

**AMICUS CURIAE BRIEF OF AMNESTY INTERNATIONAL IN THE
CONSTITUTIONAL COURT OF THE REPUBLIC OF KOREA**

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1. INTRODUCTION

Amnesty International is submitting an *amicus curiae* brief in the death penalty case file number 2019HunBa59, currently before the Constitutional Court in the Republic of Korea.

Amnesty International is a global movement of more than seven million people who campaign for a world in which human rights are enjoyed by all. Amnesty International works independently and impartially to promote respect for human rights. The organization is independent of any government, political group, ideology, economic interest, or religion, and it is funded mainly by its members, as well as by public donations. Amnesty International monitors legal practices in countries throughout the world for compliance with international human rights law, and it works to end grave abuses of human rights and to demand justice for those whose rights have been violated.

Amnesty International opposes the death penalty unconditionally, for all cases and under any circumstances, as a violation of the right to life and as the ultimate cruel, inhuman and degrading punishment. The organization began its global campaigning to promote the abolition of the death penalty in December 1977, following the adoption of its programmatic statement in the Stockholm Declaration.¹

Amnesty International has extensive experience in submitting *amicus curiae* briefs and other third-party submissions in international and national courts to assist them in resolving fundamental questions of international law. This brief demonstrates that the use of the death penalty in the Republic of Korea, a country that has not carried out any executions since 1997 and which Amnesty International regards as abolitionist in practice, constitutes a violation of human rights as guaranteed under the Constitution of the Republic of Korea (Articles 10, 34.(1) 37(1) and 37(2)) and international law and standards.²

1.1 BACKGROUND TO THE CONSTITUTIONAL COMPLAINT IN THIS CASE

On 28 December 2018 the complainant (“K”, 30-year-old male) was convicted and sentenced to life imprisonment by the Bucheon branch of Incheon District Court under Article 250(2) of the Criminal Act of the Republic of Korea (2009, ref. 22824), in relation to the murder of his lineal ascendants (2018GoHap158, 159(ByeongHap), 200(ByeongHap), 2018JeonGo8(ByeongHap)). He has since appealed his conviction and sentence to the Seoul High Court.

On 20 November 2018, prior to his conviction, the complainant had filed before the Bucheon Branch of Incheon District Court a request for adjudication on the constitutionality of statutes allowing for the imposition of the death penalty. This request was dismissed by the court on 28 December 2018 (2018Cho-Gi659) and he was informed of this decision on 14 January 2019.

The Complainant sought permission to file a constitutional complaint before the Constitutional Court on 12 February 2019, and the request was granted.³ In its decision, the Constitutional Court has stated that it will decide on the following issues:

- Whether the use of the death penalty violates Articles 10, 12(1), 110(4) of the Constitution of the Republic of Korea;
- Whether the death penalty is a violation of human dignity, as recognized under Article 10 of the Constitution;

¹ Amnesty International, *Conference on the Abolition of the Death Penalty, Declaration of Stockholm* (Index: ACT 50/001/1977), www.amnesty.org/download/Documents/204000/act500011977en.pdf

² For more information on classification of countries by death penalty use, see Amnesty International, *Abolitionist and retentionist countries* (Index: ACT 50/6665/2017), www.amnesty.org/en/documents/act50/6665/2017/en/

³ “S.Korea’s Catholic bishops call for legislation banning capital punishment”, *Hankyoreh*, 13 February 2019, www.hani.co.kr/arti/english_edition/e_national/882013.html

- Whether the death penalty is a violation of the right to life, as recognized under Article 37(2) of the Constitution;
- Whether the death penalty is an excessive restriction on the right to life, as recognized under Article 37(2) of the Constitution;
- Whether Article 41.1 of the Criminal Act is unconstitutional;
- Whether the requisites for parole as set out in Article 72(1) of the Criminal Act are constitutional.

1.2 SUMMARY OF THE ARGUMENT

Amnesty International submits this *amicus curiae* brief to aid the Constitutional Court in deciding these questions. This brief demonstrates that:

- the death penalty violates the human rights to life and not to be subjected to cruel, inhuman or degrading treatment or punishment, as reflected in the development of international and national law;
- state practice shows that the global trend remains overwhelmingly in favour of the abolition of the death penalty, while the numbers of executing countries and executions recorded yearly have been declining;
- the death penalty is inherently arbitrary, disproportionately impacting those from less advantaged backgrounds and administered by justice systems that are fallible;
- the death penalty does not have a unique deterrent effect;
- international human rights law and standards law sets out aims and principles to be applied to alternative punishments.

2. THE DEATH PENALTY VIOLATES THE RIGHTS TO LIFE AND NOT TO BE SUBJECTED TO CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment are recognized in the Universal Declaration on Human Rights (Universal Declaration) in its Articles 3 and 5, respectively, as well as several international and regional human rights instruments, national constitutions and laws.

Amnesty International believes – and is supported in this by jurisprudence developed at national and international level over the years – that the death penalty is the ultimate denial of these rights.⁴ Every execution is a brutal act that not only dehumanizes those that carry it out, but also devalues the worth that society places upon human life. As Amnesty International noted in the Declaration of Stockholm in 1977:

“Execution is an act of violence and violence tends to provoke violence, [t]he imposition and infliction of the death penalty is brutalizing to all who are involved in the process...It is the duty of the state to protect the life of all persons within its jurisdiction, without exception.”⁵

2.1 ABOLITION OF THE DEATH PENALTY: A GOAL SET UNDER INTERNATIONAL LAW

The desirability of the abolition of the death penalty is enshrined under international law. While Article 6 of the International Covenant on Civil and Political Rights (ICCPR), to which the Republic of Korea acceded in 1990, allows for the use of capital punishment under certain circumstances, its paragraph 6 clearly states that the same Article should not be used to “prevent or delay the abolition of the death penalty”. In its most recent General Comment on Article 6 of the ICCPR, the Human Rights Committee – the UN body tasked with the interpretation of this treaty – has stated that:

“Article 6, paragraph 6 reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to

⁴ See also section 3.3 of this document.

⁵ Amnesty International, *Conference on the Abolition of the Death Penalty, Declaration of Stockholm* (Index: ACT 50/001/1977).

life, and abolition of the death penalty is both desirable and necessary for the enhancement of human dignity and progressive development of human rights.”⁶

The progressive shift in the treatment of the death penalty – from a criminal justice matter only to a human rights issue – by the international community is reflected in a series of international treaties and international instruments adopted to abolish or at least dramatically limit capital punishment. These agreements have sought to move away from merely narrowing the acceptable uses of the death penalty to recognizing in treaties and instruments that executions are never a legally or morally appropriate form of punishment.

To date, four international and regional treaties provide for the abolition of the death penalty:

- the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, adopted by the UN General Assembly in 1989. Since the Constitutional Court of the Republic of Korea last considered the issue of the death penalty in February 2010,⁷ 14 more UN member states and one observer state have become parties to the treaty.⁸ Additionally, Angola signed the treaty.
- Protocols No. 6 and No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in 1982 and 2002.⁹
- and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organization of American States in 1990.

In addition, in 2015 the African Commission on Human and Peoples’ Rights drafted and adopted an Additional Protocol to the African Charter on Human and Peoples’ Rights on the abolition of the death penalty, which is currently awaiting consideration and adoption by the African Union.¹⁰

2.2 SHIFT IN FAVOUR OF ABOLITION OF THE DEATH PENALTY IN THE UN INSTRUMENTS

Progress towards abolition of the death penalty is also evident when considering the statutes establishing international criminal courts. The Nuremberg and Tokyo tribunals, which were established after the end of World War II at a time when only eight countries of the world had abolished the death penalty, did have powers to impose the death penalty.

However, the constitutive instruments of every international criminal court established since then (that is, from 1993 onwards) have excluded the death penalty from the punishments that these courts are authorized to impose for crimes under international law, including genocide, crimes against humanity and war crimes. These instruments include the Rome Statute of the International Criminal Court (ICC), which has now been ratified by 122 states; statutes of the International Criminal Tribunal for the former Yugoslavia and for Rwanda; the Statute of the Special Court for Sierra Leone; the United Nations Transitional Administration in East Timor (UNTAET) Regulation establishing the Special Panels for Serious Crimes in Dili, Timor-Leste; and the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia.

The position of the United Nations on the death penalty is unequivocally in favour of its abolition. In the words of the former UN Secretary-General, Ban Ki-moon:

“The death penalty has no place in the 21st century [...] Let our actions always be guided by the moral compass of human rights – the most effective route to a safer, more just and secure world”.¹¹

Over the years, the UN system has worked to reduce the use of the death penalty and limit its use, shifting in more recent years to unequivocally encourage UN member states to remove it from national legislation. The UN Economic and Social Council, the UN Human Rights Committee and the UN Human Rights Council

⁶ Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, para.50

⁷ The Constitutional Court of Korea, 22-1(A) KCCR 36, 2008Hun-Ka23, decided on 25 February 2010. The Constitutional Court of Korea, Constitutional Court Decisions, 2011, p. 1

⁸ The 14 UN member states are Benin, Bolivia, Dominican Republic, El Salvador, Gabon, Gambia, Guinea-Bissau, Kyrgyzstan, Latvia, Madagascar, Mongolia, Poland, Sao Tome and Principe, and Togo. The State of Palestine also acceded to the treaty in 2019.

⁹ The Russian Federation is the only member of the Council of Europe not to have ratified Protocol 6 (but it signed the treaty); Azerbaijan and the Russian Federation are the only two states not to have ratified Protocol 13.

¹⁰ African Commission on Human and Peoples’ Rights, “Final Communiqué of the 56th Ordinary Session of the African Commission on Human and Peoples’ Rights”, 7 May 2015, para.33, www.achpr.org/sessions/info?id=218

¹¹ “On World Day against Death Penalty, Ban says practice ‘has no place in the 21st century’”, UN News, 10 October 2016, <https://news.un.org/en/story/2016/10/542302-world-day-against-death-penalty-ban-says-practice-has-no-place-21st-century>

(and its predecessor, the UN Commission on Human Rights) have all contributed to the progressive restriction of the use of the death penalty and urged UN member states to move towards its abolition. In 1984 the UN Economic and Social Council adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which set out the most basic guarantees to be observed in all death penalty cases,¹² more than three decades later the UN General Assembly adopted its first landmark resolution calling for the establishment of a “moratorium on executions *with a view to abolishing the death penalty*” (emphasis added).¹³

2.3 ABOLITIONIST VISION REFLECTED IN NATIONAL CONSTITUTIONS AND JURISPRUDENCE

The strengthening of the abolitionist vision under international law has been mirrored in the development of constitutions and constitutional jurisprudence of many countries. In its 1996 survey of the constitutions of all countries, Amnesty International noted that only 24 out of the then 57 abolitionist countries made reference to the abolition of the death penalty in their founding documents.¹⁴ Most recently, the organization has recorded that the constitutions of 56 of the 106 abolitionist countries explicitly prohibit the death penalty.¹⁵ In addition to this, Burkina Faso is due to carry out a referendum on its new draft Constitution in 2020, which in its draft Article 5 provides for the abolition of the death penalty.¹⁶

National courts are increasingly determining that the use of the death penalty is a violation of human rights as protected by national constitutions and international obligations undertaken by the country. Among other most recent examples:

- On 6 June 1995, the **South African** Constitutional Court declared the death penalty to be incompatible with the prohibition of “cruel, inhuman or degrading treatment or punishment” under the country’s Constitution.¹⁷ Eight of the 11 judges also found that the death penalty violates the right to life. In its decision, the Court noted: “By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby. [...] Retribution cannot be accorded the same weight under our Constitution as the rights to life and dignity, which are the most important of all the rights...It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be. Taking these factors into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder, has not been made out.”¹⁸
- On 4 August 2012, the Constitutional Court of **Benin** declared that, due to the country’s ratification of the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, “no legal provision can now mention the death penalty” in Benin.¹⁹ The decision led to the removal of death penalty provisions from the Criminal Procedure Code by the National Assembly on 17 December 2012. In another landmark case, the Constitutional Court on 21 January 2016 determined unambiguously that the entry into force of the Second Optional Protocol to the ICCPR and its

¹² UN Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the UN Economic and Social Council in resolution 1984/50 of 25 May 1984. The safeguards were endorsed by the UN General Assembly in 1984 by consensus

¹³ UN General Assembly resolution 62/149 of 18 December 2007. The UN General Assembly adopted, with an increased cross-regional support, a further six other resolutions on a moratorium on the use of the death penalty, resolutions 63/168 of 18 December 2008; 65/206 of 20 December 2010; 67/176 of 21 December 2012; 69/186 of 18 December 2014; 71/187 of 19 December 2016; and 73/175 of 17 December 2018.

¹⁴ Amnesty International, *Constitutional provisions of the death penalty* (Index: ACT 50/006/1996), 31 May 1996, <https://www.amnesty.org/en/documents/ACT50/006/1996/en/>

¹⁵ Andorra, Angola, Armenia, Austria, Belgium, Bolivia, Cabo Verde, Cambodia, Colombia, Congo (Republic of), Côte d’Ivoire, Croatia, Djibouti, Dominican Republic, Ecuador, Finland, France, Georgia, Germany, Guinea-Bissau, Haiti, Honduras, Iceland, Ireland, Italy, Kyrgyzstan, Luxembourg, Macedonia, Marshall Islands, Mexico, Micronesia, Moldova, Monaco, Montenegro, Mozambique, Namibia, Nepal, Netherlands, Nicaragua, Norway, Panama, Paraguay, Portugal, Romania, Sao Tomé and Príncipe, Serbia, Seychelles, Slovakia, Slovenia, Sweden, Switzerland, Timor-Leste, Turkmenistan, Turkey, Uruguay and Venezuela

¹⁶ Constitutional Commission of Burkina Faso, Draft Constitution of the Fifth Republic, www.rtb.bf/wp-content/uploads/2017/01/Avant-projet-Constitution-der-der.pdf

¹⁷ Constitutional Court of South Africa, *The State v. Makwanyane and Mchunu*, Case No. CCT/3/94

¹⁸ *The State v. Makwanyane and Mchunu*, Case No. CCT/3/94, paras.144-146

¹⁹ Benin Constitutional Court Decision DCC 12-153

ratification by the Republic of Benin “now renders inoperative all legal provisions [including those of the Criminal Code] stipulating the death penalty as a punishment”.²⁰

- On 25 August 2015, the Supreme Court of the **US state of Connecticut** found the application of the death penalty unconstitutional.²¹ Noting that by abolishing in 2012 the death penalty for future cases the state legislature expressed “the will of the people that it no longer makes sense to maintain the costly and unsatisfying charade of a capital punishment scheme in which no one ever receives the ultimate punishment”, the Court reflected on “Connecticut’s long, troubled history with capital punishment: the steady replacement by more progressive forms of punishment; the increasing inability to achieve legitimate penological purposes; the freakishness with which the sentence of death is imposed; the rarity with which it is carried out; and the racial, ethnic, and socio-economic biases that likely are inherent in any discretionary death penalty system. Because such a system fails to comport with our abiding freedom from cruel and unusual punishment, we hold that capital punishment, as currently applied, violates the constitution of Connecticut.”²²
- On 24 October 2017, the Constitutional Court of **Guatemala** declared unconstitutional articles in the Penal Code and the Anti-Narcotics Law allowing for the imposition of the death penalty after it found that they violated the principle of legality and the prohibition, enshrined in the American Convention on Human Rights, to apply the death penalty for crimes introduced after the ratification of the international treaty occurred. In reaching its decision, the court recalled the obligations of Guatemala as a state party to the American Convention on Human Rights to amend domestic legislation and adopt necessary legislative instruments to allow for the exercise of the rights recognized in the Convention.²³
- On 11 October 2018, the Supreme Court of the **US state of Washington** found the death penalty laws to be unconstitutional, making it the 20th abolitionist state in the country.²⁴ The Court found that the death penalty is “unequally applied – sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant”,²⁵ “imposed in an arbitrary and racially biased manner”²⁶ that “cannot withstand the ‘evolving standards of decency that mark the progress of a maturing society’”.²⁷ As such, the Court found that “it logically follows that the death penalty fails to serve penological goals” of retribution and deterrence.²⁸ The Court further noted the “local, national, and international trends that disfavor capital punishment more broadly. When the death penalty is imposed in an arbitrary and racially biased manner, society’s standards of decency are even more offended. Our capital punishment law lacks ‘fundamental fairness’ and thus violates article I, section 14 [of the state constitution]”.²⁹

2.4 THE ULTIMATE CRUEL, INHUMAN AND DEGRADING PUNISHMENT: AN EMERGING NORM

Although several aspects of the use of the death penalty – such as some methods of execution³⁰ and the failure to provide individuals on death row and their relatives with timely notification about the date of their execution³¹ – have long been found as violating the absolute prohibition under international law of torture and other ill-treatment, in recent years the question of whether the death penalty itself violates the prohibition of torture and other ill-treatment, independent of special practices, conditions or methods of executions, has been emerging.

²⁰ Benin Constitutional Court Decision DCC 16-020

²¹ Supreme Court of Connecticut, *State of Connecticut v. Eduardo Santiago*, 318 Conn.1, 122 A.3d 1 (2015)

²² *State of Connecticut v. Eduardo Santiago*, 318 Conn.1, section V

²³ Constitutional Court of Guatemala, Case file 5986-2016

²⁴ Washington Supreme Court, *State of Washington v. Allen Eugene Gregory* (No. 88086-7), (2018)

²⁵ *State of Washington v. Allen Eugene Gregory* (No. 88086-7), p.1

²⁶ *State of Washington v. Allen Eugene Gregory* (No. 88086-7), p.19

²⁷ *State of Washington v. Allen Eugene Gregory* (No. 88086-7), p.25

²⁸ *State of Washington v. Allen Eugene Gregory* (No. 88086-7), p.26

²⁹ *State of Washington v. Allen Eugene Gregory* (No. 88086-7), p.25

³⁰ Human Rights Committee, *Kindler v Canada*, Communication No.470/1991, UN Doc. CCPR/C/48/D/470/1991, 11 November 1993, para.15.3

³¹ Human Rights Committee, *Vladislav Kovalev et al. v Belarus*, Communication No.2120/2011, UN Doc. CCPR/C/106/D/2120/2011, 27 November 2012, para. 11.10

In 2012, the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment considered whether a norm under international customary law against the death penalty is emerging or has emerged. He wrote:

“A growing concern at the irreconcilable conflict between the legally imposed death penalty and the infliction of torture or cruel, inhuman or degrading treatment or punishment is evident even where some organs of protection have hesitated to pronounce accordingly.”³² “An increasing number of national constitutional courts and political instances have pronounced their conviction that the death penalty is a cruel, inhuman and degrading treatment not reconcilable with the inherent right to physical and mental integrity and human dignity. It can be said, therefore, that there is an evolving standard whereby States and judiciaries consider the death penalty to be a violation per se of the prohibition of torture or cruel, inhuman or degrading treatment. A review of precedents to determine the existence of such a norm as an already established custom is beyond the capacity of the present report. Nevertheless, the Special Rapporteur is convinced that a customary norm prohibiting the death penalty under all circumstances, if it has not already emerged, is at least in the process of formation.”³³

In 2018, the Human Rights Committee reached a similar conclusion:

“Although the allusion to the conditions for application of the death penalty in article 6, paragraph 2 suggests that when drafting the Covenant the States parties did not universally regard the death penalty as a cruel, inhuman or degrading punishment per se, subsequent agreements by the States parties or subsequent practice establishing such agreements, may ultimately lead to the conclusion that the death penalty is contrary to article 7 of the Covenant under all circumstances. The increasing number of States parties to the Second Optional Protocol, as well as by other international instruments prohibiting the imposition or carrying out of the death penalty, and the growing number of non-abolitionist States that have nonetheless introduced a de facto moratorium on the exercise of the death penalty, suggest that considerable progress may have been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment. Such a legal development is consistent with the pro-abolitionist spirit of the Covenant, which manifests itself, inter alia, in the texts of article 6, paragraph 6 and the Second Optional Protocol.”³⁴

The development of international law over the past decades has not only cemented the understanding of the death penalty as a human rights issue; it has also unequivocally linked its existence to the violation of the human rights to life and not to be subjected to cruel, inhuman or degrading treatment or punishment.

³² Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/67/279, 9 August 2012, para.66

³³ UN Doc. A/67/279, para.72

³⁴ Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, para.50

3. STATE PRACTICE: THE UNEQUIVOCAL TREND TOWARDS ABOLITION

State practice shows a progressive increase in the number of countries that have abolished the death penalty and a decrease in the overall number of executing states and executions carried out each year, despite occasional setbacks.

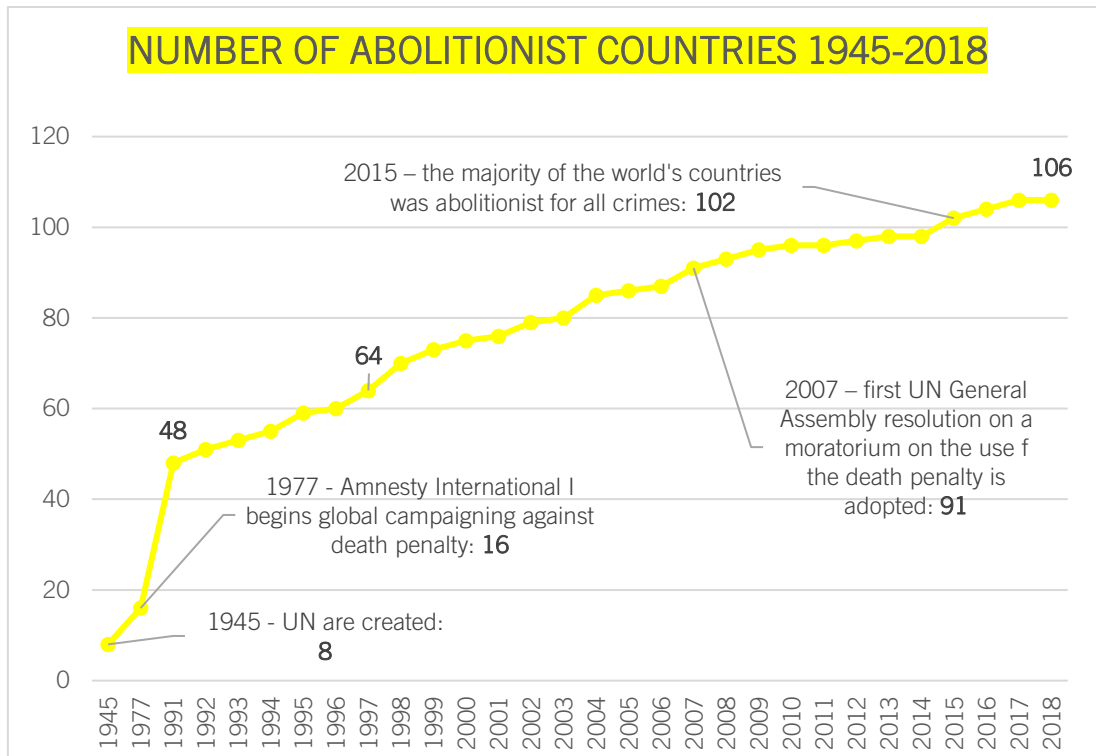
3.1 GROWING TREND TOWARDS ABOLITION

Seventy years after the adoption of the Universal Declaration, the trend towards worldwide abolition of the death penalty is unmistakable. As of today, 142 countries – more than two-thirds of the world's countries – have abolished the death penalty in law or practice.³⁵

When the Universal Declaration was adopted in 1948, only eight countries had abolished the death penalty for all crimes: Colombia (1910), Costa Rica (1877), Ecuador (1906), Iceland (1928), Panama (1922), San Marino (1865), Uruguay (1907) and Venezuela (1863).

In 1977, as Amnesty International began its global campaigning on this issue, 16 countries were abolitionist for all crimes. By 2015, the majority of the countries in the world had become abolitionist for all crimes (see chart below).

³⁵ For more information see Amnesty International, *Abolitionist and retentionist countries (as of March 2018)*, (Index: ACT 50/6665/2017), 5 March 2018, www.amnesty.org/en/documents/act50/6665/2017/en/



As of August 2019, 106 countries are abolitionist for all crimes and more than 70% of all states have abolished the death penalty in law, both through legislation and decisions by constitutional courts, or in practice. More than 30 of these became fully abolitionist in the 21st century. Since the Constitutional Court of the Republic of Korea last considered the death penalty in February 2010, countries that have abolished the death penalty are Benin, Congo (Republic of), Fiji, Guinea, Latvia, Madagascar, Mongolia, Nauru and Suriname for all crimes and Burkina Faso and Guatemala for ordinary crimes. Additionally, the US states of Connecticut, Delaware, Illinois, Maryland, New Jersey, New Mexico, New York and Washington have all abolished the death penalty since the beginning of the millennium and the governors of the states of California, Colorado, Oregon and Pennsylvania have established moratoriums on executions.

The global trends highlighted above are also reflected in the Asia-Pacific region, where nine countries carried out executions in 2018, out of 22 that still retain it in law. In the Pacific, only Papua New Guinea and Tonga retain this punishment on their law books, after Fiji and Nauru abolished the death penalty for all crimes in 2015 and 2016, respectively. However, only Papua New Guinea held people on death row and an indefinite stay of executions was put in place by its National Court, after it concluded the country's use of the death penalty violated human rights safeguards enshrined in the country's Constitution.

In 2017, Guinea and Mongolia each abolished the death penalty for all crimes and Guatemala became abolitionist for ordinary crimes only. In February 2018, the President of Gambia declared an official moratorium on executions.³⁶ The country carried out its last executions in 2012, but under the leadership of its new administration it signed the Second Optional Protocol to the ICCPR in September 2017. Burkina Faso was the last country to have removed the death penalty from its Criminal Code last June.

The trend to abolish the death penalty in all regions of the world is steadily increasing and such progress has also been reflected at the voting on seven resolutions adopted by the UN General Assembly on a moratorium on the use of the death penalty. When the UN General Assembly adopted its first resolution on this issue in December 2007, 104 states supported the move;³⁷ at the most recent vote in December 2018, 121 countries voted in favour of the resolution.³⁸ Although not legally binding, these resolutions from the main deliberative body of the UN with full membership carry considerable moral and political weight and are indicative of the trend away from the death penalty.

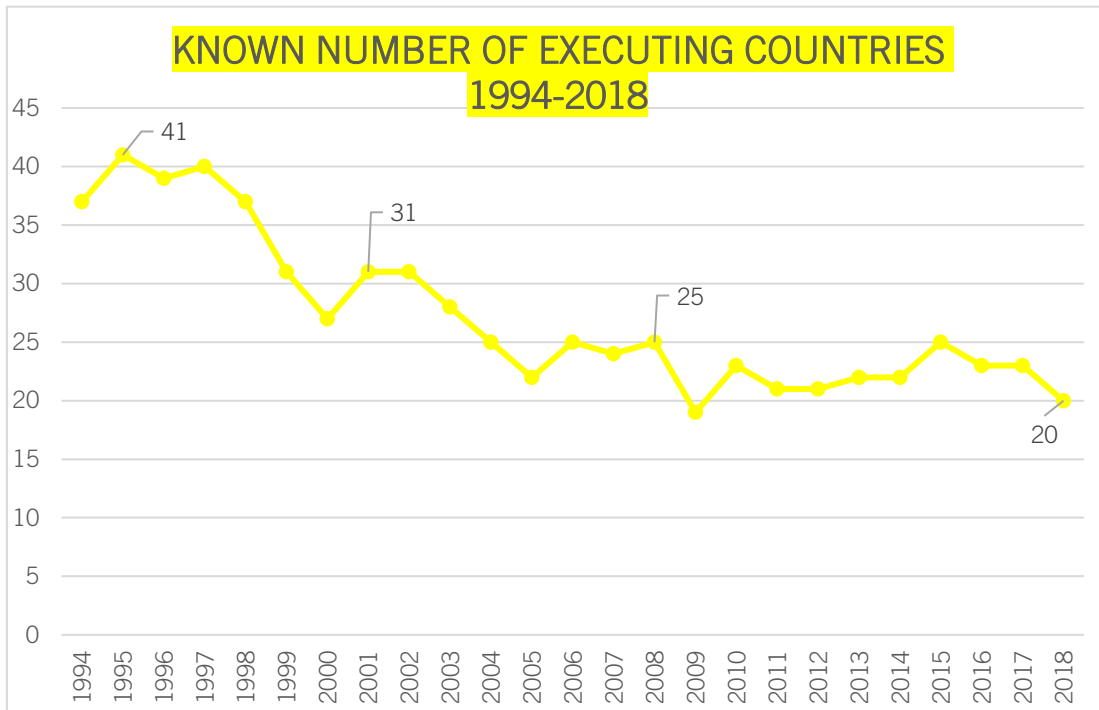
³⁶ Reuters, 'Gambia announces moratorium on death penalty', 18 February 2018, www.reuters.com/article/us-gambia-justice/gambia-announces-moratorium-on-death-penalty-idUSKCN1G20V2

³⁷ UN General Assembly resolution 62/149 of 18 December 2007

³⁸ UN General Assembly resolution 73/175 of 17 December 2018

3.2 EXECUTING COUNTRIES: AN ISOLATED MINORITY

The number of executing countries has been steadily declining, with between 41-31 countries approximately per year known to have carried out executions three decades ago; 31-25 two decades ago; and between 25-20 in the past 10 years (see chart below).



Amnesty International’s report on the global use of the death penalty in 2018 shows that the weight of the death penalty is carried by an isolated group of countries.³⁹ Executions were reported in 20 countries worldwide, 10% of the world total. Of these executing countries, only 13, or 6%, were “persistent” executioners, meaning that they carried out executions every year in the previous five years.

While China, where figures on the death penalty remained classified as a state secret, remained the lead executioner and was believed to have carried out thousands of executions, Amnesty International reported at least 690 executions were known to have taken place globally in 2018 excluding China, a decrease of 31% compared to 2017 (at least 993). This figure represents the lowest number of executions that Amnesty International has recorded in the past decade.

This decrease is primarily linked to reductions in executions in some of the countries that have historically reported highest number of yearly executions, including Iran, Iraq and Pakistan. Despite these decreases, however, Iran continued to account for more than one third of all recorded executions; and 78% of all known executions were carried out in just four countries – Iran, Saudi Arabia, Viet Nam and Iraq.

It is now evident that the use of the death penalty is confined to an isolated minority of countries, and figures show that the resort to this punishment has been declining.

³⁹ Amnesty International, *Death sentences and executions in 2018* (ACT 50/9870/2019), April 2019, <https://www.amnesty.org/en/documents/act50/9870/2019/en/>

3.3 THE DEATH PENALTY: INHERENTLY ARBITRARY AND DISCRIMINATORY

The death penalty is inherently arbitrary, impacting disproportionately those from less advantaged backgrounds and administered by justice systems that are fallible.

3.3.1 PEOPLE FROM LESS ADVANTAGED BACKGROUNDS DISPROPORTIONATELY AFFECTED

Research into the use of the death penalty by many countries has shown how those from less advantaged backgrounds are at greater disadvantage in their experience of the criminal justice system, including in their ability to enjoy effective legal representation. Among other examples:

- Research into the use of the death penalty has long shown that those living in poverty or with less financial means are often unable to enjoy their right to competent and effective legal counsel, at all stages of the proceedings. Defendants from disadvantaged socio-economic backgrounds were in numerous cases unable to engage or retain competent legal representation, as well as enjoy the much-needed support of forensic and medical experts to prepare their defence. A comprehensive study by the National Law University in Delhi on death rows in India has shown, for example, that low literacy levels among prisoners facing the death penalty, as well as their marginalised or absent social networks can in some cases be a factor influencing their understanding of, and engagement with, the judicial institutions and their own legal representatives. This in turn has the effect of further disempowering and marginalizing certain sections of society, along lines of class, gender, caste, religion and levels of educational attainment.⁴⁰
- An Amnesty International report on the death penalty in Saudi Arabia highlighted the importance of social networks in getting the death sentence commuted. Only those able to influence the victim's relatives through power or money, or a combination of both, through kinship or friendship, or through good fortune succeed in obtaining a pardon from the heirs of the crime victim, avoiding the execution – the help of legal representatives in these negotiations is not enough in itself. Migrant workers typically lack relationships and resources that could facilitate the issuing of a pardon and are therefore, in the great majority of cases, unable to obtain one. Of the 104 cases Amnesty International analysed between 2000 and 2008 in Saudi Arabia and in which pardons were granted, 92 were Saudi Arabian nationals.⁴¹

In addition to poverty, nationality can also be an additional factor influencing access to legal representation and the outcome in death penalty cases. International law affords foreign nationals the additional critical protections of consular and language assistances. Amnesty International has, however, documented numerous cases, particularly in Southeast Asia and some countries in the Middle East regions,⁴² where the authorities of the country imposing the death penalty have failed to correctly identify and notify consular officials of the arrest of their nationals and provide the accused with interpretation throughout the proceedings from the time of arrest.

In addition to this, foreign nationals from disadvantaged backgrounds can find themselves at greater risk of facing the death penalty depending on whether or not the country of nationality provides consular and legal assistance, as well as on the effectiveness of any consular assistance provided. This can vary according to the status of the death penalty in their country of nationality; the political agenda and willingness to intervene of the government of their home country; as well as the resources available to the relevant foreign representation to assist and advocate for nationals facing the death penalty abroad. Therefore, the nationality of the defendants can become a factor directly affecting the ability of persons to defend themselves and the

⁴⁰ National Law University, 'Death Penalty India Report', Delhi Press, February 2016, vol. I

⁴¹ Amnesty International, *Killing in the name of justice – the death penalty in Saudi Arabia* (Index: MDE 23/2092/2015). Similar conclusions were drawn from the analysis of media reports of cases of such pardons granted after 2008.

⁴² See, for example, Amnesty International, *Flawed Justice-Unfair trials and the death penalty in Indonesia* (Index: ASA 21/2334/2015), pp.40-45; Amnesty International, *'Killing in the name of justice' - The death penalty in Saudi Arabia* (Index: MDE 23/2092/2015), pp.24-27. See also report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/70/304, 7 August 2015.

outcome of death penalty cases, which can render the execution arbitrary.⁴³ This is primarily due to two factors: on one hand, the imposition of the death penalty where the proceedings do not adhere to the highest standards of fair trial constitutes arbitrary deprivation of life,⁴⁴ and governments that fail to make all efforts to provide effective assistance to their nationals abroad bear some of the responsibility for the outcome of the case; on the other, there is an additional element of arbitrariness depending on the extent to which particular countries intervene in support of their own nationals facing the death penalty abroad, with an individual's specific nationality becoming an additional significant factor in determining their fate.

Among those who are at greater risk of the death penalty are people with mental and intellectual disabilities. In the USA, for example, prosecutors have continued to seek death sentences against individuals who have serious mental and intellectual disabilities, despite the prohibition under international law and standards on the use of the death penalty in these circumstances and in violation of standards set by the US Supreme Court.⁴⁵

3.3.2 EVER EXISTING RISK OF EXECUTING THE INNOCENT

As long as the death penalty remains an enforceable punishment, the risk of executing the innocent can never be removed. In its annual surveys on the global use of the death penalty, Amnesty International reported that at least 306 people were cleared from blame or acquitted of the criminal charge after sentencing and the conclusion of the appeals process for the period 2014- 2018, as follows:

- In 2018, at least 8 exonerations were recorded in four countries: Egypt (1+), Kuwait (3), Malawi (2), USA (2).⁴⁶
- In 2017, at least 55 exonerations were recorded in six countries: China (1), Maldives (1), Nigeria (28), Taiwan (1), USA (5), Zambia (19).⁴⁷
- In 2016, at least 60 exonerations were recorded in 9 countries: Bangladesh (4), China (5), Ghana (1), Kuwait (5), Mauritania (1), Nigeria (32), Sudan (9), Taiwan (1) and Viet Nam (2).⁴⁸
- In 2015, at least 71 exonerations were recorded in six countries: China (1), Egypt (1), Nigeria (41), Pakistan (at least 21), Taiwan (1), and USA (6).⁴⁹
- In 2014, at least 112 exonerations were recorded in nine countries: Bangladesh (4), China (2), Jordan (1), Nigeria (32), Sudan (4), Tanzania (59), USA (7), Viet Nam (2) and Zimbabwe (1).⁵⁰

In the USA, 166 people have been exonerated from death row on the grounds of innocence since 1973.⁵¹

⁴³ The engagement of countries in this issue has been varied. See UN Doc. A/70/304, *op. cit.*, para.108

⁴⁴ See report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. A/67/275, 9 August 2012, para.25

⁴⁵ See, for example, Amnesty International, *USA: Darkness visible in the sunshine state – The death penalty in Florida* (Index: AMR 51/8959/2018), www.amnesty.org/en/documents/amr51/8959/2018/en/

⁴⁶ Amnesty International, *Death sentences and executions 2018* (Index: ACT 50/9870/2019), www.amnesty.org/en/documents/act50/9870/2019/en/

⁴⁷ Amnesty International, *Death sentences and executions 2017* (Index: ACT 50/7955/2018), www.amnesty.org/en/documents/act50/7955/2018/en/

⁴⁸ Amnesty International, *Death sentences and executions 2016* (Index: ACT 50/5740/2017), www.amnesty.org/en/documents/act50/5740/2017/en/

⁴⁹ Amnesty International, *Death sentences and executions 2015* (Index: ACT 50/3487/2016), www.amnesty.org/en/documents/act50/3487/2016/en/

⁵⁰ Amnesty International, *Death sentences and executions 2014* (Index: ACT 50/0001/2015), www.amnesty.org/en/documents/act50/0001/2015/en/

⁵¹ For more information see Death Penalty Information Center, <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row>

3.4 NO UNIQUE DETERRENT EFFECT

“It is not because the death sentence has been scrapped that crime has reached such unacceptable levels. Even if the death sentence is brought back, crime itself will remain as it is. What is required here is that the security forces must do their work and we are busy to ensure that the security forces have the capacity to deliver services, safety to the community. That is the issue, not the death sentence.”⁵²

There is no convincing evidence to support the argument that the death penalty prevents crime more effectively than other punishments. The most comprehensive survey of research findings carried out by the UN on the relationship between the death penalty and homicide rates concluded: “research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. Such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis.”⁵³

Similarly, in its April 2012 report, the National Research Council of the National Academies in the USA confirmed: “research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations ... about the effect of the death penalty on homicide.”⁵⁴

A study comparing the murder rates in Hong Kong and Singapore, both of which have a similar size of population, for a 35-year period beginning in 1973 found that the abolition of the death penalty in the former and the high execution rate in the latter in the mid-1990s had little impact on murder levels.⁵⁵

Research carried out in Trinidad and Tobago also found no correlation between executions, imprisonment and crime: “over a span of 50 years, during which these sanctions were being deployed in degrees that varied substantially, neither imprisonment nor death sentences nor executions had any significant relationship to homicides. In the years immediately following an appeals court’s determination limiting executions, the murder rate fell.”⁵⁶ In particular, the study showed that between 1950 and 1980, while executions were carried out regularly every year, homicide rates remained fairly stable. In the years since 1980, although courts continued to impose death sentences, executions took place in just two of those years. This drop in executions had no large, immediate impact on murder rates, which only began to rise sharply from 2003.⁵⁷

While there has been no comprehensive study of the link between the death penalty and crime rates in India, the country’s murder rate declined by 23% for the period 1995-2011⁵⁸ – a period during which no executions were carried out after 2004.

Statistics from countries that have abolished the death penalty show that the absence of the death penalty has not resulted in an increase in the crimes previously subject to capital punishment. In Canada, for example, the homicide rate per 100,000 of the population fell from a peak of 3.09 in 1975, the year before the death penalty for murder was abolished, to 2.41 in 1980. The homicide rate in Canada remains significantly lower than it was prior to abolition, with last available official figures rating it at 1.8 in 2017.⁵⁹

Crime trends and patterns in different countries and regions are related to a range of different factors, some of which are context-specific. Consequently, there is no one solution that could address public safety concerns in all countries. However, several studies conducted by the United Nations have identified poverty, inequality, and the capacity of States to enforce the rule of law as factors affecting the level of violence in most countries, in addition to individuals’ particular circumstances.⁶⁰ The UN Office on Drugs and Crime

⁵² Nelson Rolihlahla Mandela, ‘Address by President Nelson Mandela at the NEDLAC Conference on crime and violence’, 21 November 1996, www.mandela.gov.za/mandela_speeches/1996/961121_nedlac.htm

⁵³ Roger Hood, “The question of the death penalty and the new contributions of the criminal sciences to the matter: a report to the United Nations Committee on Crime Prevention and Control”, UN Doc. E/AC.57/1988/CRP.7, 1988. The survey was last reviewed and published commercially as Hood and Hoyle, “The Death Penalty- A worldwide perspective”, Fifth edition, Oxford University Press, 2016.

⁵⁴ Daniel S. Nagin and John V. Pepper, eds., “Deterrence and the Death Penalty”, Washington: National Research Council, The National Academies Press, 2012, p. 2

⁵⁵ Franklin E. Zimring, Jeffrey Fagan, David T. Johnson, “Executions, deterrence and homicide: a tale of two cities”, 31 August 2009, Columbia Public Law Research Paper No. 09-206; CELS 2009 4th Annual Conference on Empirical Legal Studies Paper

⁵⁶ David F. Greenberg and Biko Agozino, “Executions, imprisonment and crime in Trinidad and Tobago”, *British Journal of Criminology*, 2011

⁵⁷ David F. Greenberg and Biko Agozino, 2011

⁵⁸ UN Office on Drugs and Crime, “Global Study on Homicide—Trends, Contexts, Data”, 2011

⁵⁹ Statistics published by the Government of Canada, www150.statcan.gc.ca/n1/en/subjects/crime_and_justice/crimes_and_offences

⁶⁰ UN Office on Drugs and Crime, “Making them work –handbook on crime prevention guidelines”, August 2010

(UNODC) identified in its 2011 “Global study on Homicide”⁶¹ a relationship between homicide and human and economic development. The study found that the largest proportion of murders occurred in countries with low levels of human development; and that countries with high levels of income inequality have homicide rates almost four times higher than more equal societies.⁶²

Factors associated with the nature of the homicides themselves, such as availability of firearms, alcohol or geographical proximity to drug-trafficking routes, can also have an impact on homicide rates.⁶³ An analysis, carried out by the Commission on Crime Prevention and Criminal Justice of the Economic and Social Council, of the interrelation between homicide rates and rule of law index⁶⁴ found that countries with weak processes with regard to promulgating laws, enforcing them equally or adjudicating them independently, also had higher murder rates.⁶⁵ The Commission, however, noted that the relationship between these factors is not necessarily direct, as the capacity of States to enforce the rule of law can have an impact on ensuring social and economic development, which can, in turn, have an impact on crime rates.⁶⁶

61 UN Office on Drugs and Crime, “Global Study on Homicide—Trends, Contexts, Data”, 2011

62 ECOSOC Commission on Crime Prevention and Criminal Justice, “World crime trends and emerging issues and responses in the field of crime prevention and criminal justice”, UN Doc. E/CN.15/2012/19, 17 February 2012

63 Office on Drugs and Crime, “Global Study on Homicide—Trends, Contexts, Data”, 2011, p.10. Office on Drugs and Crime, ‘Global Study on Homicide—Trends, Contexts, Data’, 2013, pp.65-75

64 The rule of law index is a system based on the measurement of a number of indicators which analyses how “individuals, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated...It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” See also United Nations, “Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies”, S/2004/616, para.6.

65 ECOSOC Commission on Crime Prevention and Criminal Justice, “World crime trends and emerging issues and responses in the field of crime prevention and criminal justice”, UN Doc. E/CN.15/2012/19, 17 February 2012, p.10.

66 UN Doc. E/CN.15/2012/19

4. ALTERNATIVE PUNISHMENTS

In the context of the abolition of the death penalty, alternatives to the death penalty become a critical issue in reconciling the demands of victims of violent crime for justice with the need to define punishments that fully comply with international human rights law and standards. Penalties imposed following a conviction must be commensurate with the gravity of the crime and the circumstances of the offender;⁶⁷ and neither the punishment itself nor the way that a punishment is imposed may violate international standards.

Article 10(3) of the ICCPR, to which the Republic of Korea is a State Party, states that the primary aim of penitentiary systems should be the reformation and social rehabilitation of prisoners. Bearing this principle in mind, and when considering the approaches used in different jurisdictions with regard to long custodial sentences, it may be helpful to note that the Rome Statute of the International Criminal Court, which has jurisdiction over the most serious crimes of concern to the international community – often involving crimes with multiple homicides – prescribes that all sentences imposed by the Court must be subject to review after a period. The Court has the power to impose a sentence of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person; otherwise the maximum term of imprisonment it can impose is 30 years.⁶⁸ After serving two-thirds of a determinate sentence, or 25 years of a life sentence, the Court must review the sentence to determine whether it should be reduced, taking into account any factors establishing a change of circumstances sufficient to justify reduction of sentence; if at that time the Court determines it is not appropriate to reduce the sentence, it must review the question again regularly thereafter.⁶⁹

In many countries where the death penalty has been abolished, long custodial penalties have been introduced for crimes previously punishable by the death penalty. Among other recent examples:

- In Mongolia, the death penalty was replaced in the new Criminal Code with life imprisonment, effective from 2017. Similarly, Guinea and Nauru replaced the death penalty with life imprisonment;
- In Suriname, the reformed Penal Code abolished the death penalty in 2015 and increased the sentences for severe crimes, including murder, from 15 to 20 years for temporary prison sentences and from 30 to 50 years as the maximum term for consecutive, increased and life sentences.

Furthermore, UN Safeguards guaranteeing the protection of the rights of those facing the death penalty state that a person sentenced to death must benefit when a change of law imposes a lighter penalty for the crime for which they had been convicted.⁷⁰

⁶⁷ See, for example, Article 4.2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

⁶⁸ Rome Statute of the International Criminal Court, Article 77(1).

⁶⁹ Rome Statute of the International Criminal Court, Article 110.

⁷⁰ Among other examples, Safeguard no. 2 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the UN Economic and Social Council in resolution 1984/50 of 25 May 1984; Article 15(1) of the International Covenant on Civil and Political Rights; Rome Statute of the International Criminal Court, Article 24(2); European Court of Human Rights, *Case of Scoppola v. Italy* No. 2 (Application no. 10249/03), Grand Chamber judgment of 17 September 2009, para. 108.

5. CONCLUSION

This brief shows that international law has long and unequivocally recognized the death penalty as a human rights issue and its recent development has pointed to the emergence of a norm under international customary law prohibiting the use of this punishment under all circumstances. This recognition has also been demonstrated in the analysis of state practice, which shows on one hand that the global trend remains overwhelmingly in favour of the abolition of the death penalty; and on the other, the use of this punishment in the minority of countries that still resort to executions to be flawed with arbitrariness, unfairness and discriminatory practices.

In light of the concerns highlighted in this briefing, Amnesty International urges the Constitutional Court of the Republic of Korea to rule that the death penalty violates human rights as guaranteed under Articles 10, 12(1), 37(2) and 110(4) of the Constitution.

