

The Death Penalty for Drug Offences

A Violation of International Human Rights Law



HR2 | HARM REDUCTION & HUMAN RIGHTS

A PROGRAMME OF THE INTERNATIONAL HARM REDUCTION ASSOCIATION

ABOUT THE INTERNATIONAL HARM REDUCTION ASSOCIATION AND HR2

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In 2007, IHRA established HR2, the Harm Reduction & Human Rights Monitoring and Policy Analysis Programme. HR2 leads the organisation's programme of research and advocacy on the development of harm reduction programmes and human rights protections for people who use drugs in all regions of the world.

IHRA is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

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“More than 50 journalists, ministers and officials [in Thailand] witnessed the execution in April [2001] of four men convicted of drug offences and one of murder. The men were only given two hours’ notice that they were to die that day. Suranit Chaugyampin, advisor to the prime minister’s office, was quoted as saying that it was being done for psychological reasons, to let those involved in the drug trade see that the government were serious in their efforts to stamp it out.”

Amnesty International
*The Death Penalty Worldwide:
Developments in 2001*
April 2002

“[R]espect for all human rights is and must be an essential component of measures taken to address the drug problem.”

UN General Assembly
*International Cooperation Against the
World Drug Problem*
January 2002

1 Executive summary

Amnesty International reports that the death penalty has been abolished in law or practice in 133 states. Of the sixty-four 'retentionist' countries that continue to use capital punishment, half have legislation applying the death penalty for drug-related offences. Although the number of people put to death annually for drug convictions is difficult to calculate, it is clear that a significant number of executions for drug offences take place each year.

Despite the remarkable international trend towards the abolition of capital punishment over the past twenty years, the number of countries expanding the application of the death penalty to include drug offences has increased during the same period. Typically the application of capital punishment is for drug trafficking, cultivation, manufacturing and/or importing/exporting, however the definition of capital narcotics crimes is not limited to these offences. In fact, the types of drug offences which carry a sentence of death are broad and diverse and include possession of illicit drugs in some countries.

Although capital punishment is not prohibited under customary international law, its application is limited in significant ways. Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) states that the penalty of death may only be applied to the 'most serious crimes'. Over the past twenty-five years, human rights bodies have interpreted Article 6(2) in a manner that limits the number and types of offences for which execution is allowable under international human rights law.

A review of how the UN Human Rights Committee, the UN Secretary-General and various UN special rapporteurs on human rights have interpreted 'most serious crimes' reveals several areas of consensus as to the threshold necessary to satisfy the requirements of Article 6(2) of the ICCPR. These include:

1. 'Most serious crimes' should be interpreted in the most restrictive and exceptional manner possible.
2. The death penalty should only be considered in cases where the crime is intentional and results in lethal or extremely grave consequences.
3. States should repeal legislation prescribing capital punishment for economic, non-violent or victimless offences.

While many retentionist governments argue that drug offences fall under the umbrella of ‘most serious crimes’, this is not the perspective of international human rights monitors and treaty bodies. Both the UN Human Rights Committee (the body responsible for monitoring compliance with the terms of the ICCPR) and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions have stated that drug offences do not constitute ‘most serious crimes’ and that executions for such offences are therefore in violation of international human rights law.

Additionally, a comparison of domestic drug legislation among retentionist countries reveals a huge disparity in the definition of a capital drug offence. The fact that there is little consensus among retentionist states about the threshold of a capital offence indicates that the definition of a ‘most serious crime’ within drug offences is an arbitrary and inconsistent exercise at best.

Despite these facts, and the significant number of executions occurring annually for drug convictions, there has been little public outcry. Indeed, the dearth of international attention paid to human rights abuses against people

who use drugs suggests that some of the same moralising that drives repressive policy and legislation have also impeded the development of progressive human rights discourse in this area.

Addressing this situation through established international mechanisms is complicated by the inherent contradictions facing the UN as the body tasked by the international community with both promoting human rights worldwide and promoting the international narcotics control regime that drives, or provides ideological justification for, these abuses.

It is often stated that the progress towards the abolition of capital punishment over the past twenty years is a dramatic example of the success of the human rights movement worldwide. If this is indeed the case, then the expansion of capital punishment for drug offences during this same period is a dramatic failure. This situation not only demands attention among abolitionists, but also points to the need for the human rights movement to speak out on state abuses against people who use drugs.

2 Introduction

According to Amnesty International, the death penalty has been abolished in law or practice in 133 states. This figure includes countries that are abolitionist for all crimes, abolitionist for ordinary crimes (offences committed during peacetime) and de facto abolitionist (those that have not carried out an execution in the past ten years despite the existence of capital punishment in their statutes).¹ Of the sixty-four 'retentionist' states that continue to use capital punishment, half have legislation applying the death penalty for drug-related offences. In contrast to the international trend towards the abolition of capital punishment,² the number of countries applying the death penalty to drug offenders has increased over the past twenty years.

Under the International Covenant on Civil and Political Rights (ICCPR), the use of capital punishment, while not prohibited, is restricted in several ways. One of the key restrictions is contained in Article 6(2), which states that the penalty of death may only be applied for the 'most serious crimes'. Over the past twenty-five years, human rights bodies have interpreted

Article 6(2) in a manner that limits the number and types of offences for which a penalty of death is allowable under international human rights law. However, many retentionist states continue to argue that drug crimes fall under the umbrella of 'most serious crimes' and claim that the use of capital punishment for drug offences is justified.³

This report examines the use of capital punishment for drug offences, and considers whether drug crimes meet the threshold of 'most serious crimes' as interpreted under the ICCPR. It reviews the legislation and practice in retentionist states, and discusses the approach of various human rights bodies to the issue. Finally, it argues that drug-related offences do not constitute 'most serious crimes', and consequently finds that the execution of drug offenders violates international human rights law.

¹ Amnesty International (5 December 2007).
² Schabas (2002) p. 20.

³ For example, Government of Singapore (1997) para. 3.

3 Background: The use of the death penalty for drug offences

In 1985, the death penalty for drug offences was in force in twenty-two countries. Ten years later, in 1995, this number had increased to twenty-six. By the end of 2000, at least thirty-four states had enacted legislation providing for capital punishment for drug crimes, the majority of these being in the Middle East, North Africa and Asia Pacific regions.⁴ In a number of these countries, certain drug offences carry a mandatory sentence of death.⁵

The number of countries actually carrying out executions, and the number of people put to death annually for drug convictions, are more difficult figures to calculate. It is clear that not all of these countries are

implementing the death sentences provided for in their legislation. Nevertheless, it is equally clear that a significant number of executions for drug offences take place each year.

A review of various reports from UN agencies, non-governmental organisations and media outlets shows that in recent years executions for drug offences have been carried out in countries including China,⁶ Egypt,⁷ Indonesia,⁸ Iran,⁹ Kuwait,¹⁰ Malaysia,¹¹ Saudi Arabia,¹² Singapore,¹³ Thailand¹⁴ and Viet Nam.¹⁵ Even in countries that are not actively executing drug offenders, death sentences for drug-related crimes continue to be pronounced.¹⁶

While in some of these countries the number of executions is small, in others drug offenders constitute a significant proportion of total executions. For example, in Malaysia, between July 2004 and July 2005,

4 In 2001, the UN Commission on Crime Prevention and Criminal Justice (para. 90) identified Bahrain, Bangladesh, Brunei Darussalam, China, Cuba, Democratic Republic of Congo, Egypt, Guyana, India, Indonesia, Iran, Iraq, Jordan, Kuwait, Libya, Malaysia, Myanmar, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Singapore, South Korea, Sri Lanka, Sudan, Syrian Arab Republic, Taiwan, Tajikistan, Thailand, United Arab Emirates, United States (federal law), Uzbekistan and Viet Nam as those countries with capital punishment for drug crimes. Since this report was published, the Philippines has abolished the death penalty and Amnesty International has judged Brunei Darussalam, Myanmar and Sri Lanka to be abolitionist in practice. However, the above list does not include Yemen and Laos, both of which have capital punishment for drug offences: see *Yemen Times* (2006); Amnesty International (28 June 2007).
5 Hood (2002) p. 81.

6 Amnesty International (2005); Amnesty International (April 2002).

7 UN Human Rights Committee (28 November 2002) para. 9.

8 UN Commission on Crime Prevention and Criminal Justice (2001) para. 64; UN Commission on Human Rights (17 March 2005) para. 318.

9 UN Commission on Human Rights (24 March 2004) para. 225.

10 Amnesty International (January 2006).

11 Amnesty International (December 2000).

12 Amnesty International (2005).

13 Amnesty International (January 2006); Amnesty International (June 1998).

14 Amnesty International (9 May 2001); Amnesty International (April 2002).

15 Amnesty International (March 2003).

16 Amnesty International (2004).

thirty-six of the fifty-two executions carried out were for drug trafficking.¹⁷ In April 2005, the Internal Security Ministry reported to the Malaysian parliament that 229 people had been executed for drug trafficking over the previous thirty years.¹⁸

In 2004, Amnesty International reported that twenty-six of the fifty executions conducted in Saudi Arabia in the previous year were for drug-related offences.¹⁹ The following year, in the same country, Amnesty reported that 'at least' thirty-three executions were carried out for drug offences.²⁰

The government of Viet Nam admitted in a 2003 submission to the UN Human Rights Committee that, 'over the last years, the death penalty has been mostly given to persons engaged in drug trafficking.'²¹ According to a recent media report, 'Around 100 people are executed by firing squad in Vietnam each year, mostly for drug-related offences.'²² One UN human rights monitor commenting on the situation noted that 'Concerns have been expressed

that at least one third of all publicised death sentences [in Viet Nam] are imposed for drug-related crimes.'²³

Since 1991, more than 400 people have been executed in Singapore, the majority for drug offences.²⁴ It has been reported that between 1994 and 1999, 76 per cent of all executions were drug-related.²⁵ According to media reports, Singapore executed seventeen people for drug crimes in 2000, and twenty-two in 2001.²⁶ In 2004, Amnesty International suggested that Singapore has perhaps the highest per capita execution rate in the world.²⁷

In recent years, China has used the UN's International Day Against Drug Abuse and Illicit Drug Trafficking, 26 June, to conduct public executions of drug offenders. In 2001, over fifty people were convicted and publicly executed for drug crimes at mass rallies, at least one of which was broadcast on state television.²⁸ In 2002, the day was marked by sixty-four public executions in rallies across the country, the largest of which

17 CS Ling (2006) 'Debate over the death penalty heating up' *New Straits Times* (26 March 2006).

18 *Malaysiakini* (2005).

19 Amnesty International (2004) p. 301.

20 Amnesty International (2005).

21 UN Human Rights Committee (21 July 2003) para 1.

22 'Vietnam law commission wants death penalty for fewer crimes' *Thanh Nien News* (2006) (3 November 2006).

23 UN Commission on Human Rights (27 March 2006) p. 302.

24 Amnesty International (15 January 2004).

25 The figures come from a written reply dated 12 January 2001 from the Minister for Home Affairs (Ninth Parliament of Singapore, Second Session) cited in UN Commission on Crime Prevention and Criminal Justice (2001) para. 69.

26 Tan (2002).

27 Amnesty International (15 January 2004).

28 Amnesty International (April 2002) p. 33.

took place in the south-western city of Chongqing, where twenty-four people were shot.²⁹ A UN human rights monitor reported ‘dozens’ of people being executed to mark the day in 2004,³⁰ and Amnesty International recorded fifty-five executions for drug offences over a two-week period running up to 26 June 2005.³¹

3.1 Capital drug crimes in domestic legislation

The increase in countries legislating for the death penalty for drug offences is not the only contradiction to the international trend towards capital punishment abolition. The other is the increasing number and variety of drug-related offences for which the death penalty is being prescribed. The typical application of capital punishment in the domestic legislation of retentionist states is for drug trafficking, cultivation, manufacturing and/or importing/exporting. However, the definition of capital narcotics crimes is not limited to these offences. In fact, the types of drug crimes which carry a sentence of death are broad and diverse. While the UN Human Rights Committee and others have consistently called for

restrictions in the type and number of offences for which the penalty is death, narcotics control legislation in many countries outlines a disturbing number and variety of capital drug offences.

In many countries, the death penalty may be applied to people in possession of illicit drugs.³² In countries such as Singapore and Malaysia, the usual burden of proof is reversed so that an individual arrested in possession of a quantity of narcotics exceeding a certain weight is presumed to be trafficking unless he or she can prove otherwise in court. This policy has been criticised by human rights monitors.³³

In Iran, penalties for possession may be calculated cumulatively. For example, a mandatory death sentence is imposed for possession of more than 30g of heroin or 5kg of opium. Under Iranian legislation, this quantity may be based upon the amount seized during a single arrest, or may be added together over a number of cases. Therefore a person with several convictions for

29 *Associated Press* (2002).

30 UN Commission on Human Rights (17 March 2005) para. 69.

31 Amnesty International (26 June 2007).

32 For example, Narcotic Drugs and Psychotropic Substances (Amendment) Act 1988 (Act No. 2 of 1989) (India) s. 9.

33 '[T]he Special Rapporteur wishes to express his concern about the existence of laws, particularly those relating to drugs offences in countries such as Malaysia and Singapore, where the presumption of innocence is not fully guaranteed, as the burden of proof lies partially on the accused.' UN Commission on Human Rights (24 December 1996) para. 81.

possession of smaller quantities may receive a mandatory death sentence if the total amount of drugs seized from all convictions exceeds the proscribed threshold.³⁴

Many countries allow for capital punishment for drug offences where there are aggravating features, such as the use of violence³⁵ or the involvement of minors.³⁶ In Sudan, proprietors of cafés or restaurants where drug use or trafficking takes place are liable for the death penalty. Proscribed activities under Article 4 of the Sudanese legislation – potentially subjecting a proprietor to the death penalty if such activities occur on his or her premises – include smoking hashish or possession of a hashish pipe.³⁷ This is similar to a section of the legislation in Yemen which stipulates that a sentence of death can be imposed on ‘All persons who have operated, prepared or equipped premises for the consumption of narcotics’.³⁸

34 Anti-Narcotic Drug Law of 25 October 1988, as amended on 1 July 1989, Articles 8(6), 4(4) and 8(6) 6.

35 For example, Decision on the Prohibition of Narcotic Drugs (adopted at the 17th meeting of the Standing Committee of the Seventh National People’s Congress on 28 December 1990) (China) s. 2; Anti-Narcotic Drug Law of 25 October 1988 (Iran).

36 For example, Law No. 122 of 1989 amending certain provisions of Decree-Law No. 182 of 1960 concerning the Control of Narcotic Drugs and Regulation of their Utilization and Trade in Them (Egypt) Article 34(c)(i); Law No. 11 of 1988 Law on Narcotic Drugs and Psychotropic Substances (Jordan) Articles 8(b)(iii) and 9(c)(iii).

37 Hashish and Opium Ordinance 1924 Amendment No. 1, 1989, Article 7(1).

38 Law 3 of 1993 on Control of Illicit Trafficking in

Some countries, such as Jordan, Egypt, Syria and Oman, impose a mandatory death sentence if the offender is a public official or government employee.³⁹ Egypt also retains a mandatory death sentence for ‘Anyone who, by whatever means of force or deceit, induces any other person to take any narcotic substance’.⁴⁰ This is similar to a provision in Iranian narcotics control legislation prescribing the death penalty upon a repeat conviction for ‘intentionally caus(ing) another person to be addicted to the drugs’.⁴¹

3.2 Moral and utilitarian rationales

Punitive, prohibitionist policies towards drugs are typically justified on both moral and utilitarian grounds.⁴² In many ways, the application of the death penalty for drug offences is the ultimate expression of these perspectives, as both moral and utilitarian rationales feature prominently among supporters of the use of capital punishment for drug offences.

and Abuse of Narcotics and Psychotropic Substances, Article 34(d).

39 Law No. 11 of 1988 (Jordan) Article 8(b)(2); Law No. 122 of 1989 (Egypt) Article 34(c)(ii); UN Human Rights Committee (25 August 2000) para. 62(b); Law on the Control of Narcotic Drugs and Psychotropic Substances (Oman) Article 43.

40 Law No. 122 of 1989 Article 34.

41 Anti-Narcotic Drug Law of 25 October 1988, Article 18.

42 Aoyagi (2005) p. 585.

While the use of illegal drugs may potentially have harmful effects for the user, including death, most people who ingest a dose of illegal drugs suffer no significant ill-effects at all and certainly do not die from the experience. Whether from the perspective of a low-level drug dealer or a sophisticated international criminal enterprise, killing one's customers is bad for business. It is difficult therefore to make a reasonable case that the use, sale or trafficking of narcotics is intended to have a lethal outcome. As a result, the traditional 'eye-for-an-eye' retributive rationales common among death penalty supporters do not fit neatly in the context of drug offences. Because of this, it is necessary for supporters of capital punishment to adopt a moral basis for the policy, which involves the presumption that drug use is intrinsically wrong and evidence of moral inadequacy and should therefore be harshly penalised.⁴³

Following this moral perspective, rather than attempting to prove individual intent or lethality in a particular drug case, pronouncements are made about the 'social evil caused by drug trafficking'⁴⁴ and the 'global menace' of the drug trade.⁴⁵

43 Aoyagi (2005) p. 561; Gilmore (1996) p. 384.
 44 Ong Ah Chuan v. Public Prosecutor (1980–1981) para. 64.
 45 Geraghty (2004) p. 374.

Persons involved in the drug trade are not accused of being guilty of individual, identifiable homicides, but rather as being 'merchants of death',⁴⁶ 'engineers of evil'⁴⁷ or 'peddlers of death'⁴⁸ whose crimes cause 'serious harm to the nation'.⁴⁹ In this manner, the moral rationale paints drug offenders as threats to the life, values and health of the state, against whom extraordinary penalties are therefore justified. As described recently by Malaysian Prime Minister Datuk Seri Abdullah Ahmad Badawi, the death penalty is the 'right kind of punishment' given the menace that drugs pose to society.⁵⁰

Wedded to the moral rationale is the utilitarian approach, which justifies punitive policies on the basis of efficacy. The utilitarian perspective believes that harsh punishment is most effective in deterring the 'evil' of drugs and mitigating their negative societal consequences.⁵¹ Under the utilitarian rationale, capital punishment is justified because of its claimed deterrent effect on drug trafficking and drug use,⁵² which it is argued is particularly crucial in

46 Hor (2000) p. 9.
 47 Malaysia Chief Justice Azlan Shah cited in Harrington (1991) p. 380.
 48 *Ibid.*
 49 1995 US report to the Human Rights Committee cited in Schabas (2001) s. 3.
 50 Hussein (2006).
 51 Aoyagi (2005) p. 586.
 52 Malaysians Against Death Penalty and Torture (2006) p. 1.

countries located on major drug transshipment routes.

The government of Singapore, for example, has defended its use of capital punishment because ‘tough anti-drug laws have worked well in Singapore’s context to deter and punish drug traffickers’ and are ‘necessary legislation to help us keep our country drug-free.’⁵³ Similarly, the interim government of Iraq, which reintroduced capital punishment, including for drug offences, following the US-led invasion and fall of Saddam Hussein, justified this decision on the basis that ‘This penalty has a huge psychological impact on persons who are hesitant about committing serious crimes. Thus, the death penalty is one of the most important ways of preventing crime.’⁵⁴

Whether there is any truth to the utilitarian rationale is debatable. Death penalty expert Professor Roger Hood of Oxford University, for example, points out that, despite oft-repeated claims of effective deterrence made by retentionist states, there is no statistical evidence to support this contention.⁵⁵ Even if capital punishment was proven to

be an effective deterrent, the death penalty for drugs would still merit critical examination under a country’s human rights obligations as it is not permissible to inflict penalties that violate international human rights law, regardless of their deterrent effects.⁵⁶

A 1991 examination of the use of the mandatory death penalty for drugs in Malaysia concluded that ‘The actual data... shows that Malaysia’s solution to the drug problem is not effective’, highlighting that, despite the introduction of the death penalty for drugs in 1975, data on drug use suggest Malaysia ‘has one of the world’s highest per capita populations of drug addicts and users’, a point ‘vehemently denied by the government, but supported by its own official statistics.’⁵⁷ The research asks whether the lack of convenient international flight connections through Malaysia may actually have a greater impact than the mandatory death penalty on reducing the level of drug traffic.⁵⁸ More recently, a

53 Government of Singapore (1997) para. 4.

54 UN Commission on Human Rights (27 March 2006) p. 116.

55 Hood (2002) p. 82.

56 *Tyrer v. United Kingdom* (1978) para. 31: ‘As regards their belief that judicial corporal punishment deters criminals, it must be pointed out that a punishment does not lose its degrading character just because it is believed to be, or actually is, an effective deterrent or aid to crime control. Above all, as the Court must emphasise, it is never permissible to have recourse to punishments which are contrary to Article 3 (art. 3), whatever their deterrent effect may be’.

57 Harrington (1991) pp. 405, 368.

58 *Ibid.* p. 403.

member of the ruling government party in Malaysia stated during a 2005 parliamentary debate on drug policy that ‘The mandatory death sentence...has not been effective in curtailing drug trafficking’.⁵⁹

The problem that the official data pose for utilitarian rationales in Malaysia may explain why the government of Singapore ceased regular publication of crime statistics in the 1980s, thereby making its claims of the death penalty’s effectiveness impossible to test. As noted by one commentator:

One might have expected that if the death penalty is being imposed on drug offences in order to deter or incapacitate, the government would be keenly interested in statistical and other studies to find out if, in fact, the increased penalties are working. But such studies, if they exist, are seldom revealed. Statistical data are not provided in any consistent or meaningful way by the government. One can only speculate why.⁶⁰

Singapore’s dubious distinction as possibly the highest per capita executioner in the world – the

vast majority of which are for drug offences – would certainly raise doubts about the success of the death penalty as a deterrent to drug crime.

The 2003 International Narcotics Control Strategy Report from the US State Department noted that ‘Drug laws remain very tough in Vietnam’, including provision for mandatory ‘death by a seven-man firing squad’ in some cases, yet concluded that ‘Despite the tough laws, [the Standing Office for Drug Control] reported in its 2002 report...that “drug trafficking continues to rise”’.⁶¹

59 *Malaysiakini* (2005).
60 Hor (2004) fn. 62, p. 10.

61 US Department of State Bureau of International Narcotics and Law Enforcement Affairs (March 2003) s. VIII–69.

4 International human rights law and the interpretation of ‘most serious crimes’

Under the ICCPR, the application of capital punishment, while not prohibited, is restricted in important ways. One key restriction is found in Article 6(2), which states that, ‘In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes.’

The UN Commission on Human Rights⁶² identified this limitation as one of the key safeguards ‘guaranteeing the protection of the rights of those facing the death penalty,’⁶³ and the UN Human Rights Committee has called upon states to ‘abolish [capital punishment] for other than the “most serious crimes”’.⁶⁴ The definition of what does and does not constitute a ‘most serious crime’ is therefore central to a consideration of whether the execution of drug offenders is consistent with international human rights law under the ICCPR.

62 The UN Commission on Human Rights was abolished in 2006 to be replaced by the UN Human Rights Council.

63 UN Commission on Human Rights (23 January 2004) para. 28.

64 UN Human Rights Committee (30 April 1982) para. 6.

The concept of ‘most serious crimes’ was the subject of debate during the drafting of the ICCPR, with some countries arguing the need to identify specifically the offences falling within the scope of this term. The failure of the drafters to do so has left national governments with the discretion to decide for themselves what acts constitute ‘most serious crimes’ and, as a result, many retentionist countries prescribe capital punishment for a variety of ‘ordinary crimes’, including drug offences.⁶⁵

Since the ICCPR entered into force in 1976, the interpretation of ‘most serious crimes’ has been refined and clarified by a number of UN human rights bodies in an effort to limit the number of offences for which a death sentence can be pronounced. As early as 1982, the UN Human Rights Committee – the expert body that monitors compliance with state obligations under the ICCPR and provides authoritative interpretations of its provisions – declared that ‘the expression “most serious crimes” must be read restrictively to mean that the death penalty should be a quite exceptional measure.’⁶⁶ Two years later, the Economic and Social Council

65 Schabas (2002) pp. 105, 108–109.

66 UN Human Right Committee (30 April 1982) para. 7.

of the UN adopted the resolution *Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, which reaffirmed that ‘capital punishment may be imposed only for the most serious crimes’ and further specified that the scope of capital offences ‘should not go beyond intentional crimes with lethal or other extremely grave consequences.’⁶⁷ This resolution was later adopted by the UN General Assembly.⁶⁸

Guidance on the scope of concepts such as ‘most serious crimes’ and ‘intentional crimes with lethal or other extremely grave consequences’ is also found in the quinquennial reports on capital punishment issued by the UN Secretary-General. The 1995 report recognised that ‘the definition of the “most serious crimes” may vary in different social, cultural, religious and political contexts.’⁶⁹ However, the reports have criticised the term ‘most serious crimes’, describing it as ‘vague and open to a wide range of interpretations’, and observed that ‘the amorphous phrase “extremely grave consequences” has left itself open to wide interpretation by a number of countries.’⁷⁰ As a result, the Secretary-General emphasised

that ‘the safeguard...is intended to imply that the offences should be life-threatening, in the sense that this is a very likely consequence of the action.’⁷¹

In reviewing the range of ordinary offences for which capital punishment is prescribed internationally – including drug crimes – the Secretary-General concluded that the fact that the death penalty is ‘imposed for crimes when the intent to kill may not be proven or where the offence may not be life-threatening’ suggests that retentionist states are using ‘a wide interpretation of both the letter and the spirit of the safeguard’. The Secretary-General further identified the application of the death penalty to ‘a wide range of offences, far beyond the crime of murder’ as a ‘problem.’⁷² The finding that inflicting capital punishment for crimes beyond murder is a ‘problem’ suggests that a ‘most serious crime’ is restricted to homicide and excludes non-lethal or otherwise ordinary crimes.

The UN Human Rights Committee has indicated that the definition of ‘most serious crimes’ is limited to those directly resulting in death. The Committee’s Concluding Observations, which periodically

67 UN Economic and Social Council (1984) para. 1.

68 UNGA Res 39/118 (14 December 1984).

69 Report of the Secretary-General (1995).

70 Report of the Secretary-General (2001) paras. 144, 88.

71 Report of the Secretary-General (1995) para. 54.

72 *Ibid.* paras. 56, 144.

examine country compliance with the terms of the ICCPR, stated for Iran in 1993 that 'In light of the provision of article 6 of the Covenant...the Committee considers the imposition of that penalty for crimes of an economic nature...or for crimes that do not result in loss of life, as being contrary to the Covenant.'⁷³ Death penalty expert Professor William A. Schabas of the Irish Centre for Human Rights notes that the Committee's recent case law suggests that it interprets 'most serious crimes' to apply only to homicide.⁷⁴ Similarly, Professor Roger Hood concludes that a strong argument can be made that capital punishment should be restricted solely to 'the most serious offences of (culpable) homicide.'⁷⁵

Further guidance on this question is found in the reports of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, which have consistently emphasised that 'the death penalty must under all circumstances be regarded as an extreme exception to the fundamental right to life, and must as such be interpreted in the most restrictive manner possible.'⁷⁶ Commenting on the interpretation of

'most serious crimes', the 2002 report stated:

The Special Rapporteur is strongly of the opinion that these restrictions exclude the possibility of imposing death sentences for economic and other so-called victimless offences, actions relating to prevailing moral values, or activities of a religious or political nature – including acts of treason, espionage or other vaguely defined acts usually described as "crimes against the State."⁷⁷

Indeed, the Special Rapporteur has stated strongly that in cases where the 'international restrictions are not respected...the carrying out of a death sentence may constitute a form of summary or arbitrary execution.'⁷⁸ For all these reasons, 'The Special Rapporteur is deeply concerned that in a number of countries the death penalty is imposed for crimes which do not fall within the category of the "most serious crimes" as stipulated in article 6, paragraph 2, of the International Covenant on Civil and Political Rights.'⁷⁹

73 UN Human Rights Committee (29 July 1993) para. 8.

74 Schabas (2002) p. 110.

75 Hood (2002) p. 77.

76 UN Commission on Human Rights (22 December 2004) para. 55.

77 UN Commission on Human Rights (9 January 2002) para. 114.

78 UN Commission on Human Rights (22 December 2003) para. 48.

79 *Ibid.* para. 50.

The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment published a similar finding in a 2006 report on China, which expressed ‘concern at the high number of crimes for which the death penalty can be applied’ and recommended that the ‘scope of the death penalty should be reduced, e.g. by abolishing it for economic and non-violent crimes’.⁸⁰

In keeping with the interpretation that capital punishment should be used only in exceptional circumstances, the UN Commission on Human Rights consistently ‘called upon all countries that still maintain the death penalty to progressively restrict the number of offences for which it could be imposed’.⁸¹ In 2004, the Commission again passed a resolution calling upon retentionist states that have ratified the ICCPR ‘not to impose the death penalty for any but the most serious crimes’.⁸² The resolution further called upon countries ‘To ensure that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed

for non-violent acts’.⁸³ Again the Commission called for the progressive restriction of the number of offences to which the death penalty may be applied.⁸⁴

In conclusion, therefore, from the perspective of UN human rights treaty bodies and special rapporteurs, several areas of consensus emerge in the interpretation of ‘most serious crimes’ as to the threshold necessary to satisfy the requirements of Article 6(2) of the ICCPR. These include:

1. ‘Most serious crimes’ should be interpreted in the most restrictive and exceptional manner possible.
2. The death penalty should only be considered in cases where the crime is intentional and results in lethal or extremely grave consequences.
3. Countries should repeal legislation prescribing capital punishment for economic, non-violent or victimless offences.

80 UN Commission on Human Rights (10 March 2006) paras. 69, 82(r).

81 UN Commission on Human Rights (23 January 2004) para. 16.

82 UN Commission on Human Rights (21 April 2004) para. 4(d).

83 *Ibid.* para. 4(f).

84 *Ibid.* para. 5(b).

5 Do drug offences meet the threshold of 'most serious crimes'?

5.1 Drug crimes as 'most serious crimes' in international human rights law

Although none of the above-mentioned reports and resolutions provide a definitive statement on the meaning of 'most serious crimes', there are strong indications that UN human rights bodies do not consider drug crimes to be capital offences. Based upon the restrictive interpretation of 'most serious crimes' explored above, it is difficult to argue that drug offences satisfy the threshold of intent or lethal consequence necessary to justify the death penalty under Article 6(2) of the ICCPR.

For example, the UN Human Rights Committee, in its Concluding Observations on reviewing national compliance with obligations under the ICCPR, has consistently been critical of countries that apply the death penalty to a large number of offences, noting the incompatibility of many of those offences with Article 6 and calling for repeal in those cases. The Committee has addressed

these criticisms to many states that apply capital punishment to drug offenders, including Egypt,⁸⁵ India,⁸⁶ Iran,⁸⁷ Jordan,⁸⁸ Libya,⁸⁹ Philippines,⁹⁰ Sudan,⁹¹ Syria⁹² and Viet Nam.⁹³

In its Concluding Observations on Sri Lanka in 1995, the Committee specifically listed 'drug-related offences' among those that 'do not appear to be the most serious offences under article 6 of the Covenant'.⁹⁴ In 2000, in the Concluding Observations on Kuwait, it expressed 'serious concern over the large number of offences for which the death penalty can be imposed, including very vague categories of offences relating to internal and external security as well as drug-related crimes'.⁹⁵ In its 2005 Concluding Observations on Thailand, the Committee noted 'with concern that the death penalty is not restricted to the "most serious crimes"

85 UN Human Rights Committee (28 November 2002) para. 12.

86 UN Human Rights Committee (30 July 1997) para. 20.

87 UN Human Rights Committee (29 July 1993) para. 8.

88 UN Human Rights Committee (27 July 1994) s. 4.

89 UN Human Rights Committee (6 November 1998) para. 8.

90 UN Human Rights Committee (1 December 2003) para. 10.

91 UN Human Rights Committee (5 November 1997) para. 8.

92 UN Human Rights Committee (24 April 2001) para. 8.

93 UN Human Rights Committee (26 July 2002) para. 7.

94 UN Human Rights Committee (26 July 1995) s. 4.

95 UN Human Rights Committee (27 July 2000) para. 13.

within the meaning of article 6, paragraph 2, and is applicable to drug trafficking.⁹⁶ This is the most definitive statement to date that drug offences do not satisfy the threshold for capital punishment under the ICCPR.

The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has also strongly stated that drug offences do not meet the threshold of ‘most serious crimes’:

[T]he death penalty should be eliminated for crimes such as economic crimes and drug-related offences. In this regard, the Special Rapporteur wishes to express his concern that certain countries, namely China, the Islamic Republic of Iran, Malaysia, Singapore, Thailand and the United States of America, maintain in their national legislation the option to impose the death penalty for economic and/or drug-related offences.⁹⁷

The conclusion that drug-related offences fall outside the scope of ‘most serious crimes’ was recently reaffirmed in the Special Rapporteur’s 2006 Annual Report.⁹⁸

96 UN Human Rights Committee (8 July 2005) para. 14.

97 UN Commission on Human Rights (24 December 1996) para. 91.

98 UN Human Rights Council (29 January 2007) paras. 51–53.

Therefore, from the perspective of the UN human rights system, there is little to support the suggestion that drug offences meet the threshold of ‘most serious crimes’. In fact, the weight of opinion would indicate that drug offences are not ‘most serious crimes’ as the term has been interpreted.

5.2 Drug crimes as capital crimes in domestic legislation

In addition to international human rights law, another method to assess whether drug crimes constitute ‘most serious crimes’ in the eyes of the international community is to examine the domestic legislation of retentionist countries. Indeed, perhaps the strongest case against the suggestion of an international consensus in this regard is the disparity among the retentionist states themselves over the definition of capital drug offences. This disparity not only calls into question the definition of drug offences as ‘most serious crimes’, but also undermines one of the key utilitarian rationales (detering drug trafficking) used by retentionist governments for prescribing capital punishment for drugs.

A review of domestic legislation reveals a remarkable lack of

consistency in the application of capital punishment for drug crimes. In 1995, the UN Secretary-General's fifth quinquennial report on the death penalty noted that the threshold for a capital drug offence among retentionist countries ranged from the possession of 2g to the possession of 25kg of heroin.⁹⁹ Identifying a credible definition of 'most serious crimes' using such a range is a difficult, if not impossible, exercise.

Even among those states with common borders that retain the death penalty for drug offences, the threshold of what constitutes a capital offence varies, in some cases drastically. As a result of this lack of consistency – and often wildly differing standards – a capital offence in one country may only be a minor offence across the border in its neighbour. Often the differences are exponential. In some cases, a sentence of death is possible – or even mandatory – for the possession of amounts of drugs so small they would not approach the threshold of a capital offence in an adjacent state.

One illustration of this is found when comparing the neighbouring states of India, Pakistan, Sri Lanka and Bangladesh, a region described by both a Bangladeshi Minister of Home

⁹⁹ Report of the Secretary-General (1995) para. 55.

Affairs and an Indian representative to the UN as a transit route between the two major opium-producing areas of the 'Golden Triangle' and the 'Golden Crescent'.¹⁰⁰ Under Sri Lankan legislation, the death penalty may be applied for trafficking, importing/exporting or possession of only 2g of heroin.¹⁰¹ Yet a conviction for that same quantity of heroin in Bangladesh, Pakistan or India – where the death penalty is prescribed for possession of 25g,¹⁰² 100g¹⁰³ and 1kg¹⁰⁴ respectively – would not nearly approach the level of a capital offence. The same legislation reveals a similar disparity in the threshold for opium: Pakistan, the most restrictive of these jurisdictions in this regard, prescribes the death penalty for possession of over 200g, a quantity far smaller than in the legislation of Sri Lanka (500g), Bangladesh (2kg) or India (10kg).

Similar inconsistencies in the definition of capital drug offences are evident when comparing the neighbouring states of China, Laos and Viet Nam, countries that border, or are part of, the 'Golden Triangle'.

¹⁰⁰ UN General Assembly (9 June 1998); UN General Assembly (13 November 1989) para. 34.

¹⁰¹ Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984, s. 54(a).

¹⁰² The Narcotics Control Act, 1990, s. 19.

¹⁰³ Ordinance No. XLVII of 1995 an Ordinance, s. 9. (Pakistan)

¹⁰⁴ Narcotic Drugs and Psychotropic Substances (Amendment) Act 1988 (Act No. 2 of 1989) s. 9.

In China, the death penalty may be applied for possession of 50g of heroin.¹⁰⁵ In Viet Nam, the quantity necessary to constitute a capital crime is double that amount (100g),¹⁰⁶ while the 500g threshold in Laos¹⁰⁷ is five times that of the Vietnamese legislation and ten times that under Chinese narcotics laws.

Just over 1,000km away across the South China Sea, the possession of a mere 15g of heroin will bring a mandatory death sentence in both Singapore¹⁰⁸ and Malaysia.¹⁰⁹ Interestingly, Singapore's narcotics legislation does not prohibit 'heroin' but specifies 'diamorphine' (the pharmaceutical name for prescription-grade heroin) instead. On this basis, the government of Singapore has claimed, in response to criticism, that its law only imposes the death penalty for persons convicted of possessing or trafficking more than 15g of pure heroin, which in its calculations is equivalent to 'a slab of approximately 750g of street heroin.'¹¹⁰ If the intention of this statement is to imply that Singapore

105 Decision on the Prohibition of Narcotic Drugs (adopted at the 17th meeting of the Standing Committee of the Seventh National People's Congress on 28 December 1990) s. 2.

106 Amnesty International (28 August 2003).

107 Amnesty International (9 May 2001) p. 1.

108 Misuse of Drugs Act (Chapter 185) 1998 revised edition, Second Schedule Offences Punishable on Conviction.

109 Malaysian Dangerous Drugs Act 1952 s. 37(da)(i).

110 Government of Singapore (2004).

maintains a higher threshold for death penalty crimes than countries whose laws only proscribe heroin, this claim opens up further regional inconsistencies as, for example, it legislates a threshold fifty times greater than neighbouring Malaysia, whose legislation prohibits 15g of 'heroin' rather than of 'diamorphine'.

Opium laws in this region are equally inconsistent. While 1kg of opium can bring execution in China,¹¹¹ across the border in Laos the quantity is 5kg.¹¹² In Singapore, a quantity of 800g of opium is a capital offence,¹¹³ whereas in neighbouring Malaysia it is 1kg.¹¹⁴

This comparison of retentionist countries with common borders not only illustrates the arbitrary nature of defining 'most serious crimes' in the context of drugs, but also undermines the utilitarian rationale that harsh penalties are necessary and justified for countries geographically located on major drug transshipment routes.¹¹⁵ If this were indeed a legitimate factor in the decision of governments to apply the death penalty for drug offences, it would

111 Decision on the Prohibition of Narcotic Drugs (1990) s. 2.

112 Amnesty International (9 May 2001) p. 1.

113 Misuse of Drugs Act (Chapter 185) 1998 revised edition, Second Schedule Offences Punishable on Conviction.

114 Malaysian Dangerous Drugs Act 1952, s. 37(da)(v, vi, va).

115 Government of Singapore (1997) para. 4; UN General Assembly (9 June 1998).

encourage neighbouring states to harmonise drug penalties so as to discourage the countries with the 'weaker' provisions being targeted by drug traffickers. The fact that the legislation in neighbouring states is at times exponentially different undermines the credibility of this justification.

This inconsistent approach to the definition of capital drug offences among retentionist countries is in itself perhaps the strongest illustration that the extension of the death penalty to narcotics is at best an arbitrary exercise. The lack of a coherent threshold for a capital drug offence – as well as the wide variety of offences for which the death penalty is prescribed – demonstrates that there is not even consensus among retentionist countries about which drug crimes constitute 'most serious crimes', except for the moral rationale that all drug crimes are necessarily 'most serious'. As a result, it cannot reasonably be claimed that drug offences are considered 'most serious crimes' by the international community as a whole.

6 Conclusion

The steady restriction and abolition of capital punishment worldwide is measurable evidence of the progress of the human rights movement. As described by Professor William A. Schabas, 'Few more dramatic examples of the spread and success of human rights law can be found'.¹¹⁶ However, the international status of the death penalty for drug-related offences stands in sharp contrast to this abolitionist trend.

As the number of countries practising capital punishment steadily decreased over the past twenty years, the number of retentionist states expanding the scope of the death penalty to include drug offences steadily increased. More countries than ever before now allow capital punishment for drug offences, and in many retentionist countries drug offenders comprise a significant percentage of executions each year.

While retentionist states argue that drug offences meet the threshold of 'most serious crimes' under Article 6(2) of the ICCPR – and suggest that the international community shares this assessment – there is little evidence to support this stance.

116 Schabas (2004) p. 419.

On the contrary, an examination of this question from a variety of perspectives shows that at best no international consensus exists on this issue, and at worst the execution of drug offenders is in clear violation of international law. By carrying out death sentences under such dubious legal circumstances – circumstances that fail to observe the basic safeguards in human rights law – countries that execute drug offenders do so in situations likened by one UN special rapporteur to summary or arbitrary executions.¹¹⁷ This regressive trend in capital punishment highlights an area of much-needed focus for anti-death-penalty campaigners and exposes a neglected area of human rights discourse generally.

Punitive, prohibitionist policies continue to drive domestic and international approaches to drug use. These punitive policies – including capital punishment – are typically rooted in moral rationales that entrench and exacerbate systemic discrimination against people who use drugs. As a result, in high income and low income countries across all regions of the world, people who use illegal drugs are among the most marginalised and stigmatised in

117 UN Commission on Human Rights (22 December 2004) para. 48.

society. They are a group uniquely vulnerable to a wide array of human rights abuses,¹¹⁸ including, in some countries, execution under legislation that fails to meet international human rights safeguards.

The dearth of international attention paid to human rights abuses against people who use drugs suggests that some of the same moralising that drives repressive policy and legislation has also impeded the development of progressive human rights discourse in this area. Indeed, addressing this situation through established international mechanisms is complicated by ‘the contradictions faced by the United Nations as it seeks to protect and expand human rights while also acting as the international community’s guarantor of conventions to control licit and illicit drugs.’¹¹⁹

If the progress towards the abolition of capital punishment is indeed a dramatic example of the success of human rights law, then the expansion of capital punishment for narcotics is a dramatic illustration of failure. This situation not only demands the attention of abolitionists, but also points to the need for the human rights movement to speak out on

state abuses against people who use drugs.

118 Open Society Institute (2005).

119 E Bonino in *ibid.* p. 17.

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