capacity, the means to resort to justice and the defence of their rights.

The Right to Appeal

The Basic Law does not provide an express right of appeal.

Pakistan

The Constitution of the Islamic Republic of Pakistan, adopted 12 April 1973; suspended 5 July 1977, restored 30 December 1985; suspended 15 October 1999, restored in stages in 2002; amended 31 December 2003; suspended 3 November 2007; restored on 15 December 2007. Found in English at <<http://www.pakistani.org/pakistan/constitution/>> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Section 9 provides:

No person shall be deprived of life or liberty save in accordance with law.

The Right to a Fair Trial / Right to Defence / Process of Law

Section 9's requirement that no one be deprived of life 'save in accordance with law' is a process of law guarantee.

The Right to an Independent and Impartial Tribunal / Separation of Powers

The Preamble to the Constitution provides that ‘the independence of the judiciary shall be fully secured’.

The Right to Counsel

Section 10(1) provides:

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

The Right to Appeal

Section 185 provides the Supreme Court with an appellate jurisdiction where the High Court has imposed a sentence of death, whether in its original or appellate jurisdiction.

Palestinian Authority

Palestinian Basic Law, promulgated 18 March 2003, amended in 2005. Found in English at <<http://www.palestinianbasiclaw.org/>> on 18 November 2008.

The Right to Life / The Inviolability of the Person

The Basic Law does not expressly guarantee the right to life, although article 10(1) provides that ‘basic human rights’ shall be protected and respected.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 14 provides:

An accused person is considered innocent until proven guilty in a court of law that guarantees the accused the right to a defense. Any person accused in a criminal case shall be represented by a lawyer.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Articles 97 and 98 provide:

Article 97

The judicial authority shall be independent and shall be exercised by the courts at different types and levels. The law shall determine the way they are constituted

and their jurisdiction. They shall issue their rulings in accordance with the law. Judicial rulings shall be announced and executed in the name of the Palestinian Arab people.

Article 98

Judges shall be independent and shall not be subject to any authority other than the authority of the law while exercising their duties. No other authority may interfere in the judiciary or in judicial affairs.

The Right to Counsel

No express right to counsel is contained in the Basic Law.

The Right to Appeal

No express right to appeal is contained in the Basic Law.

Qatar

Permanent Constitution of the State of Qatar, ratified 8 June 2004. Found in English at <http://english.mofa.gov.qa/details.cfm?id=80> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Neither of these rights are expressly recognised by the Qatari Constitution.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 39 provides:

An accused person is presumed innocent until his conviction is proved before a court of law wherein the necessary guarantees of the right of self-defense are secured.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Articles 129 – 131 provide:

Article 129

The supremacy of law is the base of rule in the State. The honour of the judiciary, its integrity, and impartiality of judges are a safeguard of rights and liberties.

Article 130

The judicial authority shall be independent and it shall be vested in courts of different types and grades. The courts shall make their judgments according to the law.

Article 131

Judges are independent and they shall not be subject to any power in the exercise of their judicial functions as provided by the law and no interference whatsoever shall be permitted with court proceedings and the course of justice.

The Right to Counsel

No express right to counsel is recognised by the Qatari Constitution.

The Right to Appeal

No express right to appeal is recognised by the Qatari Constitution.

Saint Christopher & Nevis

The Saint Christopher and Nevis Constitution, made 22 June 1983, entered into force 23 June 1983. Found at <<http://pdba.georgetown.edu/Constitutions/Kitts/kitts83.html>> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Section 4(1) provides:

A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of treason or murder under any law of which he has been convicted.

The Right to a Fair Trial / Right to Defence / Process of Law

Section 10(1) provides:

If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 10(1) above.

The Right to Counsel

Section 10(2)(d) provides:

Every person who is charged with a criminal offence-
... shall be permitted to defend himself before the court in person or, at his own expense, by a legal practitioner of his own choice

The Right to Appeal

Section 96 grants the High Court original jurisdiction in questions affecting fundamental rights guaranteed by the Constitution. Section 98 provides for an appeal as of right to the Court of Appeal from decision in the exercise of that jurisdiction.

Saint Lucia

The St. Lucia Constitution, made 20 December 1978, entered into force 22 February 1979. Found at

<http://www.stlucia.gov.lc/saint_lucia/saintluciaconstitution/the_saint_lucia_constitution.htm> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Section 2(1) provides:

A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law for which he has been convicted.

The Right to a Fair Trial / Right to Defence / Process of Law

Section 8(1) provides:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 8(1) above.

The Right to Counsel

Section 8(2)(d) provides:

Every person who is charged with a criminal offence-
... shall be permitted to defend himself before the court in person or, at his own expense, by a legal practitioner of his own choice

The Right to Appeal

Section 105 provides for the High Court to have original jurisdiction in constitutional matters. Section 107 provides for an automatic right of appeal to the Court of Appeal in such cases.

Saint Vincent & Grenadines

Constitution of St. Vincent and the Grenadines, made 26 July 1979, entered into force 27 October 1979. Found at <http://pdba.georgetown.edu/Constitutions/Vincent/stvincent79.html> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Section 2(1) provides:

A person shall not be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under any law for which he has been convicted.

The Right to a Fair Trial / Right to Defence / Process of Law

Section 8(1) provides:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 8(1) above.

The Right to Counsel

Section 8(2)(d) provides:

Every person who is charged with a criminal offence-
... shall be permitted to defend himself before the court in person or, at his own expense, by a legal practitioner of his own choice

The Right to Appeal

Section 96 grants the High Court original jurisdiction in questions affecting fundamental rights guaranteed by the Constitution. Section 98 provides for an appeal as of right to the Court of Appeal from decision in the exercise of that jurisdiction.

Saudi Arabia

Basic Law of Saudi Arabia, promulgated 31 January 1992. Found in English at <http://www.saudinf.com/main/c541.htm> on 18 November 2008.

The Right to Life / The Inviolability of the Person

The Basic Law does not expressly recognize either of these rights.

The Right to a Fair Trial / Right to Defence / Process of Law

The Basic Law does not expressly recognize these rights.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 46 provides:

The judicial authority is an independent power. In discharging their duties, the judges bow to no authority other than that of Islamic Shari'ah.

The Right to Counsel

The Basic Law does not expressly recognise this right.

The Right to Appeal

The Basic Law does not expressly recognise this right.

Sierra Leone

The Constitution of Sierra Leone, entered into force 1 October 1991, amended several times. Found in <<http://www.sierra-leone.org/Laws/constitution1991.pdf>> in 18 November 2008.

The Right to Life / The Inviolability of the Person

Section 15(a) provides:

Whereas every person in Sierra Leone is entitled to the fundamental human rights and freedoms of the individual, that is to say, has the right, whatever his race, tribe, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following—

- a. life, liberty, security of person, the enjoyment of property, and the protection of law;

The Right to a Fair Trial / Right to Defence / Process of Law

Section 23(1) provides:

Whenever any person is charged with a criminal offence he shall unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 23(1) above.

The Right to Counsel

Section 23(5) provides:

Every person who is charged with a criminal offence—

... shall be permitted to defend himself in person or by a legal practitioner of his own choice

The Right to Appeal

Section 132(1) provides that the High Court shall have jurisdiction in criminal matters. Section 129(1) provides a right of appeal to the Court of Appeal against any judgment of the High Court. Section 123 provides a further right of appeal to the Supreme Court.

Singapore

Constitution of the Republic of Singapore, entered into force 3 June 1959, amended in 1965. Found in English at http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?&actno=Reved-CONST&date=latest&method=part on 18 November 2008.

The Right to Life / The Inviolability of the Person

Section 9(1) provides:

No person shall be deprived of his life or personal liberty save in accordance with law.

The Right to a Fair Trial / Right to Defence / Process of Law

Section 9(1) has been interpreted as providing substantive protection in line with the guarantees provided by the English common law in 1959. *See Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 670. *Ong Ah Chuan* was recently followed in *Nguyen Truong Van v Public Prosecutor* [2004] SGCA 47, [82] (Lai Kew Chai J, giving the judgment of the Court, stated ‘[i]t is well established that the phrase “in accordance with law” in Art 9(1) connotes more than just Parliament-sanctioned legislation.’)

The Right to an Independent and Impartial Tribunal / Separation of Powers

The English common law of 1959 recognised the right to an independent and impartial tribunal. *See, e.g., R v Sussex Justices; ex parte McCarthy* [1924] 1 KB 256 (holding that even the appearance of bias may invalidate a trial). *See also* sections 95, 98 and 99, providing protection similar to Article 3, § 1 of the *United States Constitution*.

The Right to Counsel

Section 9(3) provides:

Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

The Right to Appeal

The Constitution does not provide an express right to appeal.

Somalia

Somalia is currently without a strong central government. At time of writing, the Transitional Federal Government (TFG) is the nominal central government. The TFG produced the *Transitional Federal Charter of the Somali Republic* in 2004. Found in English at <http://www.somalilaw.org/Documents/The%20Transitional%20Federal%20Charter%20of%20the%20Somali%20Republic.pdf> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Article 16 provides:

Everyone shall have the right to life and no person shall be deprived of his/her life.

The Right to a Fair Trial / Right to Defence / Process of Law

Per article 71(2) of the Transitional Federal Charter, provisions of the 1960 Constitution of Somalia are effective where not inconsistent with the Charter. Article 16(2) of the 1960 Constitution provides that '[a]rbitrary limits' on the right to life 'shall not be established'.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 55(1) provides:

The Judiciary shall be independent of the legislative and executive branches of Government and in the exercise of their judicial functions; the members of the judiciary shall be subject only to the law.

The Right to Counsel

Articles 17(3) and (4) provide:

3. Every person detained, imprisoned or restricted shall be permitted the right to defend himself/herself in a court in person or communicate with his/her relatives, lawyer of his/her own choice whenever he/she requires.
4. The Government shall guarantee free legal services for individual citizens who cannot afford them.

The Right to Appeal

Per article 71(2) of the Transitional Federal Charter, provisions of the 1960 Constitution of Somalia are effective where not inconsistent with the Charter. Article 97(3) of the 1960 Constitution provides:

All judicial decisions and all measures concerning personal liberty shall state the grounds therefor, and shall be subject to appeal in accordance with law.

Sudan

The Interim National Constitution of the Republic of Sudan, ratified 5 July 2005. Found in English at <http://www.sudan-embassy.de/c_Sudan.pdf> on 18 November 2008.

Between 2005 and 2011, Southern Sudan is an autonomous region with a separate constitution. That constitution is, however, subject to the Interim National Constitution. Article 3, Interim National Constitution.

The Right to Life / The Inviolability of the Person

Article 28 provides:

Every human being has the inherent right to life, dignity and the integrity of his/her person, which shall be protected by law; no one shall arbitrarily be deprived of his/her life.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 34(3) provides:

In all civil and criminal proceedings, every person shall be entitled to a fair and public hearing by an ordinary competent court of law in accordance with procedures prescribed by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 128 provides:

- (1) All Justices and Judges are independent in the performance of their duties and have full judicial competence with respect to their functions; and they shall not be influenced in their judgments.
- (2) Justices and Judges shall uphold the Constitution and the rule of law and shall administer justice diligently, impartially and without fear or favour.
- (3) Tenure of office of Justices and Judges shall not be affected by their judgments.

The Right to Counsel

Article 34(6) provides:

Any accused person has the right to defend himself/herself in person or through a lawyer of his/her own choice and to have legal aid assigned to him/her by the State where he/she is unable to defend himself/herself in serious offences.

The Right to Appeal

Section 125(1)(c) provides that the National Supreme Court shall review all death sentences.

Syria

The Constitution of Syria, entered into force 13 March 1973. Found in English at http://www.servat.unibe.ch/icl/sy00000_.html on 18 November 2008.

The Right to Life / The Inviolability of the Person

The Syrian Constitution does not expressly recognise either right.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 28(4) provides:

The right of litigation, contest, and defense before the judiciary is safeguarded by the law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 133 provides:

- (1) Judges are independent. They are subject to no authority except that of the law.
- (2) The honor, conscience, and impartiality of judges are guarantees of public rights and freedoms.

The Right to Counsel

The Syrian Constitution does not expressly provide for a right to counsel.

The Right to Appeal

The Syrian Constitution does not expressly provide for a right to appeal.

Taiwan

The *Republic of China (Taiwan) Constitution* was adopted on 25 December 1946, promulgated 1 January 1947, entered into force 25 December 1947, amended in 1992, 1994, 1997, 1999, 2000, 2005. Found in English at http://constitution.president.gov.tw/en/law_roc.htm on 18 November 2008.

The Right to Life / The Inviolability of the Person

The Taiwanese Constitution does not expressly recognise either of these rights. Article 22, however, provides a residuary category of rights. It provides:

All other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 8 provides, in relevant part:

Personal freedom shall be guaranteed to the people. Except in case of flagrante delicto as provided by law, no person shall be arrested or detained otherwise than by a judicial or a police organ in accordance with the procedure prescribed by law. No person shall be tried or punished otherwise than by a law court in accordance with the procedure prescribed by law. Any arrest, detention, trial, or

punishment which is not in accordance with the procedure prescribed by law may be resisted.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 80 provides:

Judges shall be above partisanship and shall, in accordance with law, hold trials independently, free from any interference.

The Right to Counsel

The right to counsel is not expressly provided for by the Taiwanese Constitution.

The Right to Appeal

The right to appeal is not expressly provided for by the Taiwanese Constitution.

Thailand

Permanent Constitution of Thailand, approved 19 August 2007. Found in English at <http://www.asianlii.org/th/legis/const/2007/> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Article 32 provides, in relevant part:

A person shall enjoy the right and liberty in his life and person.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 40(3) provides a 'right to correct, prompt and fair trial'.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 40(2) provides for 'fundamental rights in judicial process [sic]', including the 'right to object the partial judges'.

The Right to Counsel

Article 40(7) provides that:

an alleged offender and the accused in criminal case shall have the right to correct, prompt and fair investigation or trial with an adequate opportunity in

defending his case, the right to examine or to be informed of evidence, right to defend himself through counsel and the right to bail

The Right to Appeal

Article 40(2) provides for ‘fundamental rights in judicial process’, including the ‘right to be considered by the full bench of judges’.

Trinidad And Tobago

The Constitution of the Republic of Trinidad and Tobago, entered into force 1 August 1976. Found at <<http://pdba.georgetown.edu/Constitutions/Trinidad/trinidad76.html>> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Section 4(a) provides:

It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:-

- a. the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

The Right to a Fair Trial / Right to Defence / Process of Law

Section 5(2)(f)(ii) provides, relevantly:

Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not-

- (f) deprive a person charged with a criminal offence of the right-
 - (i) ...
 - (ii) to a fair and public hearing by an independent and impartial tribunal

Note: Article 54 deals with the amendment of the Constitution.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 5(2)(f)(ii) above.

The Right to Counsel

Section 5(2)(c)

Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not-

(c) deprive a person who has been arrested or detained-

(i) ...

(ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him

The Right to Appeal

Section 14 provides the High Court with original jurisdiction in matters involving an actual or potential violation of the fundamental rights guaranteed under the Constitution. Section 108 provides for a right of appeal to the Court of Appeal from a decision of the High Court under section 14.

Uganda

The Constitution of the Republic of Uganda, entered into force 8 October 1995; in 2005 the constitution was amended removing presidential term limits and legalizing a multiparty political system. Found at http://www.ugandaonlinelawlibrary.com/files/constitution/constitution_1995.pdf on 18 November 2008.

The Right to Life / The Inviolability of the Person

Article 22 provides:

No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

The Right to a Fair Trial / Right to Defence / Process of Law

See article 22 above.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 28(1) provides:

In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

The Right to Counsel

Articles 28(3)(d) and (e) provide:

Every person who is charged with a criminal offence shall—

- (d) be permitted to appear before the court in person or, at that person's own expense, by a lawyer of his or her choice;
- (e) in the case of any offence which carries a sentence of death or imprisonment for life, be entitled to legal representation at the expense of the State;

The Right to Appeal

See article 22 above, which requires that any capital sentence be 'confirmed by the highest appellate court.'

United Arab Emirates

Constitution of the United Arab Emirates, entered into force 2 December 1971; made permanent in 1996. Found at <http://www.helplinelaw.com/law/uae/constitution/constitution01.php> on 18 November 2008.

The Right to Life / The Inviolability of the Person

The UAE Constitution does not expressly recognize either of these rights.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 28 provides, in part, that an ‘accused shall be presumed innocent until proved guilty in a legal and fair trial’.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 94 provides:

Justice is the basis of rule. In performing their duties, judges shall be independent and shall not be subject to any authority but the law and their own conscience.

The Right to Counsel

Article 28 provides, in part, that ‘[t]he accused shall have the right to appoint the person who is capable to conduct his defence during the trial’ and that ‘[t]he law shall prescribe the cases in which the presence of a counsel for defence shall be assigned.’

The Right to Appeal

The UAE Constitution does not provide an express right to appeal.

United States of America

The Constitution of the United States of America, adopted 17 September 1787, effective 4 March 1789. Found at <http://www.law.cornell.edu/constitution/constitution.overview.html> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Amendment V and Amendment XIV, § 1, prohibit the deprivation of life without due process.

The Right to a Fair Trial / Right to Defence / Process of Law

Amendment V and Amendment XIV, § 1, require due process.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Amendment VI provides that an accused has the right to be tried ‘by an impartial jury’.

The Right to Counsel

Amendment VI guarantees an accused ‘the assistance of counsel for his defense’.

The Right to Appeal

Amendment VIII's prohibition on cruel and unusual punishment requires that the death penalty not be imposed arbitrarily. The US Supreme Court has held that rights of appeal are an important safeguard against misapplication of the death penalty.

Viet Nam

Constitution of the Socialist Republic of Vietnam, adopted 15 April 1992. Found in English at http://www.vietnamembassy-usa.org/learn_about_vietnam/politics/constitution/ on 18 November 2008.

The Right to Life / The Inviolability of the Person

Article 71 provides, in part:

The citizen shall enjoy inviolability of the person and the protection of the law with regard to his life, health, honor and dignity.

The Right to a Fair Trial / Right to Defence / Process of Law

It is not clear that the Vietnamese Constitution recognises a right of this kind. Article 132 does provide, however:

The right of the defendant to be defended is guaranteed. The defendant can either conduct his own defence or ask someone else to do it.

An organisation of barristers shall be set up to help the defendant and other parties in a law case to defend their rights and legitimate interests and contribute to the safeguarding of socialist legality.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 130 provides:

During a trial the judges and assessors are independent and shall only obey the law.

The Right to Counsel

Article 132 provides:

The right of the defendant to be defended is guaranteed. The defendant can either conduct his own defence or ask someone else to do it.

An organisation of barristers shall be set up to help the defendant and other parties in a law case to defend their rights and legitimate interests and contribute to the safeguarding of socialist legality.

The Right to Appeal

The Vietnamese Constitution does not appear to provide an express right to appeal.

Yemen

Constitution of the Republic of Yemen, entered into force 16 May 1991; amended 29 September 1994 and February 2001. Found in English at <http://www.al-bab.com/yemen/gov/con94.htm> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Neither of these rights are expressly recognised by the Constitution.

The Right to a Fair Trial / Right to Defence / Process of Law

Article 48 provides:

The right to defend oneself in person or by representation is guaranteed during all periods of investigation and in front of all courts, in accordance with the rules of the law. The state shall guarantee judicial assistance to those who cannot afford it, according to the law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

Article 147 provides:

The Judiciary authority is an autonomous authority in its judicial, financial and administrative aspects and the General Prosecution is one of its sub-bodies. The courts shall judge all disputes and crimes. The judges are independent and not subject to any authority, except the law. No other body may interfere in any way in the affairs and procedures of justice. Such interference shall be considered a

crime that must be punished by law. A charge regarding such interference cannot be nullified with the passing of time.

The Right to Counsel

See article 48 above.

The Right to Appeal

No express right of appeal is provided for in the Yemeni Constitution.

Zimbabwe

Constitution of Zimbabwe, entered into force 21 December 1979. Found at <http://www.sokwanele.com/node/508> on 18 November 2008.

The Right to Life / The Inviolability of the Person

Section 12(1) provides:

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

The Right to a Fair Trial / Right to Defence / Process of Law

Section 18(2) provides:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The Right to an Independent and Impartial Tribunal / Separation of Powers

See section 18(2) above.

The Right to Counsel

Section 18(3)(d) provides:

Every person who is charged with a criminal offence—

... shall be permitted to defend himself in person or, save in proceedings before a local court, at his own expense by a legal representative of his own choice;

The Right to Appeal

Section 24 provides for the Supreme Court to have original jurisdiction over actual or threatened violations of the rights guaranteed in Constitution. This would presumably include violations of the right to life, but might exclude capital sentences.

Appendix C: Retentionist States

1. Afghanistan
2. Antigua and Barbuda
3. Bahamas
4. Bahrain
5. Bangladesh
6. Barbados
7. Belarus
8. Belize
9. Botswana
10. Burundi
11. Cameroon
12. Chad
13. China
14. Comoros
15. Congo (Democratic Republic)
16. Cuba
17. Dominica
18. Egypt
19. Equatorial Guinea
20. Ethiopia
21. Guatemala
22. Guinea
23. Guyana
24. India
25. Indonesia
26. Iran
27. Iraq
28. Jamaica
29. Japan
30. Jordan

31. Korea (North)
32. Kuwait
33. Lebanon
34. Lesotho
35. Libya
36. Malaysia
37. Mongolia
38. Nigeria
39. Oman
40. Pakistan
41. Palestinian Authority
42. Qatar
43. Saint Christopher & Nevis
44. Saint Lucia
45. Saint Vincent & Grenadines
46. Saudi Arabia
47. Sierra Leone
48. Singapore
49. Somalia
50. Sudan
51. Syria
52. Taiwan
53. Thailand
54. Trinidad And Tobago
55. Uganda
56. United Arab Emirates
57. United States of America
58. Viet Nam
59. Yemen
60. Zimbabwe