



# FLAWED JUSTICE

UNFAIR TRIALS AND THE DEATH  
PENALTY IN INDONESIA

AMNESTY  
INTERNATIONAL



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*Cover photo:* A protester prays during a vigil held outside the Indonesian Embassy in Manila, Philippines on 27 April 2015, to halt the execution of convicted Filipina drug trafficker Mary Jane Veloso.

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## EXECUTIVE SUMMARY

“TAKING INTO ACCOUNT THAT BEFORE THE TRIAL HEARING WE HAVE ALSO HEARD THE ORAL LEGAL DEFENCE FROM THE DEFENDANT’S LEGAL COUNSEL WHO ESSENTIALLY STATED THAT THE ACTIONS CARRIED OUT BY THE DEFENDANT WERE EXTREMELY CRUEL AND INHUMANE AND SO THE LEGAL COUNSEL ASKED (THE JUDGES) THAT THE DEFENDANT BE SENTENCED TO DEATH, WHILE THE DEFENDANT HIMSELF ASKED (THE JUDGES) TO BE SENTENCED AS LENIENTLY AS POSSIBLE”

Excerpt (translated from Bahasa Indonesia) from the Gunungsitoli District Court Decision on the death sentence of Yusman Telaumbanua, 17 May 2013

In the early hours of 18 January 2015 the firing squad was assembled. At the signal, the crack of gunfire killed six people in Indonesia’s first executions under the then newly sworn-in President Joko Widodo. The four men and two women were all executed for drug-related crimes, offences that do not meet the threshold of the “most serious crimes” which is the only category of crime for which international law allows the death penalty.

Joko Widodo and other government authorities justified the executions on the basis that Indonesia was in a “state of emergency” with regards to incidents of drug abuse and that some 50 young people were dying daily due to their addiction. The President also stated publicly that the government would deny any application for clemency made by people sentenced to death for drug-related crimes saying that “[t]his crime warrants no forgiveness”.

Although very few groups believed that the new administration under President Joko Widodo would abolish the death penalty, the executions still shocked the human rights community both in Indonesia and abroad. Joko Widodo took office in October 2014 on the back of promises he made during his presidential campaign to improve respect for human rights. Instead, within weeks he proved himself to be a staunch supporter of the death penalty and authorized its use in violation of international law and standards. Despite the national and international outcry that followed the executions in January, three months later, on 29 April, eight other people convicted of drug-related crimes were also executed.

The fourteen executions represent a regressive step on Indonesia's journey towards abolition of the death penalty. Executions had been put on hold in previous years; the authorities proactively took measures to prevent the executions of Indonesian citizens abroad, interventions that resulted in 240 commutations between 2011 and 2014; and in 2012 Indonesia changed its position from against to abstention during voting on UN General Assembly resolutions on a moratorium on the use of the death penalty.

Amnesty International opposes the death penalty unconditionally, in all cases without exception, regardless of the nature or circumstances of the crime, the guilt, innocence or other characteristics of the individual, or the method used by the state to carry out the execution. The organisation has long held that the death penalty violates the right to life, as recognized in the Universal Declaration of Human Rights, and is the ultimate cruel, inhuman and degrading punishment.

While Article 6 of the International Covenant on Civil and Political Rights (ICCPR), to which Indonesia acceded in 2006, allows for the use of capital punishment under certain circumstances, paragraph 6 clearly states that provisions in the same Article should not be used to "prevent or delay the abolition of the death penalty." In its General Comment No. 6 on Article 6 of the ICCPR, the Human Rights Committee – the body tasked with the interpretation of the ICCPR - has stated that the Article "refers generally to abolition [of the death penalty] in terms which strongly suggest... that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life..."

## IN VIOLATION OF INTERNATIONAL FAIR TRIAL STANDARDS

The Indonesian authorities have repeatedly claimed they apply the death penalty in line with international law and standards. In this report, Amnesty International highlights 12 individual cases of death row prisoners (out of a total of 131 as of December 2014) which illustrate how the administration of justice in Indonesia resulted in violations of international human rights law and standards. Under international human rights standards, people charged with crimes punishable by death are entitled to the strictest observance of all fair trial guarantees and to certain additional safeguards.

**Agus Hadi**, 53 years old, and **Pujo Lestari**, 39, are from Riau, Indonesia. They worked as ship crew members. Agus Hadi is an elementary school graduate while Pujo Lestari is a high school graduate. They were arrested by a sea patrol in Batam, Riau Islands Province, for trying to smuggle 12,490 benzodiazepine pills (sedatives colloquially known as 'Happy Five Erimin') from Malaysia. They were convicted and sentenced to death in 2007. They have exhausted all legal avenues available to them.

Indonesian national **Zainal Abidin** was 51 years old when he was executed. He worked as a wood polisher and was an elementary school graduate. He was arrested by the Palembang City Police and charged with possession of 58.7kg of cannabis on 21 December 2000. He was sentenced to 18 years' imprisonment by the Palembang District Court in 2001. However during the appeal process, he was then convicted and sentenced to death by the Palembang High Court for drug trafficking in 2001. He was executed on 29 April 2015.

**Ruben Pata Sambo**, 70 years old, and his son **Markus Pata Sambo**, 40 years old, are from Tana Toraja, South Sulawesi province, Indonesia. They were convicted and sentenced to death for the murder of four family members in the Tana Toraja district, South Sulawesi province, in 2006. They have exhausted all available legal avenues.

Pakistani national **Zulfiqar Ali** is 51 years old. He was a garment businessman. He was arrested at his home in West Java province on 21 November 2004, and charged with possession of 300g of heroin. He was convicted and sentenced to death in 2005. His death sentence was upheld by the Supreme Court in 2006.

Nigerian national **Raheem Agbaje Salami** (or Jamiu Owolabi Abashin) was 50 years old when he was executed. He was arrested by police from the East Java Provincial Headquarters after being caught carrying 5.28kg of heroin on 2 September 1998. He was convicted and sentenced to death for drug trafficking in 1999 by the Supreme Court. He was executed on 29 April 2015.

Nigerian national **Namaona Denis** (or Solomon Chibuke Okafer) was 48 years old when he was executed. He was initially convicted by the Tangerang District Court in 2001 for importing heroin into Indonesia, and sentenced to life imprisonment. He was then convicted and sentenced to death by the West Java District Court for drug trafficking [importing heroin into Indonesia] in 2001. He was executed on 18 January 2015.

Indonesian national **Christian** (with no second name), 54 years old, was a wheat flour trader. He was convicted of and sentenced to death for drug trafficking [importing ecstasy pills into Indonesia] in 2008. His death sentence was upheld by the Supreme Court in 2009.

**Yusman Telaumbanua** is from Riau, Indonesia. He worked as a plantation worker. He left elementary school and is unable to read or write. According to the police he was born in 1993, but Yusman claimed he was born in 1996, which means he could have been under 18 years old at the time the crime was committed and at the time when he was sentenced to death. He was convicted and sentenced to death for the murder of three men in April 2013 in the North Nias district, North Sumatra province. He did not appeal the sentence as he was not told by his lawyer that he had the right to appeal.

Brazilian national **Rodrigo Gulate** was 43 years old when he was executed. He was convicted and sentenced to death for drug trafficking [importing cocaine into Indonesia] in 2005. He was executed on 29 April 2015. He had a mental disability, having been diagnosed with paranoid schizophrenia.

Filipina **Mary Jane Veloso**, 30 years old, worked as a domestic worker. She was convicted and sentenced to

death for drug trafficking [importing heroin into Indonesia] in 2010. Her execution was halted at the last minute on 29 April 2015, so she could give testimony at the trial of the person accused of tricking her into becoming a drug courier.

Amnesty International found in the 12 cases documented in this report that the defendants did not have access to legal counsel from the time of arrest and at different stages of their trial and appeals; and that they were subjected to ill-treatment while in police custody to make them “confess” to their alleged crimes or sign police investigation reports. All 12 prisoners were brought before a judge for the first time when their trials began, months after their arrest.

International fair trial standards grant foreign nationals the right to be promptly informed of their right to communicate with their embassy or consular post and to have the assistance of an independent interpreter as soon as they are arrested. The protection of these rights is particularly relevant in the Indonesian context, as a significant number of death row prisoners are foreign nationals, particularly those convicted of drug-related offences. Amnesty International, however, found that in several cases the Indonesian authorities failed to correctly identify or verify the identity of the prisoner. Furthermore, Indonesian law denies foreign nationals the possibility to challenge any of its provisions before the Constitutional Court, including challenges that may affect the country’s death penalty policy.

## DEATH PENALTY, JUVENILES AND PERSONS WITH MENTAL DISABILITIES

Despite the clear prohibition under international law concerning the use of the death penalty against persons who were below 18 years of age or have a mental or intellectual disability, Amnesty International documented that claims put forward by two prisoners in relation to their juvenility and mental illness were not adequately investigated by the authorities and have resulted in the unlawful imposition of the death penalty and, in at least one case, execution.

While Indonesian law requires that all births be registered, in practice many people do not undergo this process, making the determination of one’s age particularly challenging. This, coupled with a lack of legal assistance, increases the risk that persons who were below 18 when the crime was committed are exposed to the death penalty. Additionally, defendants and prisoners are not regularly and independently assessed, which can result in mental disabilities remaining undiagnosed and prisoners not being afforded the care and treatment they might need.

## RIGHT TO APPEAL AGAINST CONVICTION AND SENTENCE AND NO EXECUTIONS WHILE APPEALS OR OTHER RECOURSE ARE PENDING

Amnesty International found that in some cases prisoners did not receive legal assistance when appealing against their conviction or sentence, or did not even submit an appeal application because they were not informed by their lawyers of their right to do so.

Furthermore, Amnesty International found that the execution of some death row prisoners went ahead even though the Indonesian courts had accepted to hear their appeals.

## RIGHT TO SEEK PARDON OR COMMUTATION OF A DEATH SENTENCE

In December 2014 and February 2015 President Joko Widodo announced he would not grant clemency to any individuals convicted of and sentenced to death for drug-related crimes, even though these offences do not meet the threshold of the “most serious crimes” for which the death penalty can be imposed under international law. Amnesty International received information relating to some clemency rejections by the authorities that cast doubts on the meaningful exercise of the President’s constitutional power to grant clemency.

## CONCLUSIONS AND RECOMMENDATIONS

The resumption of executions in Indonesia represents a “U turn” on the country’s achievements towards abolition and exposes the weakness of its criminal justice system. By focusing on 12 individual death penalty cases in particular, in this report Amnesty International highlights violations of international human rights law and standards which require immediate addressing by the authorities to prevent arbitrary deprivation of life. More than 130 people remain on death row at the time of writing (data on file with Amnesty International).

Amnesty International reiterates its calls on the government of Indonesia to establish a moratorium on executions as a first step towards abolition of the death penalty. Pending full abolition, Amnesty International makes several recommendations to the Indonesian authorities, which are set out in full in Chapter 4 and include:

- Establish an independent and impartial body, or mandate an existing one, to review all cases where people have been sentenced to death, with a view to commuting the death sentences, in particular in all cases where the death penalty has been imposed for drugs offences or where the trial did not meet the most rigorous international fair trial standards, or, in cases where the procedures were seriously flawed, offer a retrial that fully complies with international fair trial standards and which does not resort to the death penalty.
- Bring provisions in national legislation that allow for the use of the death penalty in line with international law and standards, including by removing from the scope of the death penalty any offence other than intentional killing, and ensure that all those who have been sentenced to death for other offences, in particular for drugs offences, have their sentences commuted accordingly.
- Ensure that in proceedings related to offences where the death penalty might be imposed the most rigorous internationally recognized standards for fair trial are respected, including by implementing all relevant recommendations made by the UN Human Rights Committee and the UN Committee against Torture.

- Improve access for all people facing the death penalty to competent legal assistance for those facing criminal charges or where there is a possibility to pursue appeals or other recourse procedures, in particular for those from disadvantaged or marginalized socio-economic backgrounds, and ensure that resources are available to the Legal Aid Council for the appointment of competent pro bono lawyers in all regions of the country.
- Ensure that there are prompt, thorough, impartial and effective investigations by independent and impartial bodies into all allegations of torture and other ill-treatment by police or other authorities; that victims have access to an effective remedy and receive reparation; and that if there is sufficient admissible evidence, those suspected of responsibility, including superior officers who knew or should have known that those under their command were resorting to torture or other ill-treatment and who did not take all measures in their power to prevent, halt or report it, are prosecuted in proceedings which meet international standards of fairness.
- Ensure that all prisoners on death row who have never appealed are provided without delay with effective opportunities to appeal and to competent legal counsel to assist them in doing so, and make reviews of death penalty cases mandatory, even if the defendant elects not to pursue an appeal, including when the death penalty is imposed by a higher court during the course of the appeal process.
- Establish transparent procedures for the exercise of the presidential power to grant clemency applications, in order to fulfil its purpose of meaningful safeguard of due process.
- Initiate an immediate and independent review of all cases where there is credible evidence that prisoners who have been sentenced to death have mental or intellectual disabilities or disorders, including those who have developed such disabilities or disorders after being sentenced and ensure that no one with such disabilities is sentenced to death in the future.
- Ensure that all detainees facing a charge for which a death sentence may be imposed are given proper medical assessments by a qualified and competent doctor at the time of their arrest, and regularly thereafter. Ensure that the results of all such medical examinations, as well as any relevant statements by the person in custody and the doctor's conclusions, are recorded in writing by the doctor and are made available to the person in custody and his or her lawyer.
- Regularly publish full and detailed information, if possible disaggregated by nationality and ethnic background, about the use of the death penalty which can contribute to a public debate on the issue. This information should include: the number of persons sentenced to death and their offences; the number of prisoners appealing the sentences and at what level; location of detention; information on past and imminent executions; the total number of persons awaiting execution; and the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted.

- Initiate an informed public and parliamentary debate on abolition of the death penalty.

## METHODOLOGY

This report is based on research conducted by Amnesty International and focuses on developments in the use of the death penalty in Indonesia in recent years and especially since December 2014, when President Joko Widodo announced his plan to resume executions of people sentenced to death for drug-related offences.

Amnesty International has been monitoring the use of the death penalty in Indonesia since the 1980s and maintained a log of all cases (see Amnesty International, Death Penalty Special Action; Dr. Subandrio and other prisoners under sentence of death, 1 May 1981, Index: ASA 21/03/1981; Statement of Amnesty International's Concern in Indonesia, 30 August 1985, pp. 12-13, Index: ASA 21/33/1985. See also the first Amnesty International report on the death penalty in the country, *Indonesia: A Briefing on the Death Penalty*, October 2004, Index: ASA 21/040/2004). Sources for the monitoring include court judgments, legal and clemency appeals by prisoners, information from lawyers, civil society organizations, statements and publications by government authorities, and news articles. Amnesty International has also documented human rights violations in police detention as part of other research projects, the findings of which were published in 2009 and remain relevant, in the context of the administration of the death penalty (see Amnesty International, *Unfinished Business: Police Accountability in Indonesia*, June 2009, Index: ASA 21/013/2009).

Amnesty International delegates carried out a research mission in Jakarta between 9 and 22 March 2015, during which they interviewed lawyers, human rights activists, experts on drug prevention and treatment, academics, and members of the National Commission on Human Rights (Komnas HAM). This report also draws on findings by UN bodies, including the UN Human Rights Committee, Komnas HAM, Indonesian NGOs and criminologists.

In this report Amnesty International focuses on 12 illustrative cases which have been selected out of 131 prisoners who were known to be on death row at the end of 2014 (based on the Attorney General Office 2014 Annual Report). Amnesty International also received reports of similar violations in many of the other 131 cases, but the case-specific details in this report are limited to those of individuals where Amnesty International was able to obtain consent through their lawyers or other representatives for their cases to be used in this report and in related campaigning.

Amnesty International wrote to the Indonesian Minister of Law and Human Rights, Yasonna Laoly, and the President of Indonesia, Joko Widodo, on 5 December 2014 and 18 February 2015 respectively, to relay its ongoing concerns on the use of the death penalty in the country.

Amnesty International is grateful to all those who agreed to be interviewed or provided information during this research, in particular to Puri Kencana Putri from KontraS (the Commission for the Disappeared and Victims of Violence) and Ricky Gunawan from LBH Masyarakat (the Community Legal Aid Institute).

Amnesty International opposes the death penalty in all cases and under any circumstances, regardless of the nature of the crime, the characteristics of the offender, or the method used by the state to carry out the execution. The organization considers the death penalty a violation of the right to life as recognized in the Universal Declaration of Human Rights and the ultimate cruel, inhuman and degrading punishment.

# 1. BACKGROUND: THE DEATH PENALTY IN INDONESIA

“Please visit the drugs rehabilitation places, it will be shown how destructive the drugs are. Do not see only the death row prisoners, see their victims and the victims’ families. People would just realise how evil the drugs dealers are. Therefore, once again for me there is no pardon for the drugs dealers or kingpins, no...no...”

President Joko Widodo’s statement during a radio interview<sup>1</sup>

## 1.1 RECENT DEVELOPMENTS ON THE DEATH PENALTY

On 18 January 2015 Indonesia carried out its first executions under the then newly sworn-in President Joko Widodo. Six people were executed for drug-related crimes. Those executed included one Indonesian - Rani Andriani alias Melisa Aprilia - and five foreign nationals: Daniel Enemu (Nigerian), Ang Kim Soei (Dutch), Tran Thi Bich Hanh (Vietnamese), Namaona Denis (Nigerian) and Marco Archer Cardoso Moreira (Brazilian).<sup>2</sup>

Joko Widodo and other government authorities linked the resumption of executions to the fact that Indonesia was in a “state of emergency” with regard to incidents of drug abuse and that some 50 young people were dying daily due to their addiction.<sup>3</sup> The President also stated

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<sup>1</sup> Elshinta Radio’s interview with President Joko Widodo at the Presidential Palace, 17 March 2015, weblink: <http://elshinta.com/news/5203/2015/03/17/wawancara-eksklusif-elshinta-dengan-presiden-jokowi>, accessed on 10 August 2015.

<sup>2</sup> Amnesty International, *Indonesia: First Executions Under New President Retrograde Step for Rights*, available at: <https://www.amnesty.org/en/press-releases/2015/01/indonesia-first-executions-under-new-president-retrograde-step-rights/> (accessed on 10 July 2015).

<sup>3</sup> President Joko Widodo’s speech during the opening of the national coordination meeting on tackling drugs in Jakarta, 4 February 2015, weblink:

publicly that the government would deny any application for clemency made by people sentenced to death for drug-related crimes saying that “[t]his crime warrants no forgiveness”.<sup>4</sup>

The executions led to strong protests from both local and international human rights organisations. President Joko Widodo said: “There are many pressures from the international community, from the head of states, Prime Ministers, Presidents, from the United Nations and also from Amnesty.... This is normal, but again it is about our legal sovereignty, about our political sovereignty”.<sup>5</sup>

Despite the outcry, three months later, on 29 April, another eight individuals convicted for drug-related crimes were executed. They were Andrew Chan and Myuran Sukumaran (both Australian nationals), Raheem Agbaje Salami (Nigerian, also known as Jamiu Owolabi Abashin), Zainal Abidin (Indonesian), Martin Anderson (Ghanaian, alias Belo), Rodrigo Gularte (Brazilian), Sylvester Obiekwe Nwolise (Nigerian) and Okwudili Oyatanze (Nigerian).<sup>6</sup> Two others were granted a temporary stay of execution.<sup>7</sup>

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[http://www.setneg.go.id/index.php?option=com\\_content&task=view&id=8712&Itemid=26](http://www.setneg.go.id/index.php?option=com_content&task=view&id=8712&Itemid=26), accessed on 17 August 2015.

<sup>4</sup> *Antara*, “No mercy for drug dealers: President”, 9 December 2014, available at: <http://www.antaranews.com/en/news/96848/no-mercy-for-drug-dealers-president%20/> (accessed 6 July 2015). President Joko Widodo’s speech during the opening of the national coordination meeting on tackling drugs, *supra* note No. 3.

<sup>5</sup> Elshinta Radio’s interview with President Joko Widodo at the Presidential Palace, 17 March 2015, weblink: <http://elshinta.com/news/5203/2015/03/17/wawancara-eksklusif-elshinta-dengan-presiden-jokowi>, accessed on 10 August 2015.

<sup>6</sup> Amnesty International, *Indonesia: ‘Reprehensible’ executions show complete disregard for human rights safeguards*, 28 April 2015, available at: <https://www.amnesty.org/en/latest/news/2015/04/indonesia-reprehensible-executions-show-complete-disregard-for-human-rights-safeguards/> (accessed on 6 July 2015).

<sup>7</sup> The execution of Filipina Mary Jane Veloso was halted at the last minute. The stay of execution was granted following a request by the President of the Philippines to spare her life, since she would be required to give testimony at the trial of the person who allegedly deceived Mary Jane Veloso into becoming a drug courier. Another individual who was at risk of execution, French national Serge Atlaoui, was also given a reprieve as he had an ongoing appeal in the administrative court.



A large crowd of locals, the media and security personnel gather outside Nusakambangan Island Prison hours before the mass state-led execution carried out on 29 April 2015 © LBH Masyarakat

These 14 executions represent a regressive step for human rights in Indonesia, particularly as the application of the death penalty was ordered by a new administration that had taken office after having promised to prioritise human rights. The executions were also carried out in violation of international law and UN safeguards guaranteeing protection of the rights of those facing the death penalty.<sup>8</sup> Amnesty International has expressed concern at a number of specific human rights violations it observed in the cases of the 14 individuals executed so far in 2015, which include violations of the right to a fair trial; executions carried out while legal appeals were still pending; the summary consideration and rejection of clemency petitions; and the execution of at least one person with a severe mental disability. Further, as repeatedly noted by international bodies, drug trafficking does not meet the threshold of “most serious crimes” for which the death penalty can be imposed under international law.<sup>9</sup>

National and international experts also raised concerns about the validity of the data put forward by the authorities on the national “drug emergency”, presented as the cause of the resumption of executions.<sup>10</sup> For instance, President Joko Widodo estimated that 2.6% of the population (between 4.2 and 4.5 millions) has been using drugs based on figures from the

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<sup>8</sup> Economic and Social Council resolution 1984/50 of 25 May 1984.

<sup>9</sup> See also Chapter 3.

<sup>10</sup> Irwanto, Dewa N Wirawan, Ignatius Praptoraharjo, Sulistyowati Irianto, Siti Musdah Mulia on behalf of 11 signatories, “Evidence-informed Response to Illicit Drugs in Indonesia”, in the *Lancet Journal* Volume 385, 6 June 2015, weblink: [http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736\(15\)61058-3.pdf](http://www.thelancet.com/pdfs/journals/lancet/PIIS0140-6736(15)61058-3.pdf), accessed on 17 August 2015. See also *The Guardian* “Data used by Indonesia to justify drug laws is ‘questionable’, say experts”, 5 June 2015, available at: <http://www.theguardian.com/world/2015/jun/05/experts-criticise-data-used-by-indonesia-to-justify-punitive-drugs-policies> (accessed on 6 July 2015) and *The Conversation*, “Indonesia Uses Faulty Stats on ‘Drug Crisis’ to justify Death Penalty”, 5 February 2015, available at: <http://theconversation.com/indonesia-uses-faulty-stats-on-drug-crisis-to-justify-death-penalty-36512>, (accessed on 6 July 2015).

Indonesian National Narcotics Board (*Badan Narkotika Nasional*, BNN).<sup>11</sup> According to the researchers, the figure of 4.2 or 4.5 million drug users is not an estimation of the actual number of people in Indonesia who are in need of support to manage their drug addiction. It is rather a projection cited in a 2008 study by the National Narcotics Agency of all drug users, including those who have used drugs no more than once in their life.<sup>12</sup>

The executions amount to a policy reversal by the Indonesian government after years of indications that the country was moving away from the death penalty. Between 2009 and 2012, no executions were carried out and the authorities allegedly established what they referred to as a “de facto moratorium on executions”.<sup>13</sup> When the death sentences on a woman and a man convicted of drug trafficking were commuted to life imprisonment in 2011 and 2012 respectively, Foreign Minister Marty Natalegawa at the time declared that it was part of a wider move away from the use of the death penalty in Indonesia.<sup>14</sup> In the same month the Indonesian Supreme Court commuted the death sentence imposed on another man who had been convicted of drug trafficking, and stated that the death penalty violates human rights and the Indonesian Constitution.<sup>15</sup> In December 2012, at the 67<sup>th</sup> session of the UN General Assembly, Indonesia changed its vote from ‘against’ to ‘abstention’ on a resolution calling on UN member states to establish a moratorium on executions, as a first step towards abolition of the death penalty (see Chapter 1.4).

In recent years the authorities have also proactively taken measures to prevent the execution of Indonesian citizens abroad. In 2011, then President Susilo Bambang Yudhoyono established a taskforce to provide legal and consular assistance to Indonesians on death row abroad. Between 2011 and 2014, 240 Indonesians who were facing executions abroad had

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<sup>11</sup> President Joko Widodo’s speech in front of some of his ministers, Chief of the National Narcotics Agency (BNN), Deputy Chief of the Supreme Court, some governors and district leaders during the opening of the national coordination meeting on tackling drugs, Jakarta, 4 February 2015, available at: <http://setkab.go.id/sambutan-presiden-joko-widodo-pada-pembukaan-rakornas-penanganan-narkoba-4-februari-2015-pukul-di-hotel-bidakara-jakarta-selatan/> (accessed 8 September 2015).

<sup>12</sup> The Indonesian National Narcotics Agency Board (BNN), *Jurnal Data; Pencegahan dan Pemberantasan Penyalahgunaan dan Peredaran Gelap Narkoba (P4GN) Tahun 2013, Edisi Tahun 2014* [Journal of Data; Prevention and Combating the Drugs Abuse and Illicit Trafficking 2013, Edition of 2014], June 2014, p. 38. Interview with Claudia Stoicescu, a DPhil Candidate the University of Oxford’s Centre for Evidence Based Intervention and researcher at Indonesian Drug User Network (*Persaudaraan Korban Naza Indonesia*, PKNI), 18 March 2015.

<sup>13</sup> See “Statement by the delegation of the Republic of Indonesia high-level panel discussion on the question of the death penalty ‘regional efforts aiming at the abolition of the death penalty and challenges faced in that regard’ at the 28th session of the Human Rights Council”, available at: <http://www.mission-indonesia.org/article/516/statement-by-the-delegation-of-the-republic-of-indonesia---high-level-panel-discussion-on-the-question-of-the-death-penalty---regional-efforts-aiming-at-the-abolition-of-the-death-penalty-and-challenges-faced-in-that-regard---at-the-28th-session-of-the-human-rights-council> (accessed on 6 July 2015).

<sup>14</sup> *The Jakarta Globe*, “Indonesia not Alone in Death Penalty Reticence: Ministers”, 17 October 2012, available at: <http://www.thejakartaglobe.com/archive/indonesia-not-alone-in-death-penalty-reticenceministers/550602/> (accessed 29 June 2015).

<sup>15</sup> *Putusan Peninjauan Kembali Mahkamah Agung* [Supreme Court’s Decision on the Case Review], Hanky Gunawan, No. 39 PK/Pid.Sus/2011, on file with Amnesty International, pp. 53-54.

their death sentences commuted; these included 46 in 2014.<sup>16</sup>

## 1.2 THE LEGAL FRAMEWORK OF THE DEATH PENALTY IN INDONESIA

The death penalty has been a part of Indonesia's legal system since before the country's independence in 1945, and can be imposed for a broad range of crimes.<sup>17</sup> However it is usually imposed for murder with deliberate intent and premeditation; drug-related crimes (producing, processing, extracting, converting or making available narcotics); and "terrorism". Under international law, the death penalty can only be imposed for the "most serious crimes" which has been most recently interpreted to refer to "intentional killing"(see also Chapter 3).

At the same time, the legal reforms introduced after the fall of former President Suharto in 1998<sup>18</sup> recognised the right to life, as outlined in Article 28 of the Indonesian Constitution and in Law No. 39/1999 on Human Rights.<sup>19</sup> In 2006 the government also ratified the International Covenant on Civil and Political Rights (ICCPR) which recognises the right to life, prohibits the arbitrary deprivation of life and, while allowing for the imposition of the

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<sup>16</sup> Antara, "Government saves 190 Indonesians from death sentence: Yudhoyono", 16 August 2014, available at: <http://www.antaraneews.com/en/news/95328/government-saves-190-indonesians-from-death-sentence-yudhoyono> See also Amnesty International, *Death sentences and executions in 2014*, 31 March 2015, (Index: ACT 50/0001/2015), p.31.

<sup>17</sup> Specifically, the death penalty is provided for in the following provisions of the Indonesian Criminal Code (*Kitab Undang-undang Hukum Pidana*, KUHP): Article 104 (The attempt with intent to deprive the President or Vice-president of his life or liberty or to render him unfit to govern); 111(2) (collusion with a foreign power resulting in war); 124 (3) (assisting the enemy); 127 (fraud in delivery of military materials in time of war); 140 (premeditated murder of the head of a friendly state); 340 (murder with deliberate intent and premeditation); 365(4) (theft resulting in murder); 368(2) (extortion by two or more people resulting in serious injuries or death) and 444 (piracy resulting in the death of a person). The following laws also contain provisions which allow for a maximum sentence of death: Emergency Law No. 12/1951; Presidential Decree No. 5 / 1959, Article 2 on the Authority of the Attorney General/Military Attorney General in increasing the punishment for a crime that endangers the supply of food and clothing; Government Regulation in lieu of Law No. 21 of 1959 on increasing the punishment for crimes against the economy; Law No. 4/1976, (Article 479 k and 479 o) on the Ratification and Addition of Several articles in the Criminal Code in relation to the extension of the implementation of Law on Aviation Crimes and Crimes against the Facilities /Infrastructures of Aviation; The Military Criminal Code (*Kitab Undang-undang Hukum Pidana Militer*, KUHPM); Law No. 5/1997 on Psychotropic Drugs; Law No. 22/1997 on Narcotics; Law No. 26/2000 on Human Rights Courts; Law No. 20/2001 concerning Acts of Corruption; and Law No. 15/2003 on Combating Criminal Acts of Terrorism; Law No. 35/2009 on Narcotics.

<sup>18</sup> General Suharto took control of Indonesia following a coup in 1965 and officially became president in 1968. He remained president until his resignation in 1998. During his presidency, freedoms of expression and assembly were severely curtailed, and the Indonesia security forces committed systematic human rights violations with impunity.

<sup>19</sup> Article 28A of the Constitution states that "every person shall have the right to live and to defend his/her life and living" and Article 28I states that "[t]he right to...shall constitute human rights which cannot be reduced under any circumstances whatsoever". Article 4 of Law No.39/1999 on Human Rights also states that "[t]he right to life...are human rights that cannot be diminished under any circumstances whatsoever".

death penalty in certain circumstances, clearly sets the goal of its abolition in Article 6(6).<sup>20</sup>

Individuals charged by the public prosecutor with an offence punishable by the death penalty are first tried in lower district courts. The conviction and sentence can be appealed before the high courts and the Supreme Court. The death penalty may be imposed at any stage during the criminal justice process – by the lower district court, the high courts or the Supreme Court. Once the Supreme Court has imposed the sentence or confirmed the sentence issued by the lower court, the remaining legal avenues are to submit an application to the Supreme Court for a case review (*Peninjauan Kembali*, PK)<sup>21</sup> and to seek clemency from the President. People very often have different lawyers at different stages of the trial.

There was considerable debate on how many case reviews (PK) can be submitted prior to the executions that were carried out in 2015. In 2013 the Indonesian Constitutional Court annulled a provision in the Criminal Procedure Code (KUHAP) which limited an individual to only one case review application.<sup>22</sup> However in December 2014 the Supreme Court issued Circular Letter No. 7/2014 reaffirming that only one application was allowed per case review, and only on the basis of new evidence.<sup>23</sup> According to Indonesian human rights groups the Circular Letter was issued allegedly following an intervention by the Attorney General and the Ministry of Law and Human Rights, who stated that multiple case review applications would “interfere with executions”.<sup>24</sup> The Circular Letter led to the district courts rejecting at least four case review applications submitted by individuals facing execution in 2015.<sup>25</sup> This issue has yet to be resolved and a legal challenge was filed to the Supreme Court by a coalition of NGOs in April 2015 to annul the Circular Letter.<sup>26</sup>

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<sup>20</sup> Law No. 12/2005 on the Ratification of the International Covenant on Civil and Political Rights.

<sup>21</sup> Under Article 263(2) of Criminal Procedure Code a case review (PK) can be submitted to the Supreme Court if there is discovery of new evidence, contradictory judgements or judicial errors.

<sup>22</sup> Constitutional Court Decision No. 34/PUU-XI/2013.

<sup>23</sup> See Supreme Court Circular Letter No. 7/2014 on Submission of application for Case Review in Criminal Cases, available at: [http://bawas.mahkamahagung.go.id/bawas\\_doc/doc/sema\\_07\\_2014.pdf](http://bawas.mahkamahagung.go.id/bawas_doc/doc/sema_07_2014.pdf) (accessed on 6 July 2015).

<sup>24</sup> See Institute for Justice and Criminal Reform, *ICJR Warns the Supreme Court to Revoke Circular Letter on Request for Case Review (Peninjauan Kembali)*, 6 March 2015, available at: <http://icjr.or.id/icjr-warns-the-supreme-court-to-revoke-circular-letter-on-request-for-case-review-peninjauan-kembali/> (accessed on 6 July 2015).

<sup>25</sup> The case review was submitted to the district court who had tried the case in the first instance. If the district court accepts the submission, the case review will be brought to the Supreme Court. Case reviews that were rejected by the courts include Mary Jane Veloso, Andrew Chan, Myuran Sukumaran, Agus Hadi and Pujo Lestari [Veloso - <http://www.thejakartapost.com/news/2015/04/27/veloso-s-second-pk-rejected.html>, Andrew/Myuran - <http://www.smh.com.au/world/myuran-sukumaran-and-andrew-chan-lose-final-legal-recourse-before-execution-20150204-136bao.html>].

<sup>26</sup> See Institute for Justice and Criminal Reform, *Supreme Court to Review Its Own Regulation. Civil Society has filed constitutional review petition on the Supreme Court Circular Letter on the Limitation of Case Review Application Submission at the Supreme Court*, available at: <http://icjr.or.id/supreme-court-to-review-its-own-regulation-civil-society-has-filed-judicial-review-petition-on-the-supreme-court-circular-letter-on-the-limitation-of-case-review-application-submission-at-the-supreme/> (accessed on 6 July 2015).

Until 2010, individuals on death row could submit clemency applications to the President every two years if their execution was not carried out (Law No. 22/2002). However in 2010 Parliament adopted Law No. 5/2010 on amendments to Law No. 22/2002 on clemency, restricting those sentenced to death to one submission for clemency to the President, to be submitted within a year from the date their conviction attained “permanent legal force” (*kekuatan hukum tetap*).<sup>27</sup>

One of the issues that arose around the executions in 2015 was the declared policy to reject clemency applications of people sentenced to death for drug-related crimes. There is no legal requirement for the President to thoroughly consider the specific aspects of each clemency request nor to provide an explanation when approving or rejecting a clemency application. Under the current law, all that is required is a decision from the President after considering advice from the Supreme Court.<sup>28</sup> Following the blanket rejection of their clemency petitions in 2014 and 2015, at least six individuals filed appeals in the administrative courts arguing that the President had not given proper consideration to their clemency applications. However, in all cases the judges rejected the appeal stating that the presidential authority to issue clemency was granted under the Constitution and it was not in their jurisdiction to hear the case.<sup>29</sup> In April 2015 a coalition of NGOs filed a case before the Constitutional Court to challenge provisions in the Clemency Law; the outcome of the case is still pending.<sup>30</sup>

The Indonesian Constitutional Court<sup>31</sup> considered the constitutionality of the death penalty in at least three cases in the post-Suharto period (1998-present). In the first constitutional review of a case related to the death penalty brought to the Court in 2007, lawyers for Edith Yunita Sianturi, Rani Andriani (Melisa Aprilia), Andrew Chan, Myuran Sukumaran and Scott Rush challenged the legality of the death penalty for drug-related crimes. The Court found in a majority decision that the three of the petitioners who were Australian did not have standing before it to review the constitutionality of Indonesian laws, as they were foreign nationals and secondly, that the imposition of the death penalty for drug offences was not in breach of the Indonesian Constitution. The Court held that drug crimes could be classified as

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<sup>27</sup> A “permanent legal force” is defined by the Elucidation (*Penjelasan*) to Article 2(1) of the Law on Clemency (No. 5/2010) as “the decision by the District Court which is not appealed; the decision by the High Court which is not appealed; or the decision made by the Supreme Court”.

<sup>28</sup> See Article 11 of Law No. 22 of 2002 on Clemency.

<sup>29</sup> The six individuals include Andrew Chan, Myuran Sukumaran, Raheem Agbaje Salami, Rodrigo Gularte, Serge Areski Atlaoui and Sylvester Obiekwe Nwolise. See also *The Guardian*, “Bali Nine pair Andrew Chan and Myuran Sukumaran lose bid to challenge clemency decision”, 6 April 2014, available at: <http://www.theguardian.com/world/2015/apr/06/bali-nine-pair-andrew-chan-and-myuran-sukumaran-lose-bid-to-challenge-clemency-decision> (accessed on 6 July 2015).

<sup>30</sup> The constitutional review was submitted on behalf of six individuals (two of which were Australian) and one NGO. They challenged Article 55(1) of the Constitutional Court that allows only Indonesian nationals to file a constitutional review, and Articles 11(1) and 11(2) that do not require the President to explain why he/she refuses a clemency application. See document No.: 099/LSM/TML/LA/IV/2015, a constitutional review filed by Myuran Sukumaran, Andrew Chan, Rangga Sujud Widigda, Anbar Jayadi, Luthfi Sahputra, Haris Azhar and Imparsial, an NGO, 8 April 2015.

<sup>31</sup> The Constitutional Court (*Mahkamah Konstitusi*) was established in 2003 after the third amendment of the 1945 constitution which provided this body among other things, a mandate to review laws against the constitution. Subsequently, there is a specific law regulating the Constitutional Court (Law No. 24/2003).

among “the most serious crimes” for which the death penalty can be imposed under international law.<sup>32</sup> However, in the judgment the Court called on the government to consider to no longer use the death penalty as a principal punishment, but rather as a “special and alternative punishment” to be reserved for aggravated cases only; that it should be imposed with a “probation period” of 10 years and later commuted into life imprisonment or 20 years’ imprisonment if the prisoner shows signs of rehabilitation; and that it should not be imposed on children, or pregnant women or people with mental disabilities.<sup>33</sup>

Subsequently, in 2008 the Constitutional Court unanimously rejected a challenge to the law governing the use of a firing squad to carry out executions, which was filed by three men (Amrozi bin Nurhasyim, Imam Samudra and Ali Gufron) convicted of carrying out the bombing of two nightclubs in Bali in 2002. The applicants contended that the use of a firing squad may not lead to instantaneous death, and that the pain caused by this method of execution amounted to torture. The Court disagreed, finding that any pain generated could not be considered as torture because it was merely an inevitable by-product of the lawful act of executing a prisoner.<sup>34</sup>

In a third case, in 2012, two applicants - Raja Syahril alias Herman and Raja Fadli alias Deli - argued, among other things, that aggravated robbery causing death or serious injury does not meet the threshold of the “most serious crimes” for which the death penalty may be imposed under the ICCPR. The Court upheld the constitutionality of the death penalty.<sup>35</sup>

A new draft Criminal Code was submitted to lawmakers by the government in March 2015.<sup>36</sup> It includes provisions that would allow for a death sentence to be commuted to life imprisonment (set at 20 years) in certain, limited, circumstances.<sup>37</sup> The draft law is currently

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<sup>32</sup> See Constitutional Court Decision No. 2-3/PUU-V/2007, pp. 421-427

<sup>33</sup> See Constitutional Court Decision No. 2-3/PUU-V/2007, pp. 430-431. See also Natalie Zerial, “Decision No. 2-3/PUU-V/2007 [2007] (Indonesian Constitutional Court)”, *Australian International Law Journal*, Vol. 14, 2007: [217]-226.

<sup>34</sup> See Constitutional Court Decision No. 21/PUU-VI/2008, p.74 & Dave McRae, “A Key Domino? Indonesia’s Death Penalty Politics”, *Lowy Institute Analysis*, p.8, available at: [http://www.lowyinstitute.org/files/mcrae\\_a\\_key\\_domino\\_web-1.pdf](http://www.lowyinstitute.org/files/mcrae_a_key_domino_web-1.pdf) (accessed on 7 July 2015).

<sup>35</sup> See Constitutional Court Decision No. 15/PUU-X/2012.

<sup>36</sup> *Detik.com*, “Pemerintah Serahkan Draft RUU KUHP & RUU KUHP ke DPR” [Government hand over the draft law on Criminal & Criminal Procedure Code], 6 March 2015, weblink: <http://news.detik.com/berita/2187254/pemerintah-serahkan-draft-ruu-kuhp-amp-ruu-kuhap-ke-dpr> (accessed on 19 August 2015); *Tempo.co*, “DPR setuju revisi KUHP dan KUHP” [Parliament agrees to revise the Criminal and Criminal Procedure Code], 6 March 2015, weblink: <http://nasional.tempo.co/read/news/2013/03/06/063465473/dpr-setujui-revisi-kuhap-dan-kuhp> (accessed on 19 August 2015).

<sup>37</sup> These are: if there is no strong public reaction against the death row convict; the convict shows remorse and there are signs of “improvement”; the complicity of the convicted in a criminal act is “not very important”; and other mitigating reasons. Furthermore, if the request for clemency is denied and the death penalty is not carried out after 10 years, the President can commute the death sentence to life imprisonment.

being deliberated in the House of Representatives.<sup>38</sup>

## INDONESIA'S INTERNATIONAL OBLIGATIONS

**As a UN Member State, Indonesia is obliged to comply with the Universal Declaration of Human Rights and has ratified other international and regional human rights treaties including:**

- the International Covenant on Civil and Political Rights, acceded to on 23 February 2006
- the International Covenant on Economic, Social and Cultural Rights, acceded to on 23 February 2006
- the Convention on the Rights of the Child, ratified on 5 September 1990 (and its Optional Protocols in 2012)
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, ratified on 28 October 1998
- the Convention on the Elimination of All Forms of Discrimination against Women, ratified on 13 September 1984
- the International Convention on the Elimination of All Forms of Racial Discrimination, acceded to on 25 June 1999
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ratified on 31 May 2012
- the Convention on the Rights of Persons with Disabilities, ratified on 30 November 2011

Indonesia also signed the Convention for the Protection of All Persons from Enforced Disappearance on 27 September 2010.

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<sup>38</sup> The latest draft is the June 2015 version and is available at: <http://reformasikuhp.org/r-kuhp/>.

### 1.3 DEATH SENTENCES AND EXECUTIONS IN INDONESIA

It is almost impossible to determine exactly how many prisoners are on death row in Indonesia, or their nationality. According to figures obtained from the Law and Human Rights Ministry on 30 April 2015, there were at least 121 prisoners under sentence of death. These include 54 people convicted of drug-related crimes, two convicted on terrorism charges and 65 convicted of murder.<sup>39</sup>

However Amnesty International found that figures provided by the Law and Human Rights Ministry and the Attorney General are incomplete, as 70 cases recorded by the organization are not included in the official list. Zainal Abidin's name was also in the list provided by the authorities, even though he was executed on 29 April 2015, while Mary Jane Veloso's name is not listed. An estimated 38 foreign nationals from 13 countries are on death row, all for drug-related crimes.

Twenty-seven people were executed between 1999 and 2014, under Indonesia's first four presidents after the fall of Suharto. No executions were carried out between 2009 and 2012. However, in 2013 executions resumed under then President Susilo Bambang Yudhoyono when Adami Wilson, a 48-year old man who has been identified in official records as either Malawian or Nigerian, was executed in Jakarta after being convicted of drug trafficking in 2004. Four other people were executed in the same year. As noted above, 14 executions have now taken place within the first six months of Joko Widodo's presidency. Twelve of the executed prisoners were foreign nationals and all 14 were executed for drug-related crimes.

### 1.4 AGAINST THE GLOBAL TREND

International intergovernmental bodies have long considered the death penalty as a human rights issue and recommended establishing a moratorium on executions as a first step towards full abolition of the ultimate cruel, inhuman and degrading punishment.<sup>40</sup>

The UN system reaffirmed and strengthened its position against the death penalty in December 2007, when the General Assembly adopted the first of five resolutions in succeeding years, calling on UN member states to "establish a moratorium on executions with a view to abolishing the death penalty".<sup>41</sup> The last of these resolutions was adopted on

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<sup>39</sup> Data on file with Amnesty International. The data from the Ministry of Law and Human Rights contains names of the prisoners. Meanwhile data from the Attorney General Office as of December 2014, does not contain any names. The Attorney General Office 2014 Annual Report [*Laporan Tahunan 2014*], pp. 46-47, available at: <https://www.kejaksaan.go.id/upldoc/laptah/2015-Laptah%20Kejagung%202014-id.pdf> (accessed on 22 September 2015).

<sup>40</sup> Among others, the UN Commission on Human Rights stated in its resolution 2005/59 adopted on 20 April 2005 that "the abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights"; and that "the abolition of the death penalty is essential for the protection of [the right to life]". See also Chapter 4.

<sup>41</sup> UN General Assembly 62/149 of 18 December 2007.

18 December 2014 with increased support compared to previous years, with 117 votes in favour, 38 against and 34 abstentions.<sup>42</sup> Indonesia voted against the first three resolutions, but switched its vote to abstention in 2012. It abstained again at the vote in 2014.

As of today, more than two-thirds of countries worldwide have abolished the death penalty in law or practice, and the global trend towards abolition could not be clearer. While only eight countries were abolitionist for all crimes when the UN was created in 1945, over half – 101 – have now fully removed the death penalty from their national legislation, and a further six retain it in exceptional circumstances only, such as at times of war. In the first six months of 2015, three countries – Fiji, Madagascar and Suriname – removed the last provisions in their laws that allowed for the imposition of the death penalty. Meanwhile Nebraska became the 19<sup>th</sup> abolitionist state in the USA on 27 May 2015.

Legislative bodies in several other countries are considering, at the time of writing, proposals to repeal the death penalty from their laws. By resuming executions the Indonesian authorities have set the country against this global trend as well setting back the country's own progress towards the abolition of the death penalty.

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<sup>42</sup> UN General Assembly resolution 69/186 of 18 December 2014. The USA voted against the resolution but its vote was not captured in the official voting list. UN General Assembly, 69th session, 73rd plenary meeting on 18 December 2014, New York, UN doc. A/69/PV.73, p.17, available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/69/PV.73](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/69/PV.73) (accessed on 19 August 2015).

## 2. UNFAIR AND UNLAWFUL: THE USE OF THE DEATH PENALTY IN INDONESIA

“WE BELIEVE THAT COUNTRIES WHO RETAIN DEATH PENALTY SHOULD ALWAYS EXERCISE MAXIMUM RESTRAINT, CAREFUL, AND SELECTIVE IN THE IMPOSITION OF DEATH PENALTY... INDONESIA ENSURES THAT DUE PROCESS OF LAW IS FULLY OBSERVED IN THE IMPOSITION OF DEATH PENALTY.”

Statement by the Indonesian Ministry of Foreign Affairs during the UN Human Rights Council biennial high-level panel discussion on the question of the death penalty on 4 March 2015<sup>43</sup>

The right to a fair trial is a basic human right and one of the universally applicable guarantees proclaimed in the Universal Declaration of Human Rights. It has become legally binding on states as part of customary international law. With regard to states parties to the International Covenant on Civil and Political Rights (ICCPR), the key elements of the right to a fair trial are set out in Article 14.<sup>44</sup> In cases where the life of the accused is at stake it is all the more important that fair trial principles are rigorously applied throughout the entire process. In 1984, the UN Economic and Social Council (ECOSOC) introduced safeguards to further protect the right to a fair trial for those facing the death penalty (see Chapter 3),<sup>45</sup>

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<sup>43</sup> Supra note No. 13.

<sup>44</sup> See Amnesty International, *Fair Trial Manual, Second Edition*, Index: POL 30/002/2014, 2014, available at: <https://www.amnesty.org/en/documents/pol30/002/2014/en/> (accessed on 21 September 2015).

<sup>45</sup> Safeguards guaranteeing protection of the rights of those facing the death penalty, UN Economic and

because death penalty cases involve the right to life, and the arbitrary deprivation of life is prohibited under international law. Sentencing someone to death following a trial that does not respect basic fair trial standards violates the right to life of that person.<sup>46</sup>

The Indonesian authorities have frequently claimed they apply the death penalty in line with international law and standards. However, Amnesty International has documented numerous instances in which established international safeguards have been flouted. This is both because some provisions within Indonesian legislation regulating the administration of justice and the death penalty do not comply with international fair trial standards; and because state officials responsible for law enforcement and the administration of justice violated the rights of defendants and prisoners, as recognized in national and international law.

In this chapter Amnesty International focuses on 12 illustrative cases (short summary included in the Executive Summary) which have been selected from 131 prisoners who were known to be on death row at the end of 2014.<sup>47</sup> Taken together, these cases show numerous violations of international safeguards at different points of the criminal justice process. The chapter highlights instances in which defendants were held without access to legal counsel and brought before a judge only several days or weeks, and in some cases months, after arrest; the use of evidence which had been obtained as a result of torture or other ill-treatment to secure convictions leading to death sentences; the failure to enable foreign nationals to access consular assistance; and failure to provide effective interpretation for foreign nationals and others who could not adequately understand the language used in the proceedings.

It further identifies failures to respect the defendants' right to appeal against their conviction and sentence and to seek clemency from the executive. This includes the actual implementation of death sentences while appeals or clemency petitions are still pending. This chapter then considers the use of the death penalty against people who were below 18 years of age when the crime was committed and against those with mental disabilities.

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Social Council Resolution 1984/50 of 25 May 1984, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/DeathPenalty.aspx> (accessed on 25 June 2015). See also Chapter 3 of this report.

<sup>46</sup> Article 6(2) ICCPR; see also UN Special Rapporteur on the independence of judges and lawyers, UN Doc. A/62/207 (2007), para. 62.

<sup>47</sup> The Attorney General Office 2014 Annual Report, pp. 46-47, supra note No. 39.

## 2.1 ACCESS TO A LAWYER OF ONE'S CHOICE

All persons arrested or detained on a criminal charge have the **right to competent and effective legal counsel** from the start of a criminal investigation and as soon as they are deprived of their liberty.<sup>48</sup> This enables the individual to protect their rights and to prepare their defence, and serves as an important safeguard against torture and other ill-treatment, and against coerced “confessions” or other self-incriminating statements. This right extends to all stages of criminal proceedings, including the preliminary investigation, before and during the trial and appeals.<sup>49</sup> If the defendant cannot afford to pay, a lawyer must be assigned to them free of charge.<sup>50</sup> The defendant must have adequate time and facilities, including language interpretation, to prepare his or her defence.<sup>51</sup> The authorities have a particular obligation in death penalty cases to ensure that the appointed counsel is competent and effective.<sup>52</sup>

Provisions in Indonesian legislation guarantee the right to competent legal counsel:

- Articles 54 and 55 of the Indonesian Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana*, KUHAP)<sup>53</sup> guarantee that a suspect or an accused person has the right to legal counsel of his/her choice at all criminal investigation proceedings. Article 56 stipulates that “if a suspect or an accused is charged with a criminal offence punishable by the death penalty, 15 years’ imprisonment or more, or cannot afford to pay for counsel and is charged with a criminal offence punishable by five years’ imprisonment or more; all relevant officials at all criminal proceedings should appoint counsel for them”.
- Article 17(1)(b) of Law no. 23/2002 on the Protection of the Rights of the Child stipulates that “every child deprived of his/her liberty has the right to receive effective legal or other aid at any criminal proceedings”.
- Articles 56(1) and (2) and 57(2) of Law No. 48/2009 on the Judicial Authority stipulate that anyone facing a criminal charge against him/her is entitled to legal aid and the state should cover all legal fees for those who cannot afford them until a “permanent legal force” (*kekuatan hukum tetap*) has been reached.<sup>54</sup>
- Articles 68(B)(1) and (2) of Law No. 49 of 2009 on the Second Amendment of Law No.

<sup>48</sup> See Amnesty International Fair Trial Manual, supra note No. 44, Chapter 3.2.

<sup>49</sup> Principle 1 of the UN Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

<sup>50</sup> Article 14(3)(d) of the ICCPR.

<sup>51</sup> See also Chapter 3.2.

<sup>52</sup> See Amnesty International Fair Trial Manual, supra note No. 44, Chapter 28.6.1.

<sup>53</sup> The Indonesian Criminal Procedure Code (KUHAP) is based on Law No. 8/1981.

<sup>54</sup> This law replaced Law No. 4/2004 on the Judicial Authority which replaced Law No. 14/1970 on the Basic Provisions of Judicial Authority. For the explanation of the “permanent legal force” term, see supra note No. 27.

2 of 1986 on General Courts provide identical provisions to Articles 56(1) and (2) of the Judicial Authority Law.

- Articles 4 and 5 of Law No. 16/2011 on Legal Aid stipulate that legal aid should be provided for anyone who cannot afford to pay legal fees.

Despite these guarantees in Indonesian and international law, the 12 cases documented in this report provide evidence of multiple breaches:

- **Agus Hadi and Pujo Lestari** were arrested for trying to smuggle 12,490 benzodiazepine pills (sedatives colloquially known among drug users as ‘Happy Five Erimin’) from Malaysia. They were detained at the narcotics directorate of the Riau Islands Police Headquarters on 22 November 2006, interrogated there until 12 December and subsequently transferred to the Batam prosecution detention centre. However, court documents indicate that Agus Hadi only received assistance from a lawyer on 12 December, 20 days after his arrest, while the Batam District Court appointed Pujo Lestari’s legal counsel on 8 February 2007, 78 days after his arrest and a week after the court had scheduled the first trial hearing.<sup>55</sup>
- **Zainal Abidin** was arrested and charged with possession of 58.7kg of cannabis on 21 December 2000. The police investigation dossier (*Berita Acara Pemeriksaan*, BAP) records that he had access to legal counsel upon his arrest. However, Zainal Abidin’s lawyer claimed his client had only received assistance from a lawyer two days after his arrest and that the police dossier was compiled after the police investigator had beaten Zainal Abidin.<sup>56</sup>
- **Ruben Pata Sambo** and his son **Markus Pata Sambo** were arrested on 13 and 14 January 2006 respectively, for the murder of four family members. They only received legal assistance appointed by the Makale District Court on 28 March 2006, over two months after their arrest.<sup>57</sup> At the appeal proceeding at the High Court and the Supreme Court, they also claimed they were subjected to physical and mental intimidation while in police detention so as to “confess” to the murders.<sup>58</sup> The appeal courts did not take their claims into consideration when considering their case, nor did they request an independent investigation into the allegation of physical and mental intimidation.<sup>59</sup>
- Pakistani national **Zulfiqar Ali** was arrested at his home in the West Java province on 21

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<sup>55</sup> The Batam District Court, *Putusan [Decision]* on Agus Hadi alias Oki and Pujo Lestari Bin Kateno, case number: 82/Pid.B/2007/PN.BTM, 23 May 2007, pp. 2-3.

<sup>56</sup> Yayasan Lembaga Bantuan Hukum Peradil (Zainal Abidin’s legal team), *Pledoi* (legal defence) of Zainal Abidin in the case No. 550/Pid.B/2001/PN.PLG, 22 August 2001, p.3.

<sup>57</sup> The Makale District Court, *Putusan* (Decision) No. 23 Pid.B/2006/PN.Mkl for the case of Markus Pata Sambo, 31 July 2006, pp. 1-2 and No. 25/Pid.B/2006/PN.Mkl for the case of Ruben Pata Sambo, 3 August 2006, pp. 1-2.

<sup>58</sup> The Supreme Court, *Putusan* (Decision) No. 79 PK/Pid/2008, 7 September 2009, p. 74.

<sup>59</sup> The Supreme Court, *Putusan* (Decision) No. 79 PK/Pid/2008, 7 September 2009, p. 82-83.

November 2004, and charged with possession of 300g of heroin. During his pre-trial detention, Zulfiqar Ali was not permitted any access to a lawyer until approximately one month after his arrest.<sup>60</sup>

- Nigerian national **Raheem Agbaje Salami** (also known as Jamiu Owolabi Abashin) was arrested on 2 September 1998 after being caught carrying 5.28kg of heroin. He did not receive any legal assistance until 15 October 1998.<sup>61</sup> He was found guilty of drug trafficking by the Surabaya District Court in April 1999 and sentenced to life imprisonment.<sup>62</sup> After the prosecutor and Raheem separately appealed against the first court's judgement to the East Java High Court, the Court of Appeal did not appoint any lawyer to assist Raheem Agbaje Salami during his appeal and he defended himself as he could not afford to pay for a lawyer. Nor did Raheem Agbaje Salami have any legal counsel during the Supreme Court reviews of this case, again because he could not afford a lawyer.<sup>63</sup>
- Nigerian national **Namaona Denis** was initially convicted by the Tangerang District Court for importing heroin into Indonesia, and sentenced to life imprisonment.<sup>64</sup> His lawyer at the time alleged he accepted the decision and did not want to appeal.<sup>65</sup> However, according to his last lawyer, while in prison Namaona was approached by people who appear to have been from the prosecutor's office and asked to sign a document in Bahasa Indonesia, a language he did not understand, without advice from any legal counsel. He then found out the document was used by the prosecutor to claim that he had in fact submitted an appeal, which was then considered and rejected.<sup>66</sup>
- **Christian**<sup>67</sup> was arrested in November 2007 for drug trafficking and moved to the National Narcotics Agency Board (*Badan Narkotika Nasional*, BNN) detention centre during the investigation. He asked for a lawyer of his choice, but the investigator denied his request and appointed a lawyer for him. Christian told the National Commission on Human Rights (Komnas HAM), he was told by the police that he could only use a lawyer

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<sup>60</sup> Interview with Ardi Manto Ardiputra from Imparsial, member of the Zulfiqar Ali's advocacy team, 16 March 2015. Anti Death Penalty Asia Network (ADPAN), Zulfiqar Ali; Indonesia, October 2012, Index: ASA 21/024/2012.

<sup>61</sup> The Surabaya District Court, *Putusan* (Decision) No. 1014/Pid.B/1998/PN.Sby, 22 April 1999, pp. 1-2.

<sup>62</sup> The Surabaya District Court, *Putusan* (Decision) No. 1014/Pid.B/1998/PN.Sby, 22 April 1999, pp. 16-17.

<sup>63</sup> Interview with Utomo Karim, Raheem Agbaje Salami's last lawyer, 17 March 2015.

<sup>64</sup> Tangerang District Court, *Putusan* (decision), No. 453/Pid.B/2001/PN.TNG, 4 September 2001, p. 26.

<sup>65</sup> A letter signed by Namaona Denis's former lawyer during the first trial (Husen Tuhuteru) dated on 1 June 2012. Interview with Akbar Tanjung, Namaona Dennis' last lawyer, 19 March 2015.

<sup>66</sup> Interview with Akbar Tanjung, *supra* note No. 65. See also a letter sent by his wife to the Attorney General, dated 28 November 2012.

<sup>67</sup> He does not have a second name.

from that office.<sup>68</sup> This lawyer's only advice to Christian was to answer any questions from the investigator with "yes". Christian later told Komnas HAM that he was unsure whether his legal counsel was actually a lawyer.<sup>69</sup>

- **Yusman Telaumbanua** and another man were arrested and detained on 14 September 2012 by the Gunungsitoli District Police for the murder of three men in April 2012 in the North Nias district, North Sumatra province. The two men only received legal assistance – from the same legal team - when the District Court appointed a lawyer on 29 January 2013.<sup>70</sup> When delivering the indictment, the prosecutor sought life imprisonment for the two men. Their lawyers, however, asked the judges to sentence them to death, although both of the defendants asked the judges for lenient sentences.<sup>71</sup> Based on their lawyers' request, the Court eventually sentenced them to death. Neither of the men submitted an appeal to a higher court, as they did not know they had the right to do so and the lawyers representing them at the time did not inform them of this right.<sup>72</sup> Yusman's current lawyers from KontraS have complained to Peradi, a bar association, regarding the conduct of his first lawyers and to the Judicial Commission<sup>73</sup> regarding the conduct of the judges.<sup>74</sup>

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<sup>68</sup> Komnas HAM 2010 Report, *Laporan Pemantauan Terpidana Mati* [Monitoring the Death Row Inmates], 2010, p. 19.

<sup>69</sup> Communication with Azas Tigor Nainggolan, Christian's current lawyer, 16 July 2015. Komnas HAM 2010 Report, *Laporan Pemantauan Terpidana Mati* [Monitoring Report on Death Row Inmates], pp. 19-20.

<sup>70</sup> The Gunungsitoli District Court, *Putusan* (Decision) No. 07/Pid.B/2013/PN-GS, 17 May 2013 pp. 1-2, and No. 08/Pid.B/2013/PN-GS, 17 May 2013, pp. 1-2.

<sup>71</sup> The Gunungsitoli District Court, *Putusan* (Decision) No. 07/Pid.B/2013/PN-GS, 17 May 2013 pp. 4 and 70, and No. 08/Pid.B/2013/PN-GS, 17 May 2013, pp. 4 and 65.

<sup>72</sup> Interview with Arif Nur Fikri, Yusman Telaumbanua's current lawyer, 16 March 2015.

<sup>73</sup> Judicial Commission has mandates, including to monitor and oversee the conduct of judges. It was set up in 2005 based on Article 24(A)(3) of the Indonesia Constitution and Law No. 22/2004 on Judicial Commission which was amended by Law No. 18/2011.

<sup>74</sup> KontraS, press release, *Rekayasa Kasus Yang Berujung pada Hukuman Mati terhadap Yusman Telaumbanua dan Rasula Hia* [Miscarriage of Justice Resulting to Death Sentence on Yusman Telaumbanua and Rasula Hia], 16 March 2015, available at: <http://kontras.org/home/index.php?module=pers&id=2013> (accessed on 22 September 2015).



Yusman Telaumbanua © KontraS

The types of violations of fair trial rights highlighted in the above cases have also been identified in research done by a number of other organizations and institutions. The National Commission on Human Rights (*Komisi Nasional Hak Asasi Manusia*, Komnas HAM) concluded in its 2011 report on the death penalty and unfair trials<sup>75</sup> that in 10 out of 56 cases of people sentenced to death, the defendant did not receive legal counsel at the beginning of the police interrogation or the investigation.<sup>76</sup> A study conducted by the think tank, Indonesian Institute for Independent Judiciary (*Lembaga Kajian dan Advokasi untuk Independensi Peradilan*, LeIP), highlights 10 cases of people charged with offences punishable by death in which the defendants did not receive legal counsel at their court trials.<sup>77</sup> A report by the NGO, the Institute for Criminal Justice Reform (ICJR), further analyses the court documents of 42 death penalty cases and concludes that in 11 of those cases the suspects were denied legal counsel at various levels of the proceedings, mostly

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<sup>75</sup> Komnas HAM issued two reports in 2010 and 2011. The 2011 report was based on a research mission conducted between September and December 2011 into 17 prisons in 13 provinces (North Sumatra, West Sumatra, Riau, Jambi, South Sumatra, Banten, Jakarta, West Java, Central Java, East Java, West Kalimantan, Bali and East Nusa Tenggara), during which 56 death row prisoners were interviewed. The 2010 report was based on a monitoring mission to 10 prisons in five provinces and on interviews with 41 death row inmates between September and October 2010.

<sup>76</sup> Komnas HAM found that in 10 out of 56 cases the defendant received no legal counsel during the police investigation. Komnas HAM 2011 report, *Laporan Pemantauan Terpidana Mati* [Monitoring Report on Death Row Inmates], pp. 17, 23, 24, 25, 27, 42 and 55.

<sup>77</sup> LeIP, *Monitoring Legal Aid in Indonesia; the Rights of the Suspect/Defendant to Access Legal Counsel*, 2011, p. 17. LeIP conducted research between September and December 2010 on the right to counsel only in Jakarta, Indonesia's capital, with the highest ratio of lawyer per population in the country. They monitored 1,490 trials and interviewed 115 detainees.

during the police investigation.<sup>78</sup>

The lack of legal representation is partly attributable to the scarce resources allocated to legal aid in Indonesia. The LeIP study found that in 1,171 out of 1,490 trials the defendant did not have legal counsel, even if in 776 cases the presence of legal counsel was required by Article 56 of the Criminal Procedure Code. As of November 2011 membership of the Indonesian Association of Advocates, Peradi, amounted to approximately 23,000 lawyers for a population of 248 million.<sup>79</sup> Furthermore, according to the LeIP report the majority of these lawyers (approximately 8,000) are concentrated on Java Island, with around 4,000 lawyers in Jakarta, the capital of Indonesia.<sup>80</sup> The low percentage of lawyers per capita in the country is even more concerning given that only an estimated 200 lawyers provide pro bono (free of charge) legal aid services for the whole country.<sup>81</sup>

With regards to the importance in having access to competent legal advice for anyone facing a criminal charge, particularly when conviction on that charge may lead to the death penalty and is based on proceedings which do not respect basic fair trial standards violates the right to life, the geographical disparity in the provision of free and competent legal assistance raises concerns in relation to the equal protection of the law against arbitrary deprivation of life.

While the adoption in 2011 of Law No. 16/2011 on Legal Aid, which requires the state to allocate a budget for legal aid services, represents a positive development,<sup>82</sup> ongoing problems remain with its implementation. These challenges include insufficient budget and the difficulty of identifying eligible legal aid organizations.<sup>83</sup>

As part of their obligation to ensure a fair trial the authorities must ensure that any person facing trial for a criminal offence has access to a competent lawyer who is able to advise

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<sup>78</sup> Institute for Criminal Justice Reform (ICJR), Overview on Death Penalty in Indonesia, 2015, p. 11, available at: <http://icjr.or.id/data/wp-content/uploads/2015/06/Overview-on-Death-Penalty-in-Indonesia.pdf> (accessed on 7 June 2015).

<sup>79</sup> Peradi, Information Sheet on Indonesia; Number of lawyers, available at: [http://www.nichibenren.or.jp/library/ja/bar\\_association/word/data/Indonesia.pdf](http://www.nichibenren.or.jp/library/ja/bar_association/word/data/Indonesia.pdf) (accessed on 9 July 2015); BPS [*Badan Pusat Statistik* (Bureau of Statistic)], population of Indonesia 2000-2013, available at: <http://www.bps.go.id/linkTabelStatis/view/id/1284> (accessed on 9 July 2015).

<sup>80</sup> LeIP, supra note No. 77, pp. 15-16.

<sup>81</sup> LeIP, Monitoring Legal Aid in Indonesia, supra note No. 77, p. 15.

<sup>82</sup> It is compulsory for the central, but not regional, government to allocate legal aid budget. Articles 16-19 of the Legal Aid Law.

<sup>83</sup> In 2013 the central government allocated 40 billion rupiah (US\$3 million) to legal aid services but used less than a third of it, before allocating 50 billion rupiah (US\$3.75 million) in 2014. See KontraS (the Commission for the Disappeared and Victims of Violence), PSHK (Indonesian Centre for Law and Policies Studies), AIPJ (Australia Indonesia Partnership for Justice), *Bantuan Hukum Masih Sulit Diakses: Hasil Pemantauan di Lima Provinsi Terkait Pelaksanaan Undang-Undang No. 16 Tahun 2011 Tentang Bantuan Hukum* [Legal aid still difficult to be accessed: Monitoring results in five provinces with regard to the implementation of Law No. 16/2011 on Legal Aid], May 2014, pp. 41-42.

them, assist them in the appropriate way, and represent their interests.<sup>84</sup> In several of the cases described above, including Yusman Telaumbanua and another man, lawyers failed to provide effective representation to people facing the death penalty. The state and the court have a particular obligation in death penalty cases to ensure that appointed counsel are competent, effective and are able to carry out their role. If it is clear that this is not the case, the court must ensure that they carry out their duties or are replaced.<sup>85</sup> The UN Human Rights Committee has stated that if counsel shows “blatant misbehaviour or incompetence” the state may be responsible for a violation of the right to fair trial under the ICCPR.<sup>86</sup>

## 2.2 THE RIGHT TO BE BROUGHT PROMPTLY BEFORE A JUDGE

Everyone arrested or detained in connection with a criminal charge **must be brought promptly before a judge or other judicial officer**, so that their rights can be protected.<sup>87</sup> Judicial oversight of detention serves to safeguard the presumption of innocence and also aims to prevent human rights violations including torture or other ill-treatment. The Human Rights Committee has stated that “48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and be justified under the circumstances. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment”.<sup>88</sup> With specific regard to Indonesia, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, following a visit to the country in 2007, recommended that the length of police detention should, as a matter of urgent priority, be reduced to maximum 48 hours in accordance with international standards, after which detainees should be transferred to a facility under a different authority with no further unsupervised contact with interrogators or investigators. He also recommended that judges and prosecutors should routinely ask persons arriving from police custody how they have been treated, and that if they suspect that they have been subjected to ill-treatment, they should order an independent medical examination even in the absence of a formal complaint from the defendant.<sup>89</sup>

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<sup>84</sup> See, for example, Basic Principles on the Role of Lawyers 12-15, *supra* note No. 59.

<sup>85</sup> See the Human Rights Committee, *Pinto v Trinidad and Tobago*, UN Doc. CCPR/C/39/D/232/1987 (1990) para. 12.5.

<sup>86</sup> The UN Human Rights Committee, General Comment No. 32, on Article 14 (Right to equality before courts and tribunals and to a fair trial), UN Doc. CCPR/C/GC32, 23 August 2007, para. 38.

<sup>87</sup> Article 9(3) of the ICCPR.

<sup>88</sup> Human Rights Committee, General Comment No. 35, UN Doc. CCPR/C/GC/35, para. 33 (2014).

<sup>89</sup> Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Mission to Indonesia, UN Doc. A/HRC/7/3/Add.7, 10 March 2008, paras 59, 78, 80.

According to the Criminal Procedure Code a suspect may be arrested and held by the police for one day.<sup>90</sup> Subsequently, an investigator (usually a police officer) may detain the suspect for up to 20 days, with the possibility of an extension granted by the Chief Prosecutor Office for a further 40 days.<sup>91</sup> In total the police can detain a suspect for 61 days. The suspect may then be detained by the prosecutor for an additional 20 days, with the possibility of an extension granted by the head of the district court for a further 30 days.<sup>92</sup> Further, a suspect who is charged with a crime punishable by nine years' imprisonment or more can be detained for another 60 days by the chief judge of a district court without the suspect appearing in court.<sup>93</sup> This means that a suspect in a death penalty case can be detained up to 171 days before seeing a judge. In the absence of the 48 hours requirement, a person may be detained for months without being afforded a review of the legality of their detention.<sup>94</sup>

In the 12 cases under discussion, Amnesty International found that defendants were brought before a judge for the first time only when the trial began, often several months after their arrest:

- **Agus Hadi and Pujo Lestari** were arrested and detained at the narcotics directorate of the Riau Islands Police Headquarters on 22 November 2006. They did not appear before a judge until their first trial hearing in the Batam District Court, which was scheduled for 30 January 2007.<sup>95</sup> This means they were detained for at least nine weeks before appearing before a judge.
- **Zainal Abidin** was arrested on 21 December 2000 by the police. According to the court document, the Head of Palembang District Court granted the prosecutor an extension of Zainal's detention from 2 June to 31 July 2001. This means he was detained for at least five months before appearing before a judge at the first trial hearing, although there is no information as to when the first trial hearing started.<sup>96</sup>
- Brazilian national **Rodrigo Gularte** was arrested and detained on 1 August 2004 by the police. The Chief of Tangerang District Court granted the prosecutor an extension to Rodrigo's detention from 21 October to 19 November 2004.<sup>97</sup> This means he was detained for at least two months before appearing before a judge at the first trial

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<sup>90</sup> Articles 18 and 19 of the Criminal Procedure Code.

<sup>91</sup> Article 24(1) and (2) of the Criminal Procedure Code.

<sup>92</sup> Article 25(1) and (2) of the Criminal Procedure Code.

<sup>93</sup> Article 29(1-3) of the Criminal Procedure Code.

<sup>94</sup> Amnesty International, *Indonesia: Briefing to the UN Committee Against Torture*, 2008, Index: ASA 21/003/2008, p. 14.

<sup>95</sup> The Batam District Court, *Putusan [Decision]* on Agus Hadi alias Oki and Pujo Lestari Bin Kateno, case number: 82/Pid.B/2007/PN.BTM, 23 May 2007, pp. 2-3.

<sup>96</sup> The Palembang District Court, *Putusan (Decision)* No. 550/Pid.B/2001/PN.PLG, 6 September 2001, p. 1.

<sup>97</sup> Chief of the Tangerang District Decree (*Penetapan*) No. PEN. 1194/PID.B/2004/PN.TNG, 21 October 2004.

hearing, although there is no information as to when the first trial hearing started.

- **Ruben Pata Sambo** and his son **Markus Pata Sambo** were arrested on 13 and 14 January 2006 respectively. According to the court document the Chief of Makale District Court granted the prosecutor an extension of Ruben and Markus Pata Sambo's detention from 16 April to 14 June 2006.<sup>98</sup> This means they were detained for at least three months before being brought to the first trial hearing, although there is no information as to when the first trial hearing started.
- Pakistani national **Zulfiqar Ali** was arrested on 21 November 2004. According to the court document the Chief of Tangerang District Court granted the prosecutor an extension of Zulfiqar's detention from 4 March to 2 May 2005.<sup>99</sup> This means he was detained for at least three months before being brought to the first trial hearing, although there is no information as to when the first trial hearing started.
- A Filipina national **Mary Jane Fiesta Veloso** was arrested and detained on 26 April 2010 by airport police. According to the court document the Deputy Chief of Sleman District Court granted the prosecutor an extension of Mary Jane's detention from 30 July to 27 September 2010.<sup>100</sup> This means she was detained for at least three months before being brought to the first trial hearing, although there is no information as to when the first trial hearing started.
- Nigerian national **Raheem Agbaje Salami** (also known as Jamiu Owolabi Abashin) was arrested on 2 September 1998. According to the court document the Chief of Surabaya District Court granted the prosecutor an extension of Raheem's detention from 25 January to 22 February 1999.<sup>101</sup> This means he was detained for at least five months before being brought to the first trial hearing, although there is no information as to when the first trial hearing started.
- Nigerian national **Namaona Denis** was arrested on 16 April 2001 by the police. According to the court document the Chief of Tangerang District Court granted the prosecutor an extension of Namaona's detention from 18 July to 15 September 2001.<sup>102</sup> This means he was detained for at least three months before being brought to the first trial hearing, although there is no information as to when the first trial hearing

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<sup>98</sup> The Makale District Court, *Putusan* (Decision) No. 23 Pid.B/2006/PN.Mkl for the case of Markus Pata Sambo, 31 July 2006, p. 2; No. 25/Pid.B/2006/PN.Mkl for the case of Ruben Pata Sambo, 3 August 2006, p. 2.

<sup>99</sup> The Supreme Court, *Putusan* (Decision) No. 2253 K/Pid/2005, 20 January 2006, p. 1.

<sup>100</sup> The Sleman District Court, *Putusan* (Decision) No. 385/Pid.B/2010/PN.SLMN, 11 October 2010, p.2.

<sup>101</sup> The Surabaya District Court, *Putusan* (Decision) No. 1014/Pid.B/1998/PN.Sby, 22 April 1999, p. 1.

<sup>102</sup> The Tangerang District Court, *Putusan* (decision), No. 453/Pid.B/2001/PN.TNG, 4 September 2001, p. 1.

started.

- **Christian**<sup>103</sup> was arrested on 26 November 2007 by the police. According to the court document the Chief of West Jakarta District Court granted the prosecutor an extension of Christian's detention from 28 April to 27 May 2008.<sup>104</sup> This means he was detained for at least four months before being brought to the first trial hearing, although there is no information as to when the first trial hearing started.
- **Yusman Telaumbanua** and his co-accused were arrested on 14 September 2012. The Gunungsitoli District Court had scheduled the first trial hearing only on 18 January 2013.<sup>105</sup> This means they were detained for at least four months before appearing before a judge at the first trial hearing.

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<sup>103</sup> He does not have a second name.

<sup>104</sup> The Supreme Court, *Putusan* (Decision) No. 2253 K/Pid/2005, p. 1.

<sup>105</sup> The Gunungsitoli District Court, *Putusan* (Decision) No. 07/Pid.B/2013/PN-GS, 17 May 2013 pp. 1-2, and No. 08/Pid.B/2013/PN-GS, 17 May 2013, p. 2.

## 2.3 THE PROHIBITION OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT; EXCLUSION OF EVIDENCE ELICITED AS A RESULT OF SUCH TREATMENT OR OTHER FORMS OF COERCION

Everyone has the right to physical and mental integrity, and no one may be subjected to torture or to other cruel, inhuman or degrading treatment or punishment.<sup>106</sup> The prohibition on torture and other ill-treatment is a norm of customary international law that applies to all people in all circumstances. There are no exceptional circumstances, including threats of terrorism or other violent crime, which can be used to justify any departure from this absolute prohibition, which applies irrespective of the offence allegedly committed.<sup>107</sup>

Whenever an individual alleges they have been subjected to torture or other ill-treatment, there must be a prompt, independent, impartial and effective investigation with a view to ensuring that those responsible are brought to justice, and victims must have access to an effective remedy and receive reparation.<sup>108</sup>

Statements elicited as a result of torture, ill-treatment or other forms of coercion must be excluded as evidence in criminal proceedings, except those brought against suspected perpetrators of such abuse (as evidence that the statement was made).<sup>109</sup> The UN Human Rights Committee has stated that this exclusion applies not only to statements and confessions, but also, in principle, to other forms of evidence elicited as a result of torture or other ill-treatment, at all times.<sup>110</sup>

Amnesty International spoke to several prisoners who stated they had been subjected to certain forms of coercion, mainly during their police interrogation.<sup>111</sup> In many of the cases below people told their lawyers or family members they were subjected to torture or other ill-treatment, but as far as Amnesty International is aware, none of these allegations were ever investigated by the authorities:

- During the police interrogation, **Zainal Abidin** was allegedly beaten and intimidated by the police so, according to the defence pleadings to the court, he made up a story to avoid physical suffering.<sup>112</sup> Zainal stated to the judges during the district court trial that

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<sup>106</sup> Article 5 of the Universal Declaration of Human Rights, Article 7 of the ICCPR, Article 2 of the Convention against Torture, Articles 37(a) and 19 of the Convention on the Rights of the Child, Article 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>107</sup> Article 2(2) of the Convention Against Torture.

<sup>108</sup> Articles 2 and 7 of the ICCPR; Articles 12-14 of the Convention against Torture; Human Rights Committee General Comment 31, on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paras 15-16.

<sup>109</sup> Article 15 of the Convention Against Torture; Article 14(3) of the ICCPR. See Amnesty International, *Fair Trial Manual*, supra note No. 44, Chapter 17.

<sup>110</sup> Human Rights Committee General Comment No. 32 supra note No. 86, para. 6.

<sup>111</sup> Amnesty International, *Unfinished Business; Police Accountability in Indonesia*, June 2009, Index: ASA 21/013/2009. Chapter 3.2.

<sup>112</sup> *Pledoi* (legal defence) of Zainal Abidin, supra note No. 56, p.3; the Supreme Court, *Putusan* (Decision) No. 503 K/Pid/2002, 10 May 2002, pp. 13-15.

he retracted the statement he had previously made to the police. However, the court did not order any investigation into his allegation and still admitted his statement as evidence in the investigation dossier compiled by the police, even though a police investigator admitted during the trial that Zainal was not accompanied by a lawyer during the first interrogation session.<sup>113</sup>

- During an interrogation conducted by the Soekarno-Hatta Airport district police, Pakistani national **Zulfiqar Ali** was kept in a house for three days and punched, kicked and threatened with death unless he signed a “confession”, which he later did.<sup>114</sup> After three days his health deteriorated to the extent that he was sent to a police hospital for 17 days on 24 November 2004,<sup>115</sup> where he required stomach and kidney surgery due to damage caused by the beatings.<sup>116</sup> He described this torture during the trial, but the judges allowed the “confession” to be admitted as evidence, and there has been no independent investigation into his allegation.<sup>117</sup>
- **Yusman Telaumbanua** told his current lawyer that he and another man were beaten and kicked on a daily basis by police officers, or by detainees ordered by the police, while in custody.<sup>118</sup> The other man was also beaten by the prosecutor during the handover of the investigative dossier from the police, because he refused to sign it.<sup>119</sup> Although his lawyers have submitted a complaint to the police, there has been no independent investigation into his allegations.<sup>120</sup>
- **Ruben Pata Sambo** and **Markus Pata Sambo** told their lawyer they were often stripped naked, beaten and kicked by the investigator while in police detention for 18 days during the police interrogation. They were allegedly forced by the police investigator to sign the investigation dossier declaring that they had ordered another man to murder four members of the same family.<sup>121</sup> Their current lawyers have filed a complaint to the police, but no independent investigation has been conducted to look into the

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<sup>113</sup> The Palembang District Court, *Putusan* (Decision) No. 550/Pid.B/2001/PN.PLG, supra note No. 56, pp. 19-25; the Supreme Court, *Putusan* (Decision) No. 503 K/Pid/2002, supra note No. 112, pp. 13-16.

<sup>114</sup> ADPAN, supra note No. 60. Interview with Ardi Manto Ardiputra from Imparsial, supra note No. 60.

<sup>115</sup> Report of the UN Special Rapporteur on Torture, supra note No. 89, para. 109.

<sup>116</sup> ADPAN, Zulfiqar Ali; Indonesia, supra note No. 60.

<sup>117</sup> Komnas HAM 2011 report, supra note No. 76, p. 8; Interview with Ardi Manto Ardiputra, supra note No. 60.

<sup>118</sup> Interview with Arif Nur Fikri, supra note No. 72.

<sup>119</sup> Interview with Arif Nur Fikri, supra note No. 72.

<sup>120</sup> KontraS, press release, *Update Temuan Terkait Dugaan Rekayasa Kasus yang Berujung Vonis Mati terhadap Yusman Telaumbanua dan Rasula Hia* [Update on the Findings Related to the Irregularity of the Death Penalty cases of Yusman Telaumbanua and Rasula Hia], 28 March 2015, available at: [http://kontras.org/index.php?hal=siaran\\_pers&id=2020](http://kontras.org/index.php?hal=siaran_pers&id=2020) (accessed on 14 July 2015).

<sup>121</sup> Interview with Alex Argo Hernowo from former lawyer of Ruben and Markus Pata Sambo, 20 March 2015.

allegations.<sup>122</sup>

- **Christian** stated to the Komnas HAM that he was attacked during his arrest by a group of people who did not reveal their identity. After he was interrogated and charged with storing 100,000 ecstasy pills he concluded that those who attacked him were police officers.<sup>123</sup> During the interrogation, Christian was allegedly forced to “confess” to possessing the drugs, by being beaten by the police with a rifle butt. After a gun was pointed to his head, he signed the “confession”.<sup>124</sup>

The use of torture and other ill-treatment to extract “confessions” has also been documented in many other death penalty cases investigated by the Komnas HAM.<sup>125</sup> The 2011 Komnas HAM report indicates that 23 out of 56 death row prisoners interviewed told them that they had been subjected to torture or other ill-treatment during the police investigation.<sup>126</sup> Meanwhile, the ICJR report found indications that torture and other ill-treatment had been used in 11 out of 42 death penalty cases.<sup>127</sup> In the 2008 report on Indonesia by the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Special Rapporteur also noted information he had received from four death row prisoners indicating that they had been tortured or otherwise ill-treated to extract “confessions”.<sup>128</sup>

International law imposes a clear obligation on states to investigate allegations of torture or other ill-treatment.<sup>129</sup> Even without an express complaint by the victim, there must be an investigation whenever there are reasonable grounds to believe that an act of torture or other ill-treatment may have taken place.<sup>130</sup> A failure by a state to investigate allegations of torture

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<sup>122</sup> KontraS, press release, *Ruben Cs, Korban Rekamaya Kasus Berujung Vonis Mati* [Ruben and co, Victims of Miscarriage of Justice Resulting in the Death Penalty], 13 June 2013, available at: [http://kontras.org/index.php?hal=siaran\\_pers&id=1728](http://kontras.org/index.php?hal=siaran_pers&id=1728) (accessed on 14 July 2013). KontraS, *Angka Penyiksaan Meningkat, Aktor Semakin Meluas; Laporan Praktik Penyiksaan dan Perbuatan Tidak Manusiawi Lainnya di Indonesia 2013-2014* [the number of torture cases increases, the actors vary; Annual report 2013-2014 on torture and other ill-treatment in Indonesia], pp. 35-37, available at: [http://kontras.org/lampiran/Final%20Penyiksaan\\_OK.pdf](http://kontras.org/lampiran/Final%20Penyiksaan_OK.pdf) (accessed on 14 July 2015).

<sup>123</sup> Komnas HAM 2011 Report, supra note No. 76, pp. 17-18.

<sup>124</sup> Komnas HAM 2011 Report, supra note No. 76, pp. 37-38. Communication with Azas Tigor Nainggolan, Christian’s current lawyer, supra note No. 80.

<sup>125</sup> Interview with Roichatul Aswidah, Commissioner of the Komnas HAM, 18 March 2015.

<sup>126</sup> Komnas HAM 2011 report, supra note No. 76, pp. 17-22 and 36-40.

<sup>127</sup> Institute for Criminal Justice Reform (ICJR), *Overview on Death Penalty in Indonesia, 2015*, supra note No. 78, p. 10, weblink: <http://icjr.or.id/data/wp-content/uploads/2015/06/Overview-on-Death-Penalty-in-Indonesia.pdf> (accessed on 7 June 2015).

<sup>128</sup> Report of the UN Special Rapporteur on Torture, supra note No. 89, paras. 101, 105, 108 and 109. Some of them have been executed in 2013 (Adami Wilson and Muhammad Abdul Hafeez) and 2015 (Ang Kim Soei and Rodrigo Gularte).

<sup>129</sup> Article 12 of the Convention Against Torture.

<sup>130</sup> Article 12 of the Convention Against Torture.

or other ill-treatment is a violation of the right to an effective remedy and the right not to be subjected to torture or other ill-treatment.<sup>131</sup>

Although many laws and regulations in Indonesia prohibit acts of torture or other ill-treatment, Amnesty International remains concerned that these practices are not criminalized under the Indonesian Criminal Code (KUHP).<sup>132</sup> UN and other experts have indicated that the lack of the criminalization of torture facilitates its routine and widespread use during police investigations.<sup>133</sup>

A key problem in combating torture and other ill-treatment in Indonesia is the lack of an independent, effective, and impartial mechanism that can investigate complaints of torture or other ill-treatment and refer these for criminal prosecution. Its absence, together with the fact that torture is not defined as a specific criminal offence in national legislation, fosters a climate of impunity for perpetrators of torture and other ill-treatment.<sup>134</sup>

Presently, any complaints about torture or other ill-treatment at the hands of the police can only be dealt with by the internal police mechanism for criminal investigation. While bodies such as Komnas HAM, the National Ombudsman or the National Police Commission (Komisi Kepolisian Nasional, Kopolnas) are able to receive and investigate complaints from the public, they are not empowered to refer these cases directly to the Public Prosecutor's Office. If they believe that a case should be prosecuted, this can only be done via the police, which is the only body that can refer cases for prosecution.

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<sup>131</sup> The UN Human Rights Committee, *Avdanov v Azerbaijan*, UN Doc. CCPR/C/100/D/1633/2007 (2010) paras. 9.3-9.5.

<sup>132</sup> Prohibition of torture is mentioned in Article 28G(2) and 28I(1) of the Second Amendment of the 1945 Constitution, Article 34 of Law No. 39/1999 on Human Rights, Article 3 of the Chief of Police's Regulation No. 3/2008 on the Establishment of a Special Service Room and Examination Procedure on Victims and/or Witnesses of a Criminal Offence, Articles 5, 10, 11, 13, 23, 24, 37 and 38 of the Chief of Police's Regulation No. 8/2009 on the Implementation of Human Rights Principles and Standards in the Discharge of Duties of the Indonesian National Police and Articles 29, 96 and 97 of the Chief of Police's Regulation No. 12/2009 on Monitoring and Regulating of the Criminal Case Handling within the Police Force.

<sup>133</sup> Report of the UN Special Rapporteur on Torture, *supra* note No. 89, para. 64. LBH (Legal Aid Institute) Jakarta and KontraS (the Commission for the Disappeared and Victims of Violence), two NGOs, have regularly monitored torture practices in Indonesia. LBH Jakarta, available at: <http://www.bantuanhukum.or.id/web/pdf-ebook/> (accessed on 7 July 2015), see section *Advokasi Penghapusan Penyiksaan* [Advocacy on the Abolition of Torture]; KontraS annual report on torture, available at: [http://kontras.org/buku/isi\\_laporan\\_praktik\\_penyiksaan\\_2014\\_2015.pdf](http://kontras.org/buku/isi_laporan_praktik_penyiksaan_2014_2015.pdf) (accessed on 7 July 2015).

<sup>134</sup> The UN Committee Against Torture, Concluding Observations: Indonesia, UN Doc. CAT/C/IDN/CO/2, 2 July 2008, para. 12; Report of the UN Special Rapporteur on torture, *supra* note No. 89, para. 77 and p. 22.

## 2.4 FOREIGN NATIONALS

Everyone, including those accused of criminal offences and victims of crime, has an **equal right to access to the courts**.<sup>135</sup> Foreign nationals who are in the territory of a state or otherwise subject to its jurisdiction must enjoy access to the courts on an equal basis to citizens, whatever their status.<sup>136</sup>

International fair trial standards require that foreign nationals or others who do not understand or speak the language used by the authorities are entitled to the assistance of an interpreter, free of charge, following arrest, including during questioning, and at all other stages of the proceedings.<sup>137</sup> Foreign nationals also have the right to be promptly informed of their right to communicate with their embassy or consular post as soon as they are arrested, detained or imprisoned.<sup>138</sup> Consular assistance can be critical for defendants to gather evidence including to present mitigating factors in their cases.

The protection of these rights is particularly relevant in the Indonesian context, as a significant number of death row prisoners are foreign nationals, particularly those convicted of drug-related offences.<sup>139</sup> Twelve out of 14 executions in 2015 (as of September 2015) under President Joko Widodo's administration were of foreign nationals.

Foreign nationals held in pre-trial detention should be given facilities to communicate with and receive visits from representatives of their government, so that representatives can assist detainees with defence measures such as providing, retaining or monitoring the quality of legal representation, obtaining evidence in the country of origin, and monitoring the conditions under which the accused is held.<sup>140</sup> Article 57(2) of the Criminal Procedure Code (KUHAP) also contains provisions guaranteeing this right.<sup>141</sup>

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<sup>135</sup> Article 8 of the Universal Declaration of Human Rights; Articles 2, 3, 14(1) and 26 of the ICCPR; Articles 2 and 15 of the International Convention on the Elimination of All Forms of Discrimination Against Women; Articles 5-6 of the International Convention on the Elimination of Racial Discrimination; Articles 13 (and 9) of the Convention on Rights of Persons with Disabilities; Article 18 of the Migrant Workers Convention; the UN Human Rights Committee General Comment No. 32, supra note No. 97, paras 8-11.

<sup>136</sup> Article 18 of the CMW; Article 5 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, UN Doc. A/RES/40/144, 13 December 1985; the UN Human Rights Committee General Comment No. 32, supra note No. 97, para 9.

<sup>137</sup> Articles 16(8) and 18 of the Migrant Workers Convention; Article 14(3) of the ICCPR; Article 40(2) of the Convention on the Rights of the Child,

<sup>138</sup> Article 36 of the Vienna Convention on Consular Relations; Article 17(2)(d) of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED); Article 16(7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). Indonesia is a state party to the Vienna Convention on Consular Relations and the ICMW, but only a signatory to the CPED.

<sup>139</sup> According to the Ministry of Law and Human Rights' death penalty data, there are 34 foreign nationals out of 52 prisoners on death row for drug crimes as of April 2015.

<sup>140</sup> For more information, see Amnesty International's *Fair Trial Manual*, supra note No. 44, Chapter 4.6.

<sup>141</sup> The article stipulates that "a suspect or defendant of foreign nationality who is subject to detention is entitled to contact and speak with representatives of his/her country in facing his/her legal case process

Amnesty International has identified several death penalty cases involving foreign nationals in which the Indonesian authorities failed to correctly identify or verify the identity and nationality of the defendants, with the result that those defendants were not able to exercise their right to seek assistance from the consular authorities of their states of origin.

- Nigerian national **Raheem Agbaje Salami** was arrested by police from the East Java Provincial Headquarters after being caught carrying 5.28kg of heroin on 2 September 1998. He did not receive consular assistance during his arrest and detention because the Indonesian authorities failed to correctly identify his nationality and the lawyer who represented him at trial did not raise concerns about his mistaken nationality.<sup>142</sup> The police identified Raheem as a citizen of the non-existent 'Republic of Cordova'.<sup>143</sup> Because Indonesian authorities did not identify his nationality properly, he did not get consular assistance. His incorrect nationality was still recognised by the Supreme Court and President Joko Widodo when they considered his final appeal decision and clemency application respectively.<sup>144</sup> It was only following a change in legal representation that Raheem's identity was established as a Nigerian citizen whose correct name was Jamiu Owolabi Abashin.<sup>145</sup> Under Article 197(2) of the Indonesian Criminal Procedure Code, failure to provide the real identity of a defendant, including his/her nationality can render the court judgment invalid. For this reason on 27 April 2015 his last lawyer submitted a civil suit against the Attorney General to a district court, but Raheem (or Jamiu Owolabi Abashin) was executed two days later (see Chapter 3.5: No Executions While Legal or Clemency Petitions are Pending).<sup>146</sup>
- A similar problem occurred in the case of **Namaona Denis**, also a Nigerian national, who, until his execution on 18 January 2015, had been identified incorrectly as a Malawian national.<sup>147</sup> Only after his execution was carried out was he correctly identified as

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[tersangka atau terdakwa yang berkebangsaan asing yang dikenakan penahanan berhak menghubungi dan berbicara dengan perwakilan negaranya dalam menghadapi proses perkaranya].

<sup>142</sup> Interview with Utomo Karim, supra note No. 63.

<sup>143</sup> Some media in Indonesia quoted Raheem's nationality as Spanish, probably linking Cordova with Cordoba, a city in Spain. See *the Jakarta Post*, "Govt to Send More Foreign Convicts to Face Firing Squad", 29 January 2015, available at: <http://www.thejakartapost.com/news/2015/01/29/govt-send-more-foreign-convicts-face-firing-squad.html> (accessed on 26 June 2015); *BBC*, "The Inmates Executed or Spared by Indonesia", 29 April 2015, available at: <http://www.bbc.co.uk/news/world-asia-31851707> (accessed on 26 June 2015). It has been surmised that in fact he might have initially told the authorities that he was from Cote d'Ivoire (Ivory Coast), but the police thought it was 'Cordova'. In the court document it mentioned his place of origin as "Abbijan City of Cota D' Icoirein, Republik of Cordova" (see supra note No. 101); it is likely Raheem said that he came from Abidjan, capital of the Ivory Coast.

<sup>144</sup> In all court documents, Raheem was identified as a 'Republic of Cordova' national. See *Putusan Peninjauan Kembali Mahkamah Agung* [Supreme Court decision for case review] No. 15/PK/Pid/2004, p.1. *Keputusan Presiden Republik Indonesia Nomor 4/G Tahun 2015* [presidential decision No. 4/G], 5 January 2015.

<sup>145</sup> Interview with Utomo Karim, supra note No. 63.

<sup>146</sup> The lawyer cited Jamiu Owolabi Abashin as the complainant in the civil suit. The Cilacap District Court in Central Java accepted the case and registered the number 24/Pdt.G/2015/PN Clp, available at: <http://sipp.pn-cilacap.go.id/#page-5> (accessed on 26 June 2015).

<sup>147</sup> Supreme Court, *Putusan Peninjauan Kembali perkara terpidana Namona Denis* [Supreme Court

Solomon Chibuke Okafer. Namaona Denis was sentenced to death by the Bandung High Court in November 2001 and the sentence was upheld by the Supreme Court in August 2003. His lawyer at the time filed an application to the Supreme Court in January 2009 for a case review with 14 documents from Nigeria proving his mistaken identity.<sup>148</sup> In June 2010 the Supreme Court rejected his case review, arguing that the 14 documents could not be considered as new evidence; this was despite the fact they had never been used in the previous proceedings.

The failure to properly identify foreign nationals on death row was also raised by Komnas HAM in their 2010 death penalty report; Komnas HAM noted four cases in which foreign nationals from African countries had used false passports, leading to a failure to identify their correct nationality and resulting in their inability to exercise their right to access consular assistance.<sup>149</sup>

In other cases, where the nationality of the individuals concerned was known, defendants in death penalty cases have been denied the right to contact their embassy or contact has been delayed.

- **Zulfiqar Ali**, a Pakistani national, was refused the right to contact his embassy during his arrest and detention.<sup>150</sup>
- In the cases of **Rodrigo Gularte** and **Mary Jane Fiesta Veloso**, Brazilian and Filipina nationals respectively, their embassies were only informed of their arrest and detention through a letter from the Indonesian authorities, which reached them several days after their citizens had been taken into custody.<sup>151</sup>

The right of anyone who does not understand or speak the language used by the authorities to have the assistance of an independent interpreter applies at all stages of criminal proceedings as well as during any period of detention or imprisonment.<sup>152</sup>

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Decision on Namaona Denis case review] No. 105 PK/Pid.Sus/2009, 9 June 2010.

<sup>148</sup> Supreme Court Decision on Namaona Denis case review, supra note No. 147, pp. 9-10.

<sup>149</sup> Komnas HAM 2010 report, supra note No. 69, pp. 9, 13 and 14.

<sup>150</sup> ADPAN, Zulfiqar Ali; Indonesia, supra note No. 60.

<sup>151</sup> Communication with Ricky Gunawan, Rodrigo Gularte's last lawyer, 1 July 2015; *Official Gazette of the Republic of the Philippines*, available at: <http://www.gov.ph/2015/05/03/for-the-record-a-timeline-of-the-case-of-mary-jane-veloso/> (accessed on 29 June 2015).

<sup>152</sup> Article 14(3) of the ICCPR. See Amnesty International, *Fair Trial Manual*, supra note No. 44, Chapters 8.3.2, 9.5 and 23.

In the Indonesian context, the Criminal Procedure Code (KUHAP) guarantees that a suspect or defendant has a right to a competent and qualified interpreter during both the investigation and trial proceedings.<sup>153</sup>

However, Amnesty International found that most of the foreign nationals whose cases are covered in this report did not receive any language assistance. According to the last lawyer of **Raheem Agbaje Salami** (or Jamiu Owolabi Abashin), he was not provided with an interpreter during the police interrogation and during the trial received only intermittent assistance from an interpreter into English, a language which he did not understand well.<sup>154</sup> **Namaona Dennis** (or Salomon Chibuke Okafer) and **Zulfiqar Ali**, both of whom understood little English, also received limited translation assistance and then only into English during their trials.<sup>155</sup>

The case of **Mary Jane Fiesta Veloso**, a Filipina national, provides another example of the failure to respect the right to effective language assistance. During her trial at the Sleman District Court between July and October 2010, Mary Jane Veloso only received a Bahasa Indonesia-to-English interpreter, who was a college student. She could only understand Tagalog.<sup>156</sup> When her new lawyers brought this matter before the Supreme Court for a case review, which the Court rejected stating that neither Mary Jane nor her previous lawyers had raised objections on either of these points during the district court trial.<sup>157</sup> Her lawyers had argued that, in another case, the Supreme Court decided to commute a death sentence of a foreign national to life imprisonment on the grounds that the prisoner could not fully prepare her legal defence due to the use during the proceedings of an interpreter who translated Bahasa Indonesian into a language she could not understand.<sup>158</sup>

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<sup>153</sup> Articles 177(1) and 53(1) of the Indonesian Criminal Procedure Code (KUHAP).

<sup>154</sup> Interview with Utomo Karim, supra note No. 63.

<sup>155</sup> Interview with Akbar Tanjung, supra note No. 65 and communication with Ardi Manto Ardiputra from Imparsial, 29 June 2015.

<sup>156</sup> Supreme Court, *Putusan Peninjauan Kembali perkara terpidana Mary Jane Fiesta Veloso* [Supreme Court decision on Mary Jane Fiesta Veloso's case review] No. 51/PK/Pid.Sus/2015, 25 March 2015, pp. 10-12.

<sup>157</sup> Supreme Court decision on Mary Jane Fiesta Veloso's case review, p. 19, supra note No 156.

<sup>158</sup> Supreme Court decision on Mary Jane Fiesta Veloso's case review, p. 18, supra note No 156; Supreme Court decision No. 128 PK/Pid/2006, 25 January 2007.



Mary Jane Veloso is escorted by police officials to Sleman Court in Yogyakarta to attend her case review on 3 March 2015. © Suryo Wibowo

Komnas HAM has also reported on this issue. Seven out of 17 foreign nationals on death row interviewed by Komnas HAM in September and October 2010 were not provided with an interpreter and had no option but to sign the police investigation dossier in Bahasa Indonesia a language they did not understand.<sup>159</sup>

The right to the free assistance of an interpreter applies to anyone, nationals and non-nationals alike, who does not understand or speak the language used by the authorities.<sup>160</sup> The interpretation must also be given in a language that the person understands. Amnesty International documented the case of an Indonesian national under sentence of death who could not understand Bahasa Indonesia and was not provided with meaningful interpretation into a language he understood at any stages of the criminal proceedings (see Chapter 3). The right also applies to individuals who do not read the language of documents such as written records they are asked to sign. The 2011 Komnas HAM report found that one death row prisoner who was unable to read did not have the written information contained in his investigation dossier explained to him, and signed the dossier using his fingerprint after

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<sup>159</sup> Komnas HAM 2010 report, supra note No. 69, pp. 23, 24, 25 and 43.

<sup>160</sup> Article 14(3)(a) and (f) of the ICCPR.

being beaten by the police.<sup>161</sup>

Article 51(1) of Law No. 24/2003 on the Constitutional Court stipulates that an application for a constitutional review of any provisions in a law can only be made by an Indonesian national. This has resulted in the Constitutional Court rejecting applications for constitutional reviews submitted by foreign nationals regarding Law No. 22/1997 on Narcotics<sup>162</sup> and Law No. 5/2010 on Clemency.<sup>163</sup> These applications related to the impact of these laws on the human rights, specifically the right to life, of individuals under Indonesian jurisdiction facing the death penalty as a result of the application of Indonesian law. It is unclear why a constitutional remedy should be limited to nationals to the detriment of non-nationals, especially when the issue at stake is a human right guaranteed to all persons under Indonesia's jurisdiction as a state party to the ICCPR, such as the right to life. As a state party to the ICCPR, Indonesia has the obligation to ensure an effective remedy without distinction of any kind and to ensure equality before the law and equal protection of the law without discrimination, including on the basis of nationality.<sup>164</sup> When an application for a constitutional review of legislation relates to the detrimental impact of that legislation on the human rights of the individual concerned, and is a recourse which is available to Indonesian nationals, the denial of that recourse to non-nationals violates these obligations.

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<sup>161</sup> Komnas HAM 2011 report, *supra* note No. 76, pp. 24 and 38.

<sup>162</sup> The Constitutional Court's Decision on the Law No. 22/1997 on Narcotics, No. 2-3/PUUV/2007, 30 October 2007, p. 431, available at: [http://www.mahkamahkonstitusi.go.id/putusan/putusan\\_sidang\\_Putusan%202-3%20PUUV2007ttgPidana%20Mati300ktober2007.pdf](http://www.mahkamahkonstitusi.go.id/putusan/putusan_sidang_Putusan%202-3%20PUUV2007ttgPidana%20Mati300ktober2007.pdf) (accessed on 6 July 2015). Two of the applicants, Andrew Chan and Myuran Sukumaran, were Australian.

<sup>163</sup> *Risalah Sidang* [minutes of the hearing] of the constitutional review on Law No. 5/2010 on clemency, case number 56/PUU-XIII/2015, 20 May 2015, pp. 10-11, available at: [http://www.mahkamahkonstitusi.go.id/Risalah/risalah\\_sidang\\_7532\\_PERKARA%20NOMOR%2056.PUU-XIII.2015%20tgl.%2020%20Mei%202015.pdf](http://www.mahkamahkonstitusi.go.id/Risalah/risalah_sidang_7532_PERKARA%20NOMOR%2056.PUU-XIII.2015%20tgl.%2020%20Mei%202015.pdf) (accessed on 6 July 2015). Two of the applicants, Andrew Chan and Myuran Sukumaran, were executed on 29 April 2015.

<sup>164</sup> Articles 2 and 26 of the ICCPR.

## 2.5 DEATH SENTENCES IMPOSED ON PERSONS UNDER 18 YEARS OF AGE AT THE TIME OF THE CRIME

International law prohibits the use of the death penalty for anyone who was under the age of 18 at the time the crime was committed.<sup>165</sup> If there is doubt about whether an individual was under 18, the individual should be presumed to be a child, unless the prosecution proves otherwise.<sup>166</sup>

Under Indonesian law the prohibition of the death penalty for people under 18 years of age at the time of the offence is set out in Article 64(f) of Law No. 35/2014 on the Revision of the Law on the Protection of Children and Article 81(6) of Law No. 11/2012 on Criminal Justice System for Children.<sup>167</sup>

Despite this clear prohibition, in one of the cases highlighted in this report Amnesty International found that the age of the man under sentence of death at the time of the offence was disputed. In a court document, the police investigator considered **Yusman Telaumbanua** to be 19 years old at the time of the crime in 2012, although he did not have a birth certificate as births are not usually registered in his village of origin.<sup>168</sup> During the police interrogation, he did not have a legal counsel assisting him and was allegedly subjected to ill-treatment (see Chapter 2.3).<sup>169</sup> He was unable to read or write, could not speak Bahasa Indonesia, and did not have any documents to indicate his age.<sup>170</sup> Yusman was sentenced to death by the Gunungsitoli District Court in May 2013, but did not appeal to a higher court (see Chapter 2.1). His new lawyers managed to gather information from his family and village neighbours, who confirmed that Yusman was born in 1996, indicating that he was only 16 years old when the murder was committed.<sup>171</sup> Following a request by his last

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<sup>165</sup> Article 6(5) of the ICCPR and Article 37(a) of the Convention on the Rights of the Child; Paragraph 3 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty; the UN Economic and Social Council Resolution 1984/50 of 25 May 1984. The Human Rights Committee considers that the prohibition on executing children is a peremptory norm of customary international law, binding on all states and permitting no derogations. See Human Rights Committee General Comment No. 24 on Article 41 of the ICCPR, para 8. See also Amnesty International, *The Exclusion of Child Offenders from the Death Penalty under General International Law*, July 2003, Index: ACT/50/004/2003.

<sup>166</sup> Paragraph 55 of UN Human Rights Council Resolution 19/37, 19 April 2012, UN Doc. A/HRC/RES/19/37.

<sup>167</sup> Article 64(f) of Law No. 35/2014 prohibits the use of death penalty and/or life imprisonment for children (a person under 18 years old) and Article 81(6) of Law No. 11/2012 stipulates that the death sentence or life imprisonment for children should be replaced by 10 years' imprisonment.

<sup>168</sup> In the date of birth column, Yusman is listed as born in 1993, instead of a complete date. The Gunungsitoli District Court, *Putusan perkara terpidana Yusman Telaumbanua* [District Court decision on Yusman Telaumbanua] No. 08/Pid.B/2013/PN-GS, 17 May 2013, p. 1.

<sup>169</sup> Interview with Arif Nur Fikri, supra note No. 72.

<sup>170</sup> Interview with Arif Nur Fikri, supra note No. 72. According to his current lawyer, Yusman could only speak the Nias language.

<sup>171</sup> KontraS, press release, *Update Temuan Terkait Dugaan Rekayasa Kasus yang Berujung Vonis Mati terhadap Yusman Telaumbanua dan Rasula Hia* [Updated Information With Regards to the Death Penalty Case of Yusman Telaumbanua and Rasula Hia], 28 March 2015, available at: [http://kontras.org/index.php?hal=siaran\\_pers&id=2020](http://kontras.org/index.php?hal=siaran_pers&id=2020) (accessed on 1 July 2015).

lawyers, the Ministry of Law and Human Rights plans to conduct a medical test to assess Yusman's real age.<sup>172</sup>

While Indonesian law requires that all births be registered,<sup>173</sup> in practice few people have a birth certificate. According to the 2012 Indonesia Demographic Statistic Survey, it is estimated that across the country as a whole, only 57% of children under the age of five have a birth certificate.<sup>174</sup> In the North Sumatra province, where Yusman comes from, only 18.9% of children under the age of four have a birth certificate, which is the second-lowest proportion of any province in the country.<sup>175</sup>

## 2.6 DEATH SENTENCES IMPOSED ON PERSONS WITH MENTAL DISABILITIES

International law prohibits the imposition and implementation of a death sentences against persons with mental or intellectual disabilities.<sup>176</sup> This includes people who have developed mental disorders after being sentenced to death.<sup>177</sup>

One of the men executed in April 2015, Brazilian national **Rodrigo Gularte**, had been diagnosed with paranoid schizophrenia and bipolar disorder.<sup>178</sup> The psychiatrist appointed by the head of his prison authority recommended that Rodrigo be admitted to a psychiatric hospital for intensive medical treatment.<sup>179</sup> Rodrigo had had a mental disability since he was young and had been treated at psychiatric hospitals before he came to Indonesia.<sup>180</sup> This medical diagnosis was used by his lawyers and the Brazilian Embassy as grounds to ask for a stay of execution to enable the mental health issues to be examined, and to call for the

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<sup>172</sup> Communication with Arif Nur Fikri, supra note No. 72.

<sup>173</sup> Article 197(1)(b) of the Criminal Procedure Code.

<sup>174</sup> Statistic Indonesia (*Badan Pusat Statistik*, BPS), the National Population and Family Planning Board (BKKBN) and the Ministry of Health, 2012 Indonesia Demographic and Health Survey, August 2013, pp. 19-20, available at: <http://dhsprogram.com/pubs/pdf/FR275/FR275.pdf> (accessed on 10 August 2015).

<sup>175</sup> Statistic Indonesia, 2005 census, available at: [http://www.ykai.net/index.php?option=com\\_content&view=article&id=155:jumlah-penduduk-usia-0-4-tahun-yang-memiliki-akta-kelahiran-menurut-provinsi&catid=105:tabel&Itemid=119](http://www.ykai.net/index.php?option=com_content&view=article&id=155:jumlah-penduduk-usia-0-4-tahun-yang-memiliki-akta-kelahiran-menurut-provinsi&catid=105:tabel&Itemid=119) (accessed on 10 August 2015).

<sup>176</sup> Article 6(5) of the ICCPR and Paragraph 3 of the UN Death Penalty Safeguards, supra note No. 45.

<sup>177</sup> Paragraph 3 of the UN Death Penalty Safeguards, supra note No. 45; the UN Human Rights Commission resolution 2005/59 on the question of the death penalty, 20 April 2005, UN Doc. E/CN.4/RES/2005/59; Human Rights Committee Concluding Observation: USA, UN Doc. CCPR/C/USA/CO/3/Rev.1 (2006) para 7, Japan, UN Doc. CCPR/C/JPN/CO/5 (2008) para 16; *Sahadath v Trinidad and Tobago*, UN Doc. CCPR/C/78/D/684/1996 (2002) para 7.2; Special Rapporteur on extrajudicial executions, UN Doc. A/51/457 (1996) paras 115-116.

<sup>178</sup> Letter issued by Prof. Dr. dr. H. Soewadi, MPH, SP.KJ(K), an expert psychiatrist, based on the request of the Director of Cilacap General Hospital, 11 February 2015.

<sup>179</sup> Letter issued by Prof. Dr. dr. H. Soewadi, MPH, SP.KJ(K), supra note No. 178.

<sup>180</sup> Statement from Dr. Vernon Hiebert, M.D, director of the Eirene Psychiatric Hospital in Paraguay, 28 October 2005; Clinica Vitao, medical-psychiatric report on Mr Rodrigo Gularte, 23 August 2004; communication with Ricky Gunawan, Rodrigo Gularte's last lawyer, 2 July 2015.

commutation of his death sentence.<sup>181</sup> Rodrigo's medical condition had been raised by his lawyers during the first trial, but the court did not take it into consideration; nor did it examine his mental disability.<sup>182</sup>



Cross commemorating Rodrigo Gularte's death in a Requiem Mass in Jakarta, Indonesia.  
© LBH Masyarakat

The Attorney General used two arguments to justify Rodrigo's execution. The first one was that Indonesian law only prohibits execution for pregnant women or children aged under 18 years of age.<sup>183</sup> However, as argued by a lawyer acting for Rodrigo, the Constitutional Court has determined that protections under Article 44 of the Indonesian Criminal Code (KUHP) also extends to those "with mental illness" until his/her mental illness has been cured in a

<sup>181</sup> Letter from Dr. H. Ricco Akbar, SH., MH, Rodrigo Gularte's at the time, to the Attorney General, 12 February 2015; letter from Paulo Alberto da Silvera Soares, the Brazilian Ambassador to Indonesia, to the Directorate General of Correction, Ministry of Law and Human Rights, 18 November 2014.

<sup>182</sup> Emil Syam SH and Nazori Do'ak Achmad SH, *Pembelaan atau Peldooi* [legal defence] for Rodrigo Gularte on the case No. Reg. 1194/Pid.B/2004/PN.TNG, 26 January 2006, pp. 7 and 11.

<sup>183</sup> *The Jakarta Post*, "Rodrigo mentally fit for execution: Attorney General", 20 March 2015, available at: <http://www.thejakartapost.com/news/2015/03/20/rodrigo-mentally-fit-execution-attorney-general.html> (accessed on 2 July 2015). The Attorney General referred to Article 7 of Law No.2/PNPS/1964 (later known as Law No. 5/1969) on the Procedure of Execution by Civilian and Military Courts.

psychiatric hospital.<sup>184</sup>

Secondly, the Attorney General challenged the medical report by referring to results of a test carried out by different psychiatrists. According to the Attorney General, that second report showed that Rodrigo was mentally fit for execution. However, that document and the analysis on which it was based was never given to Rodrigo's family, his lawyer, the Brazilian Embassy or even the prison authority.<sup>185</sup> Rodrigo's lawyers are still requesting access to the document from the Attorney General's office.<sup>186</sup>

Komnas HAM found that another death row prisoner who had a severe mental disability had been under sentence of death for over 12 years.<sup>187</sup>

Defendants and prisoners are not routinely subjected to mental health assessments in Indonesia, suggesting that these disabilities remain undiagnosed, with the prisoners not being afforded the care and treatment they might need,<sup>188</sup> and in cases where such individuals are facing the death penalty, that they may be executed in violation of international standards prohibiting the sentencing to death or the execution of people with mental or intellectual disabilities or disorders.

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<sup>184</sup> Constitutional Court decision on the Law No. 22/1997 on Narcotics, No. 2-3/PUUV/2007, supra note No. 162, p. 431.

<sup>185</sup> Letter from the chief of Pasir Putih prison on Nusakambangan Island to the chairperson of Komnas HAM, 14 April 2015; communication with Ricky Gunawan, Rodrigo Gularte's last lawyer, 2 July 2015; *CNN Indonesia*, "Jaksa Agung harus transparan atas opini kedua Rodrigo Gularte" ["the Attorney General must be transparent on the second opinion of Rodrigo Gularte"], 19 April 2015, available at: <http://www.cnnindonesia.com/nasional/20150419140007-12-47705/jaksa-agung-harus-transparan-atas-opini-kedua-rodrigo-gularte/> (accessed on 2 July 2015).

<sup>186</sup> This public information mechanism is regulated under Law No. 14/2008 on Public Information; communication with Ricky Gunawan, supra note No. 180.

<sup>187</sup> Komnas HAM 2011 report, supra note No. 76, p. 28.

<sup>188</sup> Report of the UN Special Rapporteur on Torture, supra note No. 89, para. 29.

## 2.7 THE RIGHT TO APPEAL; NO EXECUTIONS WHILE LEGAL OR CLEMENCY PROCEDURES ARE PENDING

Anyone convicted of a criminal offence has the **right to have their conviction and sentence reviewed by a higher tribunal**.<sup>189</sup> The death penalty may only be carried out after a final judgment by a competent court.<sup>190</sup> UN Safeguard No.8 states that executions may not be carried out “pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.”

In Indonesia, there are three layers of criminal proceedings: the District Court, the High Court and the Supreme Court. A death sentence can be imposed at any of these stages (see Chapter 1.2).<sup>191</sup> Indonesian law establishes an exceptional legal appeal after the Supreme Court’s decision through the so-called case review (*Peninjauan Kembali*).<sup>192</sup> The execution of death row prisoners is currently carried out only after a final judgment made by the Supreme Court through the case review.<sup>193</sup>

In one case, it took almost 10 years for the case review application to be examined. The Supreme Court agreed to review **Zainal Abidin**’s case on 23 August 2005,<sup>194</sup> and issued their decision upholding the death sentence on 27 April 2015, just two days before his execution.<sup>195</sup> A few months earlier, Zainal’s name had been included in the second batch of executions due to take place in 2015, after his clemency appeal was rejected in January 2015. This raises the question of whether the decision on the 27 April case review might have been influenced by the imminent execution.<sup>196</sup> The question of whether a case review

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<sup>189</sup> Article 14(5) of the ICCPR; Article 40(2)(b)(v) of the UN Convention on the Rights of the Child; Article 18(5) of the Migrant Workers Convention.

<sup>190</sup> Article 6(2) of the ICCPR; Paragraph 5 of the Death Penalty Safeguards, *supra* note No. 45.

<sup>191</sup> Articles 84-88 of the Criminal Procedure Code (KUHAP).

<sup>192</sup> Articles 263-269 of the Criminal Procedure Code (KUHAP), see also *supra* note No. 21.

<sup>193</sup> Based on Law No. 5/2010 on amendments to Law No. 22/2002 on clemency, a prisoner can submit clemency application after their conviction attained “permanent legal force” (*kekuatan hukum tetap*). The law does not clarify whether a death row convict should submit a case review to the Supreme Court then to submit clemency to the President. Some political dissidents related with failed coup in September 1965 who were sentenced to death by the special military courts set up in the late 1960s, did not have the right to appeal to any higher court. See Amnesty International, *Indonesia; The Application of the Death Penalty*, November 1987, Index: ASA 21/27/87, p.5.

<sup>194</sup> The Supreme Court letter accepting to review Zainal Abidin’s case was dated 23 August 2005 with registration No. 1533/TU/76 PK/Pid/2005. However, a similar letter dated 9 April 2005 notes the case review dossier was accepted by the Supreme Court on 8 April 2015.

<sup>195</sup> *Viva.co.id*, “PK Ditolak, Zainal Abidin Bakal Dieksekusi” [“Case Review Rejected, Zainal Abidin Will Be Executed”], 27 April 2015, available at: <http://news.viva.co.id/nusantara/sinar-harapan/150427110-pk-ditolak-nbsp-zainal-abidin-bakal-dieksekusi-b-b-2> (accessed on 15 July 2015); *Detik.com*, “PK Tereksekusi Mati Zainal Terselip 10 Tahun, MA Salahkan PN Palembang” [“Case review of the executed Zainal slipped for 10 Years, the Supreme Court blamed the Palembang District Court”], 30 April 2015, available at: <http://news.detik.com/berita/2902159/pk-tereksekusi-mati-zainal-terselip-10-tahun-ma-salahkan-pn-palembang> (accessed on 15 July 2015).

<sup>196</sup> Amnesty International, Urgent Action, *Six Executed, Nine More at Risk*, 30 January 2015, Index: ASA 21/005/2015.

application can be submitted multiple times to the Supreme Court has been a matter of controversy since the end of 2014 when the Supreme Court maintained that death row prisoners can only submit one application for a case review. This departed from an earlier decision by the Constitutional Court that stated that the limit of one application for a case review under Article 268(3) of the Criminal Procedure Code was unconstitutional and therefore should be annulled.<sup>197</sup>

Amnesty International found that in at least four instances the Supreme Court refused to consider case review applications, referring to its Circular Letter No. 7/2014.<sup>198</sup> However, even before that letter was issued, the Supreme Court had rejected an application for a second case review in the case of **Namaona Denis**.<sup>199</sup>

This issue is particularly relevant for cases in which the death sentence is imposed for the first time by the Supreme Court or re-imposed by the Supreme Court after it has been commuted by the High Court, or when the Supreme Court does not provide legal reasoning for its decision.<sup>200</sup>

**Raheem Agbaje Salami** was initially sentenced to life imprisonment by the Surabaya District Court<sup>201</sup> before his sentence was commuted to 20 years' imprisonment by the Surabaya High Court.<sup>202</sup> However, the Supreme Court sentenced him to death at the cassation (*kasasi*) level (see Chapter 1.2), without providing any legal reasoning.<sup>203</sup> Raheem's lawyer then submitted a case review application, but the Supreme Court again did not provide any legal explanation and upheld the death sentence.<sup>204</sup>

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<sup>197</sup> In 2013 the Indonesian Constitutional Court annulled a provision in the Code of Criminal Procedure (KUHAP) which limited an individual to only one case review application. (Constitutional Court decision No. 34/PUU-XI/2013 on Article 268(3) of Law No. 8/1981 on the Criminal Procedure Code. However, in December 2014 the Supreme Court issued Circular Letter No. 7/2014 reaffirming that only one application was allowed per case review, and only on the basis of new evidence.

<sup>198</sup> See supra note No. 23, communication with Yulmia Makawekes, lawyer of Agus Hadi and Pujo Lestari, 22 June 2015.

<sup>199</sup> The Circular Letter No. 7/2014 was issued by the Supreme Court on 31 December 2014, while Namaona Denis' second case review was submitted on 29 December 2014; interview with Akbar Tanjung, supra note No. 65.

<sup>200</sup> ICJR, Media briefing 1/2015, April 2015, pp. 15-16 and 25-26; interview with Supriyadi W. Eddyono, Anggara and Erasmus A.T. Napitupulu of the Institute for Criminal Justice Reform (ICJR), 19 March 2015; Articles 197(d) and (f) of the Criminal Procedure Code.

<sup>201</sup> Surabaya District Court, *Putusan* (decision) No. 101/Pid.B/1998/PN.Sby, 22 April 1999.

<sup>202</sup> Surabaya High Court, *Putusan* (decision) No. 160/Pid/1999/PT.Sby, 12 July 1999.

<sup>203</sup> Supreme Court, *Putusan* (decision) No. 1195 K/Pid/1999, 16 November 1999; interview with Utomo Karim, supra note No. 63.

<sup>204</sup> Supreme Court, *Putusan* (decision) on case review No. 15 PK/Pid/2004, 31 May 2006.

Furthermore, Amnesty International found that the execution of death row prisoners in the cases listed below went ahead even though the Indonesian courts had accepted to hear their appeals or other legal action was ongoing:

- On 27 April 2015 lawyers of **Raheem Agbaje Salami** filed a civil suit in the Cilacap District Court against the Attorney General office for failure to identify and disclose Raheem's real identity, and asked for a stay of execution.<sup>205</sup> The court accepted to hear the case and had scheduled the first hearing for 27 May 2015. Raheem was executed on 29 April 2015 while the legal proceedings in the District Court were still pending;<sup>206</sup>
- On 15 January lawyers of **Namaona Dennis** filed a civil suit in the Central Jakarta District Court against the Supreme Court for refusing to refer the second case review (*Peninjauan Kembali*) citing the Constitutional Court 2013 decision, but he was executed three days later;<sup>207</sup>
- The lawyers of **Rodrigo Gularte** filed two applications: on 22 April 2015 they filed a civil case application to the Cilacap District Court asking for a judicial decision on his cousin's application for guardianship;<sup>208</sup> and on 28 April they filed an application to the Jakarta Administrative Court to challenge the January 2015 blanket rejection of clemency by the President (see Chapter 2.8 of this report).<sup>209</sup> The Cilacap District Court and the Jakarta Administrative Court scheduled the first court hearings for 6 and 12 May 2015, respectively. Rodrigo was executed in April 2015;<sup>210</sup>

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<sup>205</sup> The Cilacap District Court in Central Java registered the civil suit under number 24/Pdt.G/2015/PN Clp.

<sup>206</sup> See the Cilacap District Court website for tracking cases and trials for Number 24/Pdt.G/2015/PN Clp, <http://sipp.pn-cilacap.go.id/> (accessed on 6 July 2015).

<sup>207</sup> The Central Jakarta District Court registered the civil suit under number 19/PDT.BGTH.PLW/2015/PN.JKT.PST, dated 15 January 2015.

<sup>208</sup> The right to guardianship of Rodrigo was filed by his cousin on the grounds that Rodrigo had a mental disability as regulated by Article 433 of the Indonesian Criminal Procedure Code (KUHP). The Cilacap District Court registered the petition under number 83/Pdt.P/2015/PN Clp. Had the court granted the civil application, it could be used as an argument that Rodrigo should not be put on death row and should be transferred to a psychiatric hospital for treatment; communication with Ricky Gunawan, Rodrigo's last lawyer, 3 July 2015.

<sup>209</sup> This challenge was based on Article 1 of Law No. 51/2009 on State Administrative Court. Copy of the receipt made by the Jakarta Administrative Court confirmed they had accepted the petition on 28 April 2015.

<sup>210</sup> Communication with Ricky Gunawan, supra note No. 208.

- Similarly, on 8 April 2015 **Andrew Chan** and **Myuran Sukumaran** filed an application for a constitutional review of the Clemency Law and the Constitutional Court Law by the Constitutional Court.<sup>211</sup> The first hearing was scheduled for 20 May 2015. They were executed on 29 April 2015.<sup>212</sup>

## 2.8 THE RIGHT TO SEEK PARDON AND COMMUTATION

Article 6(4) of the ICCPR and Paragraph 7 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty guarantee to anyone sentenced to death the right to seek pardon, clemency or commutation (substitution of a lighter penalty). The competent officials must genuinely consider such requests. The International Court of Justice has taken the view that such clemency procedures, though carried out by the executive rather than the judiciary, are an integral part of the overall system for ensuring justice and fairness in the legal process.<sup>213</sup>

In Indonesia, the power to grant pardons or clemency, or to commute death sentences, lies in the hands of the President.<sup>214</sup> The President decides whether to accept or refuse a clemency application after consulting with the Supreme Court.<sup>215</sup> The Clemency Law does not require the President to provide any reason or explanation for refusing a clemency application.

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<sup>211</sup> The application was submitted on behalf of six individuals (two of whom were Australian) and one NGO. They challenged Article 51(1) of the Law on the Constitutional Court that allows only Indonesian nationals to file an application for constitutional review (see Chapter 2.4 above), and Articles 11(1) and 11(2) that do not require the President to explain why he/she refuses a clemency application. See document No.: 099/LSM/TML/LA/IV/2015, a constitutional review filed by Myuran Sukumaran, Andrew Chan, Rangga Sujud Widigda, Anbar Jayadi, Luthfi Sahputra, Haris Azhar and Imparsial, 8 April 2015. These two death penalty cases are not among the 12 which are the main focus of this report.

<sup>212</sup> Constitutional Court, “*Pemeriksaan Pendahuluan*” (“introductory examination”), Case No. 56/PUU-XIII/2015 on 20 May 2015, available at: <http://www.mahkamahkonstitusi.go.id/index.php?page=web.JadwalSidang&id=17&kat=1&cari> (accessed on 10 August 2015).

<sup>213</sup> Avena Case (Mexico v United States), ICJ (2004) para. 142.

<sup>214</sup> Article 14(1) of the Indonesian Constitution.

<sup>215</sup> Article 11 of Law No. 5/2010 on Clemency which replaced Law No. 22/2002.



Candlelight vigil held by protestors for the stay of execution for Mary Jane Veloso, outside the Indonesian Embassy in Manila, Philippines on 29 April 2015 © Suryo Wibowo

International law and standards clearly state that drug-related offences do not meet the threshold of the “most serious crimes”, which is the only category of crime for which international law allows the death penalty (see Chapter 3). Yet, in December 2014<sup>216</sup> and February 2015<sup>217</sup> President Joko Widodo announced he would not grant clemency to any individuals sentenced to death for drug-related crimes, and would not even consider the merits of each individual case.<sup>218</sup>

Amnesty International received information relating to four clemency rejections by the President. The President’s responses used the same format, simply stating that he refused the application, without providing any additional explanation.<sup>219</sup> Two death row prisoners had

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<sup>216</sup> *The Jakarta Post*, “Jokowi to Ban Clemency for Drug Convicts”, 10 December 2014, available at: <http://www.thejakartapost.com/news/2014/12/10/jokowi-ban-clemency-drug-convicts.html> (accessed on 7 July 2015); *Kompas*, “Jokowi Tolak Permohonan Grasi 64 Terpidana Mati Kasus Narkoba” [“Jokowi refuses clemency to 64 death row inmates related to drugs cases”], available at: <http://regional.kompas.com/read/2014/12/09/16545091/Jokowi.Tolak.Permohonan.Grasi.64.Terpidana.Mati.Kasus.Narkoba> (accessed on 7 July 2015).

<sup>217</sup> *Supra* note No. 11.

<sup>218</sup> Between the first (18 January 2015) and second wave (29 April 2015) of executions, President Joko Widodo granted a clemency request for a murderer after he was criticized by international and national communities as a merciless leader. See *Keputusan Presiden* [presidential decision] No. 18/G 2015; *The Jakarta Post*, “Jokowi Fulfills Clemency Request of Death Row Murderer in Pekanbaru”, available at: <http://www.thejakartapost.com/news/2015/03/15/jokowi-fulfills-clemency-request-death-row-murderer-pekanbaru.html> (accessed on 7 July 2015).

<sup>219</sup> See *Keputusan Presiden* [presidential decision] No. 10/G 2004, No. 26/G 2014, No. 4/G 2015 and

their clemency application rejected through the same presidential decision, despite the fact that the prisoners' cases were not related.<sup>220</sup> Such summary consideration and rejection appears to undermine the right of prisoners facing the death penalty to seek clemency and have their requests given meaningful consideration. The lack of transparency in the President's explanation for the clemency refusals led several individuals and an NGO, Imparsial, to submit an application for constitutional review of Article 11 of the Clemency Law.<sup>221</sup>

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No. 9/G 2015.

<sup>220</sup> *Keputusan Presiden* [presidential decision] No. 32/G 2014. This was a clemency refusal for Myuran Sukumaran (Australian national) and Ang Kim Soei (Dutch national).

<sup>221</sup> Supra note No. 211 (See document No.: 099/LSM/TML/LA/IV/2015, a constitutional review filed by Myuran Sukumaran, Andrew Chan, Rangga Sujud Widigda, Anbar Jayadi, Luthfi Sahputra, Haris Azhar and Imparsial, 8 April 2015). They challenged Article 11 of the Clemency Law with several articles in the Constitution [Articles 4(1), 28D(1), 28F and 28I(4)], including the right to information. See also *Uji Materi UU Grasi, Aktivis Perbaiki Pokok Permohonan dan Kedudukan Hukum* [Constitutional Challenge of Clemency Law, Activists Revise the Content of the Petition and the Legal Standing], <http://www.mahkamahkonstitusi.go.id/index.php?page=web.Berita&id=11013#.VgqMgMtVhHx> (accessed on 29 September 2015).

### 3. THE DEATH PENALTY: INTERNATIONAL LAW AND STANDARDS

"[B]ecause it is impossible to ensure that wrongful executions do not occur, countries applying the death penalty should undertake regular, independent, periodic reviews of the extent to which international standards have been complied with and to consider any evidence of wrongful execution."

UN Special Rapporteur on Extrajudicial, summary or arbitrary executions, December 2004<sup>222</sup>

#### A VIOLATION OF HUMAN RIGHTS

Amnesty International opposes the death penalty unconditionally, in all cases without exception, regardless of the nature or circumstances of the crime, the guilt, innocence or other characteristics of the individual, or the method used by the state to carry out the execution. The organisation has long held that the death penalty violates the right to life, as recognized in the Universal Declaration of Human Rights, and is the ultimate cruel, inhuman and degrading punishment.<sup>223</sup>

While Article 6 of the International Covenant on Civil and Political Rights (ICCPR), to which

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<sup>222</sup> Report by the Special Rapporteur on Extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/2005/7, 22 December 2004, para. 88.

<sup>223</sup> Universal Declaration of Human Rights, Articles 3 and 5.

Indonesia acceded in 2006, allows for the use of capital punishment under certain circumstances, paragraph 6 clearly states that provisions in the same article should not be used to “prevent or delay the abolition of the death penalty.” In its General Comment No. 6 on Article 6 of the ICCPR, the Human Rights Committee – the body tasked with the interpretation of the ICCPR - has stated that the article “refers generally to abolition [of the death penalty] in terms which strongly suggest... that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life...”<sup>224</sup>

In July 2013 the Human Rights Committee considered the periodic report of Indonesia on its implementation of the ICCPR. The Committee expressed regret at the resumption of executions in the country and the continued use of the death penalty for drug-related offences, and urged the Indonesian authorities to “reinstate the de facto moratorium on the death penalty and consider abolishing the death penalty by ratifying the Second Optional Protocol to the [International] Covenant [on Civil and Political Rights]. Furthermore, [Indonesia] should ensure that, if the death penalty is maintained, it is only for the most serious crimes. In this regard, the Committee recommends that the State party review its legislation to ensure that crimes involving narcotics are not amenable to the death penalty. In this context, the State party should consider commuting all sentences of death imposed on persons convicted for drug crimes.”<sup>225</sup>

On 13 February 2015 the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions expressed regret that the Indonesian authorities continue to execute people in violation of international human rights standards and urged the Indonesian government to establish a moratorium on the death penalty with a view of its complete abolition, in order to comply with the international move towards the abolition of the death penalty.<sup>226</sup>

This chapter contains short references to key safeguards guaranteeing the rights of persons facing the death penalty, as established in international law and standards.

## RESTRICTIONS AND SAFEGUARDS ON THE USE OF THE DEATH PENALTY

The UN and several international bodies have set out a number of standards aimed at regulating and restricting the use of the death penalty, with a view to its abolition.

In particular, the UN Economic and Social Council adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty (UN Safeguards), which set out the most basic guarantees to be observed in all death penalty cases. The UN Safeguards were

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<sup>224</sup> Human Rights Committee, General Comment No.6, Article 6 (Sixteenth session, 1982), “Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies”, UN doc. HRI/GEN/1/Rev.9, May 2008.

<sup>225</sup> Human Rights Committee, *Concluding observations on the initial report of Indonesia*, UN doc. CCPR/C/IDN/CO/I, 21 August 2013, para.10.

<sup>226</sup> UN News, “UN Rights Expert Calls For a Halt to Indonesia Executions, Cites International Obligations”, 13 February 2015, available at: <http://www.un.org/apps/news/story.asp?NewsID=50087#.VZZQF4uprzl> (accessed on 29 September 2015).

endorsed by the UN General Assembly in 1984 without a vote.<sup>227</sup>

This section provides a short overview of the international standards that are most relevant to the use of the death penalty in Indonesia.

### 3.1 SCOPE OF CRIMES PUNISHABLE BY DEATH

Article 6(2) of the ICCPR 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 Human Rights Committee has stated that “the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure”.<sup>228</sup>

The UN Safeguards on the Death Penalty recommend that crimes punishable by death should “not go beyond intentional crimes with lethal or other extremely grave consequences”.<sup>229</sup> In this regard the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has clarified that the death penalty “may be imposed only for those crimes that involve intentional killing”. In particular he has specifically underlined that “The death penalty may not be imposed for drug-related offences unless they meet this requirement.”<sup>230</sup>

The UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has also underlined that the imposition of the death penalty for drugs offences violates international human rights law. He noted that “drug offences do not meet the threshold of ‘most serious crimes’. Therefore, the imposition of the death penalty on drug offenders amounts to a violation of the right to life, discriminatory treatment and possibly [...] their right to human dignity.”<sup>231</sup>

As noted in chapter 1 of this document, not only does Indonesian law allow the imposition of the death penalty for a wide range of offences that do not meet the threshold of “most serious crimes”, but the death penalty has also been implemented extensively for drug-related offences in recent years. More than half (53%) of the executions carried out in Indonesia between 2000 and 2015 were for drug-related offences.

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<sup>227</sup> Economic and Social Council resolution 1984/50 of 25 May 1984, endorsed by the UN General Assembly resolution 39/118 of 14 December 1984. The Economic and Social Council recommended further measures aimed at strengthening the protection of the rights of those facing the death penalty in its subsequent resolution 1989/64 of 24 May 1989.

<sup>228</sup> Human Rights Committee, General Comment No.6, Article 6 (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN doc. HRI/GEN/1/Rev.9, May 2008.

<sup>229</sup> UN Safeguard No. 1 of UN Economic and Social Council resolution 1984/50 of 25 May 1984.

<sup>230</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 9 August 2012, A/67/275, para.122.

<sup>231</sup> Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 14 January 2009, A/HRC/10/44, para. 66.



A banner held up by pro-death penalty non-governmental organisation (FOKAN) at the Anti-Narcotic Agency Office in Jakarta, Indonesian reads: "Execute the Drug Kingpins; Desired by the People, Blessed by the God. Keep Continue...!!" © Amnesty International

### 3.2 PEOPLE WHO MAY NOT BE EXECUTED

International law and standards prohibit the imposition of the death penalty against certain groups.

The ICCPR (Article 6.5) and the Convention on the Rights of the Child (Article 37) prohibit the imposition of the death penalty against people who were under the age of 18 when the crime was committed. Indonesia is a state party to both treaties. If there is doubt about whether an individual was under 18, the individual should be presumed to be a child, unless the prosecution proves otherwise.<sup>232</sup>

The death penalty must not be used against people with mental (psychosocial) or intellectual disabilities. This includes people who have developed mental disabilities after being sentenced to death.<sup>233</sup> In commenting on a recent case of an individual with serious mental

<sup>232</sup> Human Rights Council resolution 19/37, para.55.

<sup>233</sup> UN Safeguard No.3 in Economic and Social Council resolution 1984/50 of 25 May 1984. UN Commission on Human Rights resolution 2005/59, para.7(c); Human Rights Committee: *Concluding Observations: USA*, UN Doc. CCPR/C/USA/CO/3/Rev.1, 2006, para. 7; *Concluding Observations: Japan*, UN Doc. CCPR/C/JPN/CO/5, 2008, para.16; *Sahadath v Trinidad and Tobago*, UN Doc. CCPR/C/78/D/684/1996, 2002, para.7.2. Committee Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Concluding observations on the second periodic report of Japan*,

illness and facing execution, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has stated the view that the execution of persons who are mentally disabled is a violation of a norm of customary international law.<sup>234</sup>

The UN Economic and Social Council has recommended that states should establish "a maximum age beyond which a person may not be sentenced to death or executed"<sup>235</sup> and the Human Rights Committee has raised concern about executions of individuals of an advanced age.<sup>236</sup>

The death penalty may not be applied to pregnant women and mothers of young children.<sup>237</sup>

### 3.3 STRICT COMPLIANCE WITH ALL FAIR TRIAL RIGHTS

Article 6(1) of the ICCPR protects against the arbitrary deprivation of life, which is, together with torture and other ill-treatment and punishment, absolutely prohibited under customary international law.<sup>238</sup>

Article 14 of the ICCPR sets out standards of fair trial. These include the right of anyone facing a criminal charge to a fair and public hearing by a competent, independent and impartial tribunal; the right to be presumed innocent until proven guilty; the right to be informed promptly and in detail in a language which they understand of the nature and cause of the charges against them; the right to adequate time and facilities to prepare a defence; the right to communicate with counsel of the defendant's choosing; the right to free legal assistance for defendants unable to pay for it; the right to examine witnesses for the prosecution and to present witnesses for the defence; the right to free assistance of an interpreter if necessary; the right not to be compelled to testify against themselves or to confess guilt; and the right to appeal to a higher court.

The UN Human Rights Committee has stated that "the imposition of a sentence of death upon conclusion of a trial in which the provisions of the [International] Covenant [on Civil and Political Rights] have not been respected constitutes a violation of article 6 of the Covenant".<sup>239</sup> The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions

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UN doc. CAT/C/JPN/CO/2, 28 June 2013, para. 15.

<sup>234</sup> Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN document A/HRC/28/68/Add.1, 5 March 2015, para. 607.

<sup>235</sup> UN Economic and Social Council resolution 1989/64, para.1(c).

<sup>236</sup> HRC, *Concluding Observations: Japan*, UN doc. CCPR/C/JPN/CO/5, 18 December 2008, para.16.

<sup>237</sup> UN Safeguard No.3 and Special Rapporteur on Extrajudicial Executions, UN Doc. A/51/457, 1996, para.115. UN Commission on Human Rights resolution 2005/59, para. 7(b).

<sup>238</sup> Human Rights Committee, General Comment 24, para. 8; Report of the Special Rapporteur on Extrajudicial Executions, UN Doc. A/67/275, 2012, para. 11; Committee Against Torture, General Comment 2, para.1.

<sup>239</sup> Human Rights Committee, *Maryam Khalilova v Tajikistan*, *Views of the Human Rights Committee*, Communication No. 973/2001, UN Doc. CCPR/C/83/D/973/2001, 13 April 2005, para. 7.6

has underlined that “it is arbitrary to impose the death penalty where the proceedings do not adhere to the highest standards of fair trial.”<sup>240</sup>

## RIGHT TO LEGAL COUNSEL AND OTHER ASSISTANCE

The UN Human Rights Committee has stated that the “assistance of counsel should be ensured, through legal aid as necessary, immediately on arrest and throughout all subsequent proceedings to persons accused of serious crimes, in particular in cases of offences carrying the death penalty.”<sup>241</sup> The Committee has also clarified that the denial of legal aid to a person sentenced to death who cannot pay for counsel is not only a violation of their right to counsel, but also of their right to appeal.<sup>242</sup> In addition, the right to counsel extends to clemency procedures and to individuals seeking review of capital cases by constitutional courts.<sup>243</sup>

The right to counsel generally means that a person has the right to a lawyer of their choice. If a defendant does not have a designated lawyer, they are entitled to have one assigned by a judge or judicial authority. If the defendant cannot afford to pay, assigned counsel must be provided free of charge.<sup>244</sup> The accused individual may decide not to be represented by a lawyer during questioning and pre-trial phases, and instead represent themselves.<sup>245</sup> However, the UN Human Rights Committee has stated that in death penalty cases the state should give preference to appointing counsel chosen by the accused, including for any appeal of their sentence.<sup>246</sup>

Death penalty cases should not proceed unless the accused is assisted by competent and effective counsel.<sup>247</sup> The state and the court have a particular obligation in death penalty cases to ensure that the appointed counsel is competent, has the requisite skills and experience commensurate with the gravity of the offence, and is effective.<sup>248</sup> The UN Human

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<sup>240</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/67/275, 9 August 2012, para. 25.

<sup>241</sup> Human Rights Committee, Concluding observations of the Human Rights Committee: Trinidad and Tobago, UN Doc. CCPR/CO/70/TTO, 3 November 2000, para. 7.

<sup>242</sup> Human Rights Committee, General Comment No. 32, supra note No. 86, para. 51.

<sup>243</sup> Guideline 6 para. 47(c) of the Principles on Legal Aid (the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems), UN Doc. E/CN.15/2012/L.14/Rev.1, 25 April 2012.

<sup>244</sup> Human Rights Committee Concluding Observations on Tajikistan, UN Doc. CCPR/CO/84/TJK (2005) para. 11, on Slovenia, UN Doc. CCPR/CO/84/SVN (2005) para. 9.

<sup>245</sup> Article 14(3)(d) of the ICCPR.

<sup>246</sup> Human Rights Committee, *Pinto v Trinidad and Tobago*, (232/1987), 20 July 1990, UN Doc. CCPR/C/39/D/232/1987 (1990), para. 12.5, *Frank Robinson v Jamaica*, (223/1987), 30 March 1989, UN Doc. CCPR/C/35/D/223/1987 (1989), para. 10.3.

<sup>247</sup> Human Rights Committee, *Robinson v Jamaica*, Communication No. 223/1987, paras. 10.2-10.3, *Abdool Saleem Yasseen and Noel Thomasa v Guyana*, UN Doc. CCPR/C/62/D/676/1996 (1998) para. 7.8.

<sup>248</sup> Principle 13 of the Principles on Legal Aid, supra note No. 243.

Rights Committee has also stated that if counsel shows “blatant misbehaviour or incompetence”, or if the authorities “hinder appointed lawyers from fulfilling their task effectively,” the state may be responsible for a violation of the right to fair trial under the ICCPR.<sup>249</sup> If the authorities or the court are notified that counsel is not effective, or if the counsel’s ineffectiveness is manifest, the court must ensure that the counsel performs his or her duties or is replaced.<sup>250</sup>

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated “that proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments. All defendants facing the imposition of capital punishment must benefit from the services of a competent defence counsel at every stage of the proceedings.[...] In addition, all mitigating factors must be taken into account.”<sup>251</sup>

Foreign nationals (regardless of their immigration status)<sup>252</sup> who have been arrested, detained or imprisoned must be notified of their right to contact and receive assistance from officials from the embassy or the consular post of the country of their nationality, or another relevant consular post. If the person is a refugee or stateless person, or is under the protection of an intergovernmental organization, they must be notified of their right to communicate with an appropriate international organization or with a representative of the state where they reside.<sup>253</sup>

The International Court of Justice ruled that the failure of a state to inform foreign nationals charged with capital crimes of their rights to consular assistance violated the individuals’ rights, as well as the United States of America’s obligations to the foreign states under international law. The Court considered that the United States of America was required to review and reconsider the conviction and sentence of the individuals concerned.<sup>254</sup>

In addition, under international fair trial standards foreign nationals or others who do not

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<sup>249</sup> The UN Human Rights Committee, General Comment No. 32, supra note No. 86, para. 38.

<sup>250</sup> The UN Human Rights Committee, *Pinto v Trinidad and Tobago*, supra note No. 85, para. 12.5; *Kelly v Jamaica*, UN Doc. CCPR/C/41/D/253/1987, 1991, para. 5.10; *Chan v Guyana*, UN Doc. CCPR/C/85/D/913/2000, 2005, para. 6.2-6.3; *Brown v Jamaica*, UN Doc. CCPR/C/65/D/775/1997 (1999) para. 6.8; *Burrell v Jamaica*, UN Doc. CCPR/C/57/D/546/1993 (1996) para. 9.3.

<sup>251</sup> Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1997/60, 24 December 1996, para. 81

<sup>252</sup> UN General Assembly resolution 65/212, para. 4(g); Human Rights Council resolution 12/6, para. 4(b).

<sup>253</sup> Article 36 of the Vienna Convention on Consular Relations; Article 17(2)(d) of the Convention on Enforced Disappearance; Article 16(7) of the Migrant Workers Convention; Principle 16(2) of the Body of Principles; Guideline 3, para.43(c) of the Principles on Legal Aid.

<sup>254</sup> International Court of Justice, *LaGrand Case (Germany v the USA)*, (2001); *Avena and Other Mexican Nationals (Mexico v USA)*, (2004).

understand or speak the language used by the authorities are entitled to the assistance of an interpreter, free of charge, at all stages of the proceedings.<sup>255</sup> The right to an interpreter applies at all stages of criminal proceedings, including during police questioning, preliminary examinations or inquiries, and challenges to the legality of detention, as well as during any period of detention or imprisonment. It also applies, where necessary, to contact between the accused and their counsel in all phases of the investigation, pretrial and throughout the proceedings. For the right to an interpreter to be meaningful, the interpretation must be competent and accurate; the accused must be able to understand the proceedings and the court must be able to understand testimony presented in another language. The courts are responsible for ensuring the assistance of a competent interpreter to those who need it.

## RIGHT TO APPEAL AGAINST THE CONVICTION AND SENTENCE

UN Safeguard No.6 and Article 14 of the ICCPR guarantees the right to everyone convicted of an offence carrying the death penalty to a review of the conviction and the sentence by a higher independent, impartial and competent tribunal. Article 6.2 of the ICCPR also clearly states that the death penalty may only be carried out after a final judgment by a competent court.

While the right to appeal under international law does not require states to provide for more than one instance of appeal, the Human Rights Committee recommends that if domestic law provides for more, the convicted person must be given effective access to each instance.<sup>256</sup>

The higher court must be competent to review both the sufficiency of the evidence and the law.<sup>257</sup> The higher court is required to review the allegations against the individual in detail, consider the evidence submitted at trial and referred to in the appeal, and render a judgment about the sufficiency of the incriminating evidence. The Human Rights Committee has taken the view that a judicial review limited to matters of law did not meet the requirements of the ICCPR for a full evaluation of the evidence and conduct of the trial.<sup>258</sup>

## 3.4 RIGHT TO SEEK PARDON AND COMMUTATION OF A DEATH SENTENCE

Article 6(4) of the ICCPR and UN Safeguard No.7 guarantees the right to anyone sentenced to death to seek pardon or commutation of the sentence.

Respect for the right to seek pardon or commutation requires a fair and adequate procedure that affords the opportunity to present all favourable evidence relevant to the granting of clemency, and gives the competent official(s) the power to grant pardons or commute death sentences. Essential guarantees for pardon and commutation procedures include the rights of

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<sup>255</sup> Article 14(3) of the ICCPR; Articles 16(8) and 18 of the Migrant Workers Convention;

<sup>256</sup> Human Rights Committee, General Comment 32, supra note No. 86, para. 45; *Henry v Jamaica*, UN Doc. CCPR/C/43/D/230/1987, 1991, para. 8.4.

<sup>257</sup> Human Rights Committee, General Comment 32, supra note No. 86, para. 48.

<sup>258</sup> Human Rights Committee, *Domukovsky et al v Georgia*, UN Docs. CCPR/C/62/D/623/1995, CCPR/C/62/D/624/1995, CCPR/C/62/D/626/1995 and CCPR/C/62/D/627/1995, 1998; *Saidova v Tajikistan*, UN Doc. CCPR/C/81/D/964/2001, 2004, para. 6.5; *Gómez Vázquez v Spain*, UN Doc. CCPR/C/69/D/701/1996, 2000, para. 11.1.

condemned individuals to make representations in support of the request and respond to comments made by others, to be informed in advance of when the request will be considered, and to be informed promptly when the decision is reached.<sup>259</sup> Individuals, in particular when facing the death penalty, should receive legal counsel.<sup>260</sup> The competent officials must genuinely consider such requests.

### 3.5 NO EXECUTIONS WHILE APPEALS OR CLEMENCY PETITIONS ARE PENDING

UN Safeguard No.8 states that executions may not be carried out “pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence.”

### 3.6 RESUMPTION OF EXECUTIONS

In Indonesia the resumption of executions in 2013 was a reversal of policy after some years of positive indications that the country was moving away from the death penalty. Between 2009 and 2012, no executions were carried out and the authorities established what they described in a statement to the UN Human Rights Council as a “de facto moratorium on executions”. The Indonesian government spokesperson went on to say “if we have to reintroduce death penalty, it is simply because we are dictated by the aggravated situation affecting our society as a result of those crimes.”<sup>261</sup>

As noted by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, executions carried out as part of a policy to resume executions owing to extraneous developments which are not related to the crime or individual offender in question may be considered arbitrary. The Special Rapporteur has underlined that “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 [and] the execution of that convict in order to demonstrate strength in the criminal justice system is arbitrary.” In this context, the Special Rapporteur has also referred to the possibility that not only may prisoners and their families have developed something akin to legitimate expectations of avoiding execution, but that, for example, “prosecutors are arguably more inclined to demand and judges to impose death sentences if they assume the sentence will not be implemented”, and that “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.”<sup>262</sup>

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<sup>259</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/HRC/8/3, 2008, paras. 59-67.

<sup>260</sup> Guideline 6 para. 47(c) of the UN Principles on Legal Aid, supra note No. 243.

<sup>261</sup> Supra note No. 13.

<sup>262</sup> Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/69/265, 6 August 2014, paras. 103-106.

## 4. CONCLUSIONS AND RECOMMENDATIONS

The resumption of executions in Indonesia represents a “reversal” on the country’s achievements towards abolition of the death penalty and exposes severe flaws in the administration of justice in the country, where more than 100 people remain on death row. By focusing on 12 individual death penalty cases in particular, Amnesty International has highlighted violations of international human rights law and standards which require immediate addressing by the authorities to prevent further arbitrary deprivation of life.

These flaws in the administration of justice meant that individuals facing the death penalty were denied their right to a fair trial and appeal process. The violation of an individual’s legal rights often started at the point of arrest and continued during prolonged periods – often months - in pre-trial detention without the supervision of a judicial authority. Several prisoners did not have access to legal counsel or were not adequately represented by their lawyers at different stages of the proceedings. Some were foreign nationals and did not receive interpretation or consular assistance.

The cases described in this report highlight violations of international law in the criminal justice process where they were on trial for their lives. Some claimed they had been subjected to torture or other ill-treatment or to other forms of coercion while in police detention to make them sign “confessions” or other self-incriminating statements, which were admitted as evidence during their trials. Their claims were not investigated by the judicial authorities. One of those sentenced to death and executed had a severe mental disability, while another could have been below 18 years of age at the time the offence was committed. In several cases, executions were carried out while recourse procedures were still pending.

The blanket rejection of clemency applications from those sentenced to death for drugs offences has undermined the right to seek pardon or commutation of death sentences. The authorities of Indonesia have justified the resumption of executions as a tool to resolve the “national drug emergency”, analysis of which was based on flawed research findings and the ill-conceived premise that the death penalty deters crime. Against international law, the death penalty continued to be imposed and implemented for drug-related offences.

Amnesty International reiterates its calls on the government of Indonesia to establish a moratorium on executions as a first step towards abolition of the death penalty, in line with five UN General Assembly resolutions adopted since December 2007.<sup>263</sup> Pending full abolition, Amnesty International urges the Indonesian authorities to take immediate steps to address the following:

## RECOMMENDATIONS TO GOVERNMENT

- Establish an independent and impartial body, or mandate an existing one, to review all cases where people have been sentenced to death, with a view to commuting the death sentences; in particular in all cases where the death penalty has been imposed for drugs offences or where the trial did not meet the most rigorous international fair trial standards, or in cases where the procedures were seriously flawed, offer a retrial that fully complies with international fair trial standards and which does not resort to the death penalty.
  - Bring provisions in national legislation that allow for the use of the death penalty in line with international law and standards, including by removing from the scope of the death penalty any offence other than intentional killing, and ensure that all those who have been sentenced to death for other offences, in particular for drugs offences, have their sentences commuted accordingly.
  - Ensure that in proceedings related to offences where the death penalty might be imposed that the most rigorous internationally recognized standards for fair trial are respected, including by implementing all relevant recommendations made by the UN Human Rights Committee and the UN Committee against Torture.
  - Improve access for all people facing the death penalty to competent legal assistance for those facing criminal charges or where there is a possibility to pursue appeals or other recourse procedures, in particular for those from disadvantaged or marginalized socio-economic backgrounds, and ensure that resources are available to the Legal Aid Council for the appointment of competent pro bono lawyers in all regions of the country.
  - Ensure that there are prompt, thorough, impartial and effective investigations by independent and impartial bodies into all allegations of torture and other ill-treatment by police or other authorities; that victims have access to an effective remedy and receive reparation; and that if there is sufficient admissible evidence, those suspected of responsibility, including superior officers who knew or should have known that those under their command were resorting to torture or other ill-treatment and who did not take all measures in their power to prevent, halt or report it, are prosecuted in proceedings which meet international standards of fairness.
  - Ensure that all prisoners on death row who have never appealed are provided without
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delay with effective opportunities to appeal and competent legal counsel to assist them

in doing so, and make reviews of death penalty cases mandatory, even if the defendant elects not to pursue an appeal, including when the death penalty is imposed by a higher court during the course of the appeal process.

- Establish transparent procedures for the exercise of the presidential power to grant clemency applications, in order to fulfil its purpose of meaningful safeguard of due process.
- Initiate an immediate and independent review of all cases where there is credible evidence that prisoners who have been sentenced to death have mental or intellectual disabilities or disorders, including those who have developed such disabilities or disorders after being sentenced and ensure that no one with such disabilities is sentenced to death in the future.
- Ensure that all detainees facing a charge for which a death sentence may be imposed, be given proper medical assessments by a qualified and competent doctor at the time of their arrest, and regularly thereafter. Ensure that the results of all such medical examinations, as well as any relevant statements by the person in custody and the doctor's conclusions, are recorded in writing by the doctor and are made available to the person in custody and his or her lawyer.
- Regularly publish full and detailed information, if possible disaggregated by nationality and ethnic background, about the use of the death penalty which can contribute to a public debate on the issue. These should include: the number of persons sentenced to death and for what offences; the number of prisoners appealing the sentences and at what level; location of detention; information on past and imminent executions; the total number of persons under sentence of death; the number of death sentences reversed or commuted on appeal; and the number of instances in which clemency has been granted.
- Initiate an informed public and parliamentary debate on abolition of the death penalty.

## RECOMMENDATIONS TO THE PRESIDENT AND THE INDONESIAN NATIONAL HEAD OF POLICE

- Provide genuine consideration to all clemency applications by persons under sentence of death and ensure clemency procedures are an integral part of the overall system for ensuring justice and fairness in the legal process.
- Ensure that all detainees and prisoners at police detention facilities are notified of, and able effectively to exercise, their right to legal assistance (and, if foreign nationals, their right to seek consular assistance), are allowed access to and to consult with their lawyer in private, as well as access to their families, as required by international law and standards.

## RECOMMENDATIONS TO THE JUDICIARY

- Exclude from proceedings statements or other evidence extracted through torture or other ill-treatment or other forms of coercion, and ensure that any allegations made in court or to a judge or other judicial officer that a defendant or witness has been subjected to such treatment are thoroughly and independently investigated.
- Ensure that defendants have competent legal representation from the time of arrest and throughout the whole process.
- Ensure that the identity of the defendants is appropriately attributed and that they enjoy all protections afforded to them by the law, and that in disputed circumstances the benefit of the doubt is given in favour of the defendant.

## RECOMMENDATIONS TO THE PARLIAMENT

- Take measures to abolish the death penalty in national law, most urgently by excluding from the scope of the death penalty any crimes other than intentional killing.
- Ensure that, in line with Indonesia's obligations as a state party to the Convention Against Torture, all acts of torture, along with attempts to commit torture and acts by any person which constitute complicity or participation in torture, are offences under the criminal law punishable by appropriate penalties which take into account their grave nature.
- Establish an independent mechanism to receive and deal with allegations of torture or other ill-treatment by the police or other officials within the criminal justice system. The body should be operationally independent of the government, political influence and the police itself, and accessible to complainants throughout the country. Its mandate should empower it to, among other things, carry out effective investigations and refer cases to the Public Prosecutor.
- Ensure that the draft revised Criminal Code and draft revised Criminal Procedure Code are brought into line with the relevant provisions of the International Covenant on Civil and Political Rights and other international human rights standards on fair trials. In particular, provisions should be incorporated within the Criminal Procedure Code that would ensure detainees are brought before a judge or other judicial officer promptly – that is, within a maximum of 48 hours after their arrest, and the Criminal Code must be revised to remove provisions allowing for the imposition of the death penalty for crimes other than intentional killing. The revised Codes should then be passed into law as a matter of priority.

## RECOMMENDATIONS TO THE INTERNATIONAL COMMUNITY, INCLUDING GOVERNMENTS AND INTERGOVERNMENTAL AGENCIES

- Raise concerns with Indonesian authorities regarding the use of death penalty in Indonesia and advocate for compliance with international law and standards in all cases.
- Provide technical support to the Indonesian authorities to assist them to improve the administration of justice in Indonesia and to review legislation with a view to bringing it in line with international law and removing provisions that allow for the imposition of the death penalty for crimes other than intentional killing, pending full abolition.

# ANNEX

## EXECUTIONS BETWEEN 2000-2015

YEAR	NAME	CRIME
2015	Raheem Agbaje Salami (or Jamiu Owolabi Abashin) (Nigerian)	Drugs
	Andrew Chan (Australian)	Drugs
	Myuran Sukumaran (Australian)	Drugs
	Rodrigo Gularte (Brazilian)	Drugs
	Zainal Abidin (Indonesian)	Drugs
	Martin Anderson alias Belo (Nigerian/Ghanaian)	Drugs
	Sylvester Obiekwe Nwolise (Nigerian)	Drugs
	Okwudili Oyatanze (Nigerian)	Drugs
	Marco Archer Cardoso Moreira (Brazilian)	Drugs
	Ang Kiem Soe (Dutch)	Drugs
	Namaona Denis (or Solomon Chibuke Okafer) (Nigerian)	Drugs
	Rani Andriani alias Melisa Aprilia (Indonesian)	Drugs
	Daniel Enemu alias Diarrssaouba (Nigerian)	Drugs
	Tran Thi Bich Hanh (Vietnamese)	Drugs
2013	Mohammad Abdul Hafeez (Pakistani)	Drugs
	Ibrahim bin Ujang (Indonesian)	Murder
	Jurit bin Abdullah (Indonesian)	Murder
	Suryadi Swabuana (Indonesian)	Murder
	Adami Wilson (Nigerian/Malawian)	Drugs
2008	Amrozi bin Nurhasyim (Indonesian)	Terrorism offences
	Ali Ghufron (also known as Mukhlas) (Indonesian)	Terrorism offences
	Imam Samudra (Indonesian)	Terrorism offences
	Rio Alex Bullo (Indonesian)	Murder

	Usep alias TB Yusuf Maulana (Indonesian)	Murder
	Sumiarsih (Indonesian)	Murder
	Sugeng (Indonesian)	Murder
	Ahmad Suraji alias Dukun AS (Indonesian)	Murder
	Samuel Iwuchukwu Okoye (Nigerian)	Drugs
	Hansen Anthony Nwaliosa (Nigerian)	Drugs
2007	Ayub Bulubili (Indonesian)	Murder
2006	Fabianus Tibo (Indonesian)	Murder
	Marinus Riwu (Indonesian)	Murder
	Dominggus Da Silva	Murder
2005	Astini (Indonesian)	Murder
	Turmudi (Indonesian)	Murder
2004	Ayodya Prasad Chaubey (India)	Drugs
	Saelow Prasad (India)	Drugs
	Namsong Sirilak (Thailand)	Drugs
2001	Gerson Pande (Indonesian)	Murder
	Fredrik Soru (Indonesian)	Murder

# WHETHER IN A HIGH-PROFILE CONFLICT OR A FORGOTTEN CORNER OF THE GLOBE, **AMNESTY INTERNATIONAL** CAMPAIGNS FOR JUSTICE, FREEDOM AND DIGNITY FOR ALL AND SEEKS TO GALVANIZE PUBLIC SUPPORT TO BUILD A BETTER WORLD

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# I WANT TO HELP



# FLAWED JUSTICE

## UNFAIR TRIALS AND THE DEATH PENALTY IN INDONESIA

Despite strong protests from local and international human rights organisations, the new Indonesian administration under President Joko Widodo has executed 14 people, including Indonesian and foreign nationals, in 2015. All of them had been convicted of drug trafficking. In other occasions President Widodo also stated publicly that the government would deny any application for clemency made by people sentenced to death for drug-related crimes.

This report which builds on Amnesty International's past work over three decades documenting the use of death penalty in Indonesia, includes research carried out during a March 2015 visit to the country. The report highlights 12 individual cases of death row prisoners, out of a total of 131 people on death row, which point to systemic problems in Indonesia's administration of justice that resulted in violations of international human rights law and standards.

Amnesty International opposes the death penalty in all cases and under any circumstances, regardless of the nature of the crime, the guilt, innocence or other characteristics of the offender, or the method used by the state to carry out the execution. The organization considers the death penalty a violation of the right to life as proclaimed in the Universal Declaration of Human Rights and the ultimate cruel, inhuman and degrading punishment.

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