Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions

REFERENCE:
UA USA 19/2019

30 September 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on extrajudicial, summary or arbitrary executions, pursuant to Human Rights Council resolution 35/15.

In this context, I would like to draw the attention of Your Excellency's Government to information I have received concerning the execution of Mr. Russell Bucklew, which is scheduled to be carried out in the State of Missouri on Tuesday, 1 October 2019.

According to the information received:

Mr. Russell Bucklew was sentenced to death on 19 May 1997. He reportedly suffers from a very severe form of cavernous hemangioma, a condition that causes unstable, blood-filled tumors to grow in his head, neck and throat. Even under normal, daily circumstances, he is subject to hemorrhage on a regular basis.

On 9 May 2014, Mr. Bucklew filed a suit claiming that execution by lethal injection under Missouri’s protocol would cause him severe pain because of his rare and congenital medical condition. The execution, which would require the use of a painful procedure to access his veins and would require him to lie supine, a position that would cause his tumors to flatten and obstruct his airway, would subject him to excruciating and prolonged, severe pain.

On 20 May 2014, the Inter-American Commission on Human Rights granted precautionary measures in favor of Mr. Bucklew, requesting that the United States of America refrain from executing him pending the Commission’s investigation of the allegations raised in his petition.

On 10 May 2018, the Inter-American Commission on Human Rights (IACHR) found that the United States was responsible for violating Mr. Bucklew’s rights to life, liberty and security of the person, to a fair trial, to protection from arbitrary arrest, and to due process of law\(^1\). The IACHR concluded that the United States

failed to provide Mr. Bucklew with effective access to judicial protection regarding his right to be free from cruel and inhuman punishment and torture in the context of the application of lethal injection as the method of execution and further, that the amount of time that he had spent on death row, over twenty years, greatly exceeded the length of time that international and domestic courts have characterized as cruel, inhuman and degrading treatment. Accordingly, the IACHR recommended that Mr. Bucklew’s sentence be commuted, that he be transferred out of death row, and that the State ensure that his conditions of detention be compatible with his human dignity.

No measure, however, has reportedly been adopted to comply with this recommendation.

In the meantime, Mr. Bucklew’s physical and mental condition reportedly deteriorated. In June 2018, Mr. Bucklew nearly died from meningitis, which caused him severe fever, diarrhea, and vomiting and required two emergency hospital stays. At the first hospital, he was reportedly misdiagnosed and prematurely released. During the trip to the second hospital, he reportedly went into respiratory distress, requiring eleven days of in-patient care and the insertion of a tracheotomy to allow him to breathe. After these distressing medical emergencies, Mr. Bucklew issued a do-not-resuscitate order, to be implemented in the event of another medical emergency.

In March 2019, Mr. Bucklew reported symptoms that medical staff determined to be manifestations of recurrent Bell’s Palsy. These symptoms include paralysis on the left side of his face that prevents him from eating solid foods and consuming liquids. Additionally, he has been reportedly diagnosed with symptoms of post-traumatic stress disorder, anxiety and major depressive disorder with psychotic features.

On 23 August 2019, the IACHR urged the USA to stay the execution of Mr. Bucklew, and to grant him effective relief in compliance with its international human rights obligations. The Commission reminded the USA that, in carrying out the execution of Mr. Bucklew, it would commit a grave and irreparable violation of the fundamental rights to life and to not receive cruel punishment, protected by Articles I and XXVI of the American Declaration of the Rights and Duties of Man.

The Commission also urged the USA to review its laws, procedures and practices to ensure that persons sentenced to the death penalty have access to effective judicial remedies to challenge the possible impact of the method of execution on

their fundamental rights, and that it should adopt a moratorium on the execution of persons sentenced to death.

While I do not wish to prejudge the accuracy of these allegations, I wish to express my utmost concern in relation to the likelihood that carrying out the death penalty may inflict on Mr. Bucklew severe pain and suffering that may amount to cruel, inhumane or degrading treatment or punishment, or even torture.

In this regard, I wish to recall the urgent appeal I sent to the Government of the USA, jointly with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, on 15 February 2018 (UA USA 4/2018), concerning the execution of Mr. Doyle Hamm by lethal injection, which caused excruciating pain to the person concerned, due to his medical situation, and which, for this reason, had to be called off by the authorities.

In view of the above, I respectfully call upon your Excellency’s Government as a matter of urgency to halt the imminent execution of Mr. Bucklew scheduled to be carried out on 1 October 2019. Based on the information brought to my attention, his execution may constitute a violation of applicable international human rights standards and thus an arbitrary execution and a violation of the prohibition against torture. I further urge your Excellency’s Government to commute the death sentence of Mr. Bucklew and to comply with the recommendations made by the IACHR.

In this regard, I would also like to respectfully call on your Excellency’s Government to review domestic laws, procedures and practices with a view to ensuring that persons sentenced to the death penalty have access to effective judicial remedies to challenge the possible impact of the method of execution on their fundamental rights, and that it should adopt a moratorium on the execution of persons sentenced to death.

I wish to stress that the above allegations appear to be in contravention of the rights of every individual to life, liberty and security and to not be subjected to torture or to other cruel, inhuman or degrading treatment or punishment, as respectively set out in Articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (CAT), to which the United States is a party.

In particular, CAT prohibits the intentional infliction of severe pain or suffering for purposes of punishment and obliges States to take effective measures to prevent any form of torture. Potentially severe pain and suffering which can be avoided, or which arises only due to the victim’s personal circumstances or medical condition, cannot be regarded as “inherent” in or “incidental” to a lawful sanction but amounts to cruel,
inhuman or degrading punishment as prohibited by CAT and the United States Constitution.

Article 5 of the United Nations Safeguards Protecting the Rights of those Facing the Death Penalty, provides that capital punishment may only be carried out pursuant to legal procedures which give all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the ICCPR. Only full respect for the most stringent due process guarantees distinguishes capital punishment as possibly permitted under international law from an arbitrary execution. Article 4 of the Safeguards also stipulate that the death penalty may only be imposed when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts. Furthermore, Article 6 (4) of the ICCPR and Article 7 and 8 of the Safeguards establish that anyone sentenced to death shall have the right to seek pardon or commutation of the sentence and that amnesty, pardon or commutation of the sentence of death may be granted. Moreover, capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.

The longstanding position of the United Nations Human Rights Committee is that imposition of the death penalty in a manner that is contrary to another provision of the ICCPR also violated Article 6. Thus, failure to respect Article 7 by imposing the death penalty in a manner that constitutes torture or cruel, inhuman or degrading treatment contrary to Article 7 would inevitably render the execution arbitrary in nature and be in violation of Article 6. The Committee has opined that various methods of execution are contrary to Article 7 (for example stoning, injection of untested lethal drugs, gas chambers, burning and burying alive, and public executions) and other painful and humiliating methods of execution are also considered unlawful under the Covenant.

In its general comment No. 20 (CCPR/C/21/Add.3) the Human Rights Committee also stressed that countries that choose to retain the death penalty must apply it in a manner that “causes the least possible physical and mental suffering.” This is reiterated in Article 5 of the United Nations Safeguards Protecting the Rights of those Facing the Death Penalty, which also demands that the death penalty shall be carried out so as to inflict the minimum possible suffering.

It should also be noted that both the Human Rights Committee (A/50/40, para. 296) and the Committee against Torture (CAT/C/USA/CO/2, para. 31) have called on the

---

United States to review the use of lethal injections to perform executions in order to prevent severe pain and suffering.

Additionally, I would like to respectfully call your attention to an emerging international customary norm prohibiting the death penalty as a form of cruel, inhuman, or degrading punishment. The cruelty of the death penalty goes beyond the execution itself. The concept of the “death row phenomenon” explains that prisoners on death row may experience severe mental trauma and physical deterioration, which may cross into the territory of degrading, cruel or inhuman treatment, or even torture. The IACHR stated in Hilaire, Constantione and Benjamin et al. v. Trinidan and Tobago (2002) that the being on the death row for a prolonged period, awaiting execution could cause severe mental and physical anguish that constituted a violation of the prohibition of torture ad cruel, inhuman or degrading treatment. In the 1993 case of Pratt and Morgan v. Jamaica, the Judicial Committee of the Privy Council of the British House of Lords held that spending more than five years on death row was enough to consider the existence of the death row phenomenon on its merits.

In the present case, Mr. Bucklew spent more than two decades on death row. The Human Rights Committee clarified that the right to security of persons protects individuals from intentional infliction of bodily or mental harm (General Comment 35, CCPR/C/GC/35). The Committee added that the right to security of persons may overlap with the right to life guaranteed by Article 6 of the ICCPR.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

In view of the urgency of the matter, I would appreciate a response on the initial steps taken by your Excellency’s Government to safeguard the rights of the above-mentioned person in compliance with international instruments.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and any comment you may have on the above-mentioned allegations.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible of the alleged violations.
Given the importance and urgency of the matter, a human being’s life is at risk, I intend to publicly express my concerns in this case as, in my view, the information at hand is sufficiently reliable to indicate a matter warranting the most immediate attention.

I indeed believe that, given the above circumstances, the public should be alerted to these concerns and the human rights implications of the case. Any public statement on my part would indicate that I have been in contact with your Government’s to clarify the issue in question, and recall the State’s international legal obligations.

This communication and any response received from your Excellency’s Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of my highest consideration.

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions