

Report to the UN Secretary-General on the question of the death penalty,
pursuant to UN Human Rights Council Resolution 36/17

28 March 2019

Reporting organisation:



Harm Reduction International is a leading NGO dedicated to reducing the negative health, social and legal impacts of drug use and drug policy. We promote the rights of people who use drugs and their communities through research and advocacy to help achieve a world where drug policies and laws contribute to healthier, safer societies.

Since 2007, Harm Reduction International has been at the forefront of advocating for the abolition of the death penalty for drug-related offences worldwide; including via the [Death Penalty for Drug Offences: Global Overview](#) series.

Introduction

Harm Reduction International welcomes the opportunity to comment on crucial issues and developments concerning the use of the death penalty, and urges the Secretary-General to continue prioritising this issue. We further reaffirm the call for a moratorium on the death penalty, as a step towards its definitive abolition worldwide.

This submission addresses key impacts of the resumption of the use of the death penalty on human rights, with a specific focus on drug offences.

After describing recent cases of resumption of the use of capital punishment for drug offences – or risk thereof – the submission will consider:

- 1) Repercussions for the international human rights system;
- 2) Impact on the human rights of individuals on death row and their families;
- 3) Impact on other stakeholders.

Resumption of the use of the death penalty for drug offences: recent cases

In contrast with a clear global trend towards abolition of the death penalty, in recent years a pattern has emerged of populist leaders identifying the death penalty as a central tool of drug control, and taking steps towards its reinstatement or expansion.¹

Resumption – or threat thereof – takes different forms:

- a) Ending of moratoria on executions. A recent case is that of Indonesia, where a moratorium on executions was in place from 2008 to 2012, and in 2014. This was ended in January 2015, when six people were executed for drug offences. Between April 2015 and July 2016 twelve more executions were carried out, all for drug offences.

A similar scenario is unfolding in Sri Lanka, where in July 2018 President Sirisena has announced the intention to resume executions (after a 43-year moratorium) against individuals convicted to death for drug trafficking.

- b) Introducing or re-introducing the death penalty in national legislation. The re-introduction of capital punishment for drug offences is the object of a dedicated bill in the Philippines, which was approved in the lower house of Parliament and is now sitting in the Senate. Notably, the Philippines ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (hereinafter: The Protocol).

Repercussions for the international human rights system

Although allowing for the use of the death penalty in a limited set of circumstances, the International Covenant on Civil and Political Rights (ICCPR) is abolitionist in spirit. This clearly emerges from paragraphs (2) and (6) of Article 6, as also authoritatively interpreted by the Human Rights Committee in General Comment 36.² Resuming the use of the death penalty, in any form, would thus be in direct violation of States' obligations under ICCPR.

A particularly grave scenario – potentially unfolding in the Philippines – consists of the (re-)introduction of the death penalty in a state party to the Second Optional Protocol. The Protocol does not contain any termination provision and cannot be denounced – making abolition of death penalty “legally irrevocable.”³ Re-introduction of the death penalty in a state party to the Protocol would be unprecedented, and would as such represent a critical test for the international community, and the system of international human rights law. A failure to

adequately respond to this grave breach of the Protocol may fatally impinge upon the strength, authority, and legitimacy of this mechanism.

In addition, a state practice of resumption of the use of the death penalty would weaken the emerging argument that a customary norm exists prohibiting the use of the death penalty in any circumstance.⁴

Impacts on the human rights of individuals on death row and their families

The negative impact of the death penalty on convicted individuals and their families is well documented by UN bodies and civil society. Resuming capital punishment in cases where a moratorium is in place would thus expose these subjects to the risk of grave violations.

A commonly denounced issue is the risk of **discriminatory imposition** of the death penalty. Evidence shows that the death penalty is disproportionately imposed upon the poorest and most vulnerable in society⁵ and (when employed as a drug control mechanism) within the drug market.⁶ Any decision to resume the use of capital punishment is thus likely to affect those individuals disproportionately.

In Indonesia, ten of the fourteen individuals executed in 2015 were foreign nationals, and in all cases serious violations were documented, including: lack of meaningful consideration of clemency petitions, execution of a person with a mental disability, and executions carried out in absence of a final judgment.⁷

Regrettably, no information is publicly available regarding the identity and the profile of the individuals which may be at risk of imminent execution in Sri Lanka. As a consequence, it is not possible to ascertain whether their execution also violates Article 6 ICCPR under other profiles (for example, whether individuals were minors at the time when the crime was committed; whether the prisoners have exhausted all judicial procedures and have been granted a fair trial; whether clemency or commutation appeals were meaningfully considered, among others).

With specific regard to Sri Lanka, we note that deciding which individuals to execute purely on the basis of the crimes they have been convicted for, is per se discriminatory, as it hints at a lack of evaluation of the specific circumstances of the crime and the accused. Notably, in 2014 the Special Rapporteur on extrajudicial, summary or arbitrary executions discussed instances of resumption related to political developments (such as in the cases of Indonesia, Sri Lanka, and the Philippines) and concluded:

“Executions **may be considered arbitrary** if they are resumed owing to extraneous developments, unrelated to the crime or criminal in question. A current deterioration in the law and order situation of a particular State is not attributable to a convict on death row, who may have committed his or her crime years, or even decades, before. The execution of that convict in order to demonstrate strength in the criminal justice system is arbitrary.”⁸

Finally, resuming the use of the death penalty in a country where a moratorium is currently in place would have a detrimental impact on the already fragile mental health of individuals on death row and their families.⁹

Impact on other stakeholders

In 2014, the Special Rapporteur on extrajudicial, summary or arbitrary executions stressed that

“Even if one rejects the idea that prisoners and their families may have developed something akin to legitimate expectations to avoid execution, it should be noted that other participants in the process may have. For example, prosecutors are arguably more inclined to demand and judges to impose death sentences if they assume the sentence will not be implemented. The psychological pressure on prison personnel is different if they assume that they will never have to carry out executions. **Resumption of**

executions destroys a balance that many participants in the process will have taken for granted and could lead to executions that were not intended to become reality.”¹⁰

Notably, in countries where the death penalty is reinstated after a lengthy period of abolition or moratorium, the lack of focus on the issue during the moratorium/abolition has the propensity to result in a weakened civil society response, and/or in fewer sufficiently skilled lawyers and legal professionals. As a consequence, the risk of a lack of adequate representation and unfair trials is heightened in these scenarios.

In addition, although not absolutely prohibited under international law, the application of the death penalty must respect a long list of safeguards; insomuch that “in practice the increasingly rigorous conditions imposed by international human rights jurisprudence made it almost impossible to carry out the death penalty without violating the prohibition of torture and other cruel, inhuman or degrading treatment or punishment”¹¹ or other fundamental rights. Resumption of the death penalty would thus expose individuals in society to a wide range of human rights violations connected to the death penalty, from inhuman and degrading treatment to lack of due process in all stages of the process.

Finally, the arbitrariness manifested by resuming the use of the death penalty only for certain crimes – especially when not the ‘most serious’ ones – creates a dangerous precedent for the expansion of the death penalty, which leads to a situation of fundamental uncertainty and ultimately erodes the rule of law in the country.

¹ Unless specified otherwise, figures and information on the use of the death penalty for drug offences come from: Giada Girelli, *The Death Penalty for Drug Offences: Global overview 2018* (London: Harm Reduction International, 2019). Available at: <https://www.hri.global/death-penalty-drugs-2018>

² Human Rights Committee, “General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life” (United Nations, 2018), https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf, Para. 34 and 50.

³ *Ibid.*, Paras 34

⁴ Human Rights Council, “High-Level Panel Discussion on the Question of the Death Penalty: Report of the United Nations High Commissioner for Human Rights,” July 4, 2017, UN Doc. A/HRC/36/27., Para 17 and 48.

⁵ Human Rights Committee, “General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life.”, Para 44. Human Rights Council, “High-Level Panel Discussion on the Question of the Death Penalty: Report of the United Nations High Commissioner for Human Rights.”

⁶ Among others: Lucy Harry and Giada Girelli, “The Death Penalty for Drug Offences: The Impact on Women” (London: Harm Reduction International and University of Oxford, 2019); Carolyn Hoyle and Giada Girelli, “The Death Penalty for Drug Offences: Foreign Nationals” (London: Harm Reduction International and University of Oxford, 2019). Both available at: <https://www.hri.global/death-penalty-drugs-2018>

⁷ Amnesty International, “Indonesia: Flawed Justice - Unfair Trials and the Death Penalty in Indonesia,” October 15, 2015, <https://www.amnesty.org/en/documents/asa21/2434/2015/en/>.

⁸ UN General Assembly, “Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,” August 6, 2014, UN Doc. A/69/265, Para. 103 (emphasis added)

⁹ Among others, see: Human Rights Commission, “Extrajudicial, Summary or Arbitrary Executions. Report of the Special Rapporteur, Philip Alston: Transparency and the Imposition of the Death Penalty,” March 24, 2006, UN Doc. E/CN.4/2006/53/Add.3. Human Rights Council, “Panel on the Human Rights of Children of Parents Sentenced to the Death Penalty or Executed,” March 15, 2013, UN Doc. A/HRC/22/L.18.

¹⁰ UN General Assembly, “Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions,” August 6, 2014, UN Doc. A/69/265, Para. 106 (emphasis added)

¹¹ Human Rights Council, “High-Level Panel Discussion on the Question of the Death Penalty: Report of the United Nations High Commissioner for Human Rights”, Para. 17