

INDONESIA

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Joint Witness Statement submitted by LBH Masyarakat, Reprieve and International Centre on Human Rights and Drug Policy

(I) REPORTING ORGANISATIONS

This Statement is authored and endorsed by the following organisations:

- (a) **LBH Masyarakat.** An Indonesian not-for-profit legal aid institute, established in 2007, that provides legal aid for the poor and victims of human rights abuses, undertakes legal empowerment education, as well as works to protect human rights and advocate legal reform in Indonesia.
- (b) **Reprieve.** An international legal action charity which was founded in 1999 (UK charity registration no. 1114900). Reprieve provides support to some of the world's most vulnerable people, including people sentenced to death and those victimised by states' abusive counter-terrorism policies. Based in London, but with offices and partners throughout the world, Reprieve is currently working on behalf of hundreds of people facing the death penalty in 16 countries, including Indonesia. Reprieve's vision is a world free of execution, torture and detention without due process.
- (c) **International Centre on Human Rights and Drug Policy.** An academic centre based at the University of Essex, Human Rights Centre. Founded in 2009, the Centre organisation of the Human Rights Centre, University of Essex. The ICHRDP is dedicated to developing and promoting innovative and high quality legal and human rights research and teaching on issues related to drug laws, policy and enforcement.



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(II) EXECUTIVE SUMMARY

1. Since its 2012 Universal Periodic Review (UPR), Indonesia has resumed executions. In 2013, 5 people were executed, two in relation to drug offences. Fourteen people and four people have been executed in 2015 and 2016 respectively, all for drug offences. We are of the view that these executions demonstrate a clear connection between Indonesia's approach to the death penalty and its punitive drug policy. The Indonesian Government wrongly justifies the use of executions by claiming that executing drug offenders will resolve what it identifies as a national "drug emergency". Our submission is made in this context and is intended to provide a clear backdrop to a government narrative where the death penalty and other punitive means are employed as a necessary part of drug policy. As this joint submission will expound, the imposition of the death penalty and carrying out of executions has not lowered rates of drug-related crimes in Indonesia; Indonesia's punitive drug policy has rather been the driver of human rights abuses against people who use drugs or those accused of being involved in drug-related crime.
2. In this 3rd cycle of the country's Universal Periodic Review, it is essential that member States of the Human Rights Council build a strong foundation for the promotion of human rights and respect for rule of law within Indonesian drug policy in their recommendations with the government. We have summarised below a number of concerns in relation to Indonesia's death penalty and drug policy framework.

(III) INTRODUCTION

Drug Policy

3. The Indonesian president, Joko Widodo, claims the country is experiencing a "drug emergency"; and cites highly contested data from the National Narcotics Board that 40-50 young Indonesians die every day because of drugs. This data has been disputed and credibly rebutted by the academic community.ⁱ These disproven numbers have been used by the administration to justify a range of law enforcement measures that directly undermine human rights protection—from arbitrary arrests and detention, abusive policing practices,ⁱⁱ resuming executions for drug crimes,ⁱⁱⁱ to compulsory drug treatment and criminalisation of people who use drugs^{iv}. This reinforces stigma around drug use, demonising those accused of drug trafficking, and remains a powerful tool to further populist objectives in a country that has become increasingly disillusioned by corrupt government institutions. The "emergency" has given *carte blanche* to the administration to scale up law enforcement measures for what is a critical public health issue. The concurrent investment from the government in healthcare and social protection required to address this complex issue has been non-existent.
4. Drug control laws and policies in Indonesia have created an environment of increased risk to fundamental freedoms and a range of human rights protected under international law. The highly punitive environment established by Indonesia's anti-narcotics strategy is not narrow in its influence and impact—it undermines the promotion and protection of human rights for the entire population of Indonesia. Equally, the punitive model of drug control has achieved no success in eliminating illicit drug consumption, trafficking, and improving the health and well-being of Indonesian society. As of the date of submission, the rates of drug consumption and availability in the country see no signs of waning and the health and social situation of the over 4 million people who use drugs in Indonesia continues to rapidly deteriorate.

5. National data from the Badan Narkotika Nasional (BNN – in English, National Narcotic Board) shows that in 2015, more than 4 million people use drugs in Indonesia—2.2% of the total population.^v This represents an increase from the previous year. There is a concentrated epidemic affecting the more than 100,000 injecting drug users in the country, though transmission rates amongst this key population in some urban areas has seen a welcome decline.^{vi} In prisons, people injecting drugs face a higher rate of transmission and lack access to necessary and life-saving harm reduction services available in the community. As of 2013, Indonesia has one of the highest rates of viral hepatitis in Southeast Asia. It is estimated that between 60-90% of injecting drug users are living with Hepatitis C—a statistic that is cause for serious alarm.^{vii} Apart from being criminalised, people who inject drugs face significant barriers in accessing necessary treatment for blood-borne viruses, including inadequate preventive education and prohibitive costs for treatment and testing.^{viii} These sobering statistics indicate much more attention is needed to ensure the rights and well-being of this highly stigmatized group in Indonesia are protected and fulfilled.
6. The normative source of Indonesia's highly punitive approach to drugs is Law No. 35 Year 2009 on Narcotics ("Narcotics Law"). This law seeks to achieve four concurrent objectives: 1. To ensure the availability of narcotic drugs for health treatment and/or technology and knowledge research, 2. To prevent, protect and save the nation from drug abuse, 3. To eradicate illicit drug and its precursor trafficking, and 4. To guarantee the management of medical and social rehabilitation for drug abuser and drug dependants. It establishes a minimum sentencing penalty for drug possession of four (4) years imprisonment and a maximum sentence of death for drug trafficking.^{ix} Likewise, the Narcotics Law guides policy on rehabilitation for persons who use drugs. Globally, it is one of the world's most punitive regimes for addressing illicit drug use and trafficking.

Death Penalty

7. Between 2008 and March 2013, there was a de facto moratorium on the imposition of the death penalty in Indonesia. However, since March 2013, 23 people have been executed: five in 2013^x, fourteen in 2015^{xi}, and four so far in 2016^{xii}.
8. As of 16 September 2016, there are at least 178 people on death row: 105 for drug offenses, 71 for murder and 2 for terrorism.^{xiii}
9. The Government of Indonesia has made it clear that it intends to continue to execute death row prisoners, in particular those who have committed drug offences. The narrative of emergency and "war" is employed to justify the imposition of the death penalty for drug offences, in breach of international law. For example, on 9 December 2014, a press report^{xiv} quoted Attorney General H.M. Prasetyo stating that "*There will be no mercy for drug traffickers" and that "[the President] was not planning to abolish capital punishment anytime soon, particularly in cases of drug trafficking*". These sentiments have been echoed by other government ministers and repeated by the President. Justice Minister Yasonna was quoted as saying that the President "*had declared war against drug traffickers, pointing to the increasing number of drug abuse victims*"^{xv}. The coordinating minister for political, legal and security affairs, at that time, Tedjo Edhy Purdijatno, was quoted as saying that traffickers "*are still able to control their drug deals from inside the prison. The criminals are not sorry for what they have done. We must stop this*"^{xvi}.

(IV) 2012 UNIVERSAL PERIODIC REVIEW OF INDONESIA

Previous UPR Recommendations

10. The 2012 UPR included a number of recommendations relevant to the death penalty in Indonesia. Some recommendations were made in relation to improvement of the realisation of the right to health in general, and for disadvantaged groups, but there were no recommendations specifically related to the right to health of people who use drugs or to the cross-cutting human rights impact of Indonesian drug policy.
11. Indonesia has failed to implement these recommendations and has in fact regressed since 2012, when a de facto moratorium on executions was in place. Since 2013, Indonesia has carried out executions of individuals convicted of drug offences and vigorously advances one of the world's most punitive drug control policies, resulting in systemic and widespread breaches of international law, described in detail below.

(V) DRUG POLICY AND THE DEATH PENALTY IN INDONESIA

A. Breach of the Right to Life

12. The imposition of the death penalty for drug offences in Indonesia constitutes a violation of the right to life in the following ways:
 - (a) prisoners convicted of drug offences have been denied access to a meaningful clemency process, contrary to Article 6(4) International Covenant on Civil and Political Rights (ICCPR);
 - (b) a number of prisoners have been denied the right to seek clemency due to the expiration of a one year time limit (a limit which is universally imposed), contrary to Article 6(4) ICCPR; and
 - (c) prisoners have been/are scheduled to be executed for offences that cannot be classified as amongst the "*most serious*", contrary to Article 6(2) ICCPR.
13. Each of these breaches is considered further below.
 - (a) ***Denial of access to a meaningful clemency process, contrary to Article 6(4) ICCPR***
14. All persons sentenced to death have the right to consideration, on an individual basis, of their clemency requests, pursuant to Article 6(4) ICCPR. **Prisoners on death row who have been convicted and sentenced to death for a drug-related offence in Indonesia have, however, been denied access to a meaningful clemency process because Indonesia exercises a blanket refusal to consider clemency applications in all drug-related cases**^{xvii}. Therefore, any application to review or grant a clemency petition of anyone convicted of a drug-related offence would be rejected.
15. The scope of the right to seek clemency has been clarified in subsequent jurisprudence and reports of UN bodies and special procedures.^{xviii}
16. The blanket policy applied by Indonesia in respect of drug-related cases, and its decision not to consider exceptions to this rule, in relation to all prisoners in Indonesia is a breach of Article 6(4) ICCPR, since it denies such individuals their right to seek clemency "*in all cases*", effectively negating the right itself.

(b) ***Denial of the right to seek clemency due to the expiration of a one year time limit, contrary to Article 6(4) ICCPR***

17. Indonesia has adopted a policy whereby clemency will be denied to those who do not file a petition within one year of the decision in their case becoming "*final and binding*" which constitutes a breach of Article 6(4) ICCPR. The basis for this is Article 7 paragraph 2 of Law Number 5 Year 2010 concerning Revision of Law Number 22 Year 2002 concerning Clemency.
18. This deadline imposed by Indonesia also constitutes a breach of Article 10(3) ICCPR which states that "*the essential aim of [the penitentiary system] shall be [prisoners] reformation and social rehabilitation*". A one year deadline does not provide sufficient time for a prisoner to demonstrate that they are capable of reformation and rehabilitation.
19. Two of the prisoners who were executed on 29 July 2016 (Seck Osmane and Humphrey Jefferson Ejike Eleweke) received notice that this time limit has expired and their right to seek clemency was therefore void. This was despite a successful challenge to the legality of this deadline in the Indonesian Constitutional Court and ambiguity regarding the exact meaning of "*final and binding*" in the context of capital cases.^{xix}
20. According to Indonesia's clemency law, an execution of a prisoner who has filed a valid clemency petition cannot be carried out before the President has issued a presidential decree.^{xx} Following the *Rusli* case, the clemency applications submitted by Mr. Osmane and Mr. Eleweke should have been considered valid because the one year time limit no longer applied. In such circumstances the executions of Mr. Eleweke and Mr. Osmane were contrary not only to international human rights standards but also to Indonesian Law.

B. Breach of the Prohibition on Torture and Cruel, Inhuman and Degrading Treatment

21. The rights of prisoners on death row in Indonesia have been, or are at risk of being, violated in the following ways:
 - (a) Prisoners are often tortured and/or interrogated after their arrest, in some cases in order to obtain a confession;
 - (b) Prisoners are only provided with 72 hours' notice of their execution; and
 - (c) Prisoners whose executions were postponed in July 2016 have no indication of why or for how long their executions have been stayed.

In the context of drug policy, article 7 is being breached by:

- (d) Mandatory reporting and compulsory drug rehabilitation, this is also a breach of the right to liberty & the right to health
 - (e) Availability of evidence-based drug treatment, including harm reduction services: this also breaches the right to humane treatment while incarcerated
 - (f) Criminalisation of people who use drugs, this also breaches the right to humane treatment while incarcerated, right to health, right to liberty, right to humane treatment while incarcerated, right to be free from arbitrary detention
22. Each of these issues is considered in detail below.

(a) ***Prisoners are often tortured and/or interrogated after their arrest, in some cases in order to obtain a confession***

23. Prisoners have been physically assaulted by police officers after arrest and during interrogation.^{xxi} In Zulfiqar Ali's case, this has led to long-term damage and prisoners requiring hospital treatment. Humphrey Jefferson Ejike Eleweke was convicted on the basis of evidence which he alleges was obtained through torture.

(b) ***72 hours' notice of execution constitutes cruel, inhuman or degrading treatment***

24. By Indonesian law, prisoners are to be given 72 hours' notice of execution. This is insufficient advance notice of the date and time of the execution denies the victim and family sufficient notice to make arrangements, and undermines the ability of the lawyers to make representations which might avert the sentence.

25. These considerations are even more significant for prisoners who are foreign nationals. They are unlikely to have any relatives in Indonesia; therefore, it is unlikely that they will be able to be visited by members of their family before they die. Indonesia's death row inmates are from around 30 different countries.^{xxii}

26. **In the most recent round of executions, on 29 July 2016, the prisoners executed before the expiration of the 72 hour notice period.** They were given their notification of execution on 26 July 2016 at or around 3pm. This meant that the executions could legally only be conducted, at the earliest, on the afternoon of 29 July 2016. The executions took place at 12.45am on 29 July 2016 which was, therefore, illegal under Indonesian Law.^{xxiii} The wife of Michael Titus (a Nigerian national, who was executed on 29 July 2016), did not arrive in time to see Michael for the last time before he was executed because he was executed before the expiration of the 72 hours period.

(c) ***Prisoners whose executions were postponed in July 2016 have no indication of why or for how long their executions have been stayed***

27. On 29 July Eugene Ape (Nigerian), Frederick Luttar (Nigerian), Obinna Nwajagu (Nigerian), Okonkwo Nonso Kingsley (Nigerian), Ozias Sibanda (Nigerian), Merri Utami (Indonesian), Agus Hadi (Indonesian), Pujo Lestari (Indonesian), Gurdip Singh (Indian) and Zulfiqar Ali (Pakistani) were spared execution at the very last moment. Activists and journalists described the process as chaotic.^{xxiv} Merri Utami was told to make preparations to leave her cell to be executed. No official stay has been granted. This situation has affected mental and physical health conditions of those who were spared. After receiving a last minute reprieve, Zulfiqar Ali received medical treatment for at least a week in a regional government hospital.^{xxv} Meanwhile, Merri Utami, who was still in an isolation cell in Women's Prison in Cilacap at the time of writing, has been severely affected by the uncertainty around her execution and has lost a considerable amount of weight.

C. Breach of the Right to a Fair Trial

28. The right to a fair trial of prisoners on death row for drug offences has been, or is at risk of being, violated in the following ways:

- (a) Denied access to an impartial tribunal
- (b) Prisoners have been denied the presumption of innocence/reliance on flawed evidence/failure to give consideration to exculpatory evidence;

(c) Prisoners have been denied access to a competent lawyer.

29. These breaches are considered below.

(a) ***Denied access to an impartial tribunal***

30. In relation to drug offences, courts in Indonesia have shown prejudice towards foreign prisoners and in particular towards Nigerian nationals. For example the judgment of the Central Jakarta District Court in the case of Mr. Eleweke stated that "**black-skinned people from Nigeria**" are under surveillance by police because they are suspected of drug trafficking in Indonesia, expressing the view of the Court that the relevant defendant was more likely than average to have committed the crime based solely on his race and the colour of his skin.

31. 8 of the 14 people listed for execution in July 2016, and 3 of the 4 people executed, were Nigerian nationals. This underlines the discriminatory and disproportionate treatment of Nigerians in Indonesia, both in sentencing and in executions in relation to drug offences.

(b) ***Denial of the presumption of innocence/reliance on flawed evidence/failure to give consideration to exculpatory evidence***

32. Prisoners have been denied the presumption of innocence because the evidence relied upon to support a conviction is flawed and/or there has been a failure to give consideration to exculpatory evidence. For example, the Court convicted Mr. Eleweke despite not being presented with any tangible evidence that linked him to the crime. Further, during his case review (*Peninjauan Kembali*), key evidence pertaining to his innocence was not given due consideration by the Court.

33. The Courts have refused to take into account mental illness of prisoners in sentencing them to the death penalty. For example, Rodrigo Gularte was sentenced to death for drug smuggling, and subsequently executed in April 2015, despite being diagnosed with paranoid schizophrenia and bipolar disorder so severe that he could not understand that he was going to be executed. ^{xxvi}

(c) ***Denied access to a competent lawyer***

34. Article 14(3)(b) ICCPR guarantees a prisoner the right to "*adequate time and facilities for the preparation of his defence and to counsel of his own choosing*". 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^{xxvii}. The UN has held that this right extends to all stages of criminal proceedings, including the preliminary investigation, before and during the trial and appeals.^{xxviii}

35. There are many instances where prisoners have been denied access to a competent lawyer, for example Zulfiqar Ali was denied access to legal counsel for a month following his arrest during which the authorities severely tortured him and extracted a forced confession. Mr. Eleweke had no access to lawyer during his first five months in pre-trial detention.^{xxix} This not only put him at a greater risk of being tortured, but also negatively affected the quality of defence on his case and left him with no legal avenues to raise violations of the right to be free from torture against the authorities.

D. Denial of Access to Consular Support

36. Article 36 of the Vienna Convention on Consular Relations provides foreign nationals with 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.
37. Zulfiqar Ali was refused the right to contact his embassy during his arrest and detention. In other cases, the Indonesian authorities have failed to correctly identify nationalities of foreign nationals facing the death penalty which led to them not being promptly and effectively assisted by their own government. This happened to Namaona Denis (executed in January 2015), who was a Nigerian, but was identified as a Malawian. Meanwhile, Raheem Agbaje Salami (executed in April 2015), was falsely identified as a national of the Republic of Cordova. Also, Federik Luttar and Ozias Sibanda (both were slated for execution in July 2016 but spared at the last moment), were previously known as Zimbabweans, and were later identified as Nigerians after they had received the notification of executions.

(VI) DRUG POLICY AND THE RIGHT TO HEALTH IN INDONESIA

(a) *Mandatory reporting and compulsory drug rehabilitation for people who use drugs*

38. One of the four objectives in the Narcotics Law is ‘*to guarantee medical and social rehabilitation for drug abuser and drug dependants*’.^{xxx} This obligates people who abuse drugs—under the government’s terminology—to report to the government to enrol in drug rehabilitation programming. This obligation is mandatory and is an obligation that extends to family. A “drug abuser” and “drug dependent” lacks a clear definition within the law and fails to distinguish between casual drug use and use that may medically be considered clinically dependent.^{xxx} This widens the net in which a range of people can be subject to mandatory reporting, treatment they do not want, and in many cases, treatment they do not need, including cannabis users.
39. While the law is designed, in theory, to divert people who use drugs away from the criminal justice system, the failure to distinguish who is in need of treatment combined with the coercive nature of mandatory reporting leads to environment where people are routinely subject to compulsory treatment. For example, under the Narcotics Law, family members who fail to report a known “drug abuser” face up to six-months detention as a penalty.^{xxxii} This often leads to a situation where a person is placed into rehabilitation against their will. A range of human rights treaty bodies, special procedures, and UN agencies have uniformly condemned the practice of compulsory drug rehabilitation as a violation of the prohibition of inhuman and degrading treatment, the right to health, and the prohibition of arbitrary detention.^{xxxiii} Likewise, the coercive nature of mandatory reporting as a means to avoid arrest and incarceration engages questions of arbitrary detention and the obligation to respect the right to health.
40. LBH Masyarakat has conducted extensive research that exposes another weakness of the mandatory reporting system that can further subject people who drugs to exploitation and coercive medical interventions. This research uncovered the ways in which community drug treatment organisations, public hospitals and other “drug user” friendly services financially exploit government funding for “rehabilitation”. These organisations are official registration points for mandatory reporting and receive government funding for drug treatment based on the numbers of people reporting to each respective facility. These groups deploy fieldworkers to areas where people who use drugs live, work and socialise and persuade them using a range of dishonest and

opaque tactics to formally report.^{xxxiv} Many of the individuals reported feeling as though they were forced into reporting from these dishonest tactics. This further exposes how the system of mandatory reporting, *especially* in combination with criminalisation^{xxxv}, predisposes people who use drugs to exploitation and serious human rights risks.

(b) ***Availability of evidence-based drug treatment, including harm reduction services***

41. Drug treatment that is provided without the informed consent of a patient lacks an evidence base and contravenes a number of human rights protections.^{xxxvi} According to the Head of Rehabilitation Division within the BNN, drug treatment in Indonesia still lacks the appropriate capacity and services to offer quality drug treatment to persons experiencing drug dependence.^{xxxvii} Prioritising quality, community-based services informed by evidence over increasing ineffective and compulsory services is a requirement under the right to health.^{xxxviii}
42. That the Indonesian government makes provision for harm reduction programmes since 2007, is to be welcomed. These services include the provision of opioid substitution therapy, such as methadone, and clean needles and syringes for people who inject drugs. However, the geographic coverage of these programmes is wholly inadequate with less than 4% people known to be injecting opiates able to access methadone treatment.^{xxxix} Throughout the country, there are only 92 methadone clinics, mainly located in big cities, and 9 clinics inside prison setting.
43. Indonesia has the largest prison populations in Southeast Asia, rivalling only Thailand in the percentage of people incarcerated compared to the number at liberty.^{xl} Drug use, including injecting drug use in prisons is an enduring public health challenge. Rates of HIV/AIDS, TB and Hepatitis C amongst the population of injecting drug users in detention are higher than those in the community. Poor coverage of opioid substitution treatment in prisons exposes people who drugs to cruel, inhuman and degrading treatment. In cases where people experiencing opioid dependence on remand, police have denied methadone access in order to solicit confessions, amounting to torture. Opioid substitution treatment must be available and accessible to the prison population and given the current lack of coverage, a considerable scale up in its provisions is required as a matter of urgency.^{xli}
44. Poor coverage of harm reduction services throughout the country is one of several reasons people who use drugs face considerable difficulty in access. Health promotion activities, an integral aspect to the Alma Ata Declaration and under the right to health, must incorporate harm reduction as a means to inform and de-stigmatise this life-saving set of services for one of the nation's most vulnerable groups. **Concurrently, where harm reduction services are available, the highly punitive regime of criminalisation drives those seeking services away from the treatment they need.** Indonesia must do better for this community and for the well-being of their society.

(c) ***Criminalisation of people who use drugs***

45. The Narcotics Law criminalizes personal drug use^{xlii} and small possession for personal use which leads to systemic discrimination, mass incarceration of people who use drugs and low-level drug offenders, and widespread denial of essential health interventions.

46. As of June 2016, 24,606 people who use drugs are incarcerated in Indonesia. This is combined with the 46,738 incarcerated for trafficking who are small-scale suppliers selling drugs to fulfil their daily consumption needs.^{xliii}
47. Blanket criminalisation of personal possession all the way to high-level trafficking, with mandatory minimum sentencing requirements under the Narcotics Law has contributed to the prison overcrowding crisis currently happening throughout Indonesia. **Seventy percent** of the prison population in Indonesia are drug offenders.^{xliv}
48. Formal policy efforts to strengthen the diversion of people who use drugs to rehabilitation and not prison, include the enactment of the Supreme Court Circular Letter to encourage judges to deliver a rehabilitation sentence. In its recent research on rehabilitation sentencing, LBH Masyarakat found that out of 151 cases who could have benefited from diversion, only 41 cases (27.15%) received rehabilitation sentence.^{xlv} More importantly, rehabilitation should never be a sentence, it should be a decision between a patient and doctor. Criminalisation forces people in need of healthcare into a criminal justice system where their rights and dignity are formally undermined from arrest to sentencing. From a human rights perspective, it is quite simply, not fit for purpose.
49. As previously mentioned, criminalisation also fuels stigma and discrimination towards people who use drugs. Stigma and discrimination occurs not just from within the criminal justice system, but also reaches into social relationships, and tragically at the hands of health care professionals.^{xlvi}
50. Stigma and discrimination also affect the presence of legal aid for people who use and sell drugs. Advocates are reluctant to represent drug cases due to fears of being labelled a supporter of drugs. In 2011, LBH Masyarakat research found that more than 60% of drug offenders are not represented by lawyers.^{xlvii} Three years later, the situation is not improving. Out of the 275 cases that attracts death penalty, 85% of them are not assisted by lawyers despite the legal obligation ensure the provision of legal aid.^{xlviii}

(VII) RECOMMENDATIONS

51. We make the following recommendations:
 - (i) Recalling previous recommendations made to Indonesia during the first and second periodic cycles and in light of above referenced human rights impact of Indonesia's drug policy, Member States of the Human Rights Council should consider developing recommendations that encourage Indonesia to address the situation specific of drug control with the following suggested actions:
 - (ii) Ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, Optional Protocol to the Convention against Torture, and Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, in order to ensure available redress mechanism in international level for violations of human rights that occurred in the name of drug policy.
 - (iii) Review and undertake comprehensive reform to the current national drug strategies that are based upon human rights principles, this could include *inter alia*, decriminalise personal drug use; increase the availability of evidence-based drug treatment, as well as ensure the widespread information of such treatments; and ensure the protection of the right to a fair trial for drug offenders;

and apply an effective redress mechanism for discrimination against drug users in national level.

- (iv) End compulsory drug treatment and reform mandatory reporting requirements, this includes putting in place a policy that guarantees the informed consent of a person seeking drug treatment and scaling up treatment options that are based on scientific evidence.
- (v) As a priority, scale up harm reduction services, including for those incarcerated.
- (vi) Ensure that all persons sentenced to death have the right to meaningful consideration, on an individual basis and in line with international minimum standards, of their clemency requests.
- (vii) Ensure that second case review (*Peninjauan Kembali*), which aims to provide substantive justice for death row prisoners seeking remedy, is implemented by the Supreme Court and lower courts, in accordance with the recent 2014 Constitutional Court decision which revokes the limitation on the number of reviews which may be filed.
- (viii) Ensure that all persons facing execution are treated in line with domestic law and with international minimum standards.
- (ix) Establish an independent expert team under the President to evaluate the past three rounds of executions looking at impacts; and to review all death penalty cases ensuring that the right to fair trial has been protected. While such a review is undergoing, a moratorium on death sentences and executions should be in place.

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- i Irwanto, et al, Evidence-informed response to illicit drugs in Indonesia, *The Lancet*, Vol 385, No. 9984, 6 June 2015, pp. 2249 – 2250, [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(15\)61058-3/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(15)61058-3/fulltext), accessed on 19 September 2016. See also <https://www.theguardian.com/world/2015/jun/05/experts-criticise-data-used-by-indonesia-to-justify-punitive-drugs-policies>.
- ii On his report on mission to Indonesia, Manfred Nowak highlighted routine use of torture and ill-treatment against drug offenders in order to extract confessions or to receive information on drug suppliers. See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum: Mission to Indonesia, UN Doc. A/HRC/7/3/Add.7, 10 March 2008, para. 22, 64.
- iii Human Rights Committee, Concluding observations on the initial report of Indonesia, CCPR/C/IDN/CO/1, 21 August 2013, para. 10
- iv Committee on Economic, Social and Cultural Rights, Concluding Observations on the initial report of Indonesia, UN Doc E/C.12/IDN/CO/1, 19 June 2014, para. 35
- v Laporan Kinerja Badan Narkotika Nasional Tahun 2015, Badan Narkotika Nasional, Jakarta, 2016, p. 16.
- vi Laporan Perkembangan HIV/AIDS Triwulan IV Tahun 2015, Kementerian Kesehatan Republik Indonesia, 26 February 2016, p. 1, http://www.aidsindonesia.or.id/ck_upload/files/Final%20Laporan%20Perkembangan%20HIV%20AIDS%20Triwulan%204,%202015.pdf. See also 2014 UNAIDS Indonesia Country Office report here: http://www.unaids.org/sites/default/files/country/documents/IDN_narrative_report_2014.pdf
- vii Persaudaraan Korban Napza Indonesia, 'Issue Brief: The Urgent Need for Improved Hepatitis C Prevention, Care and Treatment for People Who Inject Drugs in Indonesia'.
- viii <http://jakartaglobe.beritasatu.com/news/indonesias-hidden-hepatitis-c-time-bomb/>
- ix See Section V for detailed examination of the death penalty.
- x <http://www.amnesty.org/en/news/indonesia-fifth-execution-confirms-shocking-new-trend-secrecy-2013-11-18>
- xi <https://www.amnesty.org/en/press-releases/2015/01/indonesia-first-executions-under-new-president-retrograde-step-rights/>
- xii <http://www.bbc.co.uk/news/world-asia-36920293>
- xiii <https://www.amnesty.org/en/latest/news/2015/10/indonesia-report-reveals-endemic-judicial-flaws-in-death-penalty-cases/>
- xiv <http://thejakartaglobe.beritasatu.com/news/no-mercy-for-death-row-inmates/>
- xv <http://jakartaglobe.beritasatu.com/news/no-mercy-for-death-row-inmates/>
- xvi Ibid
- xvii <http://www.theage.com.au/world/indonesian-president-joko-widodo-hardens-line-on-drug-offenders-on-death-row-20141218-12a8d7.html>
- xviii The UN Special Rapporteur on extrajudicial, summary or arbitrary executions outlined the purpose of a clemency procedure:
 "It serves:
 (a) As a final safety valve when new evidence indicating that a conviction was erroneous emerges but in a form that is inadequate to reopen the case through normal procedures;
 (b) To enable account to be taken of post-conviction developments of which an appeals court might not be able to take cognizance but which nevertheless warrant being considered in the context of an otherwise irreversible remedy;
 (c) To provide an opportunity for the political process, which is rightly excluded from otherwise interfering in the course of criminal justice, to show mercy to someone whose life would otherwise be forfeited."

The UN Special Rapporteur also stated that "the recognition of this right is so widespread that it would be difficult to deny its status as a norm of customary international law". Further, the UN Human Rights Committee has clarified that a clemency procedure must not "effectively negate the right enshrined". The effect is that an execution might proceed regardless of the merits of the application.

This approach is supported by a number of senior Courts around the world. In the case of *Maru Ram v Union of India and others*, the Indian Courts held, when finding that the power of pardon should be subject to judicial review, that:

"wide as the power of pardon, commutation and release ... is, it cannot run riot: for no legal power can run unruly... [A]ll public power, including constitutional power, shall never be exercisable arbitrarily or mala fide and, ordinarily, guidelines for fair and equal execution are guarantors of the valid play of power ...

It necessarily follows that the power to pardon, grant remission and commutation, being of the greatest moment for the liberty of the citizen, cannot be a law unto itself but must be informed by the finer canons of constitutionalism."

The Singaporean Courts have also echoed this view in the case of *Yong Vui Kong v Attorney-General*, confirming that the power to grant clemency is "not a private act of grace from an individual happening to possess power... [but] a part of the [c]onstitutional scheme". The Court concluded "there was, in principle, no reason why the administrative law rules of natural justice should not apply to the clemency process".

Similarly, the Inter American Court has found that the right to clemency, "while not necessarily subject to full due process protections, is subject to certain minimal fairness guarantees for condemned prisoners in order for the right to be effectively respected and enjoyed". In the context of clemency applications, the same Court has noted further that "[i]n the absence of minimal protections and procedures of this nature, Article XXIV of the American Declaration is rendered meaningless, a right without a remedy".

xix The challenge was brought by Suud Rusli, a prisoner sentenced to death for murder whose clemency petition was rejected for being out of time, who argued that there should be no restriction in time on the President's ability to consider a prisoner's petition for clemency. On 15 June 2016, the Indonesian Constitutional Court determined that:

- (i) such a limitation was not in line with the 1945 Constitution and therefore a prisoner could file a clemency petition more than one year after the decision in their case becomes final and binding;
- (ii) clemency is a constitutional right which serves prisoners but also helps in the administration of justice and the protection of human rights;
- (iii) limiting the submission period has the potential to remove a prisoner's constitutional right;
- (iv) granting clemency is important for both the prisoner and the state: it can be used to reduce overcrowding and may provide a way out for elderly prisoners or those suffering from serious or contagious illness;

However, where a prisoner is avoiding the right to file for clemency to postpone an execution, a prosecutor should not be bound by the unlimited submission period if the right or opportunity to submit the request for clemency is being waived, or if they have asked the prisoner or their family whether they will exercise the right to request clemency.

xx Article 3 of Law number 22 year 2002 regarding Clemency: "clemency petition cannot postpone the implementation of a sentence for prisoner, unless in a death penalty case." Article 13 of the same Law: "for death row prisoners, their lawyers, or family members who submit clemency petition, death sentence cannot be implemented before the Presidential Decree on rejection of the clemency petition is received by the prisoner."

xxi <http://tribune.com.pk/story/1150948/pakistani-drug-convict-indonesia-urges-govt-intervene-halting-execution/> <http://www.dawn.com/news/1273257>, <http://www.smh.com.au/world/they-electrocuted-me-say-indonesias-deathrow-prisoners-nearing-execution-20160724-gqcm73.html>

xxii France, Philippines, India, Pakistan, Singapore, China, Taiwan, Hong Kong, Iran, Nigeria, Netherlands, United States, United Kingdom.

xxiii <http://www.thejakartapost.com/index.php/academia/2016/08/20/executions-ri-disregards-its-own-law-s.html>

xxiv <http://www.channelnewsasia.com/news/asiapacific/indonesian-executions-a/2996366.html>

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- xxv <http://nasional.kompas.com/read/2016/08/15/15560271/terpidana.mati.zulfiqar.ali.dirawat.di.rsud.purwokerto>
- http://kbr.id/berita/08-2016/keluarga_minta_zulfiqar_ali_dipindah_ke_lapas_cipinang/84298.html
- xxvi <https://www.theguardian.com/world/2015/apr/30/brazilian-executed-by-indonesia-was-hearing-voices-all-the-time>
- xxvii Amnesty International Fair Trial Manual, supra note No. 44, Chapter 3.2.
- xxviii 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.
- xxix Anti Death Penalty Asia Network, 'When Justice Fails: Thousands Executed in Asia after Unfair Trials', December 2011, published by Amnesty International (ASA 01/023/2011 English), pp. 27-28.
- xxx Law Number 35 Year 2009 on Narcotics, Article 4.
- xxxi Report of the Special Rapporteur on the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc. A/65/255, 6 August 2010, para. 15.
- xxxii Law Number 35 Year 2009 on Narcotics, Article 55.
- xxxiii Committee on Economic, Social and Cultural Rights, Concluding Observations on the initial report of Indonesia, UN Doc E/C.12/IDN/CO/1, 19 June 2014, para. 35. See also the following briefing papers of the International Centre on Human Rights and Drug Policy: No 1: Human Rights, Drug Control and the UN Special Procedures: Preventing arbitrary detention through the promotion of human rights in drug control, Julie Hannah and Nahir de la Silva, 2015, and No. 3: Human Rights, Drug Control and the UN Special Procedures: Preventing torture and other forms of cruel, inhuman or degrading treatment or punishment through the promotion of human rights in drug control, Julie Hannah and Araks Melkonyan, 2015. See also various reports from the UN bodies as follows: Office of the High Commissioner of Human Rights, Study on the impact of the world drug problem on the enjoyment of human rights, UN Doc. A/HRC/30/65, 4 September 2015; and Joint Open Letter by the UN Working Group on Arbitrary Detention; the Special Rapporteurs on extrajudicial, summary or arbitrary executions; torture and other cruel, inhuman or degrading treatment or punishment; the right of everyone to the highest attainable standard of mental and physical health; and the Committee on the Rights of the Child, on the occasion of the United Nations General Assembly Special Session on Drugs New York, 19-21 April 2016, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19828&LangID=E#sthash.EBvYvM.dpuf>
- xxxiv LBH Masyarakat, 'Trip to Nobody Knows Where: Examining the Effectiveness of Indonesia's Compulsory Report Program for Drug Users and Its Compliance to the International Human Rights Standards', March 2016, pp. 18 – 20. Available here: http://lbhmasyarakat.org/wp-content/uploads/2016/04/310316_IPWL-Research-Report_LBHM_Mainline.pdf
- xxxv To be discussed further below
- xxxvi Daniel Werb, et al, Vienna Declaration: A call for evidence-based drug policies, the Lancet, Vol. 376, No. 9783, 31 July 2010, pp. 310 – 312. See also section above on Mandatory reporting and compulsory drug rehabilitation—Right to be free from torture, and other forms of cruel, inhuman or degrading treatment, the right to liberty & the right to health.
- xxxvii BNN report stated that 25.053 drug dependants received drug treatment from government health facilities while 9,594 others received treatment from community-based organisations. The total number of drug dependants is not clear. The BNN report stated that there are 1.910.295 regular users, and 1.159.649 person started to use drugs. See Laporan Kinerja Badan Narkotika Nasional Tahun 2015, Badan Narkotika Nasional, Jakarta, 2016, p. 16. See also <http://www.cnnindonesia.com/nasional/20150909221424-12-77758/bnn-943-ribu-pengguna-narkotika-kronis-harus-direhabilitasi/>
- xxxviii Report of the Special Rapporteur on the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, UN Doc. A/65/255, 6 August 2010, paras. 8, 33.
- xxxix Laporan Perkembangan HIV/AIDS Triwulan IV Tahun 2015, Kementerian Kesehatan Republik Indonesia, 26 February 2016, Table G, pp. 112 – 114.

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- xli Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/10/44, 14 January 2009, paras. 55- 59
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- xliv http://news.okezone.com/read/2016/08/25/337/1472734/komisi-iii-70-persen-lapas-di-indonesia-dipenuhi-napi-kasus-narkoba?utm_source=br&utm_medium=referral&utm_campaign=news
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