



# Drug-related Offences, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia



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OFFICE OF THE HIGH COMMISSIONER

*South-East Asia  
Regional Office*

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Office of the United Nations High Commissioner for Human Rights  
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# Preface

The present report was developed by the Office of the United Nations High Commissioner for Human Rights (OHCHR) as an outcome of its Expert Seminar on Drug-related Offences, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia, held in Bangkok on 28 February 2018.

The OHCHR South-East Asia Regional Office greatly appreciates the contributions of all the participants at the seminar. The diverse expertise of the group, which included representatives of States Members of the United Nations, the ASEAN Intergovernmental Commission on Human Rights, national human rights institutions and non-governmental organizations, as well as individual experts, lawyers and academics from across the region, yielded extremely beneficial results.

This report also serves as an update on South-East Asian trends described in *Moving Away from the Death Penalty: Lessons in South-East Asia*, which was published by the Regional Office in 2014.

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# Introduction

Most of the world's countries or territories have either abolished the death penalty or no longer use it. More than half of those that retain the death penalty, of which many are in South-East Asia, do so for drug-related offences. Most prisoners on death row in South-East Asia have been convicted of drug-related offences, although law and practice vary considerably among countries that retain the death penalty.

The Human Rights Council recommends, in accordance with article 6 of the International Covenant on Civil and Political Rights, the jurisprudence of the United Nations Human Rights Committee and the United Nations Economic and Social Council Safeguards that guarantee protection of the rights of those facing the death penalty<sup>1</sup> (see chapter II, section A of this document), as well as other international standards, that persons convicted of drug-related offences should not be subject to the death penalty.<sup>2</sup>

In 2016, the General Assembly held a special session on the world drug problem where all Member States reaffirmed their commitment to respecting, protecting and promoting human rights in the development and implementation of drug policies.<sup>3</sup> In 2017 the Secretary-General of the United Nations, in addressing drug abuse and trafficking issues, urged Member States to honour those commitments in order to “ensure that our approach promotes equality, human rights, sustainable development, and greater peace and security”.<sup>4</sup>

The Office of the United Nations High Commissioner for Human Rights (OHCHR) held its Expert Seminar on Drug-related Offences, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia in Bangkok on 28 February 2018, with financial support from the German Government. In opening the seminar, Assistant Secretary-General for Human Rights Andrew Gilmour noted concerns about death sentencing for drug offences. The issues included whether such offences met the “most serious crimes” threshold required under international law; the continued use of mandatory sentencing without regard for the circumstances of the offence or the offender; and access of foreign nationals to consular services. Participants shared experiences of States invoking the death penalty when confronted with public concerns over drug trafficking and public safety; examined the human rights dimensions of the application of the death penalty in cases of drug-related offences; and explored how research and information on best practices could enhance national debates on the death penalty.

The present report is based on a desk review of United Nations and open-source material on the death penalty, including OHCHR studies<sup>5</sup> and United Nations resolutions and human rights mechanisms. It builds on material from the 2018 Bangkok seminar. This report also presents recent global trends in death penalty and drug-control matters, a summary of the applicable international human rights norms and standards, and recent developments in legislation and criminal justice responses related to the death penalty and drug control in South-East Asia.

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1 Adopted by the United National Economic and Social Council in 1984. Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx>.

2 Study on the impact of the world drug problem on the enjoyment of human rights (A/HRC/30/65), para. 63. See also the Report of the High Commissioner for Human Rights on Implementation of the joint commitment to effectively addressing and countering the world drug problem with regard to human rights (A/HRC/39/39, 2018), para. 59.

3 See annex to resolution S-30/1 (2016) of the General Assembly, which the United Nations Office on Drugs and Crime has published as Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem, New York, 19–21 April 2016: Our joint commitment to effectively addressing and countering the world drug problem (V.16-03301).

4 Message on the International Day against Drug Abuse and Illicit Trafficking. Available at: <https://www.unodc.org/unodc/en/frontpage/2017/June/message-of-united-nations-secretary-general--antnio-guterres--on-the-international-day-against-drug-abuse-and-illicit-trafficking.html>.

5 OHCHR Regional Office for South-East Asia, *Moving Away from the Death Penalty: Lessons in South-East Asia* (Bangkok, 2014); OHCHR, *Moving Away from the Death Penalty: Arguments, Trends, and Perspectives* (New York, 2014); OHCHR, *Moving Away from the Death Penalty: Lessons from National Experiences* (New York, October 2012); OHCHR, *Death Penalty and the Victims* (United Nations publication, Sales No. E.16XIV.2).





# I. Global trends and developments

## A. Progress towards abolition

The death penalty has been abolished in a steadily increasing number of States over the past four decades. Most of the States that retain this sanction do not apply it frequently, if at all. The rate of abolition was 34 per cent for the period 1994–2003 and 37 per cent for 2004–2013.<sup>6</sup> From 2007 to July 2018, the number of fully abolitionist States increased from 91 to 106, while the number of retentionist States decreased from 63 to 56.<sup>7</sup>

As of November 2018, there were 172 States parties to the International Covenant on Civil and Political Rights, which guarantees the right to life (article 6); while 86 States Members of the United Nations had ratified the Second Optional Protocol to the Covenant, which aims at abolition of the death penalty.<sup>8</sup> Of the total of 11 South-East Asian countries, seven—Cambodia, Indonesia, the Lao People’s Democratic Republic, the Philippines, Thailand, Timor-Leste and Viet Nam—are States parties to the Covenant. However, only the Philippines and Timor-Leste have ratified the Second Optional Protocol to the Covenant.

In 2015, the Secretary-General of the United Nations reported that no executions had been recorded in 169 of the total 193 Member States.<sup>9</sup> In 2017, Amnesty International recorded 993 executions, down from 1,032 in 2016 and 1,632 in 2015. In the Asia-Pacific region (excluding China, Viet Nam and the Democratic People’s Republic of Korea), at least 93 executions were recorded in 2017, down from 130 in 2016 and 367 in 2015.<sup>10</sup>

Despite the overall global trend towards abolition, there has been an opposite trend with respect to punishment of drug-related offences since the 1980s. The number of countries where drug offences are punishable by death increased from 22 in 1985 to 26 in 1995;<sup>11</sup> currently 33 countries or territories prescribe the death penalty for drug-related offences,<sup>12</sup> which include eight in South-East Asia. At least nine countries still have the death penalty for drug offences as a mandatory sanction, although three of them (Brunei Darussalam, Lao People’s Democratic Republic and Myanmar) are abolitionist in practice.<sup>13</sup>

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6 Report of the Secretary-General to the Economic and Social Council, Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty (E/2015/49), para. 27.

7 Amnesty International, “Abolitionist and retentionist countries as of July 2018”, ACT 50/6665/2017 (London, 2018).

8 United Nations Treaties Collection, Multilateral treaties deposited with the Secretary-General, chapter IV, Human rights. Available at: [https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=\\_en](https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en).

9 Report of the Secretary-General to the General Assembly, Moratorium on the use of the death penalty (A/71/332), para. 6.

10 Amnesty International, “The death penalty in 2016: facts and figures”, 11 April 2017; and *Death Sentences and Executions 2017*, ACT 50/7955/2018 (London, 2018).

11 Rick Lines, International Harm Reduction Association, *The Death Penalty for Drug Offences: A Violation of International Human Rights Law*, (London, July 2010), p. 8. Available from: <https://www.hri.global/files/2010/07/01/DeathPenaltyReport2007.pdf>.

12 Report of the Secretary-General to the General Assembly, Moratorium (A/71/332), para. 32.

13 Harm Reduction International, *The Death Penalty for Drug Offences: Global Overview 2017*, p. 6.

## B. Growing global consensus for a moratorium

In 2016, in its resolution 71/187, the General Assembly stated that: “there is no conclusive evidence of the deterrent value of the death penalty”. It called on Member States to “reduce the number of offences for which the death penalty may be imposed” and “establish a moratorium on executions with a view to abolishing the death penalty”.<sup>14</sup> It also called on States having abolished the death penalty not to reintroduce it and on those observing a moratorium to maintain it. In 2018, Secretary-General António Guterres reaffirmed his opposition to the death penalty in all circumstances and invited all retentionist States to establish an official moratorium, as a step towards abolition, as soon as possible.<sup>15</sup>

The global trend towards abolition is evident in the broadening support by Member States for the six General Assembly resolutions that call for a moratorium on the use of the death penalty. The number of Member States supporting the resolutions has increased from 104 in 2007, when the first moratorium resolution was adopted, to 117 in 2016, when the latest resolution was adopted (see table 2).<sup>16</sup> Since 2014, the Human Rights Council, which is the United Nations body responsible for promotion and protection of human rights, has adopted three resolutions on “the question of the death penalty”, with the support of most of its 47 members each time (see table 3).

Through the first two rounds of the Universal Periodic Review (UPR)—which all Member States have undergone—more than 90 States with a variety of legal systems and traditions, spanning all regions, made more than 2,500 recommendations concerning the death penalty to retentionist States, urging them to consider abolition, a moratorium, removal of mandatory death sentence, and preclusion of capital punishment for drug-related offences, among other actions. These recommendations demonstrate the growing strength of a global consensus on abolition as well as a global commitment to supporting it as a key human rights concern.

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14 A/RES/71/187, operative para. 7.

15 The Secretary-General's remarks at the Panel on “Transparency and the death penalty”, New York, 10 October 2018. Available at: <https://www.un.org/sg/en/content/sg/statement/2017-10-10/secretary-generals-remarks-panel-transparency-and-death-penalty>.

16 Official Records of the General Assembly, sixty-second session, seventy-sixth plenary meeting (A/62/PV.76), p. 17; Official Records of the General Assembly, sixty-third session, seventieth plenary meeting (A/63/PV.70, p. 17); Official Records of the General Assembly, sixty-fifth Session, seventy-first plenary meeting (A/65/PV.71, p. 19); Official Records of the General Assembly, sixty-seventh session, sixtieth plenary meeting (A/67/PV.60, p. 17); Official Records of the General Assembly, sixty-ninth session, seventy-third plenary meeting (A/69/PV.73, pp. 17–18); and Official Records of the General Assembly, seventy-first session, sixty-fifth plenary meeting (A/71/PV.65, pp. 25–26).

# II. International legal framework and standards

The right to life is enshrined in article 3 of the Universal Declaration of Human Rights. Article 6 of the International Covenant on Civil and Political Rights guarantees that every human being has “the inherent right to life”. The Human Rights Committee has stated that the terms of article 6 strongly suggest “that abolition is desirable” and that the right to life should not be interpreted narrowly.<sup>17</sup>

In his 2017 report to the General Assembly on capital punishment, the Secretary-General observed that the use of the death penalty was “increasingly regarded as being incompatible with fundamental tenets of human rights, in particular human dignity, the right to life and the prohibition of torture or other cruel, inhuman or degrading treatment or punishment”.<sup>18</sup>

## A. Prohibition of arbitrary deprivation of life

The right to life is widely recognized as the supreme human right. Article 6 of the International Covenant on Civil and Political Rights provides that “no one shall be arbitrarily deprived of his life”. The Human Rights Committee has recognized that the prohibition of arbitrary deprivation of life is non-derogable or unconditional, from many legal standpoints regarding the rule of law.<sup>19</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions has noted that States, in recognizing the right to life as a rule of customary international law, are obliged to uphold it, whether or not they have ratified a relevant treaty.<sup>20</sup>

The notion of “arbitrariness”, as interpreted by the Human Rights Committee in the context of guarantees other than the right to life, is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law. The Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that there are procedural considerations with regard to the requirement of non-arbitrariness for the death penalty that concern the requirements of legality and fair trial. He also noted substantive considerations that entail (a) imposition only for the most serious crimes, (b) minimum standards of protection for vulnerable groups, and (c) equality and consistency; among other requirements.<sup>21</sup>

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17 Human Rights Committee, General Comment No. 6 (CCPR/C/GC/6), paras. 1 and 6. See also draft General Comment No. 36, (CCPR/C/GC/36), paras. 3 and 54.

18 Human Rights Council, Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, Capital punishment and the implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty (A/HRC/36/26), para. 53.

19 Human Rights Committee, General Comment No. 24 (CCPR/C/21/Rev.1/Add.6), para. 10; General Comment No. 32 (CCPR/C/GC/32), para. 6; and CCPR/C/GC/6, para. 1.

20 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the General Assembly (A/67/275), para. 105.

21 *Ibid.*, para. 14.

For States that have not yet abolished the death penalty, international human rights law provides that it shall be applied only in the most exceptional cases, for the most serious crimes and under the strictest limits. Those provisions are set out primarily in paragraphs 2, 4 and 5 under article 6 of the International Covenant on Civil and Political Rights and in the “Safeguards guaranteeing protection of the rights of those facing the death penalty”, which was approved by the Economic and Social Council in its resolution 1984/50.<sup>22</sup> The Secretary-General has stated that the Council’s Safeguards should be considered “the general law applicable on the subject of capital punishment, even for those States that have not assumed any treaty obligations whatsoever with respect to the imposition of the death penalty”.<sup>23</sup>

## B. “Most serious crimes”

As required by article 6(2) of the International Covenant on Civil and Political Rights, States that have not abolished the death penalty may impose it only for the “most serious crimes”. The Human Rights Committee has repeatedly stressed that offences such as those related to drugs, including drug trafficking, do not meet the threshold of “most serious crimes” within the meaning of article 6(2) of the Covenant.<sup>24</sup>

The Special Rapporteur on extrajudicial, summary or arbitrary executions stated in 2017 that the determination of what constitutes the most serious crimes “requires interpretation and application of the relevant international law rather than of the subjective approach opted for within a given State’s criminal code and sentencing scheme”.<sup>25</sup>

Since the 1980s, international human rights jurisprudence has continuously developed, clarifying the limits of “the most serious crimes”. The first of the Safeguards of the Economic and Social Council provides that the “the most serious crimes” should be limited to “intentional crimes with lethal or other extremely grave consequences”. In concluding observations formulated in States reports, the Human Rights Committee has found the imposition of the death penalty for crimes that “do not result in loss of life” to be contrary to the International Covenant on Civil and Political Rights.<sup>26</sup>

In 2008, the Special Rapporteurs on torture and on the right to health wrote to the Commission on Narcotic Drugs (the central drug policy-making body) that the “weight of opinion indicates clearly that drug offences do not meet the threshold of ‘most serious crimes’ to which the death penalty might lawfully be applied”.<sup>27</sup>

The Secretary-General has repeatedly recalled that “most serious crimes” should be understood as limited to intentional killings and exclude non-violent crimes such as drug-related offences.<sup>28</sup>

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22 See footnote 1.

23 E/2015/49, para. 61.

24 CCPR/C/THA/CO/2, para. 17; CCPR/CO/84/THA, para. 14; CCPR/C/SDN/CO/3, para. 19.

25 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions to the Human Rights Council (A/HRC/4/20), paras. 40 and 44.

26 Human Rights Committee, Concluding observations on the second periodic report of Iran (CCPR/C/79/Add.25), para. 8.

27 Special Rapporteur on the prevention of torture and cruel, inhuman, or degrading treatment or punishment, and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Letter to Ms. Selma Ashipala-Musavyi, Permanent Representative of Namibia to the United Nations at Vienna and Chairperson of the fifty-second session of the Commission on Narcotic Drugs (10 December 2008). Available at: <https://www.hrw.org/news/2008/12/10/un-human-rights-experts-call-upon-cnd-support-harm-reduction>.

28 See Reports of the Secretary-General to the Human Rights Council: A/HRC/18/20; A/HRC/21/29, section IV (a); A/HRC/27/23, sect. V (a); A/HRC/33/20, sect. IV (a) and para. 62; A/71/332, sect. V (a) and para. 73; A/HRC/36/26, paras. 10, 40, 46, and 48. E/2015/49, sect. 6(a).

## C. Mandatory death sentence

International human rights law prohibits the imposition of a mandatory death sentence for any offence, as it is incompatible with both the “most serious crimes” and non-arbitrariness requirements.<sup>29</sup> Mandatory sentencing removes entirely the ability of judges to make distinctions between degrees of seriousness of an offence, which can only be done by taking into account the personal circumstances of the defendant or of the offence, including any mitigating factors. In addition, mandatory sentences undermine the separation of State powers, as the legislature essentially takes the decision for the judiciary as to what will be the most appropriate sentence in all cases.

In 2000, the Human Rights Committee found that the mandatory death sentence in a murder case was “arbitrary”, even if the offence in question constituted a most serious crime.<sup>30</sup> In this and subsequent cases involving mandatory death sentences, the Committee found that “conviction for a most serious crime was not, per se, sufficient to satisfy other requirements of human rights law”. It added that “respect for human rights can be reliably ensured in death penalty cases only if the judiciary engages in case-specific, individualized sentencing that accounts for all of the relevant factors”.<sup>31</sup>

According to the Special Rapporteur on extrajudicial, summary or arbitrary executions in 2010, various reports examining the legal limits on the use of the death penalty show that “international law prohibits the mandatory imposition of the death penalty”.<sup>32</sup> He clarified that this prohibition means that retentionist States “are obligated to at least provide for the possibility that a judge might find a death sentence impermissible in a particular individual's case because of extenuating circumstances of one kind or another”.<sup>33</sup>

For all individuals who had earlier received a mandatory death sentence, the Secretary-General has called for re-sentencing through a process that takes into account the personal circumstances of the offender and the particular circumstances of the offence.<sup>34</sup>

Since 2008, more than 20 States have removed mandatory death sentences for specific crimes, including Asian States such as Bangladesh, India, Malaysia and Thailand. In some of those States, the decision was taken after the judiciary had declared mandatory death sentences unconstitutional.

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29 See views adopted by Human Rights Committee in: *Mwamba v. Zambia* (CCPR/C/98/D/1520/2006), para. 6.3; *Chisanga v. Zambia* (CCPR/C/85/D/1132/2002); *Weerawansa v. Sri Lanka* (CCPR/C/95/D/1406/2005), para. 7.2; *Johnson v. Ghana* (CCPR/C/110/D/2177/2012), para. 7.3.

30 Human Rights Committee, *Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998 (2000), para. 8.2. See also *Kennedy v. Trinidad and Tobago*, Communication No. 845/1998 (2002).

31 A/HRC/4/20, paras. 56 and 58. See also views adopted by Human Rights Committee in: *Carpo et al. v. The Philippines*, No. 1077/2002 (2002); *Pagdayawon Rolando v. Philippines*, Communication No. 1110/2002 (2004); *Ramil Rayos v. Philippines*, Communication No. 1167/2003 (2004); *Hussain et al. v. Guyana*, Communication No. 862/1999 (2005); *Lawrence Chan v. Guyana*, Communication No. 913/2000 (2006); *Larrañaga v. the Philippines*, Communication No. 1421/2005 (2006); *Raymond Persaud and Rampersaud v. Guyana*, Communication No. 812/1998 (2006).

32 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, to the Human Rights Council (A/HRC/14/24, para. 51). See also Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, to the General Assembly (A/71/372), para. 43.

33 A/HRC/4/20, para. 66.

34 Human Rights Council, Report of the Secretary-General on the Question of the Death Penalty (A/HRC/33/20), para. 55; and CCPR/C/MWI/CO/1/Add.1, para. 11.

## D. Fair trial guarantees

The death penalty, in those countries that still retain it, can only be applied in the most exceptional cases, for the most serious crimes and under the strictest limits, according to the International Covenant on Civil and Political Rights. In addition to the “most serious crimes” requirement, article 6(2) of the Covenant prescribes additional procedural components that are reaffirmed in the Safeguards and subsequent resolutions of the Economic and Social Council,<sup>35</sup> Human Rights Committee jurisprudence,<sup>36</sup> and other United Nations resolutions<sup>37</sup> and international standards.

An independent, impartial and competent tribunal established by law is a fundamental and essential guarantee of fair trial rights. The Human Rights Committee has stated that the “requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature”.<sup>38</sup> The Committee has raised concerns about trial by military or special tribunals, especially if they have the discretion to impose the death penalty. The Committee has stated that the trial of civilians by these tribunals should be exceptional and limited to cases where the State can show that resorting to such trials is necessary and justified for objective and serious reasons, and where ordinary civilian courts are unable to undertake the trials.<sup>39</sup>

The Economic and Social Council, in its resolution 1996/15 on the implementation of the Safeguards, encouraged Member States that had not abolished the death penalty to “ensure that each defendant facing a possible death sentence is given all guarantees to ensure a fair trial, as contained in article 14 of the International Covenant on Civil and Political Rights.”<sup>40</sup> In this respect, the Safeguards require States to ensure non-retroactivity, presumption of innocence, the right to appeal, the right to seek pardon or commutation, and the stay of execution pending challenges to the death sentence.

Article 14(3) of the International Covenant on Civil and Political Rights provides for the right of everyone to, among other considerations, “have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”, defend himself/herself in person or through legal assistance of his/her own choosing, and have legal assistance assigned to him/her, in any case where the interests of justice so require, and without payment in case the person does not have sufficient means to pay for it.

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35 The Economic and Social Council in its resolution 1996/15 (23 July 1996) encouraged Member States in which the death penalty had not been abolished to ensure that each defendant facing a possible death sentence was given all guarantees to ensure a fair trial, as provided in article 14 of the International Covenant on Civil and Political Rights, and bearing in mind the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, the Guidelines on the Role of Prosecutors, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Standard Minimum Rules for the Treatment of Prisoners. It also encouraged States to ensure that defendants who did not sufficiently understand the language used in court were fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence considered in court.

36 For instance, see views adopted by the Human Rights Committee in: *Shakurova v. Tajikistan*, communications No. 1044/2002, para. 8.5; *Ruzmetov v. Uzbekistan*, Communication No. 915/2000, para. 7.6; *Chan v. Guyana*, Communication No. 913/2000, para. 5.4; *Rayos v. Philippines*, Communication No. 1167/2003, para. 7.3.

37 General Assembly resolutions 62/149, 63/138, 65/206, 67/176, 69/186 and 71/187.

38 CCPR/C/GC/32, para. 19.

39 *Ibid.*, paras. 18-22.

40 Economic and Social Council resolution 1996/15, operative para. 3.

The Human Rights Committee has clarified that the procedural components with respect to the death penalty include fair trial guarantees,<sup>41</sup> and that the imposition of a death sentence upon conclusion of a trial in which provisions of article 14 have not been respected constitutes a violation of the right to life.<sup>42</sup>

At the 2018 Bangkok seminar, participants stressed that the socio-economic profile of death row inmates in the Philippines showed that most of them were poor, had not received effective legal counsel, and were sentenced to death following proceedings that did not respect fair trial guarantees. Similar findings and the revelation of a high number of wrongfully imposed death sentences had been instrumental to the successful lobbying of formal abolition in some States.<sup>43</sup>

In Indonesia, the national human rights institution and civil society organizations have documented violations of fair trial rights in death penalty cases, including the following: lack of access to legal counsel at crucial stages of criminal proceedings; ill-treatment by the police to extract confessions or to countersign police investigation dossiers used as evidence in court; prolonged pre-trial detention before individuals were brought before a judge; and failure to provide legal assistance during appeal.<sup>44</sup>

In Malaysia, two executions had been carried out in March 2017 before a final decision on the defendants' clemency petition was rendered.<sup>45</sup>

Participants at the 2018 Bangkok seminar also raised concerns that police in Singapore often interrogate defendants without the presence of a lawyer, and statements taken from the defendants under such circumstances have often been used as evidence to convict them. Under Singapore's drug law, people who are found in possession of a specified amount of drugs, or have keys to vehicles or places in which controlled drugs are found, can be presumed to be trafficking prohibited substances and can be sentenced to death. In these circumstances, the burden of proof is shifted onto the defendant, in violation of the presumption of innocence.<sup>46</sup>

In Thailand, the right to a fair trial is impeded mostly by discrimination, barriers to accessing legal counsel, quality of State-appointed defence attorneys in death penalty cases, treatment of detainees in police custody and during interrogation, and allegedly widespread corruption within the police.<sup>47</sup>

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41 CCPR/C/GC/6, para. 7.

42 CCPR/C/GC/32, para. 59.

43 The Cornell Center on the Death Penalty Worldwide, *Justice Denied: A Global Study of Wrongful Death Row Convictions* (Ithaca, NY; Cornell Law School, 2018). Available at: [http://www.deathpenaltyworldwide.org/pdf/innocence\\_clinic\\_report\\_2018\\_R4\\_final.pdf](http://www.deathpenaltyworldwide.org/pdf/innocence_clinic_report_2018_R4_final.pdf).

44 Amnesty International, "Indonesia: Government should immediately establish moratorium after maladministration surrounding execution", Public Statement ASA/21/6861/2017, 3 August 2017. Available at: <https://www.amnesty.org/download/Documents/ASA2168612017ENGLISH.pdf>. Available at: <https://www.amnesty.org/download/Documents/ASA2168612017ENGLISH.pdf>.

45 A. Ruban, "Brothers executed despite pending clemency appeal", *Malay Mail*, 15 March 2017. Available at: <http://www.themalaymailonline.com/malaysia/article/brothers-executed-despite-pending-clemency-appeal>. OHCHR Regional Office for South-East Asia, "UN Human Rights Office condemns secretive executions of two brothers in Malaysia", Bangkok, 15 March 2017. Available at: <http://bangkok.ohchr.org/news/press/Malaybrothers.aspx>.

46 Amnesty International, *Cooperate or Die: Singapore's Flawed Reforms to the Mandatory Death Sentence*, ACT 50/7158/2017 (London, 2017), p. 13.

47 International Federation for Human Rights and Union for Civil Liberty, *International Fact-finding Mission: The Death Penalty in Thailand*, Report No. 411/2, Paris and Bangkok, March 2005, pp. 22-28. Available at: <https://www.fidh.org/IMG/pdf/Thailand411-2.pdf>.



In Viet Nam, a report released by the Ministry of Public Security in 2015 indicated that 226 detainees had died in police custody between October 2011 and September 2014.<sup>48</sup> Persistent allegations of torture and ill-treatment in police custody have thus raised serious concerns regarding the observance of fair trial rights, particularly in death-penalty cases in which confession under duress has been used as evidence in courts thereby resulting in a death sentence.

## 1. Presumption of innocence

According to article 14(2) of the International Covenant on Civil and Political Rights and the fourth Economic and Social Council Safeguard, everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty. The presumption of innocence imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that individuals accused of a criminal act must be treated in accordance with this principle. Public authorities must refrain from prejudging the outcome of a trial, including by abstaining from making public statements affirming the guilt of the accused.<sup>49</sup>

## 2. Access to legal counsel

Access to effective legal counsel at all stages of criminal proceedings is crucial to implementing the Economic and Social Council Safeguards to protect the rights of those facing the death penalty.<sup>50</sup> In cases involving the death penalty, the Human Rights Committee stated that “it is axiomatic that the accused must be effectively assisted by a lawyer at all stages of the proceedings” and lawyers provided by the State “must be effective in the representation of the accused”.<sup>51</sup> The Economic and Social Council, in its resolution 1989/64, recommended that Member States should afford “special protection to persons facing charges for which the death penalty is provided 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”.

As a key procedural component for guaranteeing fair trial rights, access to legal counsel has been widely recognized in international instruments and standards apart from the International Covenant on Civil and Political Rights. That includes the Convention on the Elimination of All Forms of Discrimination against Women,<sup>52</sup> the Convention on the Rights of the Child,<sup>53</sup> the Convention on the Rights of Persons with Disabilities,<sup>54</sup> the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,<sup>55</sup> as well as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principles 17 and 18), the Basic Principles on the Role of Lawyers (Principles 5 to 8), and the Standard Minimum Rules for the Treatment of Prisoners or the Nelson Mandela Rules (Rules 61 and 119).

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48 Cam Nguyen, “Doubts linger as Vietnam reports causes of 226 deaths in custody”, *Thanh Nien News*, Hanoi, 22 March 2015.

49 CCPR/C/GC/32, para. 30.

50 Views adopted by the Human Rights Committee in: *Chikunova v Uzbekistan*, Communication No. 1043/2002 (March 2007), paras. 7.4 and 7.5; *Gunan v Kyrgyzstan*, Communication No. 1545/2007 (July 2011), para. 6.3; *Levy v. Jamaica*, Communication No. 719/1996, (November 1998), paras. 7.2–7.3; *Brown v Jamaica*, Communication No. 775/1997 (May 1999), paras. 6.11 and 6.15.

51 CCPR/C/GC/32, para. 38.

52 Committee on the Elimination of Discrimination Against Women, General Recommendation No. 33 (CEDAW/C/GC/33), para. 37 (b) and (c).

53 Convention on the Rights of the Child, art. 40(2)(b)(ii).

54 Convention on the Rights of Persons with Disabilities, art. 13(1).

55 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 18.

In December 2012, the General Assembly adopted the Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, recognizing the right to legal aid for individuals facing the death penalty at all stages of the criminal justice process.

### 3. Appeal

The right to appeal and to seek pardon or commutation is another important procedural component in the limits on the use of the death penalty.

As capital punishment has an irreversible outcome, mandatory review of death sentences by a higher tribunal is essential, so that the guilt of the defendant is proved beyond doubt with clear and convincing evidence, as set out in the fourth and sixth Economic and Social Council Safeguards. The right to appeal is also provided for under article 14(5) of the International Covenant on Civil and Political Rights. The Human Rights Committee has stated that the right to appeal “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”.<sup>56</sup> The Economic and Social Council affirmed the importance of “mandatory appeals or review” in its resolution 1989/64 of 24 May 1989 (para. 1 (b)).

### 4. Right to seek pardon or commutation

Article 6(4) of the International Covenant on Civil and Political Rights and the seventh Economic and Social Council Safeguard provide for persons sentenced to death to seek pardon or commutation of the sentence. Human Rights Council resolution 36/17 (5 October 2017) on the death penalty calls on States to ensure that persons facing capital punishment can exercise their right to seek pardon or commutation of their death sentence.<sup>57</sup> General Assembly resolution 71/187 (19 December 2016) had made the same call, noting that clemency procedures should be fair and transparent, and that information be promptly provided at all stages of the process.<sup>58</sup> In 1989, the Economic and Social Council recommended that Member States provide “provisions for clemency or pardon in all cases of capital offence”.<sup>59</sup> Moreover, it called on Member States in 1996 to “ensure that officials involved in decisions to carry out an execution were fully informed of the status of appeals and petitions for clemency of the prisoner in question”.<sup>60</sup>

According to the eighth Safeguard, 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”. Article 6(2) of the International Covenant on Civil and Political Rights provides that the death penalty can only be carried out pursuant to a final judicial judgment. When read in conjunction with article 6(4), it is clear that there is a duty not to carry out a death sentence before all judicial appeal procedures have been exhausted by the defendant and before his or her applications to “all other available non-judicial avenues have been attempted, ... meaningfully considered and conclusively decided upon.”<sup>61</sup>

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56 CCPR/C/GC/32, para. 48.

57 A/HRC/RES/36/17, operative para. 4.

58 A/RES/71/187, operative para. 7(f).

59 Economic and Social Council resolution 1989/64, operative para. 1 (b).

60 Economic and Social Council resolution 1996/15, operative para. 6.

61 Human Rights Committee, revised draft General Comment No. 36, paras. 50–51. See also Human Rights Committee, Concluding observations on the sixth periodic report of Japan (CCPR/C/JPN/CO/6), para. 13.

No category of sentenced persons can a priori be excluded from amnesties, pardons or commutation. In this vein, a blanket refusal to consider requests for pardon or commutation by an entire category of offenders based solely on the type of their offence, such as those related to drugs, is incompatible with international human rights law.

## 5. Application of lighter penalties

Article 15(1) of the International Covenant on Civil and Political Rights and the Economic and Social Council Safeguards provide that an offender shall benefit from changes in the law that provide for a lighter penalty for the offence subsequent to its commission. Once the death penalty is abolished, there can be no justification for its continued application in cases that predate the abolition. Therefore, in accordance with the retroactive leniency principle, the abolition, reduction in the number of capital crimes, removal of mandatory death sentence, and such other reforms as the raising of minimum quantity of drugs required to incur capital punishment, should apply retroactively to individuals charged or convicted of a capital offence.<sup>62</sup> In such circumstances, there should be a prompt process through which these individuals are re-sentenced or can have their sentences commuted.

## 6. Foreign nationals facing the death penalty

Foreign nationals facing the death penalty, including migrant workers, are often disadvantaged due to linguistic barriers, lack of or limited access to legal representation or consular assistance, and unfamiliarity with local laws and procedures.<sup>63</sup> By way of example, article 14 (3)(f) of the International Covenant on Civil and Political Rights guarantees a defendant “the free assistance of an interpreter if he cannot understand or speak the language used in court”. Resolution 1996/15 of the Economic and Social Council regarding its Safeguards, which guarantee protection of the rights of those facing the death penalty, provides that States should “ensure that defendants who do not sufficiently understand the language used in court are fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence deliberated in court”. In this regard, access to consular assistance, pursuant to the Vienna Convention on Consular Relations, is an important aspect of the protection of those facing the death penalty in a country where they are foreigners.

The International Court of Justice has confirmed the requirement that foreign nationals who are arrested must be informed, without delay, of their right to consular assistance,<sup>64</sup> and has provided for remedies in cases where that right was violated.<sup>65</sup> Recent General Assembly and Human Rights Council resolutions on the death penalty have called on States to respect the right of foreign nationals to consular assistance when legal proceedings are initiated against them. The Special Rapporteur on extrajudicial, summary or arbitrary executions has emphasized that States have responsibilities, with respect to the protection of the right to life of their nationals, to intervene via consular services, which implies a duty of due diligence with respect to nationals potentially facing the death penalty overseas.<sup>66</sup> The Special Rapporteur has also concluded that “the denial of the right to consular notification and access is a violation of due process and the execution of a foreign national deprived of such rights constitutes an arbitrary deprivation of life, in contravention of articles 6 and 14”<sup>67</sup> of the International Covenant on Civil and Political Rights.

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62 Human Rights Committee, revised draft General Comment No. 36, para. 43.

63 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/70/304), para. 73.

64 See *Germany v. United States*, 2001 ICJ 104.

65 See *Avena and Other Mexican Nationals*, 2004 ICJ 128.

66 See A/70/304, paras. 112–120.

67 *Ibid.*, para. 93.

In South-East Asia, a significant proportion of persons charged with or convicted of drug-related offences, particularly trafficking, are foreign nationals, who make up a considerable percentage of death row prisoners in several States in the region. Some countries place explicit limits on a foreign national's access to legal representation and support. For example, in Indonesia, article 51(1) of Law No. 24/2003 on the Constitutional Court stipulates that an application for a constitutional review of any provisions in a law can only be made by an Indonesian national. That has resulted in the Constitutional Court rejecting applications for constitutional review submitted by foreign nationals who were facing the death penalty.

## **E. Prohibition of torture and other cruel, inhuman or degrading punishment**

Whereas in general, international human rights law looks at the death penalty from the perspective of the right to life, issues concerning its implementation are also relevant to the prohibition of cruel, inhuman or degrading treatment or punishment.<sup>68</sup> Persons facing the death penalty often face harsh detention conditions, prolonged detention periods and methods of execution that inflict severe pain. The physical and mental suffering that they, as well as their family members, may face raises serious questions regarding compliance with the absolute prohibition of torture and cruel, inhuman or degrading treatment or punishment, as contained notably in the Convention Against Torture and in article 7 of the International Covenant on Civil and Political Rights. This prohibition has been widely recognized as a norm of customary international law and, as such, States are bound by it irrespective of their treaty ratification status.<sup>69</sup>

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded in 2012 that "executions today often violate the absolute prohibition [of torture], either because of the death row phenomenon or because the method applied involves unnecessary suffering and indignity". He asserted there was an emerging customary norm with regard to the death penalty and that this would flout the absolute prohibition.<sup>70</sup>

The 2017 Human Rights Council resolution on the question of the death penalty acknowledges that "a significant number of States hold that the death penalty is a form of torture or other cruel, inhuman or degrading treatment or punishment".

### **1. Methods of execution**

The ninth Economic and Social Council Safeguard provides that "[w]here capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering." The Human Rights Committee has reaffirmed that where the death penalty is applied for the most serious crimes in compliance with the strictest limits, it must be "carried out in such a way as to cause the least possible physical and mental suffering".<sup>71</sup>

United Nations human rights mechanisms have repeatedly found various methods of execution to violate the prohibition of torture and other cruel, inhuman or degrading treatment or punishment,

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68 E/2015/49, para. 110.

69 Committee Against Torture General Comment No. 2 (CAT/C/GC/2), para. 1; See also preamble in the General Assembly resolution 72/163 (19 December 2017) (A/RES/72/163).

70 Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/67/279), para. 29. See also Report of the High Commissioner for Human Rights on the "High-level panel discussion on the question of the death penalty" (A/HRC/30/21), para. 24.

71 Human Rights Committee, General Comment No. 20, para. 6.

including execution by gas asphyxiation,<sup>72</sup> hanging,<sup>73</sup> injection of untested lethal drugs,<sup>74</sup> public execution<sup>75</sup> and stoning.<sup>76</sup> The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has noted that no categorical evidence exists for any method of execution in use today to show that it complies with the prohibition of torture and cruel, inhuman or degrading treatment. After a thorough review of existing methods of execution, he concluded that “even if the required safeguards ... are in place, all methods of execution currently used can inflict inordinate pain and suffering. States cannot guarantee that there is a pain-free method of execution.”<sup>77</sup>

## 2. Death row

The term “death row” describes the prison environment of persons sentenced to death and awaiting execution. In countries where the death penalty is practised, prisoners who are sentenced to death are commonly segregated. They may be subject to a special regime with respect to visiting rights of family members and legal counsel, recreation, and access to employment. In addition, detention conditions are harsh in many of the world’s retentionist countries and territories, where prisons and other detention facilities often are overcrowded and lack basic amenities and supplies essential for the dignity and well-being of prisoners. When in detention, persons who are drug users face particular health risks as a result of lack of timely access to essential and adequate healthcare, such as harm reduction services, which in turn creates enormous health risks to themselves and the other prisoners. In its resolution 1996/15, the Economic and Social Council urged States to effectively apply the Standard Minimum Rules for the Treatment of Prisoners in order to minimize the suffering of prisoners under sentence of death and to avoid exacerbating such suffering.

Lengthy detention under harsh physical conditions, combined with the anxiety of and uncertainties over pending execution, increase the risk of severe mental suffering.

Additionally, the Human Rights Committee has found that extreme delays in carrying out a death sentence, which exceed any reasonable period of time necessary to exhaust all legal remedies, may also violate the prohibition of torture.<sup>78</sup> The Committee against Torture has expressed concern over detention conditions for prisoners facing the death penalty such as overcrowding and excessive time on death row, which may amount to cruel, inhuman or degrading treatment.<sup>79</sup> According to the Human Rights Committee, lack of timely notice regarding the date of execution, both for the prisoner and his or her family members, also constitutes a form of ill-treatment<sup>80</sup>, and the “secrecy surrounding executions and the fact that no details of executions or of places of burial are given to the families also amount to torture”.<sup>81</sup>

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72 Views adopted by the Human Rights Committee in: *Ng v Canada*, Communication No. 469/1991 (November 1993), para. 16.4.

73 *In the Matter of Sentencing of Taha Yassin Ramadan*, Application for Leave to Intervene as Amicus Curiae of High Commissioner for Human Rights to the Iraqi Supreme Criminal Tribunal, 8 February 2007.

74 Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America (CCPR/C/USA/CO/4), para. 8.

75 Human Rights Committee, Concluding Observations on the second periodic report of the Democratic People’s Republic of Korea (CCPR/CO/72/PRK), para. 13. See also A/HRC/33/20, paras. 48–49.

76 Human Rights Committee, Concluding Observations, Islamic Republic of Iran (CCPR/C/IRN/CO/3), para. 12.

77 A/67/279, para. 41.

78 Views adopted by the Human Rights Committee in: *Johnson v. Jamaica*, Communication No. 588/1994 (March 1996), para. 8.5; *Kindler v. Canada*, Communication No. 470/1991 (July 1993), para. 15.2; *Martin v. Jamaica*, Communication No. 317/1988 (March 1993), para. 12.2.

79 Committee Against Torture, Concluding Observations on the second periodic report of Zambia (CAT/C/ZMB/CO/2), para. 19.

80 CCPR/C/JPN/CO/6, para. 13.

81 A/HRC/38/51, para. 78.

## F. Right to equality and non-discrimination

The right to equality and non-discrimination constitutes a general principle of international human rights law, and is firmly established under the Charter of the United Nations, major international and regional human rights instruments, and national constitutions and jurisprudence. States have a duty to respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction, including foreign nationals, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, age, disability, health status, marital or family status, sexual orientation, gender identity or other status.

International law prohibits the discriminatory use of the death penalty. Thus, the use of the death penalty to sanction individuals based on their gender, sexual orientation or gender identity, such as for adultery<sup>82</sup> and consensual same-sex relations,<sup>83</sup> is inherently discriminatory and prohibited under international law. International human rights law also prohibits the criminalization of, let alone the imposition of, the death penalty for the peaceful exercise of the rights to freedoms of assembly, association, religion or belief, and expression.<sup>84</sup>

In practice, drug enforcement efforts and the imposition of the death penalty, including for drug-offences, have been found to have a disproportionate impact, directly and indirectly, on vulnerable groups. The 2017 Human Rights Council resolution on the death penalty deplored “the fact that frequently, poor and economically vulnerable persons and foreign nationals are disproportionately subjected to the death penalty ... and that persons belonging to religious or ethnic minorities are disproportionately represented among those sentenced to the death penalty”.<sup>85</sup> In many countries, ethnic minorities who represent a small percentage of the total population are overrepresented in the total prison population, suggesting potential bias and substantive discrimination in the criminal justice system. In November 2015, the United Nations Forum on Minority Issues pointed to evidence that in some countries, the death penalty was imposed and carried out more frequently against persons belonging to minority groups. The Forum recommended that in countries that had not abolished the death penalty, States should ensure that it was not applied as a result of discriminatory or arbitrary application of the law, including barriers to equal access to competent legal assistance. It also recommended that “States should implement safeguards guaranteeing protection of the rights of those facing the death penalty”.<sup>86</sup>

The Secretary-General has observed that “poor or less privileged individuals often do not have access to effective legal representation and run a higher risk of being subject to the death penalty”, which not only leads to violations of the right to a fair trial and the right to life, but also increases social inequality in the criminal justice system.<sup>87</sup>

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82 See CCPR/C/79/Add.25, para. 8.

83 Views adopted by the Human Rights Committee in *Toonen v. Australia*, Communication No. 488/1992 (March 1994). See also Human Rights Committee concluding observations on Yemen (CCPR/C/YEM/CO/5) and on Iran (CCPR/C/IRN/CO/3), and Committee on Economic, Social and Cultural Rights concluding observations on Iran E/C.12/IRN/CO/2).

84 A/70/304, sect. C; see also Human Rights Committee, revised draft General Comment No. 36, paras. 39–40.

85 Preamble in A/HRC/RES/36/17.

86 Recommendations of the Forum on Minority Issues at its eighth session: Minorities and the criminal justice system (A/HRC/31/72), paras. 71–72.

87 A/HRC/36/26, paras. 12–13.

Participants at the 2018 Bangkok seminar highlighted that across retentionist States, persons sentenced to death were overwhelmingly at the lower end of the drug market—street-level dealers and couriers—and typically were economically disadvantaged and vulnerable people, including women, migrant workers and foreign nationals.

General Recommendation 35 of the Committee on the Elimination of Discrimination Against Women<sup>88</sup> urges States parties to repeal any criminal provisions that affect women disproportionately, including those resulting in the discriminatory application of the death penalty to women. The Special Rapporteur on extrajudicial, summary or arbitrary executions stressed that migrant women facing the death penalty abroad are disproportionately, and thus arbitrarily, affected by the death penalty because of unfamiliarity with the laws and procedures, inadequate or low-quality legal representation, insufficient knowledge of the language and lack of a support network. She further stated that the implementation of the death penalty under these circumstances may be discriminatory and may constitute an arbitrary killing.<sup>89</sup>

In 2015, the Indonesian National Commission on Violence Against Women (Komnas Perempuan) conducted a review of women facing the death penalty, which revealed that the majority were victims of gender-based violence. It noted that “female domestic workers [were] targeted by international drug smuggling and human trafficking syndicates, unknowingly made into drug mules by perpetrators who exploit the women’s layered vulnerabilities”.<sup>90</sup> In Thailand, official figures indicate that 90 per cent of the women on death row are facing the death penalty for drug-related crimes, in contrast with 46 per cent of men.<sup>91</sup>

## G. Groups protected from the death penalty

International human rights law and standards prohibit the imposition of the death penalty or execution of persons belonging to certain groups.

### 1. Juvenile offenders and pregnant women

Article 6(5) of the International Covenant on Civil and Political Rights prohibits the sentencing to death of persons below the age of 18 at the time of the commission of a crime as well as the execution of pregnant women. The Safeguards of the Economic and Social Council state that the death sentence shall not be carried out on new mothers. Subsequent resolutions on the death penalty adopted by the General Assembly, the Economic and Social Council and the Human Rights Council reiterate the protection of these two groups. Capital punishment for crimes committed by persons below the age of 18 is also prohibited by article 37(a) of the Convention on the Rights of the Child as well as in international humanitarian law.<sup>92</sup>

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88 CEDAW/C/GC/35.

89 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/35/23), para. 43.

90 <http://en.komnasperempuan.go.id/read-news-komnas-perempuan-submission-on-right-to-life>.

91 Union for Civil Liberty, “Women, Imprisonment and the Death Penalty in Thailand”, Bangkok, February 2018, p. 11.

92 Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (United Nations Treaty Series, vol. 75, No. 973), art. 68; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (United Nations Treaty Series, vol. 1125, No. 17512), art. 77, para. 5; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (United Nations Treaty Series, vol. 1125, No. 17513), art. 6, para. 4.



The low level or lack of birth registration in such countries as Indonesia, Lao People's Democratic Republic and Myanmar, especially among the rural poor, has made it difficult to determine whether a defendant is below the age of 18 at the time of crime.<sup>93</sup>

In his 2015 report to the Economic and Social Council, the Secretary-General reported that no country seemed to permit the execution of a pregnant woman, and no such executions had been reported in modern times.<sup>94</sup>

## 2. Persons with mental or intellectual disabilities

Article 10 of the Convention on the Rights of Persons with Disabilities reaffirms everyone's inherent right to life. The third Economic and Social Council Safeguard protects persons with mental or intellectual disabilities from capital punishment. General Assembly and Human Rights Council resolutions on the death penalty have called on retentionist States not to impose capital punishment on persons with mental or intellectual disabilities, or to eliminate it.<sup>95</sup> For example, General Assembly resolution 69/186 (2014) urged States "not to impose capital punishment for offences committed by...persons with mental or intellectual disabilities" (para. 5(d)).

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment regards the imposition and enforcement of the death penalty on persons with disabilities as particularly cruel, inhuman and degrading, and in violation of article 7 of the International Covenant on Civil and Political Rights and articles 1 and 16 of the Convention Against Torture.<sup>96</sup> Likewise, the Special Rapporteur on extrajudicial, summary or arbitrary executions stated that "it is a violation of death penalty safeguards to impose capital punishment on individuals suffering from psychosocial disabilities".<sup>97</sup>

In his 2017 report to the Human Rights Council, the Secretary-General recommended that States "ensure that persons with mental or intellectual disabilities are not sentenced to death" and that laws and sentencing guidelines "must be developed or amended to prohibit the imposition of the death sentence and the execution of such persons".<sup>98</sup>

Equal access to competent legal representation, including effective presentation of the evidence concerning a person's disability, the need for mental health expertise and access to psychiatric evaluation, and the need for judges to take relevant evidence into account, are important components in upholding the prohibition of execution of persons with mental and intellectual disabilities. For instance, the Committee on the Rights of Persons with Disabilities has expressed concern that persons with disabilities, particularly persons with psychosocial and/or intellectual disabilities, may face a greater risk of being sentenced to death because of a lack of procedural accommodations in criminal proceedings.<sup>99</sup>

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93 See birth registration data published by UNICEF. Available at: <https://data.unicef.org/topic/child-protection/birth-registration/>.

94 E/2015/49, para. 80.

95 See E/CN.4/RES/2000/65, para. 3(e) and E/CN.4/RES/2005/59, para. 7(c); A/HRC/RES/36/17, para. 5; A/RES/69/186, para. 5(d) and A/RES/71/187, para. 7(d).

96 A/67/279, paras. 58 and 80. See also E/2015/49, para. 80; CAT/C/JPN/CO/2, para. 15; Human Rights Committee, Concluding observation on the initial report of Pakistan (CCPR/C/PAK/CO/1), para. 18(c); views adopted by the Human Rights Committee in *R.S. v Trinidad and Tobago*, Communication No. 684/1996 (April 2002), para. 7.2; and Human Rights Committee, Concluding observations on the fifth periodic report by Japan (CCPR/C/JPN/CO/5), para. 16.

97 OHCHR, "Death row: UN expert urges US authorities to stop execution of two persons with psychosocial disabilities", Press release, Geneva, 17 July 2012.

98 A/HRC/36/26, para. 56.

99 CRPD/C/IRN/CO/1, paras. 22-23.

### 3. Older persons

In its resolution 1989/64, the Economic and Social Council urged States to establish a maximum age beyond which a person may not be sentenced to death or executed. Some States have taken initiatives in this regard. For example, in Guatemala, the maximum age for imposition of capital punishment is 60. In Belarus, the death penalty is not applicable to men who had reached the age of 65 at the time of sentencing. In China, legislation was adopted in 2011 providing that any person 75 years of age or older at the time of trial is exempt from application of the death penalty. A provision in the Constitution of Zimbabwe adopted in 2013 states that the death sentence shall not be passed on an offender who is over the age of 70 years.<sup>100</sup>

## H. Transparency

Access to all accurate and relevant information is essential in ensuring that the use of the death penalty complies with international human rights law, including obligations to the right to life, to fair trial and to freedom of expression and information. The lack of transparency related to data on the number of executions that have taken place or on individuals on death row is a serious impediment to international and national debates that could lead to the abolition of capital punishment. It is also important for the effectiveness and transparency of such a debate to ensure that the public has access to balanced information, including accurate statistics on criminality and global best practices in how to effectively fight against crime without resorting to capital punishment.

The requirement of transparency with respect to the use of the death penalty is firmly rooted in international human rights jurisprudence and authoritative opinions.<sup>101</sup> In its resolution 1989/64, the Economic and Social Council set out minimum requirements of transparency.

The Special Rapporteur on extrajudicial, summary or arbitrary executions has recommended that States ensure transparency by taking into account three dimensions of the application of the death penalty. First, States must provide sufficient and relevant information to persons facing execution and their immediate relatives, in addition to their lawyer(s), to ensure effective representation at all stages. Second, transparency is required by the general public in the State in question for informed public debate and democratic accountability. Finally, the international community, which is moving progressively towards abolition, has an interest in monitoring the respect and protection of the right to life everywhere.<sup>102</sup>

The Human Rights Committee has concluded that refusing to be transparent about the fate of individuals facing the death penalty, including by withholding information from families about imminent executions, could itself constitute a human rights violation.<sup>103</sup> The Human Rights Committee also found that State-held information regarding the use of the death penalty was a legitimate issue of public interest. It consequently recognized a general right to gain access to that information deriving

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100 E/2015/49, para. 84.

101 Economic and Social Council resolution 1989/64, operative para. 5. Commission on Human Rights resolutions: 1999/61, operative para. 4(c); 2000/65, operative para. 4(c); 2005/59, operative paras. 5(c–d); and Human Rights Council resolutions: A/HRC/RES/30/5, operative paras. 3–4; A/HRC/RES/36/17, operative para. 9; A/RES/65/206, operative para. 3(b); A/RES/67/176, operative para. 4(b); A/RES/69/186, operative para. 5(c); A/RES/71/187, operative para. 7(c).

102 A/67/275, sect. E.

103 Views adopted by the Human Rights Committee in: *Schedko v. Belarus*, Communication No. 886/1999 (April 2003), para. 10.2, and *Staselovich v. Belarus*, Communication No. 887/1999 (April 2003), para. 9.2.

from article 19 of the International Covenant on Civil and Political Rights, which guarantees freedom of expression and information.<sup>104</sup>

The Committee against Torture has also expressed deep concern over the unnecessary secrecy and uncertainty surrounding executions. It noted that refusing to provide advance notice of the date and time of execution to convicted persons and their family members was a clear human rights violation.<sup>105</sup>

According to the Special Rapporteur on extrajudicial, summary or arbitrary executions, article 14 of the International Covenant on Civil and Political Rights addresses not only the rights of accused persons but also the public's right to information on the use of the death penalty, and States therefore have a duty to make information on the death penalty publicly available.<sup>106</sup>

In their most recent resolutions on the death penalty, both the General Assembly and the Human Rights Council called on retentionist States to publish relevant information that is disaggregated by gender, age, nationality and other applicable criteria, with regard to their use of the death penalty. The information should include the charges, number of persons sentenced to death, number of persons on death row, number of executions carried out, and number of death sentences reversed, commuted on appeal or in which amnesty or pardon has been granted; as well as any scheduled execution. Former Secretary-General Ban Ki-moon has stated that the continued lack of transparency on the part of some Governments concerning the numbers of executed persons was incompatible with human rights. He recommended that States refrain from carrying out executions in secret and strive to take all measures necessary to guarantee access to information on the death penalty, including advance notice to family members regarding the date of execution.<sup>107</sup>

## **I. Resumption of executions and reintroduction of the death penalty**

In recent years, a number of States have resumed executions after several years during which none was carried out. The resumptions of executions and other measures that increase the use of the death penalty, such as increasing the number of capital crimes, go against the spirit of international human rights law.<sup>108</sup>

The Special Rapporteur on extrajudicial, summary or arbitrary executions has questioned how a State, after not having carried out executions for a long period of time, would be able to provide objective reasons for resumption at a specific point in time or for specific death-row prisoners. She warned that executions may be considered arbitrary if the resumption is motivated by extraneous factors, such as a wish to demonstrate strength in the criminal justice system, which may be unrelated to the crime or convict in question.<sup>109</sup>

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104 Views adopted by the Human Rights Committee in *Toktakunov v. Kyrgyzstan*, Communication No. 1470/2006 (March 2011).

105 CAT/C/JPN/CO2, para. 15.

106 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, to the Commission on Human Rights (E/CN.4/2006/53/Add.3), paras. 12–13.

107 Human Rights Council, Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, Capital punishment and the implementation of the Safeguards guaranteeing protection of the rights of those facing the death penalty (A/HRC/30/18), para. 58.

108 A/71/332, para. 26; A/69/265, para. 98.

109 A/69/265, paras. 102–103.

Article 6(2) of the International Covenant on Civil and Political Rights, which regulates the imposition of the death penalty, provides that once the death penalty is abolished—through amending domestic law or acceding to the Second Optional Protocol—States are barred from reintroducing it.<sup>110</sup> Furthermore, international law does not permit a State that has ratified or acceded to the Second Optional Protocol of the International Covenant on Civil and Political Rights, which aims at the abolition of the death penalty, to denounce it or withdraw from it.<sup>111</sup> This position has been reaffirmed by the Human Rights Committee in its revised, publicly available draft General Comment on the right to life.<sup>112</sup>

## J. Deportation, extradition or forcible transfer

States that have abolished the death penalty are absolutely prohibited from extraditing or forcibly transferring persons to retentionist States when they know or ought to know that there are substantial grounds for believing there is a real risk that the death penalty may be imposed, unless adequate assurances are obtained that remove completely the possibility of the persons being sentenced to death.<sup>113</sup>

States that have not yet abolished the death penalty are also prohibited from transferring persons to a State where the death penalty may be imposed in violation of international human rights law and standards, unless adequate assurances are obtained that the death penalty will be imposed only in compliance with international law.<sup>114</sup>

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110 Human Rights Committee, Open letter to the Deputy Permanent Representative of the Philippines in Geneva and the President of the Senate of the Philippines, 28 March 2017. Available at: [http://www.ohchr.org/Documents/HRBodies/CCPR/NV\\_from\\_HRC\\_ThePhilippines\\_28March2017.pdf](http://www.ohchr.org/Documents/HRBodies/CCPR/NV_from_HRC_ThePhilippines_28March2017.pdf).

111 A/71/332, para. 72.

112 CCPR/C/GC/36, para. 38.

113 Views adopted by the Human Rights Committee in: *Kindler v. Canada*, Communication No. 470/1991 (July 1993), paras. 13.1-13.2, and *Yin Fong v. Australia*, Communication No. 1442/2005 (October 2009), para. 9.7; General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22\* (CAT/GC/4).

114 A/67/275, sect. D(1)(a).

# III. Drug control and human rights

At the 2018 Bangkok seminar, experts pointed out that despite the original focus of the international drug control regime on human health and welfare, State practices have instead overwhelmingly focused on criminal justice responses that have entailed unintended negative consequences for human rights, public health and drug control efforts. In recent years, together with the global progress towards abolition and moratorium of the death penalty, the need for a rights-based approach to drug control, including opposition to the death penalty for drug-related offences, has gained greater attention and support among the major stakeholders in the global drug control regime.

## A. The international drug control regime

The core legal framework of the international drug control regime consists of three main treaties:<sup>115</sup>

- 1) Single Convention on Narcotic Drugs of 1961, as amended by the 1972 Protocol;<sup>116</sup>
- 2) Convention on Psychotropic Substances of 1971;<sup>117</sup> and
- 3) United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.<sup>118</sup>

The first two conventions brought under international control such plants as opium poppy, synthetic substances and precursor chemicals used in making drugs. The third convention expanded the scope of international cooperation in tackling the drug trade and highlighted the links between illicit drug trade and organized crimes. The three treaties have been ratified by a majority of the States Members of the United Nations, including all 10 members of the Association of South-East Asian Nations (ASEAN). The preambles in the three treaties all began by expressing concerns for the “health and well-being” of humankind. The Single Convention maintains that drug addiction is a “serious evil” that States must “combat”.

International drug control and drug policy-making bodies and the United Nations, in particular the United Nations Office on Drugs and Crime (UNODC), have reaffirmed this position and stated that “there is no persuasive evidence that the use of the death penalty is a greater deterrent than other methods of punishment in eradicating drug trafficking or other drug-related offences”.<sup>119</sup>

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115 Available at: <https://www.unodc.org/unodc/en/commissions/CND/conventions.html>.

116 *United Nations Treaty Series*, vol. 976, p. 105. 186 States Parties as of 26 March 2018.

117 *United Nations Treaty Series*, vol. 1019, p. 175. 184 States Parties as of 26 March 2018.

118 *United Nations Treaty Series*, vol. 1582, p. 95. 190 States Parties as of 26 March 2018.

119 A/HRC/33/20, para. 62.

In 2010, citing Human Rights Committee jurisprudence and the expert opinions of Special Rapporteurs, UNODC concurred that “the concept of ‘most serious crimes’ was limited to those for which it can be shown there was an intention to kill which resulted in the loss of life”, and that “drug offences (such as possession and trafficking) and those of a purely economic nature do not meet this threshold”.<sup>120</sup>

A 2012 position paper on the role of UNODC in promoting human rights stated that the Office would place itself in a vulnerable position vis-à-vis its responsibility to respect human rights if it supported a criminal justice system in a country that actively continues to apply the death penalty for drug offences. The paper cautioned that continued support in such circumstances could be perceived as legitimizing the use of the death penalty. It warned that UNODC might have no choice but to employ a temporary freeze or withdrawal of support if executions for drug-related offences continued despite requests for guarantees and high-level political intervention.<sup>121</sup>

Both UNODC and the World Health Organization (WHO) have emphasized that “drug use should be seen as a health-care condition and drug users should be treated in the health-care system rather than in the criminal justice system where possible”. The two world bodies have stated that research shows treatment and care “as alternative to imprisonment or commenced in prison, followed by support and social reintegration after release, decrease the risk of relapse in drug use, of HIV transmission and of re-incidence in crime, with significant benefits for individual health, as well as public security and social savings”.<sup>122</sup>

In a 2014 policy document, the Commission on Narcotic Drugs (CND) made important clarifications regarding the content of the three main drug control conventions. First, the Commission stressed that the conventions adopt a health-centred approach and that the restrictive provisions therein should not be considered as justifying a repressive or prohibitionist regime. Second, the Commission provided that the conventions “do not absolutely require” criminal justice sanctions for the possession, purchase or cultivation for personal use, and that social protection, health care and reintegration services are more effective than punishment, especially in cases of a minor nature. Third, the Commission underscored that nothing in the conventions justifies punishment or other actions that infringe on human rights, such as torture, humiliation during treatment, and coercion. Lastly, the Commission noted that the conventions never mention or support the death penalty for drug-related offences.<sup>123</sup>

In its 2017 annual report, the International Narcotics Control Board (INCB), the monitoring body for the implementation of the international drug control conventions, reiterated its opposition to capital punishment for drug-related offences, and encouraged States that retain this punishment for drug-related offences to consider abolishing it for that category of offence.<sup>124</sup>

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120 Commission on Narcotic Drugs and Commission on Crime Prevention and Criminal Justice, Note by the Executive Director (E/CN.7/2010/CRP.6–E/CN.15/2010/CRP.1), para. 25.

121 UNODC, “UNODC and the promotion and protection of human rights”, Position Paper (2012), p. 10.

122 UNODC and WHO, “Principles of drug dependence and treatment”, Discussion Paper (2008), p. 14.

123 Commission on Narcotic Drugs, Drug policy provisions from the international drug control Conventions (E/CN.7/2014/CRP.5).

124 International Narcotics Control Board, *Report of the International Narcotics Control Board for 2017*, (Vienna, United Nations, 2018), pg. 118. Available at: [http://www.incb.org/documents/Publications/AnnualReports/AR2017/Annual\\_Report/E\\_2017\\_AR\\_ebook.pdf](http://www.incb.org/documents/Publications/AnnualReports/AR2017/Annual_Report/E_2017_AR_ebook.pdf)

## 1. Thirtieth special session of the General Assembly on the world drug problem

The outcome document of the thirtieth special session of the General Assembly on the world drug problem in 2016 is a milestone text in the evolution of the global approach to drug control, with human rights language and standards figuring throughout the document. It recognizes “drug dependence as a complex, multifactorial health disorder characterized by a chronic and relapsing nature with social causes and consequences that can be prevented and treated through, inter alia, effective scientific evidence-based drug treatment, care and rehabilitation programmes”.<sup>125</sup> The document also states clearly that the global drug problem must be addressed through measures that are taken in full conformity with the Charter of the United Nations, international law and the Universal Declaration of Human Rights, with full respect for all human rights, fundamental freedoms and the inherent dignity of all individuals. However, the text fails to sufficiently articulate the binding nature of human rights obligations in the context of international drug control and it continues to embrace the harmful concept of a “drug-free world”.<sup>126</sup>

During the 2016 special session on the world drug problem, 18 States advocated a paradigm shift away from the so-called war on drugs towards a health-centred approach, while 36 promoted proportionate penalties, 22 promoted decriminalization and nine promoted legal regulation. Fifteen United Nations entities called for decriminalization.<sup>127</sup> Significantly, 73 States expressed “strong opposition to the death penalty for drug offences” and/or condemned the lack of language on the issue in the outcome document.<sup>128</sup>

The published document contains operational recommendations in seven thematic clusters, one of which is devoted to human rights and vulnerable groups. Although language on the death penalty was omitted in the final document, six of the human rights recommendations concern proportionate and effective policies and responses, including calls on States to:

- Develop, adopt and implement alternative measures to conviction or punishment;
- Promote proportionate national sentencing policies, practices and guidelines for drug-related offences whereby both mitigating and aggravating factors are taken into account; and
- Ensure legal guarantees and due process safeguards pertaining to criminal justice proceedings, including practical measures to uphold the prohibition of arbitrary arrest and detention and of torture and other cruel, inhuman or degrading treatment or punishment and to eliminate impunity.

## 2. Impact of a punitive drug control approach

An excessively punitive approach to drug control has been linked to violations of and a negative impact on a wide range of human rights, including the right to health. The Special Rapporteur on the right to health has stated that mounting evidence suggests that an excessively punitive approach has not only failed to achieve the international drug control regime’s stated public health goals but also undermined health-promotion initiatives.<sup>129</sup> A group of the Special Procedure mandate holders of the Human

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125 A/RES/S-30/1, operative para. 1(i).

126 OHCHR, “Tackling the world drug problem: UN experts urge States to adopt human rights approach”, *DisplayNews*, Geneva, 18 April 2016. Available at: [www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19833&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=19833&LangID=E).

127 Speaker at the OHCHR Expert Seminar on “Drug-related Offences, Criminal Justice Responses and the Use of the Death Penalty in South-East Asia” (28 February 2018, Bangkok).

128 Gen Sander, *The Death Penalty for Drug Offences: Global Overview 2017* (Harm Reduction International, 2018), p. 12 and table 1.

129 A/65/255, para. 14.



Rights Council (see chapter IV, section A.2 below) expressed concern that the current international drug control regime remained excessively punitive. Most drug control policies at the national level are based on criminalization, incarceration and over-investment in law enforcement, which have proven to be serious barriers in the protection and fulfilment of human rights. In particular, a group of Special Procedures mandate holders rejected the use of the death penalty for drug offences, and considered most of the existing drug control approaches problematic because of criminalization and the overuse of incarceration for drug offences. Such approaches have led to overburdened criminal justice and prison systems where standards of care and living create an environment that promotes torture and ill-treatment.<sup>130</sup>

An overwhelming criminal justice approach does not deter people from using drugs. Rather, it tends to deter drug users from voluntarily seeking counselling, testing and treatment. The fear of arrest and imprisonment drives drug users underground and towards riskier practices, such as the use of unsterile equipment. That in turn may compromise public health responses such as those aimed at preventing and treating HIV/AIDS and other infectious diseases.

A punitive approach also fosters and reinforces discrimination and stigma. People who use or are dependent on drugs have been denied essential treatment and health services in some countries simply because of their status as drug users. Abuse and violence are common by authorities who target people on the basis of using drugs, including during detention, interrogation or incarceration. Such practices increase physical and mental health risks among people who use drugs.

Marginalization, stigmatizing attitudes, discrimination and fear of social, employment-related or legal repercussions may dissuade many who need help from accessing it. They also lead those who are in stable long-term recovery from a substance-use disorder to avoid disclosure of their status as a person in recovery from addiction. The 2016 special session recommended preventing social marginalization and promoting non-stigmatizing attitudes. That includes taking measures to remove stigmatization as a barrier to the availability and delivery of health care and social services for people who use drugs.<sup>131</sup>

Prison overcrowding is a direct consequence of an excessively punitive approach related to drug offences. Globally, one in five people in prison are serving sentences related to drug offences. In South-East Asia, a majority of drug-related offenders in prison are held for possession or personal use of drugs.<sup>132</sup>

The global drug control system has also been linked to a number of broader unintended consequences globally, including disproportionately greater investment in criminal justice measures at the expense of public health intervention and treatment, the emergence of a multi-billion-dollar criminal black market for illicit drugs, and the stigmatization of drug addiction, displacing people who use drugs from one location to another in their community without addressing the root causes.<sup>133</sup>

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130 See footnote 127.

131 Commission on Narcotic Drugs, resolution 61/11 (16 March 2018) on promoting non-stigmatizing attitudes to ensure the availability of, access to and delivery of health care and social services for drug users. Available at: [https://www.unodc.org/documents/commissions/CND/CND\\_Sessions/CND\\_61/CND\\_res2018/CND\\_Resolution\\_61\\_11.pdf](https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_61/CND_res2018/CND_Resolution_61_11.pdf).

132 UNODC, World crime trends and emerging issues and responses in the field of crime prevention and criminal justice (E/CN.15/2016/10), paras. 27–29.

133 Statement by Executive Director Antonio Maria Costa of UNODC at its fifty-first session (Vienna, 10 March 2008). Available at: <https://www.unodc.org/unodc/en/about-unodc/speeches/2008-03-10.html>.

## B. Recent drug-related trends in South-East Asia

Based on recent official national and regional statistics, the production, trafficking and use of certain illicit drugs appear to have increased or remained at a comparatively high level in East and South-East Asia in recent years.

According to UNODC<sup>134</sup>, in 2006 opium poppy cultivation in East and South-East Asia had reached its lowest level; since then, however, it has gradually increased and, from 2014, has remained at comparatively high levels. In 2015, increasing heroin-use trends were reported in Cambodia, Malaysia, Thailand and Viet Nam. There is no sign that the expansion of the methamphetamine market in the region is slowing, with seizures rising annually since 2007 and reaching record highs in 2015. Seizures of crystalline methamphetamine also reached record highs in 2015, with the Greater Mekong countries accounting for approximately 75 per cent of the seizures between 2011 and 2015. There are indications that methamphetamine production in the “Golden Triangle”, the area where the borders of Thailand, Laos, and Myanmar meet, has intensified.

UNODC has also reported that all countries in the Greater Mekong subregion, except Thailand, reported an increase in the use of methamphetamine tablets in 2015. Several retentionist States in the region, including China, Singapore and Viet Nam as well as the Philippines, have reported consecutive increases in crystalline methamphetamine use in recent years.

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<sup>134</sup> UNODC, *The Challenge of Synthetic Drugs in East and South-East Asia: Trends and Patterns of Amphetamine-type Stimulants and New Psychoactive Substances*, A Report from the Global SMART Programme (UNODC, 2017). Available at: [https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/The\\_Challenge\\_of\\_Synthetic\\_Drugs\\_in\\_East\\_and\\_South-East-Asia.pdf](https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/The_Challenge_of_Synthetic_Drugs_in_East_and_South-East-Asia.pdf).

# IV. Drugs and the death penalty in South-East Asia

Progress towards abolition of the death penalty in South-East Asia has been uneven. Drug-related offences continue to be considered capital crimes in the region, despite the lack of evidence that the death penalty has a deterrent effect on criminality. However, recent high-level political announcements and legislative reforms in Malaysia, Myanmar, Singapore and Viet Nam, although quite limited in some instances, could be promising signs of a potential shift in the momentum towards stricter limits on the use of the death penalty and movement toward abolition (see section C below for details).

At the same time, there are worrying signs that the “war on drugs” approach is behind a swell in the number of extrajudicial killings and mass arrests of persons suspected of drug offences in some countries, such as the Philippines and Bangladesh. ASEAN political declarations and plans of action on drugs continue to envisage a “drug-free” region and adopt language that remains heavily focused on punitive responses to the drug problem.

Table 1 shows the policy positions and the status of application of the death penalty in all 11 South-East Asian countries.<sup>135</sup> Brunei Darussalam, Lao People’s Democratic Republic and Myanmar have not carried out executions in many years, but they, along with Malaysia and Singapore, mandate the death sentence for drug offences. Four countries prescribe discretionary death sentence for drug offences. Seven countries, including the three that are abolitionist in practice, mandate the death penalty for other non-drug-related offences.

**TABLE 1**

## South-East Asian countries and the death penalty: policy positions and how the law is applied

Abolitionist for all crimes (3)	Cambodia, Philippines, Timor-Leste
De facto abolitionist <sup>136</sup> (3)	Brunei Darussalam, Lao PDR, Myanmar
Retentionist (5)	Indonesia, Malaysia, Singapore, Thailand, Viet Nam
Mandatory death sentence for drug offences (4)	Brunei Darussalam, Lao PDR, Myanmar, Singapore
Discretionary death sentence for drug offences (4)	Indonesia, Thailand, Viet Nam, Malaysia
Mandatory death sentence for non-drug crimes (7)	Brunei Darussalam, Lao PDR, Malaysia, Myanmar, Singapore, Thailand, Viet Nam

<sup>135</sup> Brunei Darussalam, Cambodia, Indonesia, Lao People’s Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, Timor-Leste and Viet Nam

<sup>136</sup> A State that has not executed anyone for 10 years is deemed abolitionist de facto, regardless of whether the State acknowledges that there is a moratorium in place.

## A. International obligations and commitments

Of the 11 countries of South-East Asia, seven—Cambodia, Indonesia, Lao People’s Democratic Republic, the Philippines, Thailand, Timor-Leste and Viet Nam—are States parties to the International Covenant on Civil and Political Rights. Only the Philippines and Timor-Leste have ratified the Second Optional Protocol to the Covenant.

Abolitionist Cambodia and three retentionist States—Indonesia, Thailand and Viet Nam—are States parties to the Convention against Torture. Brunei Darussalam, which is de facto abolitionist, has signed but not yet ratified that Convention.

All 10 ASEAN countries<sup>137</sup> and Timor-Leste are States parties to the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. The latter prohibits imposing the death penalty or life imprisonment without possibility of release for offences committed by children under 18 years of age. All 10 ASEAN members are also States parties to the Convention on the Rights of Persons with Disabilities, which reaffirms the right to life.

Among the constitutions of the eight South-East Asian countries that retain the death penalty in law, all but two (Brunei Darussalam and Lao People’s Democratic Republic) include provisions explicitly recognizing the right to life.

### 1. Treaty bodies

The Human Rights Committee and other treaty bodies have addressed various aspects of the death penalty or policies and practices concerning drug control in several South-East Asian countries, as described in the following paragraphs.

#### Brunei Darussalam

The Committees on the Elimination of Discrimination Against Women and the Rights of the Child have expressed concern regarding the introduction in 2013 of the Shariah Penal Code Order, which prescribes the death penalty and corporal punishment for “crimes” that may disproportionately affect women and that also can be imposed on children.<sup>138</sup>

#### Cambodia

While fully abolitionist, Cambodia has adopted a punitive approach to drug control. In 2015, the Human Rights Committee expressed concern about reports of arbitrary arrests and detention of vulnerable groups, including drug users, in drug rehabilitation centres where they were allegedly subjected to torture, ill-treatment and other abuses committed by staff working at those institutions.<sup>139</sup>

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137 Brunei, Cambodia, Indonesia, Lao People’s Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

138 Committee on Elimination of Discrimination Against Women, Concluding observations on the combined initial and second periodic report of Brunei Darussalam (CEDAW/C/BRN/CO/1-2), para. 12; Committee on the Rights of the Child, Concluding observations on the combined second and third periodic reports of Brunei Darussalam (CRC/C/BRN/CO/2-3), paras. 9–10.

139 Human Rights Committee, Concluding observations on the second periodic report of Cambodia (CCPR/C/KHM/CO/2), para. 16.

## Indonesia

In 2013, the Human Rights Committee regretted the resumption of executions and reiterated that drug offences do not constitute “most serious crimes”. It recommended that Indonesia reinstate a de facto moratorium on the death penalty, consider abolishing the death penalty, review its legislation to ensure that crimes involving narcotics are not subject to the death penalty, and consider commuting all sentences of death imposed on persons convicted for drug crimes.<sup>140</sup>

In its follow-up report to the Committee in March 2015<sup>141</sup>, the Government insisted that drug abuses had reached an alarming level threatening “the nation’s survival”, exacerbated by a complex network of transnational criminal syndicates operating across the country, and thus constituted a most serious crime. Notwithstanding, the Government stated that public debate on the issue was ongoing and that the legislature was in the process of revising the Criminal Code. The Government noted it would respect the outcome, regardless of whether it advocated retention, moratorium or abolition.<sup>142</sup>

In subsequent follow-up communications to the Government, the Human Rights Committee expressed concern about the executions of drug offenders and regretted the failure to adopt legislative reforms to remove the possibility of capital punishment for drug offences. The Government did not respond, so it earned a D grade for non-cooperation with follow-up procedures.<sup>143</sup>

In 2014, the Committee on Economic, Social and Cultural Rights expressed concern about legal provisions providing for compulsory treatment of drug users, and recommended that Indonesia apply a human rights-based approach to the treatment of drug addiction, whereby it would provide appropriate health care and culturally sensitive psychological support services and rehabilitation to such persons.<sup>144</sup>

In 2010, the Committee Against Torture, in its preliminary questions in preparation of its next report, asked Indonesia to comment on a trend towards increasing use of the death penalty and on adoption of a 2009 law that provides for the death penalty as possible punishment for the unauthorized disclosure of State secrets.<sup>145</sup>

## Lao People’s Democratic Republic

In July 2018, the Human Rights Committee welcomed the de facto moratorium on execution but expressed concern that courts continued to impose death sentences, mostly for drug-related offences. It also noted that, despite fewer articles providing for the death penalty in the draft Penal Code, it still prescribed the death penalty for crimes, including for drug-related crimes that did not meet the threshold of “most serious crimes”. The Committee recommended that the “State party should maintain the moratorium on executions, and give due considerations to the legal abolition of the death penalty”. Furthermore, it recommended that the State should undertake a comprehensive

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140 Human Rights Committee, Concluding observations on the initial report of Indonesia (CCPR/C/IDN/CO/1), para. 10.

141 Human Rights Committee, Concluding observations on the initial report of Indonesia, Addendum: Information received from Indonesia on follow-up to the concluding observations (CCPR/C/IND/CO/1/Add.1).

142 Ibid.

143 Human Rights Committee, Letters to Indonesia regarding follow-up decisions adopted in April 2015 at its 113<sup>th</sup> session (KF/fup-113, April 2015; KF/fup-114, October 2015; KF/fup-117, August 2016; KF/fup-119, April 2017). Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=623&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=623&Lang=en). See also OHCHR, “UN Human Rights Committee deplores Indonesia’s response to its call to stop executions for drug-related crimes”, *DisplayNews*, Geneva, 2 April 2015.

144 Committee on Economic, Social and Cultural Rights, Concluding observations on the initial report of Indonesia (E/C.12/IDN/CO/1), para. 35.

145 Committee Against Torture, List of issues prior to the submission of the third periodic report of Indonesia (CAT/C/IDN/Q/3), para. 34.

review of relevant legislation to ensure that the death penalty could be imposed only for the most serious crimes and to ensure that, if imposed at all, the death penalty would never be imposed in violation of the International Covenant on Civil and Political Rights, including in violation of fair trial procedures.<sup>146</sup>

### **Philippines**

In 2016, the Committee on Economic, Social and Cultural Rights expressed concern that declarations made by high-ranking Philippine officials in the context of the “war on drugs” may be seen as encouraging and legitimizing violence against drug users, including extrajudicial killings, which had drastically increased in the months leading up to the Philippines review by the Committee. The Committee was also concerned that poor neighbourhoods and individuals had been disproportionately affected in the “war on drugs” and that the criminalization of the possession and use of drugs hindered persons in need of treatment from receiving it. The Committee urged the Government to adopt a right-to-health approach to drug abuse.<sup>147</sup>

### **Thailand**

In its 2017 review of Thailand’s implementation of its obligations under the International Covenant on Civil and Political Rights, the Human Rights Committee expressed concern that the death penalty could be applied to crimes related to corruption, bribery and drugs, which do not meet the threshold of “most serious crimes” within the meaning of article 6(2) of the Covenant. The Committee was also concerned about the large number of death sentences handed down. It recommended that Thailand consider abolishing the death penalty or apply it only to crimes committed with the intention of killing.

In 2014, the Committee against Torture recommended that Thailand end the use of permanent shackling of death-row prisoners, as well as the use of shackles as a punishment, and prolonged solitary confinement.<sup>148</sup>

### **Viet Nam**

In 2002, the Human Rights Committee, while acknowledging the reduction in capital crimes, remained concerned about the large number of crimes for which the death penalty could still be imposed, including those that are not considered as most serious. The Committee further stated that the definition of certain offences concerning public order or national security, for which the death penalty could be imposed, were excessively vague and inconsistent with the Covenant. It recommended that Viet Nam continue to reduce and limit capital crimes to those which could be strictly considered as the most serious ones, with a view to abolishing the death penalty eventually.<sup>149</sup> In 2015, Viet Nam amended the 2015 penal code, reducing the number of offences punishable by the death penalty, as reported in their State Party report to the Human Rights Committee submitted in 2017.<sup>150</sup> The amended code removed the death penalty for eight offenses but retained it for 18, including for the preparation, transport and trade of narcotics, for embezzlement and for corruption.

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146 Human Rights Committee, Concluding observations on the initial report of Lao People’s Democratic Republic (CCPR/C/LAO/CO/1), paras. 16–17.

147 Committee on Economic, Social and Cultural Rights, Concluding observations on the combined fifth and sixth periodic reports of the Philippines (E/C.12/PHL/CO/5-6), para. 53.

148 Committee Against Torture, Concluding observations on the initial report of Thailand (CAT/C/THA/CO/1), para. 23.

149 Human Rights Committee, Concluding observations on the second periodic report of Viet Nam (CCPR/CO/75/VNM), para. 7.

150 CCPR/C/VNM/, paras. 63–69.

## 2. Special procedures

The Special Procedures mandate holders of the Human Rights Council, who are independent experts with mandates to report and advise on human rights from thematic or country-specific perspectives, have visited or addressed the situation in retentionist States in South-East Asia and made recommendations concerning the death penalty and/or drug control policies and practices.

### Brunei Darussalam

In 2014, Special Procedures mandate holders sent a communication to the Government raising concerns about the non-compliance with international human rights standards of the Shariah Penal Code Order of 2013, including the introduction of mandatory death sentences, reliance only on the accused's confession in reaching a guilty verdict, execution by stoning for sexual offences, and imposition of the death penalty for offences that do not meet the threshold of the "most serious crimes" standard under international human rights law.<sup>151</sup>

### Cambodia

In 2017, in her end-of-mission statement, the Special Rapporteur on the situation of human rights in Cambodia expressed concern over the large number of people being detained due to the anti-drug campaign. She urged the Government to deploy adequate resources to complete construction of the new rehabilitation and drop-in centres, ensuring that they would meet and ideally exceed the minimum standards set in relevant United Nations instruments and would provide adequate treatment and therapies. She further recommended a regular review of the anti-drug campaign and the adoption of a human rights-based approach.<sup>152</sup>

### Indonesia

During his visit to Indonesia in 2007, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment interviewed a number of detainees, including many drug users. In detention facilities, particularly those in urban areas, he found that torture and ill-treatment had been routinely used to extract confessions or, in the context of drug charges, to reveal dealers/suppliers.<sup>153</sup>

After his visit to Indonesia in 2017, the Special Rapporteur on the right to health stated that the country's approach to drug policy remained excessively punitive. He noted that the registration and reporting of drug use was compulsory, leading to practices of forced or coerced treatment. He emphasized that criminalization of drug use fuelled discrimination, violence and exclusion; driving people away from the health services they need, hence seriously undermining public health efforts.<sup>154</sup>

Between 2012 and 2017, Special Procedures mandate holders sent a total of 10 communications to the Government of Indonesia, raising concerns about executions, including those of foreign nationals, and other issues connected to the use of the death penalty, such as its imposition for drug-related offences, failure to stay execution while challenges are pending, death sentences against persons with

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151 Special Procedures mandate-holders, Communication No. BRN 1/2014 (25 September 2014).

152 OHCHR, "Statement by the United Nations Special Rapporteur on the situation of human rights in Cambodia by Professor Rhona Smith", Press Statement, *DisplayNews*, Phnom Penh, 18 August 2017.

153 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum, Mission to Indonesia (A/HRC/7/3/Add.7), p. 64.

154 OHCHR, "Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health Mr. Dainius Pūras, Country visit to Indonesia, 22 March to 3 April 2017, Preliminary observations", *DisplayNews*, Jakarta, 3 April 2017.



mental disability, expansion of the scope of capital crimes, and judicial procedures that may not have fulfilled the most stringent guarantees of fair trial and due process.<sup>155</sup>

## Malaysia

In 2014, the Special Rapporteur on the right to health found that drug users in Malaysia had been forcibly confined to rehabilitation camps and had received treatment without their explicit and informed consent. He stressed that punitive approaches to drug control tended to result in more health-related harms than those they sought to prevent, and recommended that drug policy and control should have a human rights focus, with emphasis on voluntary, medically assisted and evidence-based approaches.<sup>156</sup>

After its 2010 visit to the country, the Working Group on Arbitrary Detention found that the Dangerous Drugs Act was among the laws hindering human rights guarantees and called for its repeal.<sup>157</sup>

In 2016, Special Procedures mandate holders sent a communication to the Government of Malaysia concerning the imminent execution of three men who had been sentenced to death for murder, expressing grave concern about the mandatory death sentence. The mandate holders urged Malaysia to halt the executions, annul and commute their death sentences, and establish a moratorium on the use of the death penalty, with a view to its complete abolition.<sup>158</sup>

## Philippines

Since President Duterte took office in June 2016, law enforcement officials in the Philippines have been conducting operations against illegal drugs in “the war on drugs”. That has resulted in an increase in drug-related operations, detention of alleged drug offenders, seizure of illegal drugs, materials and equipment, and arrests of involved Government officials as part of its war on drugs. The Government’s initiative has been marked by violence resulting in extrajudicial killings and an extremely high number of casualties.

In June 2018, the official death toll from the Philippines Drug Enforcement Agency in police-led drug operations stood at 4,354; some 2,649 drug-related homicides had been recorded, and more than 10,000 homicides were under investigation as possible drug-related cases. Other sources quote a death toll that exceeded 20,000.<sup>159</sup>

Since June 2016, Special Procedures has issued five press statements raising concerns about the drug related operations, the death toll and the lack of investigations into alleged extrajudicial killings. Special Procedures also issued nine related Allegation Letters or Urgent Appeals. In addition, the High Commissioner for Human Rights regularly raised related concerns about the situation in the Human Rights Council and in public statements. The Human Rights Committee wrote an open letter to the Senate on the death penalty, while the Chairperson of the Committee on the Right of the Child and the Special Representative of the Secretary-General on Violence Against Children, respectively, wrote to the House and the Senate on the initiative to lower the age of criminal responsibility.

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<sup>155</sup> Special Procedures mandate-holders, Communications No. IDN 5/2012, IDN 1/2013, IDN 2/2013, IDN 6/2014, IDN 1/2015, IDN 2/2015, IDN 4/2015, IDN 5/2016, IDN 6/2016, and IDN 7/2017.

<sup>156</sup> Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Dainius Pūras, Addendum, Visit to Malaysia (19 November–2 December 2014) (A/HRC/29/33/Add.1), para. 97.

<sup>157</sup> Report of the Working Group on Arbitrary Detention, Addendum, Mission to Malaysia (A/HRC/16/47/Add.2), p. 10.

<sup>158</sup> Special Procedures mandate holders, Communication No. MYS 3/2016 (24 March 2016).

<sup>159</sup> Report of the United Nations High Commissioner for Human Rights [on the] Implementation of the joint commitment to effectively addressing and countering the world drug problem with regard to human rights. Available at: <https://www.ohchr.org/EN/HRBodies/HRC/Pages/WorldDrugProblemHRC39.aspx>.

## Singapore

Between 2011 and 2016, Special Procedures mandate holders sent communications to the Government of Singapore regarding four individuals (including two foreign nationals), three of whom had been sentenced to death for drug-related offences.<sup>160</sup> The Special Procedures mandate holders reminded Singapore that drug-related offences do not meet the threshold of “most serious crimes” and that a mandatory death sentence is prohibited under international human rights law. They also raised concerns regarding alleged violations of fair trial rights.

## Viet Nam

The Special Rapporteur on the right to health, stating his concerns over the detention and compulsory treatment of people who use drugs and the stigmatization of drug use as a “social evil” in Viet Nam, said that treatment provided in rehabilitation centres had not been evidence-based and had been ineffective, as demonstrated by high rates of relapse to drug use. He consequently urged Viet Nam to decriminalize the use of drugs, to eliminate stigmatization and create an enabling environment in which at-risk populations, including intravenous drug users, could effectively access health care.<sup>161</sup>

In 2014, a number of Special Procedures mandate holders sent a joint urgent appeal to the Government of Viet Nam raising concerns regarding the imposition of death sentences against an individual with a mental disability for a drug-related offence and allegations that he had not been provided with adequate guarantees of due process, including access to a lawyer and relevant evidence regarding his mental condition.<sup>162</sup> In 2015, Special Procedures mandate holders sent another urgent appeal regarding the death sentence for an individual for robbery, murder and rape, raising concerns about allegations that the man had been severely beaten and coerced to confess to crimes.<sup>163</sup>

### 3. Universal periodic review

All eight retentionist or de facto abolitionist States in South-East Asia have undergone at least two cycles of UPR and, in that context, received altogether more than 260 recommendations urging them to restrict, suspend or abolish the use of the death penalty, including for drug-related offences. Generally speaking, while ASEAN States have not supported the majority of death penalty-related recommendations received thus far through UPR, more recent reviews have led to an increase in support for such recommendations.

## Brunei Darussalam

Brunei Darussalam has rejected all UPR recommendations concerning the death penalty thus far. In its official responses to the recommendations, the Government has stated that the death penalty is maintained in domestic law, adding that abolition “is not required by international law”.<sup>164</sup>

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160 Special Procedures mandate holders, Communications No. SGP 3/2011, SGP 1/2012, SGP 3/2015, SGP 3/2016, and SGP 6/2016.

161 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, Addendum, Mission to Viet Nam (A/HRC/20/15/Add.2), paras. 45, 50 and 63(b).

162 Mandates of the Working Group on Arbitrary Detention and the Special Rapporteur on extrajudicial, summary or arbitrary executions, Joint Urgent Appeal, Communication No. VNM 8/2014 (25 July 2014).

163 Mandates of the Special Rapporteur on the independence of judges and lawyers, on extrajudicial, summary or arbitrary executions, and on torture and other cruel, inhuman or degrading treatment or punishment, Joint Urgent Appeal, Communication No. VNM 1/2015 (30 October 2015).

164 Report of the Working Group on the Universal Periodic Review of Brunei Darussalam, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/27/11/Add.1), p. 3.

## Indonesia

Indonesia did not support any death penalty-related recommendations in its first two UPR cycles. In its first UPR in 2008, the Government stated that the death penalty was a sovereign State matter and a subject of domestic public debates. It cited the Constitutional Court decision in 2007 to uphold capital punishment. The Government indicated, however, that the death penalty was applied in a very selective and limited manner, and only for “very serious crimes” with the “fullest legal precautions being applied exhaustively and the strictest criteria observed” throughout judicial processes leading to a possible death sentence. Indonesia declared its support for any effort to strengthen safeguards to prevent miscarriages of justice.<sup>165</sup> It reiterated these points in its second UPR, in 2012, and added that there was a mechanism to convert the death penalty to life imprisonment.<sup>166</sup>

In its third UPR, in 2017, Indonesia received significantly more recommendations concerning the death penalty than in the two previous cycles combined, reflecting international concerns after a surge of executions in 2015. Several of those recommendations also specifically targeted the death penalty for drug offences. Indonesia eventually supported recommendations to consider establishing a moratorium on executions with a view to abolishing the death penalty.<sup>167</sup>

## Lao People’s Democratic Republic

Lao People’s Democratic Republic has not expressly accepted any of the UPR recommendations concerning the abolition of the death penalty, a moratorium, or restrictions on the use of this sentence. In its first review in 2010, the Government declared it was not ready to abolish the death penalty as it was an effective deterrent to crime, especially drug trafficking, which it considered to be a “most serious” offence. However, the Government indicated it would review the scope of the offences in its criminal law to align it with article 6 of the International Covenant on Civil and Political Rights.<sup>168</sup> Lao People’s Democratic Republic highlighted the fact that it had not carried out executions in many years, that minors and pregnant women were exempt from executions, and that persons had the right to appeal and to be pardoned on “special national occasions”.<sup>169</sup> Lao People’s Democratic Republic reiterated those positions in its second review.<sup>170</sup>

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165 Report of the Working Group on the Universal Periodic Review of Indonesia, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/8/23/Add.1), paras. 9–10.

166 Report of the Working Group on the Universal Periodic Review of Indonesia, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/21/7/Add.1), para. 6.6.

167 Report of the Working Group on the Universal Periodic Review of Indonesia, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/36/7/Add.1), para. 10 (recommendations in A/HRC/36/7, para. 141.52).

168 Report of the Working Group on the Universal Periodic Review of Lao People’s Democratic Republic, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/15/5/Add.1), para. 17.

169 Statement by H.E. Mr. Yong Chantalangsy, Permanent Representative of the Lao People’s Democratic Republic to the UN Office and other International Organizations in Geneva, Head of the Lao Delegation to the fifteenth session of the Human Rights Council for consideration of UPR Outcome Report for the Lao People’s Democratic Republic (Geneva, 21 September 2010), p. 3.

170 Report of the Working Group on the Universal Periodic Review of Lao People’s Democratic Republic, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/29/7/Add.1, June 2015), p. 7. See also statement by H.E. Mr. Thongphane Savanhphet, Permanent Representative of the Lao PDR to the UN Office and other International Organisations in Geneva, Head of the Lao Delegation to the 29th Session of the Human Rights Council on the Adoption of UPR Outcome Report for the Lao PDR (Geneva, 25 June 2015), p. 3.

## Malaysia

In its first UPR in 2009, Malaysia rejected all recommendations calling for the abolition of the death penalty, for a moratorium, or for restrictions of the death penalty to the most serious crimes.<sup>171</sup> The Government stated that the death penalty was only imposed for the “most heinous crimes”, including drug trafficking. Yet, it announced that it was considering further reducing capital crimes by, inter alia, proposing amendments to anti-drug trafficking legislation to reduce the maximum sentence to life imprisonment.<sup>172</sup>

In the second review of Malaysia, in 2014, 6 of the 21 recommendations on abolishing the death penalty referred to the use of the death penalty for drug-related offences. The Government partially supported recommendations on engaging in public consultation to explore alternatives to the death penalty and to abolish the death penalty for drug dealers, citing a study on the death penalty conducted by the Attorney-General’s office. However, it stressed that international law did not prohibit the death penalty, and that its application was a sovereign State matter. It added it was not yet in a position to establish a moratorium, citing the resumption or reintroduction of the death penalty in several retentionist States after a period of de facto moratorium.<sup>173</sup>

## Myanmar

In the first UPR of Myanmar in 2011, the Government did not provide a clear position on the death penalty recommendations it had received. Although the death penalty had not yet been abolished, it stated that no execution had been carried out since 1988. It also explained that a presidential order issued in May 2011 had commuted all death sentences to life imprisonment, in accordance with Section 204(b) of the State Constitution.<sup>174</sup> In its second review in 2015, Myanmar accepted recommendations to ratify the International Covenant on Civil and Political Rights and its Second Optional Protocol, and to consider abolishing the death penalty in law. It did not support 12 other recommendations calling for abolition or a formal moratorium. Myanmar asserted that the death penalty was a sovereign State matter and that its use was aimed at deterring “heinous crimes”.<sup>175</sup>

## Singapore

In its first UPR in 2011, Singapore rejected the majority of recommendations related to the death penalty, except for two regarding shifting the burden of proof to the prosecution and publishing statistics on the death penalty. The Government stated there was no international consensus for or against capital punishment, including mandatory capital punishment, and stated that capital punishment in Singapore was only imposed for the “most serious crimes”, after due judicial process, and was supported by the majority of Singaporeans.<sup>176</sup>

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171 Report of the Working Group on the Universal Periodic Review of Malaysia (A/HRC/11/30), para. 105.

172 Report of the Working Group on the Universal Periodic Review of Malaysia, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/11/30/Add.1), para. 10. See also Statement by H.E. Othman Hashim, Permanent Representative of Malaysia on the Adoption of Malaysia, Universal Periodic Review Outcome Report at the eleventh session of the Human Rights Council (Geneva, 12 June 2009), p. 4.

173 Report of the Working Group on the Universal Periodic Review of Malaysia, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/25/10/Add.1), pp. 3 and 5.

174 Report of the Working Group on the Universal Periodic Review of Myanmar, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/17/9/Add.1), para. 9.

175 Report of the Working Group on the Universal Periodic Review of Myanmar, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/31/13/Add.1), para. 12.

176 Report of the Working Group on the Universal Periodic Review of Singapore, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/18/11), para. 87.

Singapore received almost triple the number of pro-abolition or pro-moratorium recommendations in its second review, but the Government did not support any of them. It stated that the imposition of the death penalty was to deter the “most serious crimes”, such as murder and drug trafficking, and it highlighted recent reforms that had made the death penalty discretionary under specific conditions.<sup>177</sup>

## Thailand

In its first UPR in 2012, Thailand accepted a recommendation to study the possibility of ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights. It stated that, pending the outcome, it would not be able to accept recommendations to ratify the Protocol, review or amend domestic law concerning the death penalty (including for drug-trafficking), or adopt a moratorium on or abolish the death penalty.<sup>178</sup>

In its second review in 2016, Thailand said it was continuing to study the possibility of abolition, citing “varying public sentiments”. It stated that abolition was the intention of the Government, as reflected in its second and third national human rights action plans. Consequently, Thailand accepted recommendations to move towards abolition, review the imposition of the death penalty for drug-trafficking, and commute death sentences. It noted all other recommendations on the death penalty and committed itself to considering them in subsequent UPR cycles, when the country “reaches the stage of complete abolition”.<sup>179</sup>

## Viet Nam

In its first UPR in 2009, Viet Nam accepted recommendations to reduce the number of capital crimes. It stated that under the 1999 Penal Code, the number had already been reduced to 29 offences, and that the death penalty was only imposed for “extremely serious crimes, such as drug trafficking and cruel murder to deter the criminals”. It declared that public opinion was “not yet ready for the complete removal of the death penalty”.<sup>180</sup> The Government did not support recommendations calling for abolition, a moratorium, ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights, or publication of information on the use of the death penalty. While it said it did not have an “immediate plan” for abolition or a moratorium, it left open the possibility of ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights when “conditions so allow”.<sup>181</sup> The Government stated that international law did not require abolition.

In its second review in 2014, Viet Nam reiterated its commitment to reduce the number of crimes punishable by death.<sup>182</sup> It did not support recommendations calling more directly for the abolition or a moratorium and for the publication of precise figures on executions and death sentences.

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177 Report of the Working Group on the Universal Periodic Review of Singapore, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/32/17), paras. 61–63.

178 Report of the Working Group on the Universal Periodic Review of Thailand, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/19/8/Add.1), paras. 4, 5, 6 and 10.

179 Report of the Working Group on the Universal Periodic Review of Thailand, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/33/16/Add.1), paras. 6 and 20.

180 Report of the Working Group on the Universal Periodic Review of Viet Nam (A/HRC/12/11), para. 74.

181 Report of the Working Group on the Universal Periodic Review of Viet Nam, Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review (A/HRC/12/11/Add.1), paras. 20 and 21.

182 Report of the Working Group on the Universal Periodic Review of Viet Nam (A/HRC/26/6), para. 59.

## B. Voting patterns at the General Assembly and the Human Rights Council

### General Assembly

Table 2 presents a summary of how the 11 South-East Asian countries have voted on a moratorium on use of the death penalty in the General Assembly from 2007 to 2016. Cambodia and Timor-Leste have consistently voted in favour of a moratorium. The Philippines, which abolished the death penalty in 2006, abstained for the first time in 2016 after voting in favour of all previous resolutions.

Among the countries which retain the death penalty in law, Brunei Darussalam, Malaysia and Singapore have consistently voted against the General Assembly resolutions on the death penalty, while Lao People's Democratic Republic and Viet Nam have abstained on all resolutions.

Myanmar, Indonesia and Thailand have in recent years changed from opposing the earlier resolutions to abstaining.

**TABLE 2**

### South-East Asian States' voting on General Assembly resolutions on "Moratorium on the use of the death penalty", 2007–2016

	2016	2014	2012	2010	2008	2007
<b>Summary voting pattern</b>	<b>117-40-31</b>	<b>117-37-34</b>	<b>111-41-34</b>	<b>109-41-35</b>	<b>106-46-34</b>	<b>104-54-29</b>
Brunei	Against	Against	Against	Against	Against	Against
Cambodia	For	For	For	For	For	For
Indonesia	Abstained	Abstained	Abstained	Against	Against	Against
Lao PDR	Abstained	Abstained	Abstained	Abstained	Abstained	Abstained
Malaysia	Against	Against	Against	Against	Against	Against
Myanmar	Abstained	Abstained	Against	Against	Against	Against
Philippines	Abstained	For	For	For	For	For
Singapore	Against	Against	Against	Against	Against	Against
Thailand	Abstained	Abstained	Abstained	Abstained	Against	Against
Timor-Leste	For	For	For	For	For	For
Viet Nam	Abstained	Abstained	Abstained	Abstained	Abstained	Abstained

### Human Rights Council

Among the 10 ASEAN member States, the four retentionist countries—Indonesia, Malaysia, Thailand and Viet Nam—as well as the Philippines have been members of the Human Rights Council, which adopted three resolutions on the question of the death penalty in 2014, 2015 and 2017. With reference to table 3, Indonesia was a Council member during those years and voted against the first two resolutions while it abstained in the last vote. The Philippines was a member of the Council in 2014 and 2017, and voted for the first resolution but abstained in the last one. Consistent with its voting pattern at the General Assembly, Viet Nam, a member of the Human Rights Council in 2014 and 2015, abstained from voting on those resolutions.

**TABLE 3**

**South-East Asian States’ voting on Human Rights Council resolutions on the death penalty in 2014, 2015 and 2017**

	Summary voting pattern	Indonesia	Malaysia	Philippines	Thailand	Viet Nam
2014	29-10-8 <sup>183</sup>	Against		For		Abstained
2015	26-13-8 <sup>184</sup>	Against				Abstained
2017	27-13-7 <sup>185</sup>	Abstained		Abstained		

Note: Grey areas indicate that the particular country was not a member of the Council at the time of the vote.

In 2013, the Human Rights Council adopted, by consensus, a resolution on the impact of a parent’s death sentence and execution on his or her children. Indonesia, Malaysia, the Philippines and Thailand were members of the Council at the time.

In March 2018, the Philippines—the only South-East Asian member of the Council at the time—voted against a resolution on implementing the joint commitment of the 2016 General Assembly special session on the world drug problem to effectively address and counter the world drug problem with regard to human rights. That position reflects the country’s hardening stance on drug-related issues.<sup>186</sup>

## C. National practices, reforms and developments

Progress towards a moratorium or the abolition of the death penalty has been subject to countervailing developments in South-East Asia in recent years. However, recent reforms in law and practice in several retentionist countries suggest that further progress is possible.

### 1. “Most serious crimes”

Brunei Darussalam, Indonesia, Lao People’s Democratic Republic, Malaysia, Myanmar, Singapore, Thailand and Viet Nam retain the death penalty for drug-related and other offences which, according to international human rights mechanisms, do not meet the threshold of “most serious crimes” within the meaning of article 6 of the International Covenant on Civil and Political Rights.

Experts at the 2018 Bangkok seminar reiterated concern that some Governments in South-East Asia continued to construct their own interpretations of “most serious crimes” that are inconsistent with international human rights law.

183 Human Rights Council resolution 26/2 (26 June 2014) on the question of the death penalty (A/HRC/RES/26/2). See voting results at the end.

184 Human Rights Council resolution 30/5 (1 October 2015) on the question of the death penalty (A/HRC/RES/30/5). See voting results at the end.

185 Human Rights Council resolution 36/17 (29 September 2017) on the question of the death penalty (A/HRC/RES/36/17). See voting results at the end.

186 Human Rights Council resolution 37/42 (23 March 2018) on the contribution to the implementation of the joint commitment to effectively addressing and countering the world drug problem with regard to human rights (A/HRC/37/L.41), adopted as orally revised.



## 2. Mandatory death sentence

Laws in Brunei Darussalam, Lao People’s Democratic Republic, Malaysia, Myanmar, Singapore, Thailand and Viet Nam impose the mandatory death sentence for drug-related offences or non-drug offences or both. According to international human rights law and jurisprudence, the death penalty may not be mandatory even for murder, because the removal of judicial discretion entirely violates fair trial guarantees, precludes the consideration of the particular circumstances of the offence or the offender, and undermines the principle of separation of powers under the rule of law.

## 3. Recent use of the death penalty

With reference to table 4, the de facto abolitionist States of Brunei Darussalam, Lao People’s Democratic Republic and Myanmar have not carried out any known executions since 1957, 1989 and 1988, respectively. However, courts in these three countries have continued to hand down death sentences in recent years.

Among the five retentionist countries, in June 2018, Thailand carried out its first execution since 2009 while known executions in Indonesia, Malaysia, Singapore and Viet Nam decreased from 18 in 2015 to 17 in 2016, and to 12 in 2017. However, the secrecy surrounding the use of the death penalty in Viet Nam and lack of transparency concerning aspects of its application in Malaysia, Singapore and Thailand make it difficult for monitors to offer reliable minimum estimates on both those on death row as well as those executed.<sup>187</sup>

**TABLE 4**

### Recorded death sentences and executions in South-East Asian countries, 2015–2017 and other last known years

	Last known execution	Recorded executions in 2017	Recorded executions in 2016	Recorded executions in 2015	Recorded death sentences in 2017	Recorded death sentences in 2016	Recorded death sentences in 2015
Brunei Darussalam	1957	Abolitionist in practice			(for drug offence (DO))	0	1
Indonesia	2016	0	4	14	At least 47 (33 for DO)	At least 60 (40 for DO)	At least 46 (29 for DO)
Lao PDR	1989	Abolitionist in practice			At least 1 (for DO)	At least 3 (3 for DO)	At least 20
Malaysia	2017	4	9	Insufficient information	At least 38 (21 for drug offences)	At least 36 (17 for drug offences)	At least 39 (24 for drug offences)
Myanmar	1988	Abolitionist in practice			At least 2	At least 3	At least 17
Singapore	March 2018	8	4	4	15 (12 for DO)	At least 7	At least 5
Thailand	2018	0	0	0	75 (86 out of 192 finalised death sentences were for DO)	216 (213 out of 427 on death row convicted of DO)	At least 7
Viet Nam	Insufficient information				At least 35 (31 for DO)	At least 63 (54 for DO)	At least 47
<b>TOTAL</b>		<b>At least 12</b>	<b>At least 17</b>	<b>At least 18</b>	<b>At least 214</b>	<b>At least 388</b>	<b>At least 182</b>

Sources: Amnesty International’s annual global report series Death Sentences and Executions for the years 2015–2017 and the databases of the Cornell Center on the Death Penalty Worldwide and the World Coalition Against the Death Penalty.

187 Amnesty International, “The death penalty in 2017: facts and figures”, News, 12 April 2018.

## Indonesia

In March 2013, after a four-year de facto moratorium, Indonesia, without prior announcement, executed two convicts for drug trafficking and three for premeditated murder.<sup>188</sup> In 2014 there were no executions. In January and April of 2015, 12 foreign nationals and two Indonesian nationals were executed for drug-related offences.<sup>189</sup> On 29 July 2016, three foreign nationals and one Indonesian national were executed for drug offences.<sup>190</sup> A large proportion of new death sentences in the past three years have been handed down for drug-related offences, including 33 of at least 47 new death sentences imposed in 2017.<sup>191</sup> No executions have been carried out from 2017 to this time of writing in 2018.

At its last UPR, the Government of Indonesia announced that the ongoing revision of the Criminal Code could possibly restrict the death penalty to a last resort, with the possibility of commutation, and that the death penalty would be applied only “after all legal processes had been exhausted, and provided the legal rights of the convicted had been respected”.<sup>192</sup> In July 2017, the Indonesian Ombudsman found that the 2016 execution of a Nigerian man for drug offences had violated legal procedures as it had been carried out while his clemency request was pending and his request for case review by the Supreme Court had not been submitted.<sup>193</sup>

Research by Indonesia’s National Commission on Human Rights (Komnas HAM) and by civil society groups showed that persons charged with a capital crime often did not have access to legal representation from the time of arrest or at other crucial stages of the process. There were also instances where confessions or other information obtained through ill-treatment under police custody was subsequently used as evidence in court. In 2015 and 2016, some executions were carried out in cases where the prisoners’ applications for appeals had not yet been heard by the courts.<sup>194</sup> Recent research has shown that the President of Indonesia has continued to refuse all pardon applications specifically submitted by persons convicted for drug-related offences.<sup>195</sup>

## Malaysia

In 2015, at least one execution was carried out for murder and at least 39 new death sentences were handed down in Malaysia, including 24 for drug-related offences.<sup>196</sup> In 2016, nine executions and 36 new mandatory death sentences were handed down, including 17 for drug trafficking; between 2010 and 2016, according to Government reports, 829 persons were sentenced to death while 95 others had received a pardon or had their death sentence commuted.<sup>197</sup> In 2017, four individuals

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188 Amnesty International, *Death Sentences and Executions 2013*, ACT 50/001/2014 (London, 2014), p. 50; and Amnesty International, “Indonesia: Fifth execution confirms shocking new trend of secrecy”, *News*, 18 November 2013. Available at: <http://www.amnesty.org/en/news/indonesia-fifth-execution-confirms-shocking-new-trend-secrecy-2013-11-18>.

189 Amnesty International, *Death Sentences and Executions 2015*, ACT 50/3487/2016 (London, 2016), p. 31.

190 Amnesty International, *Death Sentences and Executions 2016*, ACT 50/5740/2017 (London, 2017), p. 21; and *Death Sentences and Executions 2017*, ACT 50/7955/2018 (London, 2018), p. 21.

191 Ibid.

192 Report of the Working Group on the Universal Periodic Review of Indonesia (A/HRC/36/7), paras. 23 and 79.

193 Moses Ompusunggu, “Indonesian state ‘negligent’ in execution of Nigerian”, *The Jakarta Post*, 28 July 2017. Available at: [www.thejakartapost.com/news/2017/07/28/indonesian-state-negligent-in-execution-of-nigerian.html](http://www.thejakartapost.com/news/2017/07/28/indonesian-state-negligent-in-execution-of-nigerian.html).

194 Amnesty International, Institute for Criminal Justice Reform, KontraS and LBH Masyarakat, “Indonesia: Government should immediately establish moratorium after maladministration surrounding execution”.

195 Adhigama A. Budiman, and others, *Overcoming the Execution in Limbo: Review on the Death Penalty Policy in Indonesia in 2017* (Jakarta: Institute for Criminal Justice Reform, 2017). Available at: [http://icjr.or.id/data/wp-content/uploads/2017/11/Overcoming-the-Execution-in-Limbo\\_6.11.17.pdf](http://icjr.or.id/data/wp-content/uploads/2017/11/Overcoming-the-Execution-in-Limbo_6.11.17.pdf).

196 Amnesty International, *Death Sentences 2015*, pp. 33–34.

197 Amnesty International, *Death Sentences 2016*, p. 22.

were executed (none for drug-related offences) and at least 38 new mandatory death sentences were imposed, including 21 for drug-related offences.<sup>198</sup>

In March 2017, two brothers convicted of murder were executed in Malaysia despite a pending clemency application before its Pardons Board, in violation of international law and standards that prohibit executions before all judicial and non-judicial avenues for pardon have been exhausted.

## Singapore

After a de facto moratorium from 2011 to 2013, Singapore resumed executions in 2014, with two executions that year (for drug-trafficking), four in 2015 (one for murder and three for drug offences), four in 2016 (two for drug trafficking and two for murder), and eight in 2017 (all for drug offences). Further, in 2017, courts imposed 15 new mandatory death sentences, including 12 for drug-related offences.<sup>199</sup> There have been two known executions during the first three months of 2018, both for drug offences.<sup>200</sup>

After the 2013 legislative reforms to the drug law, judges can only exercise sentencing discretion if the prosecutor has issued a certificate of assistance testifying that the defendant has given substantive assistance in the investigation. Lawyers and judges are informed only of the outcome of the decision on the certificate of assistance, while the criteria and process for determining assistance are unclear and lack transparency. As such, the law continues to deprive judges of the possibility to take into account the specific circumstances of the defendant or of the offence, which are not relevant in determining whether the defendant has provided substantive assistance.

The recent legislative reforms in Singapore and Malaysia providing for judicial sentencing discretion in drug-related cases under specific circumstances are not retroactive, denying recourse to re-sentencing to persons who were convicted for drug-offences prior to the entry of the new law into force. That goes against the retroactive leniency principle under international law.

## Thailand

Thailand, which was set to be considered as abolitionist in practice in 2019, conducted one non-drug-related execution in June 2018. The Government had not conducted any execution since August 2009, when two men were executed for drug-trafficking. Thai courts continue to hand down new death sentences. The Government revealed that 216 new death sentences were imposed in 2016 and 75 in 2017; that 192 people had been sentenced to death (including 86 for drug-related offences); and that 502 people were under death sentences at the end of 2017.<sup>201</sup>

## Viet Nam

Death penalty statistics continue to be classified as a State secret in Viet Nam. The Government's latest report to the Human Rights Committee on its implementation of the International Covenant on Civil and Political Rights does not include any statistics on the number of death sentences and executions.<sup>202</sup> Executions are sometimes reported by State media and other national media outlets.

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198 Amnesty International, *Death Sentences 2017*, p. 22; see also A. Ruban, "Brothers executed", Malay Mail, 15 March 2015; and, "Amnesty criticises two 'secretive executions', calls for moratorium on death penalty", Malay Mail, 24 May 2017.

199 Amnesty International, *Death Sentences and Executions* series for years 2014, 2015, 2016 and 2017. See also data from Cornell Center on Death Penalty Worldwide database; accessed on 1 April 2018.

200 OHCHR South-East Asia Regional Office, "UN Human Rights Office condemns execution for drug-related offences in Singapore", Bangkok, 16 March 2018. Available at: <https://bangkok.ohchr.org/news/press/Singapurax.aspx>.

201 Amnesty International, *Death Sentences* series for 2016 and 2017.

202 Human Rights Committee, Third periodic report submitted by Viet Nam under article 40 of the Covenant (CCPR/C/VNM/3), paras. 63–69.

In 2017, the Ministry of Public Security released a report indicating that 429 prisoners had been executed between 8 August 2013 and 30 June 2016.<sup>203</sup> Although the figure was not disaggregated by year, it amounts to an average rate of 147 executions per year. Amnesty International recorded at least 35 new death sentences in 2017, including 31 for drug trafficking, while more than 600 people were believed to be on death row at the end of that year.<sup>204</sup>

#### **4. Commutation and pardon**

Domestic laws and practices in all eight retentionist countries provide various channels or procedures through which persons sentenced to death can have their sentences commuted or receive a pardon, either by courts or the Head of State.<sup>205</sup> In recent years, commutations and pardons have been recorded in Indonesia, Malaysia, Myanmar, Singapore, Thailand and Viet Nam.<sup>206</sup>

According to research presented at the 2018 Bangkok seminar, death-penalty clemency rates between 1991 and 2016 were 95 per cent in Thailand, 55 to 63 per cent in Malaysia, 25 to 32 per cent in Indonesia, and 0.6 per cent in Singapore. However, the lack of transparency concerning the death penalty in some of those countries does not allow for an accurate and objective determination of whether commutation and pardon processes comply with international law and standards and to what extent they have contributed to a decrease in the use of the death penalty.

#### **5. Prohibition of torture and other cruel, inhuman or degrading punishment**

Hanging is the method of execution in Brunei Darussalam, Malaysia, Myanmar and Singapore; firing squad in Indonesia and Lao People's Democratic Republic; and lethal injection in Thailand and Viet Nam. In Aceh, Indonesia, a new bylaw was passed in 2009 by the provincial government that introduced stoning to death in the local Islamic Criminal Code as a punishment for adultery. This provision was subsequently rejected by a more moderate provincial administration in March 2013.

United Nations human rights mechanisms have found that hanging and stoning violate the absolute prohibition of torture (see chapter II, section E.1 above). The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has pointed to emerging new evidence indicating that the combination of drugs used in lethal injection can cause excruciating pain. In light of evolving standards concerning the prohibition of corporal punishment, he has questioned whether execution by firing squad and other forms of capital punishment could ever be justified under international human rights law.<sup>207</sup>

#### **6. Persons excluded from the death penalty**

In all retentionist countries in South-East Asia except Myanmar, laws exclude from the death penalty individuals below the age of 18 at the time of the alleged commission of the offence, as well as pregnant women and people with mental or intellectual disabilities. For the latter category, the exemption in

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203 Report of the Ministry of Public Security No. 05/BC-BCA-C81 (4 January 2017). See also "Vietnam to build five more lethal injection venues", VietNamNet, 10 February 2017. Available at: <https://english.vietnamnet.vn/fms/society/172369/vietnam-to-build-five-more-lethal-injection-venues.html>.

204 Amnesty International, *Death Sentences 2017*.

205 See country profiles in OHCHR Regional Office for South-East Asia, *Moving Away from the Death Penalty: Lessons in South-East Asia* (Bangkok, 2014), Annex A.

206 Amnesty International, *Death Sentences* series for 2015, 2016 and 2017.

207 A/67/279, paras. 38 and 54.

different jurisdictions is subject to different conditions in law and practice, such as verification by a medical professional, guidelines for courts to consider and determine the status of disability or age, the time the disability developed (at time of crime, during trial or when sentence is imposed), or the need to prove a causal link between the disability and the crime.

Myanmar laws do not explicitly prohibit the imposition of a death sentence or execution for persons below age 18 at time of crime, even though the State is party to the Convention on the Rights of the Child and has withdrawn its reservations. At its UPR in 2015, the Government stated that offenders below the age of 16 at the time of crime were not to be sentenced to death.<sup>208</sup>

The current Penal Code in Viet Nam, as amended in 2015, prohibits the execution of persons who are below the age of 18 or older than 75, as well as pregnant women and mothers of children under 36 months of age at the time of crime or trial.<sup>209</sup>

## 7. Transparency

In South-East Asia, data and information concerning the use of the death penalty are not published on a regular basis or are not available in a comprehensive and sufficiently disaggregated manner. The lack of transparency is especially acute in Lao People's Democratic Republic, Malaysia, Singapore and Viet Nam. Viet Nam continues to classify death penalty figures as State secrets and executions and death sentences are only sporadically reported by local media. In Indonesia, Malaysia and Viet Nam, executions are often carried out in secret or hastily, with little to no advance notice to the prisoner, her or his lawyer, or the family. The 2018 execution in Thailand was carried out with little advance notice to the family.<sup>210</sup>

Retentionist countries in South-East Asia have received numerous recommendations from United Nations human rights mechanisms to publish figures concerning their use of the death penalty.<sup>211</sup>

## 8. Legislative and policy reforms

### Brunei Darussalam

Although abolitionist in practice, Brunei prescribes mandatory death sentences for a wide range of crimes, including drug trafficking resulting in death, and drug possession. However, very few death sentences have been recorded in the past 10 years.

Despite the long-standing de facto moratorium, a revised penal code, which came into force in 2014, prescribes the death penalty for such offences as adultery, sodomy, extramarital sexual relations for Muslims, blasphemy and declaring oneself a prophet or non-Muslim. It also introduces stoning as a method of execution for rape, adultery, sodomy and extramarital sexual relations.<sup>212</sup> The criminalization of acts of a sexual or religious nature contravenes international law.

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208 Report of the Working Group on the Universal Periodic Review of Myanmar (A/HRC/31/13), para. 139.

209 CCPR/C/VNM/3, para. 67.

210 See OHCHR Regional Office for South-East Asia, "UN Human Rights office expresses dismay at the resumption of death penalty in Thailand", Bangkok, 19 June 2018.

211 See, as examples, the UPR recommendations received by the 10 ASEAN countries.

212 OHCHR, Spokesperson for the United Nations High Commissioner for Human Rights: Rupert Colville, "Press briefing notes on Brunei penal code, death penalty abolition and USA—execution of Mexican national", Geneva, 11 April 2014.

## Indonesia

While the Indonesian criminal code retains the death penalty, including for drug offences, it is not mandatory. The legislature is in the process of revising the criminal code. Draft amendments to the criminal code include provisions that would anticipate a 10-year suspension of executions, after which death sentences could be commuted to a prison term by the Minister for Law and Human Rights.<sup>213</sup>

This reform is occurring in the context of a seemingly softening stance on the death penalty concurrent with a harsh stance on drugs. In November 2016, the President of Indonesia announced to the media that his country wanted to move towards abolition.<sup>214</sup> In 2017, Indonesia abstained from voting on the General Assembly's resolutions on a moratorium, in a change from its position in earlier votes (see table 2).

Yet, in July 2017, the President said in a speech that he had instructed police to shoot suspected drug dealers to combat "a narcotics emergency" facing the country.<sup>215</sup> In October 2017, the Law and Human Rights Minister said that Indonesia would retain the death penalty but indicated that an alternative sentencing scheme was under consideration, including possible mandatory judicial reviews of death penalty sentences and sentence commutation.<sup>216</sup>

In 2015, the Constitutional Court abolished "Law No. 5/2010 on amendments to Law No. 22/2002 on Clemency", effectively lifting the restrictions that those sentenced to death can make only one submission for clemency to the President, to be submitted no later than a year from the date the conviction attains "permanent legal force".<sup>217</sup> Consequently, a convict can submit a request for case review more than once, in accordance with established legal procedures. The Attorney-General has expressed concern that multiple case review applications would interfere with executions and requested the Supreme Court to reverse the ruling of the Constitutional Court. The Supreme Court decision is pending as of October 2018.<sup>218</sup>

At the end of his 2018 visit to Indonesia, the High Commissioner for Human Rights stated that capital punishment was ineffective as a deterrent and noted it was disproportionately applied against already disadvantaged communities. He urged Indonesia to halt the use of the death penalty for drug offences.<sup>219</sup>

In early 2018, the Government of the autonomous province of Aceh declared it was considering introducing beheading as a punishment for murder.<sup>220</sup>

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213 Adam Harvey, ABC News [Australia], "Indonesian death penalty laws to be softened to allow reformed prisoners to avoid execution", 11 January 2018. Available at: [www.abc.net.au/news/2018-01-11/indonesia-to-soften-death-penalty-stance/9320900](http://www.abc.net.au/news/2018-01-11/indonesia-to-soften-death-penalty-stance/9320900).

214 SBS News, "Indonesia moving towards abolishing death penalty: Widodo", 5 November 2016. Available at: <https://www.sbs.com.au/news/indonesia-moving-towards-abolishing-death-penalty-widodo>.

215 Al Jazeera, "Joko Widodo: Police should shoot suspected drug dealers", 22 July 2017. Available at: <https://www.aljazeera.com/news/2017/07/joko-widodo-police-shoot-suspected-drug-dealers-170722104559016.html>.

216 Margareth S. Aritonang, "Govt seeks 'win-win solution' on death penalty", The Jakarta Post, 10 October 2017. Available at: <https://www.aljazeera.com/news/2017/07/joko-widodo-police-shoot-suspected-drug-dealers-170722104559016.html>.

217 See Amnesty International, *Flawed Justice: Unfair Trials and the Death Penalty in Indonesia*, ASA/21/2434/2015 (London, 2015); and see Netral News, "AGO waits for Supreme Court decision on pardon for death penalty execution", 29 September 2017.

218 Institute for Justice and Criminal Reform, "Supreme Court to Review Its Own Regulation. Civil Society has filed constitutional review petition on the Supreme Court Circular Letter on the Limitation of Case Review Application Submission at the Supreme Court, available at: <http://icjr.or.id/supreme-court-to-review-its-own-regulation-civil-society-has-filed-judicial-review-petition-on-the-supreme-court-circular-letter-on-the-limitation-of-case-review-application-submission-at-the-supreme/>.

219 OHCHR, "UN Human Rights Chief ends visit to Indonesia – Full statement", Jakarta and Geneva, 7 February 2018.

220 Amnesty International, "Indonesia: Aceh must drop proposal to introduce beheading as method of execution", 15 March 2018.

## Lao People's Democratic Republic

The Constitution of Lao People's Democratic Republic does not explicitly recognize the right to life. Although Lao People's Democratic Republic is abolitionist in practice, its Penal Code prescribes mandatory death sentences for the production, distribution, possession or transport of specified amounts of heroin and amphetamines or other psychotropic substances.

In Lao People's Democratic Republic's national report submitted for its last UPR in 2015, the Government stated it was revising the Penal Code to ensure that the list of capital offences was fully compliant with article 6 of the International Covenant on Civil and Political Rights. However, Lao People's Democratic Republic's initial report to the Human Rights Committee, submitted in 2017, did not provide details on whether and how the Penal Code had been amended and seemed to suggest that revision was ongoing.<sup>221</sup>

## Malaysia

In 2016, for the first time, the Government of Malaysia provided Parliament with statistics concerning executions carried out and death sentences handed down since 2010.<sup>222</sup> However, secrecy continues to surround the death penalty, particularly executions. According to Amnesty International, two men were hanged secretly in May 2017. The authorities reportedly told the family of one of the men to pay their last visit two days before the planned execution, but only informed them of the exact date during their visit, on the eve of the execution.<sup>223</sup>

In its UPR report in 2013, Malaysia stated that the death penalty had been imposed only in a few cases, adding that "there exist[ed] to a certain extent a conscious initiative or trend against the implementation or execution of the death penalty" in the country.<sup>224</sup> Subsequently, the Government announced its intention to review the mandatory death penalty for drug-trafficking and tabled the relevant bill in March 2017. On 30 November 2017, Parliament voted to abolish the mandatory death penalty for the crime of drug-trafficking under Section 39(b) of the Dangerous Drugs Act of 1952, giving the courts discretion in sentencing, but only for very limited circumstances of carrying, sending or delivering prohibited substances, in cases where the judge determines that the individual has assisted an enforcement agency in disrupting drug trafficking activities. Provisions in the original amendments that would have allowed for the issuing of "certificates of assistance" by the prosecutor as a condition for judicial sentencing discretion were eventually removed from the bill. After receiving royal assent at the end of December 2017, the bill came into force on 15 March 2018.

## Myanmar

Although abolitionist in practice, Myanmar retains the death penalty, with mandatory death sentences applicable to the crimes of murder and drug-trafficking.

In 2016, Myanmar abolished the death penalty only under the 1950 Emergency Provisions Act. That same year, high-level drug and law enforcement officials acknowledged that criminal law and judicial approaches were insufficient to tackle the drug issue and that drug use should be addressed as a

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221 Human Rights Committee, Initial report of Lao People's Democratic Republic on its implementation of the International Covenant of Civil and Political Rights (CCPR/C/LAO/1), para. 32.

222 Amnesty International, *Death Sentences 2016*, p. 22.

223 Amnesty International, "Two Men Hanged in Secretive Executions", Urgent Action: 113/17, Index: ASA 28/6343/2017 Malaysia, 25 May 2017. Available at: <https://www.amnesty.org/download/Documents/ASA2863432017ENGLISH.pdf>.

224 Human Rights Council, National report of Malaysia on human rights situation since its first UPR in 2009 (A/HRC/WG.6/17/MYS/1), para. 47.



health issue, rather than a criminal, issue.<sup>225</sup> In 2017, amendments to the 1993 Narcotic Drugs and Psychotropic Substances Law were introduced. The amended law was enacted in February 2018 and in effect decriminalizes drug use but not possession. The enactment of the amended drug law was followed immediately with the release of the Government's first-ever National Drug Control Policy, which signals a shift towards a more comprehensive, rights-focused and evidence-based approach, with emphasis on public health interventions for drug users and rural development programmes in opium-growing areas.<sup>226</sup> The new policy also recommended consideration of repealing of the death sentence for drug-related offences.<sup>227</sup> More than 6,300 people convicted for drug offences were pardoned and released from prison under a presidential pardon order issued in April 2018.<sup>228</sup>

## Philippines

The Philippines is fully abolitionist. However, as part of its "war on drugs" that was launched in 2016, the President has repeatedly called on Congress to reintroduce the death penalty. On 7 March 2017, the House of Representatives approved a bill to reintroduce the death penalty for drug-related offences, defined in the text as "heinous crimes". The bill was sent to the Senate for approval, but has been suspended at subcommittee level to permit consideration of the Government's international legal obligations.

In an open letter to the Government dated March 2017, the Human Rights Committee stated that under article 6 of the International Covenant on Civil and Political Rights, once the death penalty has been abolished, States are not allowed to reinstate it. Also in March 2017, two Special Rapporteurs warned that, if approved, "the bill will set the Philippines starkly against the global trend towards abolition and would entail a violation of the country's obligations under international law", which prohibits States that have abolished the death penalty and ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights from legally reintroducing it.<sup>229</sup> In an open letter to the Congress, in December 2016, the High Commissioner for Human Rights stressed that international law prohibits the reintroduction of the death penalty after its abolition, adding that strengthening the rule of law, ensuring an effective justice system, and adopting a strong public health approach to drug control were the most effective means of addressing drug-related offences.<sup>230</sup>

In February 2018, the Prosecutor of the International Criminal Court decided to open a preliminary examination into crimes allegedly committed in the Philippines since at least 1 July 2016, in the context of the "war on drugs".<sup>231</sup> In March 2018, the Philippine Government officially notified the Secretary-General that it was withdrawing from the Rome Statute, the founding treaty of the International

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225 Renaud Cachia, "Will Myanmar lead drug policy reform in Southeast Asia? A commentary on a draft bill recently proposed at Parliament", Transnational Institute, 6 September 2017.

226 Renaud Cachia, "Will Myanmar complete its transition towards an evidence-based approach to drug control? A Myanmar commentary", Transnational Institute, 21 March 2018.

227 Republic of the Union of Myanmar, Central Committee for Drug Abuse Control, *National Drug Control Policy*, 20 February 2018, p. 25. Available at: [https://www.unodc.org/documents/southeastasiaandpacific//2018/02/Myanmar\\_Drug\\_Control\\_Policy.pdf](https://www.unodc.org/documents/southeastasiaandpacific//2018/02/Myanmar_Drug_Control_Policy.pdf).

228 Shoon Naing and Yimou Lee, "Myanmar to free more than 8,000 prisoners in New Year amnesty", Reuters, 17 April 2018.

229 OHCHR, "UN experts urge Filipino legislators to reject death penalty bill", DisplayNews, Geneva, 16 March 2017.

230 OHCHR, An open letter to the Speaker of the House of Representatives and the President of the Senate of the Philippines, 6 December 2016. Available at: [http://www.ohchr.org/Documents/Countries/PH/OpenLetterHC\\_DeathPenalty.pdf](http://www.ohchr.org/Documents/Countries/PH/OpenLetterHC_DeathPenalty.pdf).

231 International Criminal Court, "Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela", The Hague, 8 February 2018.

Criminal Court.<sup>232</sup> Notwithstanding the notice of withdrawal, the Court retains its jurisdiction over crimes committed when the Philippines was a State party to the Rome Statute and may exercise this jurisdiction over these crimes even after the withdrawal, which only becomes effective one year after the deposit of notice of withdrawal.<sup>233</sup>

## Singapore

The Penal Code, as amended in 2013, retains the mandatory death sentence for intentional murder. It grants judges the discretion to impose death sentences or life imprisonment with optional caning for murders with no intention to kill. Under the amended 1973 Misuse of Drugs Act, which entered into effect on 1 January 2013, persons convicted of drug trafficking may escape a mandatory death sentence if they can prove to the court that they were merely “couriers”, and if the Public Prosecutor certifies that they had provided “substantive assistance” to the Central Narcotics Bureau “in disrupting drug trafficking activities within or outside Singapore”. As both requirements have to be met, the courts’ discretionary powers are considerably limited, with the discretion to issue a certificate of assistance resting entirely in the hands of the prosecutor.

Research by Amnesty International has shown that although the number of death sentences has somewhat decreased following the entry into force of the 2013 legislative reforms, courts have continued to hand down death sentences extensively. Of the 66 death sentences imposed for drug between January 2013 and September 2017, more than half were mandatory death sentences.<sup>234</sup>

In 2017, a new law, the Terrorism (Suppression of Misuse of Radioactive Material) Act, entered into force prescribing a mandatory death sentence for the crime of nuclear terrorism.

## Thailand

The Third National Human Rights Plan (2014–2018) of Thailand states the intention to abolish the death penalty, and the Ministry of Justice is continuing a study on the possibility of abolition. In 2015, nonetheless, the Anti-Corruption Law of 1999 was amended to prescribe the death penalty for foreign officials and staff of international organizations convicted of demanding or accepting a bribe.

In 2016, Thailand abolished the mandatory death penalty for selling drugs. Amendments to the drug law went into effect in January 2017, reducing penalties for possession, import and export, and production for sale. The amendments also ensure greater equality of arm by shifting the burden of proof to the prosecution, which must produce sufficient evidence to demonstrate the culpability of people accused of selling/producing illicit substances.<sup>235</sup>

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232 Republic of the Philippines, Department of Foreign Affairs, “PH officially serves notice to UN of decision to withdraw from ICC”, 16 March 2018. Available at: <https://dfa.gov.ph/dfa-news/dfa-releasesupdate/15975-ph-officially-serves-notice-to-un-of-decision-to-withdraw-from-icc>.

233 International Criminal Court, “ICC statement on the Philippines’ notice of withdrawal: State participation in Rome Statute system essential to international rule of law”, Press release, 20 March 2018.

234 Amnesty International, *Cooperate or Die: Singapore’s Flawed Reforms to the Mandatory Death Sentence*, ACT 50/7158/2017 (London, 2017), p. 20.

235 Patcharavalan Akbar and Gloria Lai, “Thailand amends drug law to reduce penalties and ensure more proportionate sentencing”, International Drug Policy Consortium, 2018.

## Viet Nam

Since the late 1990s, periodic revisions of the Penal Code have progressively reduced the number of crimes punishable by death. The number of capital crimes thus decreased from 29 in 1999 to 22 in 2009. The last round of amendments to the Penal Code, which entered into force on 1 January 2018, removed the death penalty for additional crimes, including stockpiling or appropriating illicit drugs. Nevertheless, persons convicted for drug trafficking continue to face the death penalty.<sup>236</sup> In general, the impact of the reduction of capital crimes is still difficult to assess because (a) statistics concerning the death penalty are classified as State secrets and (b) some of the crimes for which the death penalty no longer applies were not among those most commonly punished by death.

## D. Questions of Asian values and public opinion

In South-East Asia, proponents of the death penalty, particularly for drug offences, have long defended its use based on three inter-related arguments: (a) public opinion supports the death penalty as a rationale for retention; (b) the death penalty deters crime; and (c) drug offenders are generally considered as threats to public order and security.

### 1. Asian values

When faced with international criticism concerning domestic human rights abuses, some Governments in Asia have invoked "Asian values" as both a qualifier of the universality of human rights and a justification for practices that violate human rights domestically. Central to their argument is advocacy for community interests over individual liberty, the community's shared interest in upholding what the State describes as "common moral values", including retributive value, and the overriding need to protect community safety against threats.<sup>237</sup> Terms such as "evil-doers" and "merchants of death" are often used to label drug offenders.

Asian values arguments not only present false dichotomies between the protection of individual rights and collective interests, but also put forward concepts of morality, collective interests and public opinion in monolithic and immutable terms. In its General Comment No. 22, the Human Rights Committee has stated that "the concept of morals derives from many social, philosophical and religious traditions," and thus any limitations imposed on fundamental rights and freedoms for the purpose of protecting morals "must be based on principles not deriving exclusively from a single tradition".<sup>238</sup>

The Vienna Declaration and Programme of Action, adopted by the World Congress on Human Rights in 1993, reaffirms the universality and indivisibility of human rights, and succinctly states that "while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms".<sup>239</sup> On the twentieth anniversary of the Declaration, the Special Procedures mandate holders issued a joint

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236 Tuoi Tre News, "Vietnam to scrap death penalty for 5 felonies under amended Penal Code", (25 October 2017).

237 Michelle Miao, "The penal construction of drug-related offenses in the context of 'Asian values': the rise of punitive anti-drug campaigns in Asia", *International Comparative, Policy & Ethics Law Review*, The Chinese University of Hong Kong Faculty of Law Research Paper No. 2017-17, 2017. Available at SSRN: <https://ssrn.com/abstract=3040006>.

238 Human Rights Committee, General Comment No. 22 (48) (art.18), (CCPR/C/21/Rev.1/Add.4), para. 8.

239 OHCHR, Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5.

statement urging States to reject any attempt to undermine the universality of human rights through advocacy of traditional values or cultural relativism.<sup>240</sup>

## 2. Questions of public opinion and deterrence

Public opinion on any particular issue is not immutable and constantly evolves, being heavily influenced by such factors as the following: the methodology used in opinion surveys; access to, and availability and understanding of information on the issue in question; extent of civil society activism and engagement on the issue; plurality of the media landscape and quality of news reporting; and persuasion by political leaders and other public figures. As OHCHR has observed, news reports of a serial murderer can just as easily sway opinion towards the death penalty as a report of a wrongful conviction and execution can sway opinion against it.<sup>241</sup> Experts at the 2018 Bangkok seminar stressed that the causal links between drug offences and lethal crimes are strained, and accounts of drug-related harm to public security are often exaggerated.

Research has shown that popular support for the death penalty depends heavily on its supposed deterrent effect on crimes. As repeatedly emphasized in United Nations resolutions on a moratorium, reports by the Secretary-General on the death penalty, and credible research around the world, there is no clear, conclusive and reliable evidence that the death penalty has a deterrent effect on crimes, be it homicide or drug-related offences.<sup>242</sup>

In its 2017 report on world crime trends, UNODC found that a higher incarceration rate does not necessarily result in lower homicide rates, and declining imprisonment does not automatically produce a crime wave, which raises questions about the notion that more punitive approaches are successful in preventing or reducing crime.<sup>243</sup> Recent upward trends in the production, trafficking and use of certain illicit drugs in countries that prescribe capital punishment for or adopt a punitive approach to drug offences also cast doubt on the deterrent argument. Furthermore, a recent comparative study has shown that long periods of moratorium on executions may allow the criminal justice system to pursue alternative responses, allay fears of rising crime rates, and reduce public opposition to abolition.<sup>244</sup>

Recent statistics compiled and produced by national law enforcement authorities have also cast doubt on the deterrence hypothesis. For example, in Indonesia, research based on Government statistics has shown that since the executions of two drug convicts in 2008, drug-related arrests and cases have not fallen.<sup>244</sup> The number of drug users has also increased significantly since 2011, leading to Indonesian President Joko Widodo's declaration of the drug problem as a national emergency. Fourteen people were executed for drug-related offences in January and April of 2015, but drug-related convictions continued to increase throughout that year.

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240 OHCHR, "Statement of the United Nations Special Procedures Mandate Holders on the occasion of the Twentieth Anniversary of the Declaration and Programme of Action adopted at the World Conference on Human Rights in Vienna in 1993", DisplayNews, Vienna, 26 June 2013.

241 OHCHR Regional Office for South-East Asia, *Moving Away from the Death Penalty: Lessons in South-East Asia* (Bangkok, 2014), p. 18.

242 Roger Hood, "The question of the death penalty and the new contributions of the criminal sciences to the matter: a report to the UN Committee on Crime Prevention and Control" (E/AC.57/1988/CRP.7).

243 Commission on Crime Prevention and Criminal Justice, *World crime trends and emerging issues and responses in the field of crime prevention and criminal justice* (E/CN.15/2017/10), paras. 7, 17 and 25.

244 Delphine Lourtou and Sandra Babcock, *Pathways to Abolition of the Death Penalty: Analyzing the Elements of Successful Abolition Strategies* (Cornell Law School, 2016).

245 PKNI (Persaudaraan Korban Napza Indonesia), "Does the death penalty reduce drug use and drug related crime? Data from Indonesia", International Drug Policy Consortium, 3 May 2016.

In Malaysia, when tabling the bill to amend the drug law for its second reading in late 2017, Minister in the Prime Minister's Department Azalina Othman admitted that despite the Government's drastic drug control measures, police statistics revealed a high number of drug-related cases from January 2014 to October 2017, with 702,319 individuals detained for trafficking and possessing drugs.<sup>246</sup>

Two recent surveys of public opinion on the death penalty in Malaysia and Singapore indicate that public support for the death penalty is neither unconditional nor nearly as high as commonly assumed or claimed by politicians.<sup>247</sup> When asked (with no context) a general, theoretical question about whether they supported the death penalty for crimes punished by such a sentence in their country, a majority of respondents answered in the affirmative in both surveys. However, the level of support decreased considerably when they were confronted with, inter alia, cases of wrongful convictions.

The results of the surveys in both countries showed a low level of support for mandatory death sentences, particularly for drug-related offences. Most respondents, including those who expressed support for the death penalty in the abstract, declared they would sentence defendants in the scenario cases to life imprisonment or lesser punishment. In both surveys, "greater number of executions" was ranked last among measures respondents deemed as effective in reducing violent crimes and drug trafficking.

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246 Channel NewsAsia, "Malaysia parliament removes mandatory death penalty for drug offenders", Singapore, 1 December 2017.

247 Roger Hood, *The Death Penalty in Malaysia: Public Opinion on the Mandatory Death Penalty for Drug Trafficking, Murder and Firearms Offences* (London, The Death Penalty Project, 2013); Wing-Cheong Chan and others, "How strong is public support for the death penalty in Singapore?", *Asian Journal of Criminology*, October 2017, pp. 1–17.

# V. Conclusions and recommendations

Despite uneven progress, the general trend in South-East Asia continues to show diminishing resolve to retain the death penalty. Three out of 11 countries in the region are de facto abolitionist and only three carried out executions in 2017.

Although the overall approach to drug-control continues to focus heavily on punishment, there are signs that Governments in the region are beginning to acknowledge the anomalies and are more amenable to moving towards a rights-based approach that favours public health interventions.

The Office of the United Nations High Commissioner for Human Rights (OHCHR) recommends the following for all States in South-East Asia:

1. Impose an official moratorium on all executions and commute all sentences, as a first step towards full abolition of the death penalty for all crimes.
2. Ratify the International Covenant on Civil and Political Rights and its Second Optional Protocol, aiming at the permanent abolition of the death penalty, if that has not yet been accomplished.
3. Take steps, for States that are abolitionist in practice, to move expeditiously to impose an official moratorium on all executions with a view to full abolition, while the judiciary in such States should refrain from imposing death sentences in all cases.
4. Align national legislation concerning the death penalty, pending its abolition, with international human rights law and standards; for example, by abolishing the mandatory death penalty for all crimes and removing drug-related and other offences from the scope of the death penalty that do not meet the threshold of “most serious crimes” within the meaning of article 6 of the International Covenant on Civil and Political Rights.
5. Ensure that all persons who have been sentenced to death for drug-related offences and offences other than intentional killing have their sentences reviewed and commuted accordingly.
6. Ensure that the method of execution employed causes the least possible physical and mental suffering and that it does not violate the prohibition of torture and cruel, inhuman or degrading treatment.
7. End the use of secret executions and executions with little or no prior warning to condemned prisoners and their families.
8. Ensure that the highest and most rigorous standards of fair trial and due process guarantees are upheld, and that defendants receive competent legal assistance at all stages of the

judicial proceedings, including assistance free of charge and without discrimination, in all cases, particularly those where the death penalty may be imposed.

9. Ensure that the death penalty is not imposed as a result of discriminatory or arbitrary application of the law, including the lack of the provision of equal access to competent legal assistance and the hindering of the exercise of the rights to appeal against their sentence and to seek pardon or commutation on an equal basis with the majority of the prison population.
10. Ensure that competent authorities duly inform foreign nationals facing the death penalty of their right to contact the relevant consular post and, if those persons so request, notify the consular services of those who have been deprived of their liberty, in accordance with the Vienna Convention on Consular Relations.
11. Ensure that safeguards and special protections are in place, so that the death penalty is not imposed or carried out on persons under 18 at the time of the alleged commission of the offence, nor on pregnant women, new mothers, persons with mental or intellectual disabilities, or older persons.
12. Undertake studies to identify the underlying factors of the substantial racial and ethnic disparities in the application of the death penalty, where they exist, with a view to developing effective strategies aimed at eliminating discriminatory practices.
13. Make publicly available and accessible, in order to encourage informed public debate, all relevant information concerning the use of the death penalty, disaggregated by sex, age, race, offences and other applicable criteria; including the number of persons sentenced to death, the number of persons on death row and the number of executions carried out, the number of death sentences reversed or commuted on appeal, and information on any scheduled execution.
14. Ensure that implementation of the international drug control conventions and the joint commitment of the 2016 General Assembly Special Session on Drugs, as well as development and enforcement of all aspects of regional and bilateral drug control measures, are in full conformity with international human rights law and standards, without recourse to the death penalty, by taking the following measures, among others:
  - a) promoting proportionate national sentencing policies, practices and guidelines for drug-related offences, including the development, adoption and implementation of alternative or additional measures with regard to conviction or punishment, in compliance with international human rights law and standards;
  - b) enhancing access to treatment of drug use disorders for those incarcerated, implementing measures aimed at addressing and eliminating prison overcrowding and violence, and promoting effective oversight confinement facilities, taking into consideration international standards and norms on crime prevention and criminal justice, including the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules);
  - c) promoting and implementing effective criminal justice responses to drug-related offences in a manner that ensures legal guarantees and due process safeguards, ensures timely



access to legal aid and the right to a fair trial, and upholds the prohibition of arbitrary arrest and detention and of torture and other cruel, inhuman or degrading treatment or punishment.

15. Adopt a rights-based, evidence-based, gender-sensitive, comprehensive and balanced approach to drug control and strengthen the allocation of adequate resources to ensure that quality public health interventions are accessible and available to people who use drugs, including all harm-reduction measures and drug-dependence treatment services, particularly opioid substitution therapy.
16. Initiate investigations promptly that are independent, impartial and thorough, into all allegations of torture, killings and extrajudicial executions in all circumstances, including in the context of drug enforcement operations, and hold perpetrators and instigators to account.
17. Vote in favour of the next General Assembly resolution on the “moratorium on the use of the death penalty” at the seventy-third session, in 2018.
18. Promote sharing of experiences and good practices in efforts at abolishing the death penalty, for abolitionist and de facto abolitionist States; and, for retentionist States, move away from the use of the death penalty; in both instances with the cooperation of United Nations offices, departments, agencies, funds, programmes and human rights mechanisms, as well as regional intergovernmental bodies and other entities, such as non-governmental organizations.

“The death penalty has no place in the 21st century.”

António Guterres, United Nations Secretary-General



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