

Towards Abolition of the Death Penalty

Progress Paper on the Role of NHRIs

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ASIA PACIFIC HUMAN RIGHTS NETWORK

Secretariat: South Asia Human Rights Documentation Centre
B-6/6, Safdarjung Enclave Extension, New Delhi - 110029, India

Tel/Fax: +91-11-2619 2717, 2619 2706, 2619 1120

Email: secretariat@aphrn.org

Home Page: <http://www.aphrn.org>

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In September 1999, at the annual meeting, the Asia Pacific Forum of National Human Rights Institutions (APF) requested the Advisory Council of Jurists (ACJ) to consider a reference on the issue of the death penalty in the member states of the APF, at that time being India, Nepal, New Zealand, Fiji, Sri Lanka, Philippines, Indonesia and Australia. The ACJ was asked to consider the range of offences for which international human rights law permits the imposition of the death penalty, the nature and scope of procedural guarantees required by international law in its imposition, and restrictions required by international human rights law on the manner and methods of capital punishment¹.

In its Final Report the ACJ urged the member states to move towards *de facto* and eventual *de jure* abolition of the death penalty, ensure that the rule of law is observed, and that relevant international documents are strictly adhered to.

Now, three years later, we take a closer look at those eight countries to see whether the National Human Rights Commissions have dealt with the issue of the death penalty and if the ACJ's recommendations have been acted upon.

India

The recommendations for India have been as follows: encouragement to move towards ratification of the Second Optional Protocol to the ICCPR and CAT, providing respectively for abolition of the death penalty and the prohibition of all forms of torture and other cruel, inhuman or degrading treatment. Domestically, India was encouraged to take progressive steps towards *de facto* abolition of the death penalty and ultimately its *de jure* abolition, beginning by ensuring that its Penal Code did not permit the execution of a person who commits a crime while under the age of eighteen. It was also recommended that India become signatory to the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.

¹ Asia Pacific Forum of National Human Rights Institutions, *Death Penalty*, available online at www.asiapacificforum.net/human/issues/death_penalty.htm.

So far little has been done to implement these recommendations. The Second Optional Protocol to the ICCPR remains unsigned. CAT has been signed but not ratified. Extrajudicial killings are a continual occurrence, particularly “encounter” killings. The victims of such killings are usually persons who have been arrested for committing serious crimes. The victim is then alleged to have tried to escape from police custody and in the process, is shot by the police.²

India has limited the death penalty to allegedly the “rarest of rare” cases, yet this still includes narcotics offences and kidnapping for ransom. Furthermore the parliament and the central government stated that they favoured the extension of the death penalty to crimes of rape³, expanding the application of the death penalty. This contravenes the threshold set both by the ACJ definition of “most serious crimes”, and those established by international instruments to which India is a party⁴.

The ratification of POTA in March 2001 extended the use of the death penalty to “terrorist” offences resulting in death. This fact is deeply concerning because the Act provides for the possibility of unfair trials and because the necessity of fighting "terrorism" was occasionally taken as a sufficient justification for imposing the death penalty in the absence of solid evidence⁵.

The National Human Rights Commission has made several recommendations throughout the last years, but they continued not to be binding and were poorly implemented by the governments to which they were addressed⁶.

Nepal

The Advisory Council of Jurists reminded Nepal of its obligation to ensure that the rule of law is observed, that law enforcement agencies are accountable and that extrajudicial killings and disappearances do not continue.

However the escalating reports of human rights violations point to a worsening situation in the country⁷. Since the breakdown of peace talks in August, the incidents of extrajudicial killings, enforced disappearances, torture, and arbitrary detentions have

² Asian Human Rights Commission, Submissions to the UN Commission on Human Rights: Extrajudicial Killings in Asia (August 2001), available online at www.ahrchk.net/hrsolid/mainfile.php/2000vol10no04/392/.

³ Bhandare N., *Death penalty won't solve problem*, Hindustantimes.com (October 2003), available online at www.hindustantimes.com/2004/Jan/01/181_426097,001300540000.htm

⁴ Asia Pacific Human Rights Network, *The Death Penalty must go*, Human Rights Features 30/01, available online at www.hrdc.net/sahrdc/hrfeatures/HRF30.htm; Law Commission of India, *Consultation paper on mode of execution of death sentence and incidental matters*, available online at lawcommissionofindia.nic.in/cpds1.pdf

⁵ Rediff.com News, *Amnesty dismayed at death sentence in Parliament case* (December 2002), available online at www.rediff.com/news/2002/dec/19parl.htm.

⁶ Amnesty International, *AI Report 2003*, available online at web.amnesty.org/report2003/Ind-summary-eng.

⁷ Human Rights Watch (November 2003), available online at www.hrw.org/press/2003/11/nepal112403.htm.

risen dramatically⁸. On 18 November 2003, the National Human Rights Commission issued a call for United Nations human rights experts, including those charged with examining arbitrary detention and torture, to visit the country, although such a visit has yet to take place. The NHCR has also presented a proposal for a Human Rights Accord to the Government and the Maoist rebels, which would provide for five NHRC regional monitoring units in the country to operate in cooperation with the United Nations High Commissioner for Human Rights. This proposal is being fully supported by several international human rights organisations, among them Amnesty International, Human Rights Watch and the International Commission of Jurists.

Conversely the government of Nepal has tried to undermine the independent NHRC by proposing the establishment of a parallel human rights unit directly under the supervision of the Prime Minister.

New Zealand

The Council recommended that New Zealand confer on the Attorney General a positive duty not to surrender a person who may be subject to the death penalty. Furthermore the Council notes the continuing need for leadership and public education regarding the issues surrounding the death penalty, New Zealand's international legal obligations and international standards and norms.

Still worrying is New Zealand's Extradition Act that has even been strengthened by signing an Extradition Act with South Korea, a country that still carries out executions⁹. However there is no data about how many people have been extradited from New Zealand to their origin countries facing death sentence.

A positive change is the Human Rights Amendment Act 2001 that came into effect, restructuring the Human Rights Commission and introducing additional safeguards against discrimination. At the same time the government increased funding for the Commission, including funding for the development of a National Plan of Action to identify priorities for the implementation of human rights protection measures under the Act¹⁰.

The UN Human Rights Commission stated in a report 2002 that "New Zealand has made considerable progress in the full realization of Human Rights" and that "the various

⁸ Submission to the UN Commission on Human Rights: *Extrajudicial Killings in Asia*, Vol. 10 No. 04 Apr 2000.

⁹ Ministry of Justice New Zealand, *New Zealand and Korea strengthen Extradition Relations Justice Matters*, June 2001 Issue 11, available online at www.courts.govt.nz/pubs/newsletter/justice_matter/issue_11/chapter_15.html.

¹⁰ Amnesty International Report 2003, New Zealand, available online at web.amnesty.org/report2003/Nzl-summary-eng.

measures adopted and laws enacted were most impressive”.¹¹ Currently the Commission has a number of educational programs running with the purpose of advocating and promoting respect for, and an understanding and appreciation of, the human rights in the country.¹²

Fiji

Fiji has been encouraged to move towards ratification of the ICCPR, CAT and the Second Optional Protocol to the ICCPR and to affirm the rights expressed in its Constitution of 1997; namely the right to life, freedom from torture, and procedural safeguards against the use of torture or other forms of cruel, inhuman or degrading treatment. Additionally Fiji has been urged to revoke the provision of the Penal Code that provides for the mandatory imposition of the death penalty for specific crimes.

The Government of Fiji has not ratified the ICCPR, CAT, or the Second Optional Protocol to the ICCPR. However, it has made progress towards the realisation of the ACJs’ other two recommendations.

The most positive development was the removal of the death penalty from the Penal Code on 11 March 2002 by the passage of Penal Code (Amendment) Act No. 5 of 2002¹³. This development does not represent *de jure* abolition (the death penalty still being allowed under the Military Act), but rather a reduction in the death penalty’s scope¹⁴. The Fiji Human Rights Commission has commended the *de facto* abolition of the death penalty and supports future *de jure* abolition¹⁵.

The affirmation of the right to life, through the removal of the death penalty from the Penal Code, is a positive step towards the fulfilment of Fiji’s domestic and international obligations. The independence and impartiality of the judiciary is protected by the Constitution, but political influence within the judiciary remains a subject of concern¹⁶. Incommunicado and arbitrary detention still continues to occur on occasion¹⁷. The incidence of torture is reportedly low¹⁸.

¹¹ United Nations Press Release, *Human Rights Committee concludes consideration of New Zealand’s report* (July 2002),

www.unhchr.ch/hurricane/hurricane.nsf/0/8A48D61A3E73EBA6C1256BF30043BE05?opendocument.

¹² Human Rights Commission Strategic Plan 2002-2003.

¹³ Amnesty International, *The death penalty worldwide: developments in 2002*, available online at web.amnesty.org/library/print/ENGACT500022003.

¹⁴ Ibid.

¹⁵ Fiji Human Rights Commission, *Press Release-October 3, 2002: Death Penalty*, available online at www.humanrights.org.fj/news/press_releases/2002/3october2002.html.

¹⁶ US State Department, *Fiji: Country Reports on Human Rights Practices –2002*, Released by the Bureau of Democracy, Human Rights, and Labor, 31 March 2003, available online at www.state.gov/g/drl/rls/hrrpt/2002/18244pf.htm.

¹⁷ Ibid.

¹⁸ Ibid.

Sri Lanka

Also Sri Lanka has been encouraged to work towards the ratification of the Second Optional Protocol to the ICCPR. Of concern in the year 2000 was that not all crimes punishable by death were the “most serious crimes”, moving the ACJ to recommend that the laws be amended so as to reflect the Council’s definition of “most serious crimes”. Sri Lanka was also urged to ensure that the rule of law is observed, that law enforcement agencies are accountable and that extrajudicial killings and disappearances discontinue.

Sri Lanka has not ratified the Second Optional Protocol to the ICCPR and parliamentary efforts continue to be made to resume the use of the death penalty¹⁹.

In a letter written to the Interior Minister John Amaratunga, Radhika Coomaraswamy (the Chairperson of the Sri Lanka Human Rights Commission), outlined Sri Lanka’s international obligations and expressed her concern over the possible re-implementation of the death penalty in Sri Lanka²⁰. Although Sri Lanka is abolitionist in practice, Sri Lankan law still maintains provisions to impose the death penalty for crimes not recognized as “most serious crimes” by the Jury²¹.

The US State Department recognized a decrease in the number of disappearances and extrajudicial killings in 2002²². Torture is systematic in Sri Lanka and continues to be a problem. A climate of fear and culture of impunity ensures that those responsible for disappearances, torture, and extrajudicial killings are not held accountable. The integrity of the rule of law²³ and thus the re-implementation of the death penalty remains troubling in Sri Lanka.

Philippines

Next to the ratification of the Second Optional Protocol to the ICCPR, the Council recommended that consideration be given to the commutation of all death sentences, particularly those of persons under sentence of death for a long period. The ACJ also requested that the Philippines move towards *de facto* abolition of the death penalty and ultimately *de jure* abolition.

¹⁹ Amnesty International, *Sri Lanka: Appeal to members of parliament to oppose resumption of executions*, Amnesty International Press Release, 19 May 2003, available online at www.web.amnesty.org/library/Index/ENGASA370012003?open&of=ENG-LKA.

²⁰ Daily Mirror, *Death penalty inoperative in Sri Lanka says HR Commission*, Op-ed letter from Radhika Coomaraswamy, Chairperson, Human Rights Commission, to Interior Minister John Amaratunga, 23 May 2003, available online at www.dailymirror.lk/2003/05/23/opinion/1.html.

²¹ Ibid.

²² US State Department, *Sri Lanka: Country Reports on Human Rights Practices – 2002*, Released by the Bureau of Democracy, Human Rights, and Labor, 31 March 2003, available online at www.state.gov/g/drl/rls/hrrpt/2002/18315.htm.

²³ United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee: Sri Lanka*, 1 December 2003, available online at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.79.LKA.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.79.LKA.En?Opendocument).

The Philippines has not ratified the Second Optional Protocol to the ICCPR and has taken a step back by lifting the moratorium on the death penalty in December 2003²⁴. The *de facto* moratorium suppressed the Republic Act 7659 and was originally put in place by President Joseph Estrada in early 2000.

This recent re-imposition of the death penalty by President Gloria Macapagal Arroyo targets condemned kidnappers and drug traffickers²⁵. This official change of position has been read as an attempt to placate the Filipino-Chinese business community (those usually the target of recent kidnappings)²⁶. Two men connected with kidnapping for ransom, Robert Lara and Roderick Licayan, were both scheduled for execution via lethal injection on January 30th 2004. The Supreme Court has stayed their executions for 30 days²⁷. It has been reported that President Arroyo has scheduled other executions for the upcoming months²⁸.

Reports suggest that there are 1,022 people on death row in the Philippines²⁹. At least seven of these individuals have been sentenced for crimes they committed as minors. The application of the death penalty to minors' violates fundamental rights recognized in the Convention of the Rights of the Child and the International Covenant on Civil and Political Rights (both of which have been ratified by the Philippines) and the Philippines own domestic legislation (Section 22 of Republic Act 7659)³⁰.

The extension of the death penalty to crimes that do not fit the definition of “most serious crimes” is of serious concern and has been characterized by the UN Human Rights Committee as “excessive”.³¹ The last execution in the Philippines took place on 4 January 2000.

Indonesia

²⁴ Amnesty International, *Urgent Appeal 14/04 Imminent execution 13 January 2004*, available online at web.amnesty.org/library/print/ENGASA350022004.

²⁵ John McLean, *Philippines 'restores' death penalty*, BBC News, available online at newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/programm.../3337273.st.

²⁶ Ibid.

²⁷ Asia News, *State execution suspended for 30 days*, 28 January 2004, available online at www.asianews.it/view_p.php?1=en&art=308.

²⁸ Asia News, *Day of Death becomes Day of Hope for Filipino convicts*, 30 January 2004, available online at www.asianews.it/view_p.php?1=en&art=316.

²⁹ Carlos H. Conde, *Major death penalty case takes twist in Philippines*, International Herald Tribune, 26 January 2004, available online at www.iht.com/cgi-bin/generic.cgi?template=articleprint.tmplh&ArticleId=126592.

³⁰ Amnesty International, *Philippines: Something hanging over me-child offenders under sentence of death*, embargoed for 3 October 2003, available online at web.amnesty.org/library.print/ENGASA350142003.

³¹ United Nations Human Rights Committee, *Concluding observations of the Human Rights Committee: Philippines*, 1 December 2003, available online at [www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.79PHL.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.79PHL.En?Opendocument).

Next to moving towards the ratification of the ICCPR and its Second Optional Protocol, and towards the *de facto* and ultimately *de jure* abolition of the death penalty, the ACJ urged Indonesia to limit the number of crimes for which the death penalty may be imposed in line with the Council's definition of "most serious crimes".

So far nothing has been done about the recommendations of the ACJ. Whilst the use of the death penalty has reportedly diminished in Indonesia, in recent years the Indonesian government has pursued a relentless policy on drug trafficking that is clearly reflected in its multitude of death penalties directed at foreign drug dealers and their local accomplices. In practice however, few executions were carried out. An Amnesty International report reveals that twenty-seven people had been sentenced to death from 2000 to February 2003³². An inheritance from the colonial Dutch, punishment by death in Indonesia is nowadays applicable to murder, terrorism, betrayal of the military in cases of war and drug trafficking. Executions take place by firing squad. There have been attempts by the Indonesia Human Rights Commission (Komnas HAM) to revise the use of the death penalty, but the Indonesian Government believes that the death sentence is indispensable in fighting terrorism³³. The death penalty has returned to prominence in the wake of the October 2002 Bali bombings, with the passing of the death penalty for Jemaah Islamiah members Amrozi, Imam Samudra and Ali Gufron between August and October 2003.

The Indonesian Human Rights Commission has questioned the morality and professionalism of the Indonesian judicial system, arguing that the pro-death penalty statements issued by a corrupt judiciary can be very dangerous³⁴. Particularly noteworthy is the current attitude of many ordinary Indonesians who plead for a more liberal use of the death penalty in response to endemic corruption and murder throughout the country.

Australia

Australia has been encouraged to exercise national and State leadership to educate civil society on the issues surrounding the death penalty, its international legal obligations and international standards and norms.

The death penalty in Australia was abolished both in the federal jurisdiction in 1973 and in the States in 1987. Ever since Australia has succeeded in keeping its record of abolition of capital punishment intact and its bitter criticism has constantly targeted the retentionist states that continue to favour the death penalty.

Malaysia

³² Amnesty International, *Indonesia: Death penalty / fear of imminent execution*, 5 February 2003, ASA 21/002/2003, available online at web.amnesty.org/library/Index/ENGASA210022003?open&of=ENG-IDN, [Last Stand: 09/02/2003].

³³ The 7th Asia Pacific Forum on National Human Rights Institutions (2002), Full report available online at www.asiapacificforum.net/activities/annual_meetings/seventh/final.doc, [Last Stand: 09/02/2003].

³⁴ Amnesty International, *Indonesia: Death penalty / fear of imminent execution*, 5 February 2003, ASA 21/002/2003, available online at web.amnesty.org/library/Index/ENGASA210022003?open&of=ENG-IDN, [Last Stand: 09/02/2003].

Malaysia was admitted as member of the APF in November 2002, thus the ACJ made no recommendations for it in 2000.

Recent reports have adduced corroborative evidence for Malaysia's strong adherence to the death penalty. Punishment by death in Malaysia is applicable to murder, possession of a firearm or part of a firearm, drug trafficking and the offence of treason³⁵. A report published by Amnesty International argues that there have been at least 353 executions by hanging since 1970³⁶. Although it is questionable how effective the death penalty is in combating drug trafficking, the illegal activities of drug dealers have provided the Malaysian authorities with a pretext for issuing the death sentence, and to date the vast majority of all executions have been for drug offences.

Only two years after being established, the National Human Rights Commission (Suhakam) came under increased criticism from human rights groups³⁷. Investigations into the death penalty in Malaysia reveal that no activities or interventions by the Malaysian National Human Rights Commission have been noted in relation to the use of capital punishment.

Thailand

The National Human Rights Commission of Thailand was established under the *National Human Rights Commission Act* B.E. 2542 (1999), and was admitted as a member of the Forum in November 2002. Thailand's record on the death penalty therefore did not come under the scrutiny of the ACJ in its report.

Thailand is neither party to the Second Optional Protocol of the ICCPR nor the Convention Against Torture. It has not declared any intention of signing either instrument in the near future. The use of the death penalty is common for serious crimes in Thailand, particularly for drug smuggling, with up to 1000 people believed to be presently under sentence of death, the highest in Thailand's history.³⁸ Its application is, in comparative terms, amongst the worst in Asia. In 2003 the use of execution by firing squad was replaced by the use of lethal injection to ensure, according to the authorities, that less "accidents" take place during executions.³⁹ The National Human Rights Commission of Thailand has singularly failed in voicing any criticism or recommending any change in government policy since becoming members of the APF.

Mongolia

³⁵ SUARAM, *Capital and Corporal Punishment*, available online at www.malaysia.net/aliran/hr/js12.html, [Last Stand: 09/02/2003].

³⁶ Amnesty International, *Indonesia: Imminent execution*, 4 April 2001, ASA 28/004/2001, available online at web.amnesty.org/library/index/engasa280042001, [Last Stand: 09/02/2003].

³⁷ Amnesty international, Report 2003, *Malaysia*, available online at web.amnesty.org/report2003/Mys-summary-eng.

³⁸ Amnesty International, *Thailand: Resuming Executions: Backstep for Human Rights*, Press Release, AI Index: ASA 39/016/2003, 12 December 2003.

³⁹ *Ibid.*

The National Human Rights Commission of Mongolia was established in December 2000, and was admitted as a member of the Asia Pacific Forum at the Sixth Annual Meeting in September 2001. Mongolia acceded to the Convention Against Torture in February 2002, signifying a decisive step in the protection of national human rights, yet it has still to ratify the Second Optional Protocol of the ICCPR.

Mongolia retains the use of the death penalty, although its application seems to be infrequent. The National Commission points out that: “the Criminal Law of Mongolia assigns capital punishment on crimes that under the Rome Statute would not constitute severe penalty, e.g. aggravated manslaughter”,⁴⁰ and recommends, at the very least, that the threshold for imposition of the death penalty be only for the most serious crimes. However, in accordance with both the Paris Principles and the responsibilities of membership to the ABF, it is the duty of the National Commission to strongly recommend that Mongolia abolish the death penalty in both law and practice.

Conclusion

While some of the member countries like New Zealand, Australia and Fiji have worked towards fulfilling the ACJ’s recommendations, other countries like Nepal and India have done little to nothing, and have continually ignored the work of their respective National Human Rights Commissions. The situation in the Philippines is particularly disturbing, where the death penalty has been re-imposed, and in Sri Lanka, where concerns have been expressed over a similar re-introduction of the death penalty. Almost all of the above countries have yet to ratify the Second Optional Protocol to the ICCPR.

The abolition of the death penalty remains a priority issue for human rights organizations. It is the position of SAHRDC that ratification of the Second Protocol of the ICCPR, in its own language, “contributes to enhancement of human dignity and progressive development of human rights”, and that the abolition of the death penalty should be considered as progress in the enjoyment of the right to life. Its continued use is incompatible with the principles of a just society, and particular responsibility lies with National Human Rights Commissions in urging governments to move towards the *de facto*, and eventually *de jure*, abolition of the death penalty.

⁴⁰ National Human Rights Commission of Mongolia Human Rights and Freedoms in Mongolia Status Report 2003, Ch. 3.4.1.2, p. 39, concerning Article 91.2 of the Criminal Law.