



**17th Session of the Working Group on the Universal Periodic Review
United Nations Human Rights Council
October 21, 2013 – November 1, 2013
Written Statement submitted by
The Advocates for Human Rights, an NGO with special consultative status, and
Harm Reduction International, an NGO with special consultative status**

I. Scope of This Report and Background

1. This report is being submitted by The Advocates for Human Rights and Harm Reduction International, relevant stakeholders, in conjunction with the Universal Periodic Review of Malaysia by the United Nations Human Rights Council. Malaysia will be subject to review during the 17th session (October 21 – November 1, 2013). This report critically examines the imposition of the death penalty in Malaysia in light of general, international human rights standards. It has been compiled from a combination of sources, including criminal statutes, official state reports, news reports, and other commentary.
2. Malaysia is one of only 58 countries remaining in the world that retain the death penalty for ordinary crimes.¹ Malaysia's criminal law provides for death by hanging in several types of offenses, which will be explained herein. The number of those convicted under such laws, the number sitting on death row, and the number and details of who have been executed are not made public.² Instead, such estimates come mainly from summary reports by the Malaysian government itself, and various NGOs.
3. In April 2011, Malaysia's Home Minister stated that **441 people** had (at that time) been executed since 1960 and that 696 prisoners were on death row.³ The majority (479 or 69%) of these death sentences were reportedly imposed under the 1952 Dangerous Drugs Act⁴, which, as discussed below, leaves little to no room for discretion in its application. As of November 4, 2012, the number of people on death row was reported to be about **900**.⁵

¹ *Abolitionist and Retentionist Countries*, Amnesty International, 2013, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>.

² Working Group on Universal Periodic Review, *Universal Periodic Review of Malaysia*, United Nations Human Rights Council, 27 October 2008, http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/MY/A_HRC_WG6_4_MYS_3_E.PDF.

³ *The State of the World's Human Rights: Malaysia*, Amnesty International, 2012, <http://www.amnesty.org/en/region/malaysia/report-2012#section-26-8>.

⁴ Charles Hector, *Impose immediate moratorium on all executions*, Free Malaysia Today, 4 November 2012, <http://www.freemalaysiatoday.com/category/opinion/2012/11/04/imposed-immediate-moratorium-on-all-executions/>.

⁵ *Id.*

4. It has been estimated that 108 people were sentenced to death in 2011 alone,⁶ compared to at least 114 in 2010 and at least 68 in 2009.⁷ The number of executions pales in comparison. The last confirmed execution took place in 2010, and that was reportedly the only execution to take place during the entire year.⁸

II. Malaysia's Implementations of the Death Penalty

5. Malaysia's various criminal statutes provide for either mandatory or discretionary death sentences, depending on the type of offense. The types of crimes where the death penalty is a mandatory punishment include: murder; drug "trafficking"; certain types of possession(s) and/or discharging(s) of firearms in a "scheduled offence" (i.e., assisted suicide); and certain kinds of treason. The death penalty is discretionary for other types of treason; "consorting with a person carrying or having possession of arms or explosives"; and kidnapping. Death sentences in Malaysia are carried out by hanging.

a. Murder, Attempted Murder and Murder During Gang Robbery

6. Section 302 of the Malaysian Penal Code states, simply, that "[w]hoever commits murder shall be punished with death." Recent reports indicate that the death penalty is applied in practice for crimes of murder. On November 1, 2012, a Malaysian Court of Appeal upheld the conviction and death sentence of two men, Ong Tend For and Chew Ah Lan @ Chew Kai Thong, charged in the 2004 killing of a businessman.⁹ On appeal, the Federal Court rejected two main arguments for reversal, one relating to the alleged failure of a High Court judge to recuse himself from presiding over the trial, and the second relating to the locus standi of a Myanmar interpreter who was interpreting the testimony of an illegal immigrant from Myanmar.¹⁰
7. Malaysia also provides for the discretionary imposition of the death penalty for attempted murder. Section 307 of the Penal Code states that any person who causes "hurt" to any person by an act of attempted murder shall be imprisoned for up to 20 years.¹¹ The statute goes on to state that "[w]hen any person offending under this section is under sentence of imprisonment for life or for a term of twenty years, he may, if hurt is caused, be punished with death."¹²

⁶ Charles Hector, interview by Bill Bainbridge, *Hundreds on Death Row in Malaysia*, Radio Australia, 22 May 2013, <http://www.radioaustralia.net.au/international/radio/program/connect-asia/hundreds-on-death-row-in-malaysia/948014>.

⁷ *Malaysia*, Death Penalty Worldwide, 3 January 2013, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Malaysia>.

⁸ *Id.*

⁹ Bernama, *Death sentence on duo upheld for murder of businessman*, Malaysia Insider, 1 November 2012, <http://www.themalaysianinsider.com/malaysia/article/death-sentence-on-duo-upheld-for-murder-of-businessman>.

¹⁰ *Id.*

¹¹ Penal Code at Section 307(1).

¹² Penal Code at Section 307(2).

8. Murders resulting from gang robbery are also punished by a discretionary death sentence. Under Section 364 of the Penal Code, where five or more people are “conjointly committing gang-robbery,” and any one of them commits murder, all those conjointly committing the robbery “shall be punished with death or imprisonment for a term which may extend to twenty years, and, where the punishment is not death, shall also be liable to whipping.”¹³

b. Drug Trafficking

9. Malaysia’s approach to drug offenses violates international standards that call for restricting the death penalty to the most serious offenses, and it imposes an automatic death penalty to anyone found guilty of “trafficking” drugs. Further, there is a serious lack of due process afforded to accused drug traffickers, who are presumed guilty upon arrest with drugs on their person. The result of this policy, as shown below, has been hundreds of death sentences and executions.

i. Types of “trafficking” and presumptions thereof

10. Malaysia’s criminal code, through the Dangerous Drug Act of 1952 (“the Drug Act”), imposes a mandatory death penalty where someone is found guilty of drug “trafficking.” The definition of “trafficking” depends on the amount of drugs found in the accused’s possession, and the amount of drugs that will trigger the “trafficking” label, in turn, varies by the type of drug. For amounts smaller than what constitutes “trafficking,” the Drug Act provides for both prison terms and physical punishment.
11. Under Section 37(da), if a given drug is found in a prohibitively large amount, that possession “shall be **presumed**, until the contrary is proved, to be trafficking in the said drug.” Once the possession rises to the level of trafficking, Section 39(B)(2) provides that the offender “shall be punished on conviction with death.” Notably, this punishment applies whether or not the accused is a citizen of Malaysia, and in fact many on death row under the Drug Act are foreign nationals.
12. Under the Drug Act, simply finding prohibited drugs on someone’s person raises a presumption that they knowingly possessed the same. This contravenes the general legal principle, applied in most countries, of “*semper necessitas probandi incumbit ei qui agit*,” roughly meaning “he who asserts must prove.” It also contravenes Article 11 of the Universal Declaration of Human Rights, which enshrines the principle that anyone charged with a criminal offense must be presumed innocent until and unless proved guilty under the law. Section 37(d) states that:

any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession

¹³ Penal Code at Section 396.

of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;¹⁴

13. Some examples of the Drug Act's rigid framework, as applied to certain drugs is provided below:

Heroin	Opium	Cocaine	Cannabis	Punishment
2-5 g ¹⁵	100-250 g ¹⁶	5-15 g ¹⁷	20-50 g ¹⁸	2-5 years in prison and 3-9 whip strokes ¹⁹
5-15 g ²⁰	250-1000 g ²¹	15-40 g ²²	50-200 g ²³	5 years to life in prison and 10+ whip strokes ²⁴
15 g + ²⁵	1 kg + ²⁶	40 g + ²⁷	200 g + ²⁸	Mandatory death by hanging

ii. Examples of application of drug trafficking policy

14. One example of a foreign national in possession of drugs has been widely reported in international press. In July 2012, Australian citizen Emma Louisa L'Aiguille was arrested and charged with possession of about one kilogram of methamphetamine under her car seat.²⁹ Under the Drug Act, possessing 50 or more grams of methamphetamine results in the possession being classified as "trafficking," and it is thus punishable by mandatory death sentence.³⁰ Three Australians (two in 1986 for heroin trafficking, and one in 1993) had reportedly been executed under the Drug Act.³¹

15. Another illustrative example highlights an individual who was not so fortunate. Amnesty International reported that on August 14, 2000, Reza Mohammed Shah Bin Ahmad Shah (also known as Reza Shah) was arrested outside Kuala Lumpur,

¹⁴ Drug Act at Section 37(d)

¹⁵ Drug Act at Section 39A(1)(a)

¹⁶ Drug Act at Section 39A(1)(i)-(k)

¹⁷ Drug Act at Section 39A(1)(e)

¹⁸ Drug Act at Section 39A(1)(f)-(h)

¹⁹ Drug Act at Section 39(A)(1)

²⁰ Drug Act at Section 39(A)(2)(a)

²¹ Drug Act at Section 39(A)(2)(i)-(k)

²² Drug Act at Section 39(A)(2)(e)

²³ Drug Act at Section 39(A)(2)(f)-(h)

²⁴ Drug Act at Section 39(A)(2)

²⁵ Drug Act at Section 37(da)(i)

²⁶ Drug Act at Sections 37(da)(iv)-(v)

²⁷ Drug Act at Section 37(da)(ix)

²⁸ Drug Act at Section 37(da)(vi)-(viii)

²⁹ Will Ockenden, Australian faces death penalty in Malaysia, ABC News, 2 August 2012,

<http://www.abc.net.au/worldtoday/content/2012/s3558992.htm>. (On November 9, 2012, the trafficking charges against L'Aiguille were dropped after she agreed to testify against her boyfriend, who was in the backseat at the time of her arrest and subsequently fled the scene. Reportedly, L'Aiguille has since been arrested on different, less serious drug charges, and on February 7, 2013, she posted bail with respect to the new charged.)

³⁰ Drug Act at Section 37(da)(xvi).

³¹ *Australian Woman Faces Death in Malaysia*, The Sydney Morning Herald, 30 July 2012, <http://www.smh.com.au/national/australian-woman-faces-death-in-malaysia-20120730-23a87.html>.

allegedly carrying a plastic bag full of cannabis.³² The bag was found to contain nearly 800g of cannabis, well over the 200g required to define the offense as “trafficking,” punishable by death. The trial court “found that [Shah] possessed drugs in the alleged quantities” and “the law left the court with no discretion but to convict him of drug trafficking and then to hand down the mandatory death sentence.”³³ The Malaysian appellate court overturned Shah’s conviction in 2006, finding that “the prosecution had not proved that Reza Shah had knowledge of the bag’s contents.”³⁴ In January 2009, however, the Federal Court (highest court in Malaysia) agreed with the prosecution’s appeal, concluding that “Reza Shah had **failed to prove that he was not guilty** of drug trafficking” and reinstated the death sentence.³⁵ Reza Shah has since joined hundreds who have appealed to the King for clemency.

16. In whole, the majority of death sentences and executions in Malaysia have been carried out under the drug trafficking laws. The International Harm Reduction Association reported that between 1994 and 1999, 76% of all executions were for drug-related offenses.³⁶

iii. Debate and possible shift in specific application of capital punishment to drug-related offenses

17. Malaysia’s imposition of the death penalty for drug offenses has generated significant debate and public comment. As shown above in the example of Reza Shah, there is friction even within Malaysia’s own court system as to the allocation of the burden of proof in capital drug cases. Pressure from human rights bodies and other groups has prompted recent comment from the Malaysian government.
18. In 2009, Malaysia signaled a move towards the abolition of the death penalty in drug trafficking cases. Malaysia stated the following in a submission to the UN Human Rights Council:

Offences that carry the death penalty in Malaysia are limited in number and only involve crimes of very serious nature. However, the Government is considering to further reduce this number by among others, proposed amendments to existing anti-drug trafficking legislation to reduce the maximum sentence to life imprisonment. Malaysia is also reviewing all offences that carry the death penalty by reconsidering the appropriate charges to be

³² Anti-Death Penalty Asia Network, *When Justice Fails: Thousands executed in Asia after unfair trials*, Amnesty International, December 2011, <http://www.amnesty.org/en/library/asset/ASA01/023/2011/en/103678e4-fa6f-4b1c-86a9-7d94e42b9494/asa010232011en.pdf>, at 22

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Rick Lines, “A ‘Most serious crime’? International Human Rights Law and the Death Penalty for Drug Offences,” 18th International Conference on the Reduction of Drug-Related Harm, Warsaw, Poland, 15 May 2007, <http://www.ihra.net/files/2010/06/21/Lines-amostseriouscrime-may07.pdf>.

preferred in that only in deserving cases will the charges that carry mandatory death penalty be framed against the offences.³⁷

19. In late October, 2012, these comments were echoed when Malaysian law minister Nazri Aziz was reported to have said that the government may replace the death penalty for drug offenders with a prison term. Such a measure would mean reprieve for at least 675 convicted drug traffickers (as of November 4, 2012)³⁸. Aziz stated that “[t]he alternative sentence for possession of drugs is being studied by the Attorney-General’s Office” and that he planned to “discuss with the Prime Minister about applying for a moratorium on the death sentence cases so that [convicted traffickers are] not hanged while we’re reviewing the existing penalty.”³⁹

20. Acknowledging the fact that Malaysia’s law harshly targets those on whom the drugs are found, rather than those higher up in a criminal-type organization, Aziz further stated:

The majority of the countries where they’re detained have the mandatory death sentence for possession of drugs. So if we want to save the Malaysian ‘drug mules’, a large number of whom were not aware they were being used, how can we appeal to those countries while we ourselves hang such offenders. It doesn’t make sense.⁴⁰

21. Indeed, as referenced by Aziz, the Malaysian government has actually sought clemency for its citizens facing death sentences in other countries. In July 2010, Singapore received a clemency appeal from Malaysia’s foreign minister Anifah Aman for Yong Vui Kong, convicted in 2008 of trafficking 47 grams of heroin into Singapore.⁴¹

22. Amnesty International reacted to Aziz’s statements positively, stating that it “welcomes this proposal and hopes that it will lead to the quick abolition of the death penalty for drug offences.” (Amnesty International, however, urged Malaysia to further extend its review of the use of the death penalty to all capital offenses and apply a moratorium to those beyond the drug trafficking context.)⁴²

³⁷ Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review: Malaysia (Addendum)*, United Nations Human Rights Council, 3 June 2009, <http://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.30.Add.1.pdf>.

³⁸ Charles Hector, *Impose immediate moratorium on all executions*, Free Malaysia Today, 4 November 2012, <http://www.freemalaysiatoday.com/category/opinion/2012/11/04/imposed-immediate-moratorium-on-all-executions/>.

³⁹ Bernama, *Possible moratorium on death penalty pending govt’s final decision*, The Malaysian Insider, 20 October 2012, <http://www.themalaysianinsider.com/malaysia/article/possible-moratorium-on-death-sentences-pending-govts-final-decision-nazri>

⁴⁰ *Id.*

⁴¹ *Malaysia seeks clemency for death row inmate in Singapore*, Channel News Asia, 29 July 2010, <http://www.channelnewsasia.com/stories/singaporelocalnews/view/1072147/1/html>.

⁴² ASA 28/003/2012

c. Treason

23. In Malaysia, treason is punishable by discretionary death sentence. Specifically, either the death sentence or life in prison may be imposed upon “[w]hoever wages war against the Yang di-Pertuan Agong or against any of the Rulers or Yang di-Pertua Negeri.”⁴³ “[A]ttempts to wage such war, or abet[ing] the waging of such war” are punishable in the same manner.⁴⁴ In addition, the Penal Code provides for a mandatory death sentence as per the following:

Whoever compasses, imagines, invents, devises or intends the death of or hurt to or imprisonment or restraint of the Yang di-Pertuan Agong or any of the Rulers or Yang di-Pertua Negeri, their heirs or successors, shall be punished with death and shall also be liable to fine.⁴⁵

24. The Yang di-Pertuan Agong and Yang di-Pertua Negeri are the ceremonial governors of the Malaysian states without monarchs, and these statutory provisions outline crimes that are tantamount to treason. Though not enforced nearly as often as anti-drug laws, this provision did result in four executions (for “armed treason”) as recently as 2007, according to Amnesty International.⁴⁶

d. Assisted Suicide

25. Malaysia’s criminal code provides for a discretionary death sentence for assisted suicide. Specifically, Section 305 of the Penal Code states the following:

If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide shall be punished with death or imprisonment for a term which may extend to twenty years, and shall also be liable to fine.⁴⁷

e. Kidnapping

26. Any kidnapping that may possible result in the kidnapped person being murdered is punishable with a discretionary death sentence. Section 364 of the Penal Code states as follows:

⁴³ Penal Code at Section 121.

⁴⁴ Penal Code at Section 121.

⁴⁵ Penal Code at Section 121A.

⁴⁶ *Malaysia: Amnesty International Report 2007*, Amnesty International, 2007, <http://www.amnesty.org/en/region/malaysia/report-2007>.

⁴⁷ Penal Code at Section 305.

Whoever kidnaps or abducts any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered, shall be punished with death or imprisonment for a term which may extend to twenty years and shall, if he is not sentenced to death, also be liable to whipping.⁴⁸

III. Death Row Conditions

27. There is no outward indication that death row inmates are kept in special or separate quarters from other Malaysian prisoners. In turn, generally, living conditions in Malaysian prisons are reported to be quite poor.
28. According to the U.S. Department of State, prison overcrowding in Malaysia, especially near the larger cities, is a serious problem.⁴⁹ The national prison administration reported in mid-2010 that “the country’s 31 prisons held 38,387 prisoners in locations designed to hold 32,600.”⁵⁰ Further, local and international NGOs reportedly estimated that most of the country’s 16 detention centers “were at or beyond capacity, with some detainees held for a year or more.”⁵¹ In the case of death row inmates, it is especially likely that detention would extend well beyond one year, given that most are convicted of drug trafficking and carrying out a death sentence can take several years while appeals and pleas for clemency are pending.
29. Living conditions in Malaysia’s 16 detention centers is reportedly sub-standard. The Ministry of Home Affairs’ secretary general publicly acknowledged in August 2010 that “security measures and living conditions at all the [detention centers] were seriously deficient and that none met international standards.”⁵² For example, detention centers are reportedly unsanitary, overcrowded, have no air conditioning, provide inadequate clothing and food, and provide little access to medical care.⁵³ In many instances, these conditions contributed to deaths of prisoners.⁵⁴

IV. Intersection of Malaysian Policy and Human Rights Law

30. Both Malaysia’s imposition of the death penalty itself and the way in which the penalty is applied to some crimes violate several human rights standards.
31. Malaysia has been urged by several groups, including the United Nations Human Rights Council and Amnesty International, to abolish the death penalty altogether. Capital punishment violates the Universal Declaration of Human Rights, which states in Article 3 that “[e]veryone has the right to life, liberty and security of person.”⁵⁵

⁴⁸ Penal Code at Section 364.

⁴⁹ 2011 State Report at 4

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 5.

⁵⁴ *Id.*

⁵⁵ Universal Declaration of Human Rights, article 3.

- Depriving someone of life, in any circumstance whatsoever, contravenes this standard.
32. There has been comment from within the Malaysian government suggesting that it may abolish the death penalty altogether. On August 31, 2010, Malaysian Law Minister Nazri Abdul Aziz told The Online Citizen that “[i]t is time for Malaysia to abolish the death penalty... No criminal justice system is perfect. You take a man’s life and years later, you find out that another person did the crime. What can you do?”
 33. For countries such as Malaysia, which may be moving towards abolition of the death penalty, additional standards apply. Article 6(2) of the International Covenant on Civil and Political Rights states that, in countries that have not abolished the death penalty, “sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide.”⁵⁶ In addition, the death penalty “can only be carried out pursuant to a final judgment rendered by a competent court.”⁵⁷
 34. The Human Rights Committee, in a general comment on Article 6 of the ICCPR, stated further that “the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure.”⁵⁸ This principle was reiterated further by the United Nations Economic and Social Council through the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which state that the death penalty should be imposed only for the most serious crimes and that the scope of these crimes “should not go beyond intentional crimes with lethal or other extremely grave consequences.”
 35. Accordingly, drug offenses, punishable by mandatory death sentence in Malaysia, do not meet the threshold of “most serious crimes” as stated in Article 6(2). This has been confirmed by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, who stated in 1996 that “the death penalty should be eliminated for crimes such as economic crimes and **drug-related offences**.”⁵⁹
 36. Further compounding the issue is the manner in which Malaysia prosecutes drug trafficking offenses. By shifting the burden of proving innocence to the accused, Malaysia directly contravenes Article 11 of the Universal Declaration of Human Rights, which states that anyone charged with a criminal offense must be presumed innocent until and unless proved guilty under the law.
 37. All indications are that conditions on death row in Malaysian prisons may further constitute violations of human rights standards. Article 5 of the Universal

⁵⁶ International Covenant on Civil and Political Rights, article 6(2).

⁵⁷ International Covenant on Civil and Political Rights, article 6(2).

⁵⁸ General comment 6, adopted by the Committee at its 16th Session on 27 July 1982.

⁵⁹ United Nations Document No. E/CN.4/1997/60, 20 December 1996, paragraph 91.

Declaration of Human Rights states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁶⁰ As noted above, Malaysian prisons are reportedly prone to overcrowding, no air conditioning, and inadequate access to food, clothing and medical care. The Human Rights Committee has previously communicated concern about overly small cell size and lack of proper food⁶¹; as well as extreme temperatures and lack of ventilation.⁶²

V. Recommendations

- (1) Malaysia should abolish the death penalty for all offenses. In the absence of outright abolition, Malaysia should place a moratorium on all executions.
- (2) In the absence of outright abolition, Malaysia should limit the use of capital punishment to the most serious crimes, and thereby eliminate its use for drug trafficking and/or other drug-related offenses.
- (3) At a minimum, Malaysia should modify its statutory framework for drug trafficking offenses and provide for some measure of basic due process for accused traffickers. The burden of proof should always be on the state to prove, beyond a reasonable doubt, that the accused both possessed the drug at issue and knew of its dangerous character. The burden should never be on the accused to prove his/her innocence.
- (4) Further, at a minimum, Malaysia should modify its statutory framework to afford more discretion to the judiciary in sentencing offenders, and remove mandatory death sentences from the statutes.
- (5) Malaysia should also take steps to improve the conditions of those living on death row in the 16 detention centers, including, specifically: alleviating overcrowding by, for example, building additional facilities; providing more sanitary conditions with existing detention centers; and providing more adequate access to clothing, food and medical care.

⁶⁰ Universal Declaration of Human Rights, article 11.

⁶¹ Human Rights Committee, Concluding observations on Uzbekistan, U.N. Doc. CCPR/CO/71/UZB, April 26, 2001, para. 10

⁶² Safarmo Kurbanova v. Tajikistan, Views of the Human Rights Committee, Communication No. 1096/2002, U.N. Doc. CCPR/C/79/D/1096/2002, Nov. 12, 2003, para. 7.8.