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## Human Rights Council

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**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

**Joint written statement\* submitted by International Harm Reduction Association (IHRA), Canadian HIV/AIDS Legal Network, DRCNet Foundation, Inc., IDPC Consortium, World Hepatitis Alliance, non-governmental organizations in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[03 June 2019]

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\* Issued as received, in the language(s) of submission only.

## The Disproportionate Impact of The Death Penalty for Drug Offences on Foreign Nationals

Harm Reduction International (HRI) and supporting organisations welcome the report by the Special Rapporteur on the human rights of migrants, and wish to take this opportunity to comment on the disproportionate impact of the criminal justice response to drugs on foreign nationals, including migrant women, in countries that retain the death penalty for drug offences.

As highlighted in the Special Rapporteur’s report, migrant women face unique challenges, including a great risk of being subjected to acts of violence such as exploitation and human trafficking.<sup>1</sup> Indeed, migrant women are easy targets for drug trafficking rings because they are often economically vulnerable, but hold passports.<sup>2</sup> Together with murder, drug offences are the most common crimes that lead to death sentences for women.<sup>3</sup>

For the last decade, HRI has been monitoring the application of the death penalty for drug offences in violation of international law,<sup>4</sup> and the overrepresentation of foreign nationals on death row and executed for drug offences has been a recurring theme. Key findings from HRI’s latest report confirm that this trend continues. In 2018, for example, 569 foreign nationals were awaiting execution in Malaysia (44% of all death row prisoners), many for drug offences, while 20 out of the 26 people executed for drug offences in Saudi Arabia in the first five months of 2019 have been foreign nationals. This alarming trend can be observed in other countries, including China, Iran, Indonesia, Thailand, Vietnam, and Kuwait.<sup>5</sup>

### Disadvantage in the criminal process

Foreign nationals (migrant workers, trafficked subjects, asylum-seekers, those who commit crimes while traveling abroad and those who cross borders to commit crimes) are disproportionately affected by the death penalty for drug offences. They are made more vulnerable by their precarious socio-economic status, lack of fluency in the language of the host country, and are often unfamiliar with the laws or criminal process in the country where they are tried. They often have no power, resources, or access to support networks, and are subject to suspicion, over-policing, criminalisation, and discrimination in the criminal process.<sup>6</sup>

### Fair trial violations

Foreign nationals endure unique violations of their fair trial rights. Many do not receive assistance from an interpreter or lawyer in the police station when making a statement. Where they cannot afford to appoint their own lawyer, have no relations at hand, and/or have little or no assistance navigating a foreign justice system or clemency applications, they are exceptionally vulnerable.<sup>7</sup>

Over the past 13 years, over 500 foreigners, many convicted for drug offences, were executed in Saudi Arabia,<sup>8</sup> where Human Rights Watch has documented long-standing due process violations that make it difficult for a defendant to get a fair trial even in capital cases. These include: forced confessions; not informing suspects of the charges against them or allowing them to access evidence; denying lawyers to assist during interrogations; preventing lawyers from examining witnesses and presenting evidence.<sup>9</sup>

1 UN Special Rapporteur on the human rights of migrants, ‘The impact of migration on migrant women and girls: a gender perspective,’ UN Doc. A/HRC/41/38, 15 April 2019, para 43.

2 Cornell Law School, ‘Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty’ (September 2018) <<https://www.deathpenaltyworldwide.org/pdf/judged-for-more-than-her-crime.pdf>>

3 Ibid.

4 CCPR/CO/84/THA, par.14.8, CCPR/C/SDN/CO/3, para.19.

5 Girelli, ‘The Death Penalty for Drug Offences: Global Overview 2018’ (HRI, 2019)

6 Carolyn Hoyle and Giada Girelli. *The Death Penalty for Drug Offences: Foreign Nationals* (London: Harm Reduction International, 2019).

7 Ibid.

8 ESOHR, “In 13 Years Saudi Arabia Deprived 504 Foreigners of the Right to Life through Beheading after Unfair Sentences, Violating International Law,” (2018)

9 <https://www.hrw.org/news/2018/04/25/saudi-arabia-executions-drug-crimes>

Foreign nationals convicted of drug offences can also experience direct discrimination in the criminal process. In Malaysia, for example, death is the mandatory punishment for certain drug offences. The vast majority of the 1,279 people currently awaiting execution were convicted for drug offences, more than half of whom are foreign nationals. While a quarter of those sentenced to death will have their sentences overturned at appeal, foreign nationals are half as likely to be successful at appeal.<sup>10</sup> Similarly, in Indonesia 60 out of the 236 death row prisoners are foreign nationals. While less than 1% of police investigations into drug offences were against foreigners in 2015 and 2016, they accounted for almost 85% of those executed for drug offences in the same period.<sup>11</sup>

### **Consular assistance for foreign nationals**

The provision of consular assistance is critical to nationals who face criminal proceedings abroad which may result in the death penalty. The Vienna Convention on Consular Relations provides that the competent authorities of a state in which a foreign national is arrested, detained, or committed to prison shall *without delay* inform the consular post of that person's state.<sup>12</sup> Consular authorities must be allowed access to the detainee, and to assist, not least by providing access to competent counsel, but also by securing reliable interpretation services. The consulate may also make representations to the clemency authority on behalf of the prisoner.<sup>13</sup>

Consular assistance, however, is often not provided. Saudi Arabia frequently denies consular assistance to foreign nationals.<sup>14</sup> Similarly, while Malaysia's consular obligations have been incorporated into Malaysian domestic law, the police rarely inform the embassies, and the prison service is only a little more responsive, leaving many foreigners without support in pre-trial and trial processes. Despite the large number of Pakistanis languishing on death row in other countries, the Pakistani government often fails to provide this critical assistance to its citizens in cases involving drug offences.<sup>15</sup>

### **Human trafficking, drug trafficking, and the death penalty**

Many foreign nationals either executed or facing execution for drug offences were compelled to commit crimes, and in several cases they were victims of human trafficking.<sup>16</sup> Lured by promises of work and better life prospects, economically vulnerable individuals agree to travel to foreign countries at great personal expense, only to end up being tricked, coerced, or forced to act as mules to transport drugs across the border.

A recent report by Justice Project Pakistan documented cases of Pakistani migrant workers who were similarly deceived and coerced into smuggling drugs to Gulf countries, where they were ultimately sentenced to death and executed.<sup>17</sup> The report also reveals the multitude of failures of the Pakistani government not only to take adequate preventive measures, but also to intervene on behalf of or provide necessary assistance to its nationals.<sup>18</sup>

#### *i. Non-punishment principle for victims of human trafficking*

There is consensus in the international community that victims of human trafficking should not be punished in any way – including prosecution, detention, or imprisonment – for crimes related to their trafficking.<sup>19</sup> Despite the widespread recognition of this 'non-punishment principle', the status of foreign nationals convicted for drug offences as victims of

<sup>10</sup> Chee Han, Chow Ying and Arivananthan, 'Issues - Analysing Penang, Malaysia and the Region: High Incidence of Judicial Errors in Capital Punishment Cases in Malaysia' (Penang Institute, 2018)

<sup>11</sup> Ibid.

<sup>12</sup> Article 36. Emphasis added

<sup>13</sup> Hoyle and Girelli., *The Death Penalty for Drug Offences: Foreign Nationals*.

<sup>14</sup> ESOHR, "In 13 Years Saudi Arabia Deprived 504 Foreigners of the Right to Life through Beheading after Unfair Sentences, Violating International Law"; ESOHR, "2018 Death Penalty Report: Saudi Arabia's False Promise"

<sup>15</sup> Justice Project Pakistan. 'Through the Cracks: The Exploitation of Pakistani Migrant Workers in the Gulf Recruitment Regime (Lahore, 2019)

<sup>16</sup> Reprieve. Submission by Reprieve on the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018.

<sup>17</sup> JPP, Through the Cracks.

<sup>18</sup> Ibid.

<sup>19</sup> See, for example, CTOC/COP/WG.4/2009/2, par.12, OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking; U.N. A/RES/55/67.

human trafficking is not investigated by neither the detaining nor the home state, leading to the imposition of capital punishment and arbitrary deprivation of life of individuals with reduced moral culpability; and to penalising victims for crimes related to their status as trafficked persons.<sup>20</sup>

### **Recommendations**

In light of the above, we respectfully ask the Special Rapporteur to:

- Urge states that continue to use the death penalty to comply fully with their obligations to ensure the access to consular assistance to all foreign nationals detained, particularly those at risk of capital punishment;
- Urge states to intervene more actively to assist their own nationals at risk of capital punishment in foreign countries;
- Urge states to (a) establish appropriate procedures for identifying victims of human trafficking, and for giving such victims support; and (b) adopt laws mandating the non-punishment of trafficked persons for unlawful acts committed as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts; and
- Develop and disseminate a report on the disproportionate impact of the criminal justice response to drugs on foreign nationals in countries that retain the death penalty for drug offences; with particular focus on the links between drug trafficking and human trafficking, and on migrant women.

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Anti-Death Penalty Asia Network (ADPAN), Geneva Platform on Human Rights, Health and Psychoactive Substances, Institute for Criminal Justice Reform (ICJR), International Network of People who Use Drugs (INPUD), Justice Project Pakistan, LBH Masyarakat NGO(s) without consultative status, also share the views expressed in this statement.

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<sup>20</sup> Reprieve. Submission by Reprieve on the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018.