



STUDY

**On the possibility of Viet Nam
ratifying the Second Optional Protocol
to the International Covenant on civil
and political rights aiming at the
abolition of the death penalty**



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ABBREVIATIONS

UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
ICCPR	International Covenant on Civil and Political Rights
UPR	The Universal Periodic Review
CPC	Criminal Procedure Code



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EXECUTIVE SUMMARY

This study aims to assess the possibility of Viet Nam ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) aiming at the abolition of the death penalty. It analyzes: (a) the current international legal framework and the process of legal development to abolish the death penalty in selected countries, (b) the compatibility between the existing regulations on the death penalty in the Vietnamese legal system and the Second Optional Protocol of the ICCPR, and (c) the assessment of feasibility for abolition of the death penalty in Viet Nam. The report is based on qualitative desk and archival research, with an empirical element of in-depth semi-structured interviews conducted with 30 informants, comprising officials participating in the investigation, prosecution and adjudication of criminal cases, government officials, lawyers and academics currently working in the area of criminal law. This study was conducted by independent consultants under the EU Justice and Legal Empowerment Programme in Viet Nam (EU JULE) in partnership with UNDP and the Ministry of Justice of Viet Nam.

Throughout history, the death penalty was accepted and widely applied by the legal systems of most countries. However, with the development of the rule of law and the progress of society, the number of countries imposing a moratorium on executions and abolishing the death penalty both in law and in practice is growing in the world. In recent decades, the number of countries abolishing the death penalty has significantly increased regardless of differences in their legal, cultural, social economic and

religious background. Around the world, more than four out of five countries have either abolished or stopped applying the death penalty in practice. Accordingly, by 2018, 142 countries had abolished the death penalty in law and in practice, while only 56 countries still retain and apply the death penalty in their legal systems.






The international legal framework for the abolition of the death penalty has been developed and improved under the auspices of the United Nations (UN) and regional human rights mechanisms. In these fora, States have come together to acknowledge that the death penalty undermines human dignity and the realization of human rights. ICCPR was the first legal treaty to impose an obligation on States to ensure the right to life as a supreme right. It calls on States that retain the death penalty to limit its application to only the most serious crimes and with strict conditions. A major turning point on the road towards the abolition of the death penalty was the adoption by the United Nations General Assembly in December 1989 of the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. A State Party to this Protocol is obliged to take all necessary measures to abolish the death penalty within its jurisdiction, both in law and in practice. As of December 2018, the Second Optional Protocol has been ratified by 86 countries. The Human Rights Committee, the body overseeing the implementation of the ICCPR, has strongly recommended States Parties to the ICCPR to consider acceding to or ratifying its Second Optional Protocol. The UN has also adopted a number of resolutions to call upon its Member States to impose a moratorium on executions with a view to abolishing death penalty.

Although the legal scope of application on death penalty has been narrowed down, Viet Nam remains one of the countries that impose death penalty for some crimes. Therefore, the abolition of the death penalty, including through the ratification of the Second Optional Protocol to the ICCPR, is one of the topics of concern often raised with Viet Nam by the UN human rights mechanisms including the Universal Periodic Review (UPR) and treaty-based bodies.

This study assesses and evaluates the conformity between Viet Nam’s legal system and the Second Optional Protocol to the ICCPR. It identifies that some important impediments to full compliance with ICCPR standards on the limitation of the scope and application of the death penalty still remains, notably in the definition of what constitutes the “most serious crimes” as stipulated by the Human Rights Committee. The study also suggests that currently, Viet

Nam is not yet ready to abolish the death penalty. Many of the informants in this study considered that it was too early for Viet Nam to remove the death penalty completely. However, there would seem to be general support for gradually limiting the scope of the death penalty, with a view to move towards abolition of capital punishment and create the favorable conditions for Viet Nam to accede the Second Optional Protocol to the ICCPR at a later time.

In the context of the current global trend in favor of abolishing the death penalty, it is important that Viet Nam continues its efforts to improve its legal system by limiting the use of the death penalty, aiming at the eventual abolition of the death penalty. These steps would also help Viet Nam meet all the necessary conditions to accede to the Second Optional Protocol to the ICCPR at a later more opportune time. It is recommended that Viet Nam should take the following steps in the near future:

	<p>(1) Continue studying and disseminating relevant international experiences on the abolition of the death penalty to provide comprehensive information for competent agencies to develop national policy on death penalty</p>
	<p>(2) Raise awareness of arguments for a moratorium on executions and abolition of the death penalty by strengthening public campaigns and other outreach activities</p>
	<p>(3) Continue to reduce the number of offences for which the death penalty may be imposed, expand the list of sentenced persons who are not subject to the application, by amending relevant legal documents and reviewing the concept of “most serious crimes” under international human rights law and Article 6 of the ICCPR</p>
	<p>(4) Consider imposing a moratorium on executions as a significant preparatory step towards the eventual and total abolition of the death penalty</p>
	<p>(5) Conduct further studies on alternative sanctions, to provide relevant recommendations while ensuring humanity in Vietnam's criminal policy, and the requirements to fight against crime</p>



INTRODUCTION

From a legal point of view, the death penalty can be defined as a punishment that deprives someone of their life who has committed a serious crime following a judgment announced by a legally established court as regulated by a legal system. Throughout history, this form of punishment was accepted and widely applied by the legal systems of most countries to fight crime and to protect society from danger.

However, with the development of the rule of law and progress in society, a new trend emerged that considered the application of the death penalty as unnecessary, unjust or ineffective. There is a growing international consensus¹ that the death penalty needs to be removed from democratic and civilized societies to ensure the effective implementation of the right to life under Article 3 of the Universal Declaration on Human Rights and Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Consequently, States started removing this punishment from their criminal laws or decided not to apply it in their judicial systems.

The idea to abolish the death penalty appeared from the middle of the 18th century.² However, the movement gained

1 Over the past 20 years, more than 50 States have abolished it in law according to <https://www.diplomatie.gouv.fr/en/french-foreign-policy/human-rights/death-penalty/the-death-penalty-around-the-world/>; United Nation, Moving Away from the Death Penalty: Arguments, Trends and Perspectives, 2015, available at <https://www.ohchr.org/EN/newyork/Documents/Moving-Away-from-the-Death-Penalty-2015-web.pdf>, accessed 5 Jan 2019

2 See: Death Penalty Information Center, Introduction to the Death Penalty, available at: <https://deathpenaltyinfo.org/part-i-history-death-penalty>; Oliver Pickup, The history of dead penalty, available at: <https://www.raconteur.net/current-affairs/>

momentum after the Second World War, particularly in the 1990s. Since then, the number of countries removing the death penalty from their legal systems and ending it in practice has continued to grow. In 1984, the number of countries that had abolished the death penalty in law and in practice stood at 64. The figure increased to 97 in 1994 and 117 in 2014.³ As of July 2018, 142 countries in the world have abolished the death penalty in law and in practice, including 106 countries that abolished the death penalty for all kinds of crimes, 8 countries that abolished the death penalty for ordinary crimes⁴ and 28 countries that abolished death penalty in practice.⁵ As of July 2018, only 56 countries still retain and apply the death penalty in their legal systems.⁶ This means that at present more than two-thirds of all countries in the world are abolitionists. Many countries have also had programs to promote the abolition of the death penalty worldwide, as part of their foreign policy or overseas development programs. In his remarks at the special event on “Best practices and challenges in

[the-history-of-the-death-penalty](#), accessed 5 Jan 2019

3 Death Penalty Information Center, Limiting the Death Penalty, <https://deathpenaltyinfo.org/part-ii-history-death-penalty>, accessed 7 Jan 2019

4 That is, countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances: <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>

5 See: Abolitionist and retentionist countries as of July 2018, at: <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>

Besides, in October, 2018, the Cabinet of Malaysia declared that the Government will soon abolish the death penalty for all crimes. Read: Al Jazeera and News Agencies, Malaysia to abolish death penalty, <https://www.aljazeera.com/news/2018/10/malaysia-abolish-death-penalty-181011083607761.html>

6 See: Abolitionist and retentionist countries as of July 2018, available at: <https://www.amnesty.org/download/Documents/ACT5066652017ENGLISH.pdf>

implementing a moratorium on the death penalty”, co-organized by the Office of the UN High Commissioner for Human Rights (OHCHR) and the Permanent Mission of Italy to the UN on July 2, 2014, former UN Secretary-General Ban Ki-moon affirmed that “The death penalty has no place in the 21st century”.⁷

One of the most important legal developments under UN auspices in support of the abolition of the death penalty was the adoption of the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty. This Protocol was adopted by the UN General Assembly in Resolution 44/218 on 15 December 1989. It was opened for signature and ratification during the same year, and took effect in July 1991. As of December 2018, the Second Optional Protocol has been ratified by 86 countries.

Viet Nam is a party to seven out of the nine core international human rights instruments, including the ICCPR.⁸ At present, the criminal law of Viet Nam still provides for the application of the death penalty for some particularly serious crimes. However, the country has made active efforts in recent years to gradually reduce the number of crimes punishable by death through the issuance of political guidelines on the development of the legal system, in law making and in practice. The Penal Code of Viet Nam, which has undergone several rounds of amendments, has reduced significantly the number of crimes subject to the

death penalty. The procedures for cases in which the persons were charged with crimes where the maximum punishment is the death penalty, and for the execution of death sentences where the execution method used was revised from firing squad to lethal injection have been amended in relevant legal documents.

One of the accepted recommendations for Viet Nam from the Universal Periodic Review under the Human Rights Council and a recommendation also reiterated by the Committees supervising the implementation of treaties that Viet Nam is a party to, is to reduce the scope of crimes for which the death penalty applies and to consider a moratorium on the application of the death penalty.⁹ Other key recommendations concern the ratification of the Second Optional Protocol of the ICCPR, aiming at the abolition of the death penalty.

Purpose and scope of the study

This study is carried out with the aim of assessing the possibility of Viet Nam ratifying the Second Optional Protocol with the support of the EU JULE Program. The study provides an analysis of the international legal framework and presents practices of a number of countries in abolishing the death penalty. It also presents an overview of regulations and practices in Viet Nam’s criminal law relating to the death penalty. This study evaluates the compatibility between international law and the laws and practices of Viet Nam on the issue of the death penalty. Based on this, the

⁷ Ban Ki-Moon, United Nations Secretary-General, in remarks at the panel on “Best practices and challenges in implementing a moratorium on the death penalty”, New York, 2 July 2014. Available from www.un.org/sg/statements/index.asp?nid=7840

⁸ Viet Nam is a state party to ICCPR, IESCR, CRC, CEDAW, CAT, CERD, and CRPD

⁹ Recommendation 143.94 “Consider at least further restricting the use of the death penalty only for the most serious crimes, as stated in article 6 of ICCPR with a view to soon adopting a de facto moratorium on executions” (A/HRC/26/6)

study aims to provide an analysis and recommendations with regards to the possibility and potential for Viet Nam to accede to the Second Optional Protocol of the ICCPR.

Research methodologies

Due to the limited time available, it has not been possible to carry out qualitative and quantitative surveys on a large scale for this study. Hence, the study was mainly limited to qualitative desk review. In addition, the research team also conducted semi-structured interviews¹⁰ with 30 respondents comprising officials working on or doing research into the investigation, prosecution, adjudication

and execution of criminal judgments, policy and lawmakers, as well as legal professionals who work in criminal law research and teach at research and training establishments. More specifically the respondents included: (1) legal experts working in the ministries and central agencies (Ministry of Justice, Ministry of Public Security, Office of the President, the Supreme People's Court, Viet Nam Fatherland Front Committee); (2) local investigators, prosecutors and judges (in Da Nang, An Giang, Ben Tre, Dong Thap, Tien Giang, Ho Chi Minh City and Vinh Long provinces); (3) lawyers; and (4) lecturers in a law training institution (Hanoi Law University).

¹⁰ Please see annexes I and II to this report for more details on the research methodology and the outcome of the interviews



PART I

GENERAL INFORMATION ON THE ABOLITION OF THE
DEATH PENALTY AND THE SECOND OPTIONAL PROTOCOL
TO THE COVENANT ON CIVIL AND POLITICAL RIGHTS





GENERAL INFORMATION ON THE ABOLITION OF THE DEATH PENALTY AND THE SECOND OPTIONAL PROTOCOL TO THE COVENANT ON CIVIL AND POLITICAL RIGHTS

I. INTERNATIONAL LEGAL FRAMEWORK ON THE ABOLITION OF THE DEATH PENALTY

1. The death penalty and trends towards abolition

Nowadays, the death penalty continues to be used as a punishment for serious crimes in 56 countries. However, it is worth noting that the vast majority of executions are carried out in a smaller group of countries.

According to Amnesty International, at least 21,919 people were known to be on death row at the end of 2017. The same year, at least 2,591 death sentences were pronounced in 53 countries and at least 993 death sentences were carried out in 23 countries.¹¹ The country with the highest number of executions is reportedly China, though there are no official numbers as data on executions is considered a state secret. The executions reported in the media are also likely to represent

¹¹ Amnesty international, the death penalty in 2017: facts and figures, <https://www.amnesty.org/en/latest/news/2018/04/death-penalty-facts-and-figures-2017/>

only a fraction of those that are actually carried out. As per the statistics available related to executions carried out, China is followed by Iran, Saudi Arabia, Iraq and Pakistan – the four countries where 84% of all reported executions took place.¹²

The first countries to abolish the death penalty for all crimes were Venezuela (1863) and Portugal (1867). Then, in the second half of the 19th century, some European countries, such as the Netherlands, Switzerland, and Italy, gradually did away with capital punishment for ‘ordinary crimes’ within the judicial system, in other words not relating to the consequences of war or civil unrest. The number of countries that abolished the death penalty in law and in practice increased significantly at the end of the 20th century.¹³ With the establishment of the United Nations, the death penalty became an international human rights issue, rather than a matter of domestic law. It is noteworthy that, in 1971, the United Nations General Assembly adopted a resolution¹⁴ to ensure the full realization of the right to life, calling on all States to restrict the application of the death penalty with a view to its gradual abolishment. The movement to reduce and abolish the death penalty in the world became particularly strong in the 1990s, especially in Europe.

With these measures gaining momentum over time, promoting a moratorium on the use of death penalty and encouraging the abolition of capital punishment has

¹² Amnesty international, the death penalty in 2017: facts and figures, <https://www.amnesty.org/en/latest/news/2018/04/death-penalty-facts-and-figures-2017/>

¹³ Roger Hood, Capital punishment, Encyclopedia dictionary, <https://www.britannica.com/topic/capital-punishment>

¹⁴ United Nations Resolution 2857 (XXVI) on Capital Punishment, December 20, 1971, available at: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/328/73/IMG/NR032873.pdf?OpenElement>

become a global movement. International organizations such as the UN have had many initiatives to support this trend¹⁵, while some countries like Australia have adopted strategies and action plans for campaigns on a moratorium on the use of the death penalty and the abolition of capital punishment. Some countries have also made this agenda part of their foreign policy.¹⁶ The Ministry of Foreign Affairs of Switzerland adopted a 2017 - 2019 Action Plan for the Universal Abolition of the Death Penalty¹⁷, while the British Government also created a strategy for the abolition of the death penalty for the period 2011-2015.¹⁸

2. Different points of view about the death penalty

The question about whether the death penalty should be retained or abolished has become a controversial issue, giving rise to many ethical and legal debates. Arguments on this topic are mainly focused on issues such as whether the maintenance of capital punishment is an effective preventive measure against crimes or whether in fact the death penalty is a violation of the right to life.

The view that the death penalty is essential is often based on the following arguments:

15 The UN High Commissioner for Human Rights, Moving away from death penalty- lessons from national experience, https://www.ohchr.org/Lists/MeetingsNY/Attachments/27/moving_away_from_death_penalty_web.pdf

16 See: The Australian Ministry of Foreign Affairs, Australia's strategy for abolition of the death penalty, June 2018;

17 Read: the Ministry of Foreign Affairs of Switzerland, FDFA Action Plan for the Universal Abolition of the Death Penalty, 2017-2019, available at: https://www.eda.admin.ch/dam/eda/en/documents/publications/MenschenrechtehumanitaerePolitikundMigration/aktionsplan-todesstrafe-2017-19_EN.pdf

18 See: Foreign and Commonwealth Office, HMG Strategy for Abolition of the Death Penalty 2010-2015, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/35448/death-penalty-strategy-oct-11-15.pdf

Firstly, the death penalty reflects the notion of “using a murder to compensate for a murder” to punish offenders, which originates from ancient times. The Code of Hammurabi was based on the argument that “If a man puts out the eye of another man, his eye shall be put out. If he breaks another man’s bone, his bone shall be broken”. This argument has had a significant impact on the legal and ethical reasoning about the death penalty: the offender must pay a price if he or she committed a serious crime. The death penalty is thus seen as a necessary form of retribution for a loss caused to the victims and their families.

Secondly, the death penalty has a specific deterrent value, which cannot be replaced in order to prevent murdering or other serious crimes. This line of thought is derived from the premise that each person’s behavior is affected by fears, so those who intend to commit crimes will have to think about the consequences that they may suffer – including possible execution.¹⁹ This is a popular argument advanced by countries that still keep the death penalty.

Thirdly, there is an argument claiming that the death penalty is less costly to society than life imprisonment.

Fourthly, the application of the death penalty serves to remove the most dangerous criminals from society, so that they do not have the opportunity to threaten the security, peace and human rights of others.²⁰

19 Robert G. Caldwell, Why Is the Death Penalty Retained? The Annals of the American Academy of Political and Social Science, Vol. 284, Murder and the Penalty of Death (Nov., 1952), pp. 45-53

20 Robert G. Caldwell, Why Is the Death Penalty Retained? The Annals of the American Academy of Political and Social Sci-

Contrary to this view, in recent decades many countries, social organizations, law and human rights researchers, criminologists, etc. have presented arguments to oppose the maintenance of the death penalty in any form. These individuals, organizations and countries assert that the maintenance of the death penalty is not necessary, effective or just, and oppose it for the following reasons:

Firstly, it is incorrect to consider the death penalty as an effective measure for crime prevention and deterrence. Many countries, organizations and individuals argue that the effect of the death penalty on crime prevention is similar to other kinds of punishment. For example, UN reports and studies assessing the relationship between the death penalty and the rate of crimes in countries across the world have concluded that there is no scientific proof that executions prevent crimes better than life imprisonment.²¹ These findings support the conclusion that the assumed positive effects of the death penalty on crime prevention are not valid.²² Many other studies also show that the crime rate in countries that still keep the death penalty (like Singapore) is

ence, Vol. 284, Murder and the Penalty of Death (Nov., 1952), pp. 45-53

21 See for example: Human rights Council, Moving away from the Death Penalty, 2015, available at <https://www.ohchr.org/EN/newyork/Documents/Moving-Away-from-the-Death-Penalty-2015-web.pdf>; Human rights Council, Moving away from the Death Penalty, 2012

https://www.ohchr.org/Lists/MeetingsNY/Attachments/27/moving_away_from_death_penalty_web.pdf

Human rights Council, Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Yearly supplement of the Secretary-General to his quinquennial report on capital punishment, 16 July 2015, available at: https://www.ohchr.org/Documents/Issues/DeathPenalty/A-HRC-30-18_en.pdf

22 John Donohue, There's no evidence that death penalty is a deterrent against crime, The conversation, <https://theconversation.com/theres-no-evidence-that-death-penalty-is-a-deterrent-against-crime-43227>

not lower than that of countries that have abolished the death penalty (like Hong Kong). Similarly, in the United States, the murder rate in 36 states that keep and impose the death penalty is higher than in states that have abolished the death penalty. It is also noteworthy, that in Canada by 2008 the murder rate had decreased by half since the abolition of the death penalty in 1976.²³

Thus, there seems to be an abundance of data supporting the assertion that the death penalty is not an effective means of crime deterrence. Drawing on such findings, the UN General Assembly adopted in 2010 Resolution No 65/206 “Moratorium on the use of the death penalty”, which asserts that “there is no conclusive evidence of the deterrent value of the death penalty”.²⁴

Secondly, the implementation of the death penalty is irreversible with no recourse or opportunity to correct wrongful convictions. Shortcomings in the criminal legal system of many countries, particularly countries that have poor and ineffective justice systems, can lead to people being wrongfully sentenced and executed. A study by scientists in the US shows that during the period from 1973 to 2004, the rate of wrongful convictions of criminal defendants who were sentenced to death is estimated at 4.1%. The study also notes that this is likely to be a conservative estimate,²⁵ suggesting that

23 Amnesty International, The Death Penalty – Your Questions Answered, <https://www.amnesty.org/en/what-we-do/death-penalty/death-penalty-your-questions-answered/>

24 https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/65/206

25 Rate of false conviction of criminal defendants who are sentenced to death, Samuel R. Gross, Barbara O'Brien, Chen Hu, and Edward H. Kennedy PNAS May 20, 2014 111 (20) 7230-7235; published ahead of print April 28, 2014 <https://doi.org/10.1073/pnas.1306417111>

several innocent people were executed during this period in the US alone. This margin is likely to grow in countries that have more ineffective criminal justice systems.

Thirdly, the imposition of life imprisonment for criminals who are deemed to be a threat to society prevents these individuals from reoffending to the same extent as the death penalty, thus rendering the application of the death penalty unnecessary.²⁶

Fourthly, evidence suggests that the death penalty is in fact not needed to punish offenders as retribution for losses suffered by the victims and their families. Some studies show that not all victims or their families feel that they are being compensated for their loss when the offenders are executed. In some countries, many victims found peace of mind in forgiving the offenders arguing that taking someone's life should not be used as a form of revenge for an act of murder or other serious crimes.²⁷

Fifthly, the view that the death penalty is "less costly" than life imprisonment does not hold up to scrutiny. In fact, the maintenance of the death penalty is expensive as it covers not only the costs of execution and burial but also the expenses for related legal proceedings.²⁸ Studies show that the enforcement of a death sentence costs at least 18 times as much as sending someone to life

imprisonment.²⁹ For instance, it may be noted that in the period 1978 to 2011 the US State of California spent 4 billion USD on executing 13 prisoners.³⁰

The last reason is largely ethical and builds on the notion that the essential role of the State is to protect the life and property of people, and not deprive them of their right to life. Accordingly, the State should not impose the death penalty, even for serious crimes.³¹

3. International law on the abolition of the death penalty

The death penalty is directly related to two fundamental human rights, namely the right to life and the right to be protected against cruel, inhuman and degrading punishment.³² These are also two core human rights standards recognized in customary law and by the major international treaties on human rights. The first international treaty stipulating restrictions on the application of the death penalty was the 1929 Geneva Convention applicable to war prisoners.

Beginning in the early 1960s, when the death penalty was still common in many countries, regulations on restricting and abolishing the death penalty were gradually starting to be articulated in international documents about human rights.

26 Amnesty International, The Death Penalty – Your Questions Answered, <https://www.amnesty.org/en/what-we-do/death-penalty/death-penalty-your-questions-answered/>

27 Amnesty International, The Death Penalty – Your Questions Answered, <https://www.amnesty.org/en/what-we-do/death-penalty/death-penalty-your-questions-answered/>

28 Nguyễn Đăng Dung, Phạm Hồng Thái, Vũ Công Giao, Lê Khánh Tùng, Những điều cần biết về hình phạt tử hình (Things needed to know about the death penalty), Lao dong Publishing House, 2010, p. 40

29 Death Penalty Focus, 5 Myths about Death Penalty, available at: <https://deathpenalty.org/facts/5-myths-death-penalty/>

30 <https://deathpenaltyinfo.org/costs-new-study-reveals-california-has-spent-4-billion-death-penalty>

31 Nick Glipise, why the Death Penalty Needs to Die, The Daily Piece, <https://www.thedailybeast.com/why-the-death-penalty-needs-to-die>

32 William A. Schabas, International Law and Abolition of the Death Penalty, 55 Wash. & Lee L. Rev. 797 (1998), <https://scholarlycommons.law.wlu.edu/wlu/vol55/iss3/10>

At present, there are two treaties that directly regulate the application and abolition of the death penalty, namely:

- The International Covenant on Civil and Political Rights, 1966 (Article 6);
- The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1989, which is presently the only international treaty for the abolition of the death penalty.

At the regional level, some treaties on the abolition of the death penalty have also been adopted, including:

- Protocol No 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty;
- Protocol No 13 to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances;
- The Protocol to the American Convention on Human Rights to abolish the death penalty.

In addition to these binding instruments, since 1977 the UN General Assembly and the UN Economic and Social Council, Commission on Human Rights (later replaced by the UN Human Rights Council) and Sub-committee on the Promotion and Protection of Human Rights have adopted a series of resolutions urging countries to impose a moratorium on the use of the death penalty.³³

³³ These resolutions are: (1) Resolution No. 32/61 on the death penalty, dated December 8, 1977, of the UN General Assembly; (2) Resolution No. 1984/50, dated May 25, 1984, of the UN Economic and Social Council, on the implementation of guarantees to protect the rights of those facing the death penalty; (3) Resolution No. 1989/64, dated May 24, 1989, of the UN Economic and Social Council, on the implementation of guarantees to protect the rights of those facing the death penalty; (4) Resolution No. 1996/15, dated July 23, 1996, of the UN Economic and Social Council, on the implementation of guarantees to protect the rights of those facing the death penalty; (5) Resolution No.

The ICCPR was the first international human rights instrument to call on countries to restrict the application of the death penalty. At the time when ICCPR was ratified in 1966, only ten countries in the world had abolished the death penalty.³⁴ The ICCPR does not have any provisions preventing its States Parties from imposing the death penalty. However, Article 6 (1) recognizes the right to life as a supreme right protected by law. Additionally, for countries that retain the death penalty, Article 6 (2) the treaty also defines specific conditions to restrict the application of the death penalty. These conditions include:

- The death penalty can only be applied for the most serious crimes;
- The death penalty can only be enforced on the basis of fair judgment rendered by competent court;
- The death penalty cannot be imposed on offenders under 18;
- The death penalty cannot be imposed on pregnant women;
- Those who are sentenced to death have the right to seek pardon, or commutation of the sentence;
- The death penalty should not be applied when ICCPR rights, including the right to a

2000/17 of the Sub-committee on the Promotion and Protection of Human Rights, on the imposition of the death penalty on juvenile offenders; (6) Resolution No 2005/59, dated April 20, 2005, of the UN Commission on Human Rights, on the question of the death penalty; (7) Resolution No. 62/149, dated December 8, 2007, of the UN General Assembly on the temporary suspension of the enforcement of the death penalty; (8) Resolution No. 63/168, dated December 18, 2008, of the UN General Assembly on the temporary suspension of the enforcement of the death penalty; (9) Resolution No. 65/206, dated December 21, 2010, of the UN General Assembly on the temporary suspension of the enforcement of the death penalty; (10) Resolution No 67/176, dated December 20, 2012 of the UN General Assembly on the temporary suspension of the enforcement of the death penalty; (11) Resolution No 69/186, dated December 18, 2014, of the UN General Assembly on the temporary suspension of the enforcement of the death penalty

³⁴ International Bar Association, The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty, 2008

fair trial, have been violated.

The most noteworthy of the above conditions is perhaps that the death penalty can only be imposed for the most serious crimes, and this requirement is often interpreted by countries in different ways. To help clarify this concept, the Human Rights Committee (the treaty body tasked to monitor the implementation of the ICCPR) adopted General Comments No. 6, 14 and 36 further elaborating on the content of the right to life, including in relation to the death penalty, as well as the concept of “most serious crimes”. In its general comments, the Human Rights Committee states that in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes noting that this is subject to a number of strict conditions. General Comment No. 36 adopted by the Committee in May 2018, states that the concept of “the most serious crime” must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing.³⁵

The General Comment thus confirms that crimes “not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature”, can never justify the imposition of the death penalty as regulated by the Article 6.³⁶

II. KEY CONTENTS OF THE SECOND OPTIONAL PROTOCOL TO THE ICCPR, AIMING AT THE ABOLITION OF THE DEATH PENALTY

The Second Optional Protocol was adopted as open for signature and ratification by all Parties to the ICCPR pursuant to Resolution No 44/128 of the UN General Assembly, dated December 15, 1989. The Protocol took effect on July 11, 1991 pursuant to Article 8(1). As of December 2018, 86 countries are parties to the Protocol (including 41 European countries and 11 Asian countries).³⁷ The Second Optional Protocol marks an important milestone in the movement towards abolishing the death penalty in the world. In addition to its preambular paragraphs, the Protocol contains 11 specific provisions on the content and procedures relating to the abolition of the death penalty.

The Introduction of the Protocol stresses the meaning and importance of the abolition of the death penalty in the enhancement of human dignity and progressive development of human rights. Article 1 specifies the prohibition of the death penalty and requires States Parties to take necessary measures to abolish the death penalty within their jurisdiction. Article 2 establishes that the Protocol allows for no reservations, except one reservation when made at the time of ratification or accession relating to the application of the death penalty in time of war pursuant to a conviction for a most

³⁵ General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life
³⁶ General comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life

³⁷ Eric Neumayer (2008) Death Penalty Abolition and the Ratification of the Second Optional Protocol, *International Journal of Human Rights*, 12:1, 3-21

serious crime of a military nature. Articles 3, 4 and 5 regulate the obligations to report and complaint procedures. Article 6 to 11 contain provisions on related procedures.

At the international level, the Protocol contributes to a growing abolitionist trend that views the death penalty as a violation of human rights, particularly the right to life. The ratification of the Second Optional Protocol by an increasing number of States is gradually establishing a general principle that the death penalty is a violation of human rights, which could over time evolve into a tenet of international customary law.





PART II

EXPERIENCES OF COUNTRIES
ON THE ABOLITION OF THE
DEATH PENALTY





EXPERIENCES OF COUNTRIES ON THE ABOLITION OF THE DEATH PENALTY

I. GENERAL CONTEXT

Since Venezuela took the step as the first country to abolish the death penalty for all crimes in 1863, international legal opinion and views on the issue of capital punishment have evolved significantly. In recent decades, an average of three countries per year has abolished the death penalty in law, in practice, or for ordinary crimes. As a result, there is an apparent shift from capital punishment being the norm, towards the abolishment of the death penalty in most nations.

Europe is the leading continent in the movement for the abolition of the death penalty and this concept has become an important principle in the European Union's human rights policy and diplomatic affairs. In the Joint Declaration of the High Representative of the European Union on Foreign Affairs and Security Policy, and Secretary General of the Council of Europe on the European and World Day against the Death Penalty, the Council of Europe and the European Union have reaffirmed their strong opposition to the death penalty in all circumstances and in all cases. At the same time, it is emphasized that the abolition in law or practice is a pre-condition of Council of Europe membership, and the absolute ban on the death penalty in all circumstances is entrenched in the EU

Charter of Fundamental Rights.

In Africa, the number of countries retaining the death penalty is small: more than 80 percent of African nations have abolished capital punishment, with only 10 retaining capital punishment in law and in practice.³⁸ In recent years, many African countries have repeatedly declared their intention to abolish or repeal the death penalty.

In the Americas, there are only a handful of countries that still practice capital punishment, including the United States, and some Caribbean countries.

The Asian continent has the highest number of countries retaining the death penalty. According to Amnesty International statistics, among the top 10 countries that practice the death penalty, eight are in Asia (China, Iran, Iraq, Pakistan, Saudi Arabia, Yemen, North Korea, and Viet Nam). It is worth noting that while the death penalty has been abolished in many developed countries, there are still some high-income countries and territories in Asia which retain it, such as Japan, Taiwan and Singapore.

Within ASEAN, three countries have abolished the death penalty namely: Cambodia, East Timor and the Philippines. Recently, in October 2018, the Malaysian government announced that the country intended to abolish the death penalty for all crimes. Brunei, Laos and Myanmar have abolished the death penalty in practice. Since 2009, Thailand was categorized as not carrying out the death penalty in practice until it carried out its first execution in 2018. Singapore has limited the number of executions each

³⁸ FIDH, Triggers for abolition of the death penalty in Africa: A Southern African perspective, October 2017

year: although it carried out 9 executions in 2018, there were years (2010, 2012, and 2013) where there were no executions.³⁹ At present, there are two remaining countries in the region - Indonesia and Viet Nam - that have not announced a definite plan to abolish the death penalty. However, Viet Nam has been following the pathway of reducing the number of offenses carrying the death penalty under its criminal law.

The process of abolishing the death penalty is quite diverse in different countries and often depends on their political, legal, cultural and religious context and background. In some countries the process relies on the support from national leaders, while in others reforms are due to international advocacy and pressure. In some other countries, steps towards abolition have been initiated and motivated by social movements or civic initiatives. With states having taken such diverse paths towards abolition, the world does not have a unified model or roadmap for countries to adopt or replicate.

In the following section, we will explore the experiences of abolishing the death penalty in a sample of countries, including: (1) countries that have abolished the death penalty and ratified the Second Optional Protocol to the ICCPR, (2) countries that have abolished the death penalty but are yet to ratify the Second Optional Protocol to the ICCPR, and (3) Countries which are not parties to the Second Optional Protocol but have ceased to apply the death penalty in practice.

39 Conell Centre on the Death Penalty World Wide, Death Penalty Database- Singapore, <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Singapore>

II. COUNTRIES THAT ARE PARTIES TO THE SECOND OPTIONAL PROTOCOL TO THE ICCPR

People's Republic of Benin

Benin has been a party to the ICCPR and CAT since 1992 and to the Second Optional Protocol since 2012.

The last executions (of two criminals convicted of murder) in Benin were carried out in 1987. Since then, Benin has not applied the death penalty, turning Benin into a country that has abolished capital punishment de facto even before its accession to the Second Optional Protocol. The last death sentence was imposed in 2010, but it was never implemented. The process of abolition was slow due to fears of increased crime and concerns about the ineffectiveness of the judicial system. There were also worries that Benin could become a destination for criminals from other countries in the region if it abolished the death penalty.

The turning point for the abolition of the death penalty in Benin came in 2000, when national leaders, parliamentarians and many social groups expressed their support for doing away with capital punishment. This period of time saw a large number of campaigns in favor of abolition in various forms: seminars, petitions, reports to UN agencies, media campaigns, etc.⁴⁰ It is noteworthy that, in this context, the country mobilized the support of parliamentarians to promote ratification of the Second Optional

40 See: <https://www.deathpenaltyworldwide.org/pdf/Pathways%20to%20Abolition%20Death%20Penalty%20World-wide%202016-06%20FINAL.pdf>

Protocol. Benin has also expressed strong support for the abolitionist movement worldwide, especially under the auspices of the United Nations urging nations to stop practicing the death penalty. In particular, in 2007 the country voted in favor of the General Assembly resolution on the global suspension of the death penalty and co-sponsored the corresponding resolutions on this issue in 2008 and 2014.

In 2011, the Benin government submitted a bill proposing Congress to approve the country's ratification of the Second Optional Protocol. Despite some opposition and arguments that the death penalty should be retained due to the nation's high crime rate, and that life imprisonment was not a sufficient deterrent, the law was eventually passed. Thus, Benin completed the ratification procedures and became a party to the Second Optional Protocol on July 5, 2012.

At present, Benin is in the process of amending and supplementing the national legal system to abolish the death penalty in all legal documents, including criminal law. It should be acknowledged that the process of abolishing the death penalty of Benin took place quite smoothly and as part of a broad popular movement. The most prominent lesson to be drawn from Benin's experience is the importance of securing the support of national leaders, especially the President in advancing the reform process. In addition, it is also found that there has been no evidence to suggest that crime rate has increased after the abolition of death penalty.

Federal Democratic Republic of Nepal

Nepal has been a party to the ICCPR

since 1991. It ratified the Second Optional Protocol to ICCPR in 1998.

Nepal was one of the first countries to restrict the use of the death penalty, already back in the 1930s. In 1931, the Prime Minister raised the possibility of abolishing the death penalty in discussions with lawyers and religious leaders. At this point, he requested the judiciary to replace the death penalty with life imprisonment. In 1946, the death penalty was abolished in a general law called "Muluki Ain".⁴¹ Between 1960 and 1970, the country carried out only three executions. However, the death penalty continued to be maintained in the 1959 Army Act and the Treason Act, and capital punishment was still imposed for some particularly serious crimes in the sphere of politics and in the military. The last death sentence to be carried out in Nepal was in 1979 for the assassination of the King.

However, in the 1980s due to political turmoil, Nepal once again imposed capital punishment for extrajudicial killings, kidnapping, hijacking, torture, use of indiscriminate weapons and terrorism. The 1985 Special Services Act regulated the disclosure and misuse of confidential information in the private intelligence industry as a crime that could also result in application of the death penalty.⁴²

Nepal officially abolished the death penalty through the revision of the 1990 Constitution, which came into force in 1991. Article 12, paragraph 1 of the 1990 Constitution of Nepal states: "No person

41 See: <https://www.deathpenaltyworldwide.org/pdf/Pathways%20to%20Abolition%20Death%20Penalty%20World-wide%202016-06%20FINAL.pdf>

42 See: <https://www.deathpenaltyworldwide.org/pdf/Pathways%20to%20Abolition%20Death%20Penalty%20World-wide%202016-06%20FINAL.pdf>

shall be deprived of his personal liberty in accordance with law, and no law shall be made which provides for capital punishment.” As a result, the relevant laws have been amended to abolish capital punishment. The subsequent constitutions, the 2007 Provisional Constitution and the 2015 Constitution, both provide for the abolition of the death penalty. In the current 2015 Constitution, the abolition of capital punishment is regulated by Article 16 paragraph 2 on the right to life, which states that, “No law shall be made providing for the death penalty to anyone”. Nepal ratified the Second Optional Protocol to ICCPR in 1998, following the harmonization of relevant domestic legislation.

Republic of the Philippines

The Philippines has been a party to the ICCPR since 1986 and to the Second Optional Protocol since 2007.

The process of abolishing the death penalty in the Philippines has been relatively complex. The country retained the death penalty since colonial rule under Spain and later the United States and continued this practice after gaining independence in 1946. With the development of Philippine law, especially under the rule of President Ferdinand Marcos (1965-1986), the use of the death penalty was extended, including for drug trafficking.

In 1987, the Philippine Constitution abolished the death penalty, but retained a provision to allow it to be reinstated for heinous crimes, making the Philippines the first country in Asia to abolish capital punishment. In 1999, the death penalty

was reinstated and was maintained until 2006 when the President passed Republic Act No. 9346 on the abolition of death penalty. The Philippine government ratified the Second Optional Protocol to ICCPR in 2007.

However, in 2016 President Rodrigo Duterte campaigned on a promise that he would be ready to reinstate the death penalty to preserve social order, safety and fight crime. Following this pledge, a bill on the use of the death penalty for certain drug-related crimes was passed by the House of Representatives in February 2017. It is currently awaiting the approval of the Senate.

Thus, the Philippines is facing the prospect of reinstating the death penalty. This move enjoys the backing of the president and a poll on the issue of reinstatement shows that 67% of Filipinos continue to support the death penalty.⁴³

However, it should be noted that under the Second Optional Protocol, a State Party is not allowed to withdraw after ratification or accession. This being so, if the Philippines were to reinstate the death penalty, it would be in violation of its legal obligations under the Second Optional Protocol. Shortly after the Philippine House passed a plan to reinstate the death penalty, the UN High Commissioner for Human Rights, Zeid Ra’ad Al Hussein, sent an open letter to the Speaker of the House of Representatives and to the President of the Senate of the Philippines, emphasizing that: “International law does not allow a country which has ratified or joined the Second Optional Protocol to

43 Pulse Asia: Most Filipinos still support death penalty, <https://newsinfo.inquirer.net/894552/pulse-asia-most-filipinos-still-support-death-penalty#ixzz5ZXZ3dZJA>

denounce or withdraw”.⁴⁴ Similarly, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, expressed concern about reinstatement amounting to a violation of international law.

III. COUNTRIES THAT HAVE ABOLISHED THE DEATH PENALTY BUT HAVE NOT YET RATIFIED THE SECOND OPTIONAL PROTOCOL TO ICCPR

The Republic of Fiji

In Fiji, measures to limit the use of the death penalty have been in place even before independence from colonial rule in 1970. The last execution took place in 1965 and in 1979 Fiji abolished the death penalty by law for ordinary crimes. However, capital punishment was still maintained for some crimes such as genocide, treason and military crimes.

In 2002, a court in Fiji handed down a death sentence for the crime of treason. The ruling was controversial, lacked public support and even resulted in some political instability. Soon after the ruling, the government and legislators decided to amend the law to abolish the death penalty for all ordinary crimes, including treason and genocide. Capital punishment was retained only for crimes that violated the military law during wartime.

At the time of Fiji’s 2010 and 2014 UPR hearings, the country remained on the list of countries still maintaining the death

⁴⁴ <https://globalnation.inquirer.net/150445/un-ph-will-v-olate-intl-pact-restores-death-penalty>

penalty in law, which resulted in a number of recommendations from Members of the Human Rights Council to abolish death penalty under military law and to ratify the ICCPR and its Second Optional Protocol. In the second cycle of the UPR in 2014, the country’s Attorney-General pledged to abolish the death penalty. As a result, Fiji reformed its legal system to fully remove the death penalty in 2015. Soon after, the country also voted in favor of the UN resolutions for a worldwide moratorium on the death penalty. Fiji ratified the ICCPR in 2018, but is yet to accede to the Second Optional Protocol.

The abolition of the death penalty in Fiji had the advantage of inheriting the practice of non-execution of the death penalty from the colonial period. At the same time, there was also no public opposition to abolish capital punishment. However, it is noteworthy that the abolition of the death penalty in law only occurred after the country received recommendations to that effect from the Human Rights Council through the UPR. From this perspective, Fiji is a good example of how international human rights mechanisms can promote the abolition of capital punishment in Member States.

IV. COUNTRIES THAT HAVE ABOLISHED THE DEATH PENALTY IN PRACTICE

The Republic of Korea (South Korea)

South Korea still retains the death penalty in law, but has not carried out any executions since 1997, and is therefore classified as having abolished the death penalty in practice. However, South Korea still had 61 people sentenced to death in

2017.⁴⁵

In the history of South Korea, the death penalty has been applied since the Joseon Dynasty in order to prevent and deter crimes. It continues to be maintained in the Korean legal system, including in the criminal law and military law, as well as in legislations relating to sex offenders, national security, and drug related offences.⁴⁶ South Korea's latest revised criminal law from 2013 still has death penalty crimes, including for crimes in connection with rioting, collusion with foreign rioters, murder and robbery.⁴⁷ However, the death penalty does not apply to people under 18, pregnant women, and people with mental illness.

At the national level, South Korea has taken some initiatives to abolish capital punishment, such as a bill on abolishing the death penalty that was drafted and submitted to parliament, for the first time in 1999, but has not yet been passed.⁴⁸ In addition, in 2005 the Korean Human Rights Commission proposed to abolish the death penalty.⁴⁹

At the international level, South Korea often abstains from United Nations resolutions on the abolition of capital punishment. However, in the 2012 Universal Periodic Review, South Korea expressed its willingness to accede to the Second Optional Protocol to the ICCPR. The South Korean Government,

45 <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=South+Korea>

46 <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=South+Korea>

47 South Korea Criminal Act 2013

48 BYUNG-SUN CHO, South Korea's changing capital punishment policy: The road from de facto to formal abolition, PUNISHMENT & SOCIETY 10(2), 171–205

49 David Johnson & Franklin Zimring, *The Next Frontier*, p. 148, Oxford University Press, 2009, Cho Kuk, "Death Penalty in Korea: From Unofficial Moratorium to Abolition?" p. 2, *Asian Journal of Comparative Law* 3(1), 2008.

however, did not entirely agree to the UPR recommendation on the immediate abolition of death penalty. The Government argued that it also needs to take into account factors such as public opinion, legal awareness, as well as social and political realities.⁵⁰

V. RECOMMENDATIONS FROM UN HUMAN RIGHTS MECHANISMS ON THE ABOLITION OF THE DEATH PENALTY IN VIET NAM

In the context of international integration, Viet Nam has been increasingly involved in international human rights fora and mechanisms. Within the United Nations framework, Viet Nam has had significant interaction with both the charter-based and treaty-based human rights mechanisms. Under the auspices of the Human Rights Council, Viet Nam has submitted reports and engaged in dialogue during its three UPR cycles, in 2009, 2014 and 2019 respectively.

In its first UPR cycle, Viet Nam received 93 recommendations. It received 8 recommendations on the death penalty and accepted 3, namely to amend the law on capital punishment⁵¹, reduce the number of offences punishable by the death penalty⁵², and to limit the execution of the death penalty.⁵³

Of the 227 recommendations received

50 U.N.G.A., Human Rights Council, Report of the Working Group on the Universal Periodic Review: Republic of Korea - Addendum, para. 6, U.N. Doc. A/HRC/22/10/Add.1, Jan. 16, 2013.

51 Recommendation 32: Revise its legislation on the death penalty bearing in mind existing international standards on the subject, especially concerning transparency (Switzerland)

52 Recommendation 33, Reduce the number of offences punishable by the death penalty (Germany)

53 Recommendation 33: Fulfill the Government aim of limiting the use of capital punishment promptly by reducing the scope of crimes subject to the death penalty (Norway)

in the second round of the 2014 UPR, 29 were related to the death penalty, including 6 called for the ratification of the Second Optional Protocol. The Member States also recommended that Viet Nam restrict the death penalty to apply only to the most serious crimes and to impose a moratorium on executions, with a view to abolishing the death penalty. Member States also recommended that Viet Nam take measures to publish figures on the use of the death penalty. Viet Nam accepted recommendations to continue to reduce the number of crimes punishable by death and move towards a moratorium and abolition on the death penalty.⁵⁴

In 2015, the Prime Minister approved the Master Plan for the Implementation of the Accepted UPR Recommendations assigning specific tasks to 18 agencies and a number of other coordinating units. With regard to the recommendations concerning the adoption and amendment of legislation, Viet Nam carefully considered the recommendations in consultation with a wide range of government agencies and citizens. In the drafting process of the Penal Code, provisions related to the reduction of the use of the death penalty were subject to public consultations where they received broad support. These amendments have been submitted to and accepted by the National Assembly (*see details in Part III.1 of this Report*).

In the third round of the UPR review in 2019, Viet Nam received 291 recommendations and 120 countries made statements. There were 9 recommendations from more than 20 countries on the death penalty.⁵⁵

⁵⁴ Recommendation 143.89 (Belgium), 143.90 (Namibia), 143.92 (Switzerland), 143.94 (Italy) and 143.95 (New Zealand)

⁵⁵ United Nations Human rights Council, Universal Periodic Review - Viet Nam, <https://www.ohchr.org/EN/HRBodies/>

Viet Nam is also a party to the two treaties that directly relate to the death penalty, namely the ICCPR and CAT. Under these treaties, one of the issues on which Viet Nam has received the most recommendations is capital punishment, including recommendations for the ratification of the Second Optional Protocol, recommendations to reduce the use of death penalty in law, to impose a moratorium of the death penalty and to abolish the death penalty.

In its concluding observations on Viet Nam's Second Report (2002) on the implementation of the ICCPR, the Human Rights Committee also expressed its concern about the large number of death sentences and the application of the death penalty for crimes that are not considered as the most serious crimes by the Committee. Accordingly, the Committee called on Viet Nam to reduce and limit the number of crimes that carry the death penalty to those which may be strictly considered as the most serious crimes as provided in Article 6 (2) with a view to eventually abolish capital punishment.⁵⁶ This was reiterated in the Concluding Observations on Viet Nam's Third Report (2019) on the implementation of the ICCPR, along with recommendations to consider a moratorium on the application of capital punishment and ratifying or acceding to the Second Optional Protocol to the Covenant, aiming at the abolition of the death penalty, and to publish official figures on the death penalty.⁵⁷

[UPR/Pages/VNindex.aspx](https://tbinternet.ohchr.org/Pages/VNindex.aspx)

⁵⁶ Human Rights Committee, Seventy-fifth session, concluding observations of the Human Rights Committee on the second report of Viet Nam, 2/8/2002, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/CO/75/VNM&Lang=En

⁵⁷ Para. 24, CCPR/C/VNM/CO/3 (<https://tbinternet.ohchr.org>)

In November 2018, after reviewing Viet Nam's initial report on the implementation of CAT, the Committee Against Torture called on Viet Nam to establish a system to collect statistics on the application of the death penalty, including on the number of offenders who were sentenced to death. At the same time, the Committee also called on the government of Viet Nam "to take urgent measures to render

the material conditions of detention of persons sentenced to death equivalent to those of other prisoners, in line with the Nelson Mandela Rules, including access to adequate food and drink and meaningful social contacts, without restraints, and to protect them against physical abuse".⁵⁸ Currently, Viet Nam is developing a Master Plan to implement the accepted recommendations.

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/VNM/CCPR_C_VNM_CO_3_34488_E.pdf

⁵⁸ Committee against Torture, Concluding observations on the initial report of Viet Nam, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/VNM/CO/1&Lang=En





PART III

**VIET NAM'S LEGISLATION ON THE DEATH PENALTY AND
THE POSSIBILITY OF RATIFYING THE SECOND OPTIONAL
PROTOCOL AIMING AT THE ABOLITION OF THE DEATH PENALTY**





VIET NAM'S LEGISLATION ON THE DEATH PENALTY AND THE POSSIBILITY OF RATIFYING THE SECOND OPTIONAL PROTOCOL AIMING AT THE ABOLITION OF THE DEATH PENALTY

I. VIET NAM'S LEGISLATION ON THE DEATH PENALTY

1. The death penalty under the Penal Code

Since it was first enacted in 1985, the Penal Code underwent 8 amendments (in 1989, 1991, 1992, 1997, 1999, 2009, 2015 and 2017). The two most comprehensive amendments were in 1999 and 2015. The amendments to the Code have served to improve the regulation of the death penalty with a view to gradually minimize the application of the death penalty.

1.1. Provisions of the Penal Code on the death penalty

1.1.1. Nature and scope of application of the death penalty

The 1985 Penal Code with its amendments in 1989, 1991, 1992 and 1997 (hereinafter referred to as the 1985 Penal Code), the 1999 Penal Code with the 2009 amendment (hereinafter referred to as the 1999 Penal Code) and the 2015 Penal Code with the 2017 amendment (hereinafter referred to as the 2015 Penal Code) all acknowledge that the death penalty is a special punishment applicable only in

particular cases. The criteria for the crimes that are punishable by death penalty have been defined more clearly through the amendments to the Codes. In particular:

- The 1985 Penal Code stipulated that the death penalty shall apply to perpetrators in extremely serious circumstances (Article 27).
- Under Article 35 of the 1999 Penal Code, the death penalty shall only apply to perpetrators of extremely serious crimes (crimes that cause particularly serious harm to society).
- Article 40 of the 2015 Penal Code inherited the said provisions in Article 35 of the 1999 Penal Code, and further specifies the categories of crimes punishable by the death penalty. They are:
 - Crimes that infringe upon the national security;
 - Crimes that infringe upon human life or health;
 - Drug-related crimes;
 - Corruption-related crimes;
 - A number of extremely serious crimes that are stipulated in the Penal Code, namely the manufacturing of and trading in counterfeit medicines for treatment or prevention of diseases; terrorism; sabotaging peace, provocation of the war of aggression; crimes against humanity and war crimes.

1.1.2. Sentenced persons that are not subject to death penalty

The 1985 Penal Code, the 1999 Penal Code and the 2015 Penal Code all specify the circumstances whereby sentenced persons shall not be subject to the death penalty. This exclusion has been gradually extended. In particular:

- Under Article 27 of the 1985 Penal Code, the death penalty shall not apply to (1)

juvenile delinquents (persons under the age of 18); (2) pregnant women; (3) women who are raising a child under 12 months of age.

- Non-application of the death penalty to the 3 groups of sentenced persons under the 1985 Penal Code was also stipulated in Article 35 of the 1999 Penal Code, which contained a number of amendments. Accordingly, the death penalty shall not apply to (1) juvenile delinquents (persons under the age of 18); (2) women who were pregnant at the time of commission of crime or during the court proceedings; (3) women who are raising a child under 36 months of age at the time of the commission of crime or during the court proceedings.

- Article 40 of the 2015 Penal Code inherited the 1999 Penal Code's provisions on non-application of the death penalty to the above-mentioned three groups, and added a new group of sentenced persons not to be subject to the death penalty, namely "persons whose age is 75 years or older at the time of commission of crime or during the court proceedings".

1.1.3. Number of crimes punishable by the death penalty under the Penal Code

The number of crimes punishable by death penalty was changed under the amendments to the Penal Code (see in Appendix 2). In particular:

First, the 1985 Penal Code provided for the death penalty to apply to 29 out of the 195 crimes set forth in Penal Code, as follows:

- 13 crimes under Chapter 1. Crimes infringing upon national security;
- 02 crimes under Chapter 2. Crimes infringing upon human life or health;
- 04 crimes under Chapter 5. Crimes infringing upon socialist ownership;
- 01 crime under Chapter 6. Crimes

infringing upon citizen's ownership;

- 01 crime under Chapter 7. Economic crimes;
- 04 crimes under Chapter 11. Crimes infringing upon duties and responsibilities of servicemen;
- 04 crimes under Chapter 12. Sabotaging peace, crimes against humanity and war crimes.

Second, under the 1985 Penal Code with its amendments in 1989, 1991, 1992 and 1997 respectively, the death penalty shall apply to 44 out of the 218 crimes set forth in Penal Code, as follows:

- 14 crimes under Chapter 1. Crimes infringing upon national security;
- 03 crimes under Chapter 2. Crimes infringing upon human life or health;
- 06 crimes under Chapter 4. Crimes infringing upon socialist ownership;
- 03 crimes under Chapter 6. Crimes infringing upon citizen's ownership;
- 01 crime under Chapter 7. Economic crimes;
- 07 crimes under Chapter 7A. Drug-related crimes;
- 02 crimes under Chapter 9. Crimes of abuse of power;
- 04 crimes under Chapter 11. Crimes infringing upon duties and responsibilities of servicemen
- 04 crimes under Chapter 12. Sabotaging peace, crimes against humanity and war crimes.

Third, the 1999 Penal Code stipulated that the death penalty was applicable to 29 out of the 263 crimes set forth in Penal Code, as follows:

- 07 crimes under Chapter XI. Crimes infringing upon national security;
- 03 crimes under Chapter XII. Crimes infringing upon human life or health;

- 02 crimes under Chapter XIV. Crimes infringing upon ownership;
- 03 crimes under Chapter XVI. Crimes infringing upon economic management;
- 03 crimes under Chapter XVIII. Drug-related crimes;
- 02 crimes under Chapter XIX. Crimes infringing upon public safety or public order;
- 03 crimes under Chapter XXI. Crimes of abuse of power;
- 03 crimes under Chapter XXIII. Crimes infringing upon duties and responsibilities of servicemen
- 03 crimes under Chapter XXIV. Sabotaging peace, crimes against humanity and war crimes.

Fourth, the 1999 Penal Code with its 2009 amendment provided for the death penalty to apply to 22 out of the 272 crimes set forth in Penal Code, as follows:

- 07 crimes under Chapter XI. Crimes infringing upon national security;
- 02 crimes under Chapter XII. Crimes infringing upon human life or health;
- 01 crime under Chapter XIV. Crimes infringing upon ownership;
- 01 crime under Chapter XVI. Crimes infringing upon economic management;
- 02 crimes under Chapter XVIII. Drug-related crimes;
- 02 crimes under Chapter XIX. Crimes infringing upon public safety or public order;
- 02 crimes under Chapter XXI. Crimes of abuse of power;
- 02 crimes under Chapter XXIII. Crimes infringing upon duties and responsibilities of servicemen
- 03 crimes under Chapter XXIV. Sabotaging peace, crimes against humanity and war crimes.

Fifth, the 2015 Penal Code with its 2017

amendment prescribes death penalty applicable to 18 out of the 314 crimes set forth in Penal Code, as follows:

- 06 crimes under Chapter XIII. Crimes infringing upon national security;
- 02 crimes under Chapter XIV. Crimes infringing upon human life or health;
- 01 crime under Chapter XVIII. Crimes infringing upon economic management;
- 03 crimes under Chapter XX. Drug-related crimes;
- 01 crime under Chapter XXI. Crimes infringing upon public safety;
- 02 crimes under Chapter XXIII. Corruption-related crimes;
- 03 crimes under Chapter XXVI. Sabotaging peace, crimes against humanity and war crimes.

Therefore, according to the 2015 Penal Code, the death penalty is completely removed from two groups of crimes that were regulated in 1999 Penal Code, which are: the crime of infringement of ownership and crimes of infringing upon obligations and responsibilities of military personnel.

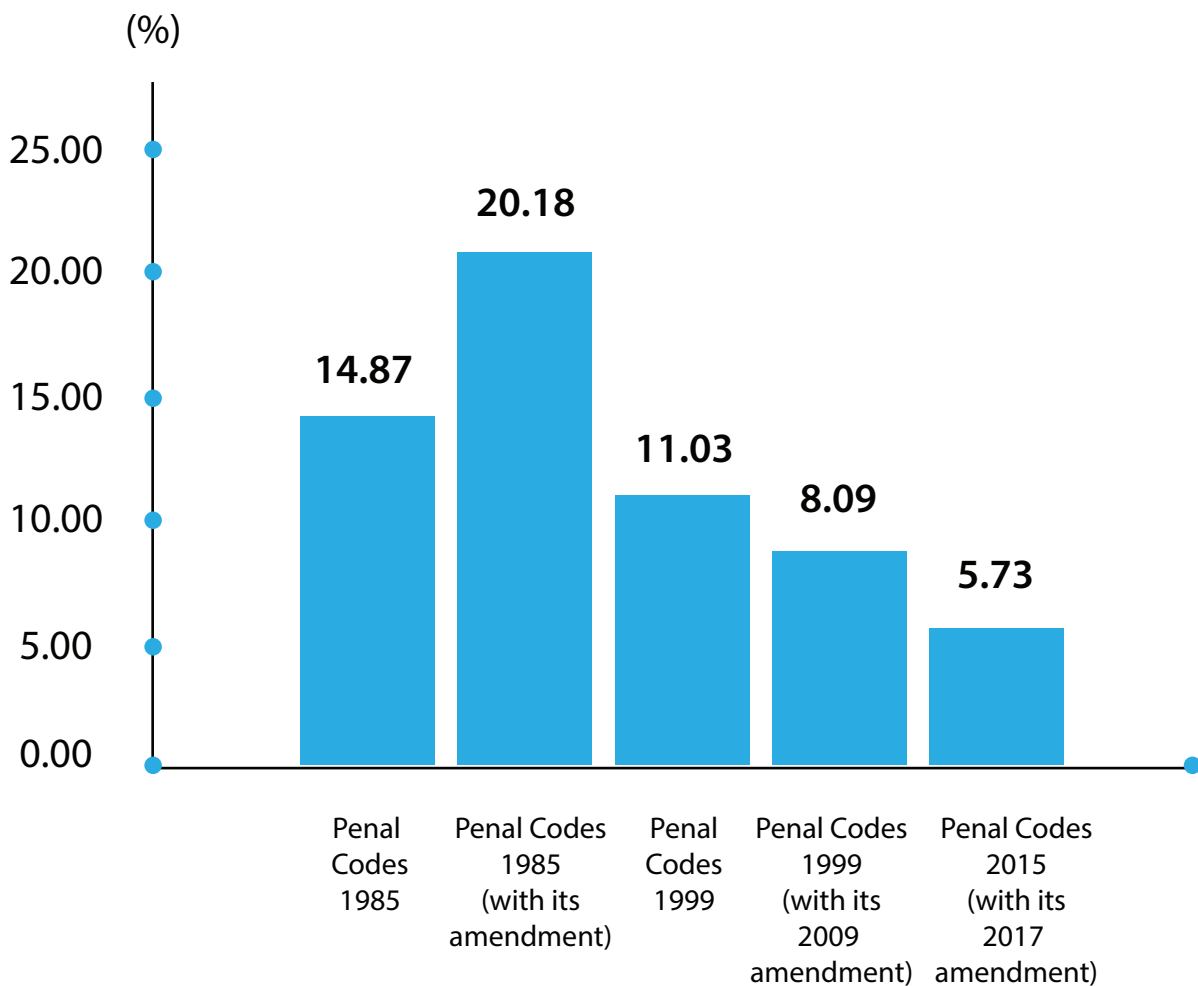
Looking at the number of crimes punishable by death and the total crimes set forth in the Penal Codes and their amendments, one can see that while the total number of crimes under the Penal Codes increased in successive amendments, the number of crimes punishable by death has been reduced. It was mainly decreased by the Penal Codes amendments.

Based on the above analysis, the changes in the number of crimes punishable by death under the Penal Codes and their amendments are illustrated in the following table and chart.

Table of the number of crimes punishable by death under the Penal Codes and their amendments (in correlation with the total number of crimes in the Penal Codes)

	1985 Penal Code	1985 Penal Code with its amendments (in 1989, 1991, 1992 and 1997)	1999 Penal Code	1999 Penal Code with its 2009 amendment	2015 Penal Code with its 2017 amendment
The number of crimes punishable by death penalty	29	44	29	22	18
The total number of crimes in the Penal Codes	195	218	263	272	314

Chart of the number of crimes punishable by death under the Penal Codes and their amendments (as a percentage of the total number of crimes)



The above statistics have shown both increase and decrease in the number of crimes punishable by the death penalty. However, overall, there has been a progressive decline in the number of crimes punishable by the death penalty through the amendments to the Penal Code. This can be clearly seen through the ratio of crimes punishable by death penalty under the current Penal Code.

1.2. Provisions of Penal Code on execution of death sentence

1.2.1. *Circumstances of non-execution of death sentence*

- The 1985 Penal Code does not provide for circumstances of non-execution of a death sentence, only for circumstances for the postponement of the execution, in the case of pregnant women, or women who are raising a child under 12 months of age.
- Article 35 of the 1999 Penal Code stipulates 02 circumstances of non-execution of death sentence, which applies to pregnant women or women who are raising a child under 36 months of age. Under this provision, in case of non-execution of death penalty or clemency, the death sentence shall be commuted to life imprisonment.
- Article 40 of the 2015 Penal Code provides for the above-mentioned circumstances for non-execution of death sentence, with two additional categories, namely:
 - Persons 75 years of age or older;
 - Persons sentenced to death for embezzlement or taking a bribe, who after being sentenced, have returned at least three-quarters of the property embezzled or the taken bribes and have closely cooperated with the authorities in the detection, investigation and/or handling

of the crime, or have been given credit for their service.

In case of the aforesaid non-execution of the death sentence, or persons sentenced to death who enjoy clemency granted by the State President, the death sentence shall be commuted to life imprisonment.

1.2.2. *Possibility of post-trial immediate execution of the death sentence*

- Article 27 of the 1985 Penal Code stipulated that “the death sentence shall be executed immediately after the trial only in special circumstances specified by law”. This provision meant that, post-trial immediate execution of the death sentence was possible.
- The 1999 Penal Code and the 2015 Penal Code no longer provide for the post-trial immediate execution. This change was introduced in recognition of the definite nature of the death penalty in depriving a person of the right to life. Before the execution, there must be special procedures to review and examine carefully the sentence to avoid any irrevocable mistakes. In other words, under the 1999 and 2015 Codes procedures for post-trial immediate execution of a death sentence no longer exist, and the execution must comply with the protocols and procedures stipulated by the Criminal Procedure Code and Law on Enforcement of Criminal Judgements. This amendment also brought Viet Nam closer in line with its obligations regarding due process and the right to appeal in death penalty cases under articles 6 and 14 of the ICCPR.⁵⁹

⁵⁹ In its General Comment No.32 (para. 48), the Human Rights Committee states that the right to appeal “imposes on the State party a duty to review substantively, both on the basis of sufficiency of the evidence and of the law, the conviction and sentence, such that the procedure allows for due consideration of the

2. Provisions of the Criminal Procedure Code on the application and execution of the death penalty

2.1. Provisions of the Criminal Procedure Code on the procedure for cases in which the person has been charged with crimes where the maximum punishment is the death penalty

Both the Criminal Procedure Code 2003 and the Criminal Procedure Code 2015 provide procedures for cases in which the charged person is investigated, prosecuted and judged for crimes for which the death penalty may apply. In particular:

Firstly, in cases that may carry the death penalty, the charged person must be provided with legal counsel. If the charged person, their representatives or their relatives have not engaged a legal counsel, the investigation authority or prosecutor is obliged to appoint counsel for them free of charge (Article 57 of Criminal Procedure Code 2003, Article 76 of Criminal Procedure Code 2015).

Secondly, in cases that may carry the death penalty, the first instance trial shall include two judges and three jurors, whereas the first instance trial of other cases consists of one judge and two jurors (Article 185 of Criminal Procedure Code 2003, Article 254 of Criminal Procedure Code 2015).

Thirdly, in cases that may carry the death penalty, the trial has to be suspended if the legal counsel for the accused is absent for reason of force majeure or objective impediment (Article 190 of Criminal Procedure Code 2003, Article 291 of Criminal Procedure Code 2015).

nature of the case" (CCPR/C/GC/32)

2.2. Procedures for the execution of death sentences under the Criminal Procedure Code

Firstly, both the Criminal Procedure Code 2003 (Article 258) and the 2015 Criminal Procedure Code (Article 367) provide procedures for reviewing the death penalty judgment before the execution:

- After the judgment becomes legally effective, the case file must be immediately sent to the Chief Justice of the Supreme People's Court and the judgment must be immediately sent to the Procurator-General of the Supreme People's Procuracy for consideration to determine whether or not to file an appeal against the judgment in accordance with the re-trial procedure or the cassation procedure.
- Within a two-month time limit of the date of receipt of the judgment and the case file respectively, the Chief Justice of the Supreme People's Court or the Procurator-General of the Supreme People's Procuracy shall decide whether or not to file an appeal against the judgment in accordance with the re-trial procedure or the cassation procedure.
- Within a seven-day time limit as of the date the judgment becomes legally effective, the sentenced person may file a petition for clemency with the State President.
- The judgment shall be enforced if it is not challenged by the Chief Justice of the Supreme People's Court and the Procurator-General of the Supreme People's Procuracy in accordance with the re-trial procedure or the cassation procedure, and the sentenced person does not file a petition for clemency with the State President.

In case the judgment is challenged in accordance with the re-trial procedure

or the cassation procedure, but the cassation panel or the re-trial panel of the Supreme People's Court decides to reject such a complaint and uphold the judgment, the Supreme People's Court must immediately notify the sentenced person of this outcome so that the latter may file a petition for clemency.

- If the sentenced person has filed a petition for clemency, the execution shall be carried out only if the State President rejects the petition.

Secondly, Article 259 of the 2003 CPC and Article 367 of 2015 CPC define the cases in which a decision on the execution is not issued as follows:

- If there are grounds to believe that the sentenced person falls within the categories for non-execution of death sentence, the President of the court which has conducted the first-instance trial shall not issue a decision to enforce the judgment and report this to the Chief Justice of the Supreme People's Court for considering the commutation of death penalty to life imprisonment.

Thirdly, Article 259 of the 2003 CPC defines the cases in which the execution of Death Sentences is suspended, as follows:

- In case the council on execution of the Death Sentence Execution Council decides that the sentenced person falls within the categories for non-execution of the death sentence, it shall postpone the execution and report this to the President of the court which has conducted the first-instance trial.⁶⁰ The case is then referred to

⁶⁰ According to Article 55, 56 of the Law on Enforcement of Criminal Judgements, the Death Sentence Execution Council has the tasks and powers: to decide the plan and prepare conditions to ensure the execution; To examine conditions on the person to be executed as required by the Penal Code and the Criminal Procedure Code; to issue a decision to postpone the execution and report it to the president of the court having issued the execution decision, if the sentenced person is ineligible for execution

the Chief Justice of the Supreme People's Court for possible commutation to life imprisonment.

- Where exceptional facts are found (for example the accused exposes new facts that can change the nature of the case) the Executing Council shall postpone the execution and report this to the President of the court which issued the execution decision for further reporting to the Chief Justice of the Supreme People's Court.

3. Provisions of the Law on Temporary Custody, Detention and the Law on Enforcement of Criminal Judgements with regard to the execution of the death penalty

Firstly, in accordance with Article 37 of the Law on Temporary Custody, Detention 2015, the Detention Facilities must ensure the right of a person sentenced to death to file an appeal and request a review of the sentence according to procedures for cassation review and re/trial. This includes the right to request a reduction/revision of the death sentence in accordance with CPC and other relevant provisions.

Secondly, Article 58 of the 2010 Law on Enforcement of Criminal Judgements inherited the provisions in Article 259 of the 2003 CPC with respect to the postponement of the execution, and further specifies the circumstances where the Council on the Execution of the Death Sentence may decide to postpone the execution. In particular:

- It is found that the sentenced person falls within the categories of non-execution of the death sentence in accordance with the Penal Code;
- Due to force majeure;
- The sentenced person produces new facts of the crime prior to the execution.

The above cases for postponement of execution of the death penalty continue to be stipulated in Article 81 of the 2019 Enforcement of Criminal Judgements (effective from January 1, 2020). At the same time, the Law also added one more circumstance for the postponement of the execution of the death penalty, which is due to objective obstacles.

In conclusion, based on the above analysis of the death penalty-related provisions in Vietnamese laws on the death penalty, including numerous amendments and supplementations, it can be observed that Viet Nam's legislation on the death penalty has been gradually reformed to progressively reduce the legal scope for application of the death penalty.

II. POSSIBILITY OF VIET NAM ACCEDING TO THE SECOND OPTIONAL PROTOCOL AIMING AT THE ABOLITION OF THE DEATH PENALTY

To have an overall assessment of the possibility of Viet Nam's accession to the Second Optional Protocol to the ICCPR, it is necessary to clarify two matters: firstly, the compatibility between Vietnamese legislation and the Protocol, which is legally important both in order to assess the possibility of accession and the implementations, and secondly, the present political feasibility of the death penalty being abolished in Viet Nam.

1. Compatibility between Vietnamese legislation and the Protocol

To assess of the possibility of Viet Nam's accession to the Second Optional Protocol to the ICCPR, it is necessary to assess the compatibility between domestic

legislation and obligations under the Protocol. This is extremely important for Viet Nam in taking appropriate decision. If basic compatibility is guaranteed, accession to the treaty will be taken into consideration, and the necessary legislative reforms will be undertaken subsequently. If the compatibility can not be secured, accession to the treaty will not be put in the agenda. Instead, the domestic legislation needs to be further amended and the accession will be decided on at an appropriate time.

In the analysis of the Second Optional Protocol to the ICCPR, it has been found that the substantial content of the Protocol is well reflected in Article 1 and the State Parties are obligated to comply therewith. In particular:

The first requirement with regard to non-execution of the death penalty: No one within the jurisdiction of a State Party to the Protocol shall be executed.

The second requirement with regard to the abolition of the death penalty: Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction both in law and in practice.

As regards the requirements above, Viet Nam does not meet the second requirement of the Protocol, as it still retains the death penalty in law and in practice. Further consideration is required regarding whether Viet Nam has met the first requirement of the Protocol and at which level.

As mentioned above, the Vietnamese legislation in relation to the death penalty has been amended to gradually narrow the legal scope of application as well as

execution of the death penalty, by:

Firstly, reducing the number of crimes punishable by death penalty from 29 crimes under the 1985 Penal Code (accounting for 14.87% of the total crimes) to 22 crimes under the 1999 Penal Code (with the 2009 amendment) (accounting for 8.09% of the total crimes) and 18 crimes under the 2015 Penal Code (accounting for 5.73% of the total crimes). On the other hand, expanding the categories of defendants that are not subject to the death penalty (including: persons committing crimes under 18; women during pregnancy or raising a child under 36 months old; persons whose age are 75 or older when committing crimes or facing trial). Persons of these categories shall not be sentenced to death by the Court under any circumstances.

Secondly, implementation of the death penalty must be limited to the most serious crimes and the alternative of life imprisonment should always be considered. It means that the Penal Code of Viet Nam does not regulate any circumstances in which the implementation of the death penalty is mandatory. The Penal Code also clearly defines and delineates conditions of circumstances under which the death penalty is applied so that the Court can selectively apply the punishment on specific cases.

Thirdly, expanding the categories of defendants that are not subjected to the death penalty. Accordingly, the 1985 Penal Code listed 03 types of defendants that must not be sentenced to death, including: persons under 18, women during pregnancy or raising a child under

12 months old. The 2015 Penal Code expanded the categories with persons whose age are 75 or older and women raising a child under 36 months old.

Fourthly, expanding the circumstances where the death penalty shall not be implemented. Accordingly, while there was no such circumstances under the 1985 Penal Code, the 1999 Penal Code expanded the categories with women during pregnancy or raising a child under 36 months old. The 2015 Penal Code witnessed 04 circumstances where the death penalty shall not be implemented, including: (1) women during pregnancy; (2) women raising a child under 36 months old; (3) persons whose age are 75 or older; (4) persons sentenced to death for embezzlement or taking bribes, who after being sentenced, have returned at least three-quarters of the property embezzled or the bribes taken, and closely cooperate with the authorities in the detection, investigation and/or handling of the crime, or have been given credit for their service. It is obvious that death penalty shall not be implemented on persons under these circumstances and death penalty shall be commuted to life imprisonment.

Besides, provisions of the 2010 Law on Enforcement of Criminal Judgements regarding the postponement of the death sentence execution further specifies the circumstances when it is found that the sentenced person falls within the categories of non-execution of death sentence in accordance with the provisions of the Penal Code mentioned above, the Council on execution of the death sentence must postpone the execution and report to the Chief Justice of the Supreme People's Court for possible

commutation to life imprisonment.

Fifthly, provisions under the 2015 Criminal Procedure Code and the 2015 Law on Temporary Custody, Detention on strengthening the right of a sentenced person to file a petition to the President of State asking for reducing the sentence also amount to the reduction of execution of the death penalty.

As can be seen from the information listed above, Viet Nam has made efforts to narrow down the legal scope of the application as well as the implementation of the death penalty.

The actual practice of the Penal Code has shown that although there were 22 crimes under the 1999 Penal Code (with 2009 amendments) punishable by the death penalty, the Courts only impose the death penalty in some particular crimes. According to the Report of the Supreme People's Procuracy⁶¹, the death penalty was imposed with regard to 03 crimes: (1) murder (mainly to defendants committed such crimes as murder to take property, repetitive crimes, etc.); (2) sexual assault against children; (3) drug-related crimes (mainly buyers, sellers, those who illegally possess drugs in large quantities and organized activities).

While the Courts still apply the death penalty for some particular crimes, this does not form the basis of the eventual abolition of the death penalty. It has been shown that death penalty-related legislation of Viet Nam has yet to meet the first requirement of the Protocol regarding non-execution of the death penalty.

⁶¹ Report No. 144/BC-VKSTC-V8 dated December 5, 2012 of the Supreme People's Procuracy on implementation of provisions of the 1999 Penal Code

In conclusion, it can be noted that the current Vietnamese legal system does not meet the requirements under Articles 1 and 2 of the Second Optional Protocol to the ICCPR. In order to meet these requirements, there is a need to put an end to the execution of death sentences and to remove capital punishment from Viet Nam's legislation. In the meantime, Viet Nam should continue to improve the national legal system with regard to death penalty to narrow down the scope of its application as a first step towards eventual abolition.

2. Possibility of the abolition of the death penalty in Viet Nam

In addition to assessing the compatibility between relevant Vietnamese legislation and the Second Optional Protocol, there is a need to consider the overall feasibility of abolishing the death penalty in Viet Nam in law and in practice.

The abolition of the death penalty is an issue with significant political and legal implications, and these aspects must be taken into serious consideration. This requires a careful study of the present crime situation, current measures towards crime prevention, as well as the available options for suppressing crime by sanctions other than the death penalty. It is also important to take into account a number of political, economic, social and cultural factors, in order to have a good assessment of the possibility of abolishing the death penalty.

2.1. Policy making

It is acknowledged that national policy consideration needs to be present in order

to allow for the gradual limitation and eventual abolition of the death penalty through legal reforms and amendments.

In Viet Nam, the Communist Party's guidance on limiting the death penalty was addressed in 2002 – three years after the enactment of the 1999 Penal Code. In particular, Resolution No. 08/NQ-TW dated 2 February 2002 of the Politbureau on a number of key judicial mandates (Resolution 08/NQ-TW) mandated a study on limiting the application of the death penalty in the Penal Code.

Resolution No. 49/NQ-TW dated 2 June 2005 of the Politbureau on the Judicial Reform Strategy up to 2020 (Resolution 49/NQ-TW) affirmed the desirability of “limiting the imposition of the death penalty in the way that the death penalty shall apply only to a certain number of extremely serious crimes”. This guidance has been followed since 2009 for amending the 1999 Penal Code, and for the drafting and adoption of the 2015 Penal Code.

Conclusion No. 92-KL/TW dated 12 March 2014 of the Politburo confirmed the continued implementation of Resolution 49/NQ-TW on the Judicial Reform Strategy. This means that Viet Nam continues implementing the pathway of limiting the death penalty in law. Therefore, to move forward with the abolition of the death penalty and to consider accession to the Second Optional Protocol to the ICCPR, it will be important to continue studying the practice of combating and preventing crime, relevant current legislation as well as to assess the situation and results of Resolution 49/NQ-TW. This would provide the basis for recommendations to the competent authorities about issues

relating to the death penalty.

2.2. Requirements for preventing and combating crime

The need to prevent and combat crime has been a significant factor in deciding whether to maintain or abolish the death penalty.

According to the assessment report of 14 years of implementation of the Penal Code (2000 – 2014), the crime situation has remained complex, with perpetrators making use of increasingly sophisticated methods. According to the report, crime has also been on the rise both in terms of its nature and scale and there has been an increase in the number of violent crimes infringing upon social safety and order. The nature of crimes has also turned increasingly violent, especially in relation to murder, deliberate infliction of bodily harm upon another person and rape. Crimes are being committed by younger persons and criminality has become more organized and aggressive, although this has been confined to relatively small criminal groups. In addition, abuse of women and children has been on the increase. This also concerns crimes of sexual violence, such as rape, forced sexual intercourse and sexual assault, including against children. Drug-related crimes have become more complex and have increased in terms of the number of cases and the volume of narcotic substances involved.⁶² They are committed by both Vietnamese and foreign perpetrators

⁶² According to research paper of Dr. Do Thanh Truong, working under the Supreme People's Procuracy, during the period 2007 – 2017, drug related crimes have increased in both number of cases and offenders. The number of cases and offenders in 2017 are respectively 17,261 and 21,411 (an respective increase of 191% and 178% over 2007). (see details at: <http://www.vksndtc.gov.vn/khac-963>)

who often use sophisticated methods to conceal their crimes and who react aggressively when detected.⁶³ In this context, the Penal Code provided for the death penalty for certain crimes such as murder, rape, drug-related crimes, etc., and was considered appropriate for the purpose of warning and prevention.

As mentioned before, as one component of the research for this report, the team conducted short interviews with legal experts working in the ministries and central agencies; local investigators, procurators and judges; lawyers; teachers and lecturers in a law training institution.⁶⁴ Most of the interviewees responded that for the time being it was not advisable to remove the death penalty completely, due to the fact that the crime situation in the country had become complex and that there had been an increase in the nature, seriousness and scale of crimes. The interviewees stated that perpetrators must be punished because they infringe on human life and health, and the interests of the State and society. In many cases, perpetrators have committed extremely serious crimes under aggravating circumstances, which, they argued, cannot be tolerated by society, such as murder, rape of children, etc. In such cases, the interviewees felt that the death penalty had to be applied to suppress criminals and to contribute to preventing and combating crime in the current context. Maintaining the death penalty, they said, was necessary in order to respond to Viet Nam's social

⁶³ Report No. 35/BC-BTP dated 12 Feb. 2015 of the Ministry of Justice on the assessment results of the implementation of the Penal Code

⁶⁴ Ministry of Public Security, the Supreme People's Court, Viet Nam Fatherland Front, Dong Thap People's Procuracy, Vinh Long People's Court, Ho Chi Minh High Court, Lawyer Associations of An Giang, Lawyer Associations of Ben Tre, Hanoi Law University

and economic situation, as well as the need to combat and prevent crime. The respondents also felt that there were no other effective measures that could replace the death penalty. Therefore, they felt it necessary to maintain the death penalty at this stage. While there is no evidence to show that the death penalty is a better deterrence than, for example, life imprisonment, this study shows that there is still a widespread belief in the deterrent power of the death penalty.

However, at the same time the interviewees also recognized that the death penalty negates the right to life – the most fundamental of rights – and deprives the sentenced persons of any opportunity for re-integration and rehabilitation. They also agreed that the execution of a death sentence leaves no room for correcting mistakes or miscarriages of justice. Therefore, interviewees felt that it was necessary to gradually narrow the scope of application of the death penalty and move towards its abolition in the future. The respondents were also of the opinion that the death penalty should apply only to a certain number of crimes with extremely serious consequences to human life and health, the national interests and the public order, such as treason, murder, terrorism and drug-related crimes.

On 17 December 2018, a consultation workshop on the topic of “Viet Nam's possible accession to the Second Optional Protocol to the ICCPR” was held in Da Nang.⁶⁵ The majority of participants was from government agencies engaged in the administration of criminal justice, including the issue of the death penalty. The participants agreed

⁶⁵ The consultation workshop was held on December 17, 2018 in Da Nang

with the arguments put forward in the interviews referred to above. They also stated that judges are as a rule hesitant to hear cases in which the death penalty could be applied, while the executors are also reluctant to carry out the sentences. However, some commentators argued, Viet Nam is faced with rising criminality and the crime situation is becoming increasingly complex and violent. They also pointed out that public awareness of the law is still limited. In this context, the participants were of the opinion that maintaining the death penalty was the strongest and the most effective remedy to combat and deter some serious crimes, for example, those involving national security, serious violence and drugs. However, the participants also agreed that there is a need to find measures to

replace the death penalty and gradually limit its use.

Based on the above analysis, it can be concluded that at present Viet Nam's legislation does not meet the requirements under the Second Optional Protocol to the ICCPR. It would also appear that the political environment is not yet conducive to pursuing total abolition at this time. However, there would seem to be general support for gradually limiting the scope of the death penalty, with a view to working towards eventual abolition that would make it possible for Viet Nam to accede to the Second Optional Protocol to the ICCPR at a later time.





PART IV

CONCLUSION
AND RECOMMENDATIONS





CONCLUSION AND RECOMMENDATIONS

I. CONCLUSION

At the global level, it is increasingly acknowledged that the implementation of the death penalty is incompatible with the protection of the right to life, as the most important of human rights. With this growing recognition, the international community has stepped up its efforts to limit and eventually abolish the death penalty. The adoption of the Second Optional Protocol to the ICCPR marked an important turning-point in the global campaign for the abolition of death penalty. Although international human rights law allows for the death penalty as an exception to the right to life, when applied for the most serious crimes, a growing majority of countries have joined a global trend to suspend and abolish it. Many have also ratified the Second Optional Protocol to the ICCPR.

Of the 142 countries that have abolished the death penalty, there are both developed and developing states. A review of the death penalty policies in a diverse sample of countries shows that the decision to retain or abolish the death penalty has no clear link to a country's level of economic or social development. Policies on the death penalty are rather more closely influenced by issues such as tradition, political priorities and social norms.

The issue of abolition or retention of capital punishment is no longer considered

an internal issue confined to national law: it has become a common human rights concern of the entire international community. This is also illustrated by the fact that the United Nations has adopted numerous resolutions calling on Member States to take measures to put an end to executions, with the ultimate aim to abolish the death penalty in all countries. Many countries have adopted strategies and programs to promote the abolition of the death penalty internationally. Some have also made the abolition of the death penalty a pre-condition in diplomatic relations and bilateral cooperation with countries that still retain capital punishment. Under the Second Optional Protocol, the States Parties are also not obliged to extradite persons accused of crimes to countries where they may face the death penalty. The experiences discussed in Part II of this Report show that countries have chosen a variety of paths towards the abolition of the death penalty. Some have acceded to the Protocol and abolished the death penalty completely in law, while others have abolished the death penalty in national law but not yet ratified the Second Optional Protocol. Others still have chosen to stop implementing the death penalty in practice, but still maintain it in their laws – sometimes as a preparatory step toward full abolition.

It emerged from the interviews conducted that many officials working with the death penalty in Viet Nam still see it as a requirement for combating and preventing crimes in Viet Nam. As analyzed in Section I, Part III of the Report above, Viet Nam still maintains the death penalty in law and in practice, although it has made efforts to reduce its application. As such, Viet Nam does not meet the

requirements for accession to the Second Optional Protocol to the ICCPR. At the same time, some impediments to full compliance with ICCPR standards on the limitation of the scope and application of the death penalty still remain, notably in the definition of what constitutes a “most serious crime” as stipulated by the Human Rights Committee.

II. RECOMMENDATIONS

Viet Nam should continue its efforts to limit the scope and application of the death penalty, with a view to meeting the necessary conditions to accede to the Second Optional Protocol to the ICCPR at an appropriate time. In the meantime, it is recommended that Viet Nam take the following steps:

	<p>(1) Continue studying and disseminating relevant international experiences on the abolition of death penalty, from countries with similar economic, social condition, including, memorandum models etc. to provide comprehensive information for competent agencies to develop national policy on death penalty</p>
	<p>(2) Raise awareness among public and government officials of arguments for a moratorium on executions and abolition of the death penalty, international movement on the abolition of the death penalty; strengthen public campaigns and other outreach activities to improve awareness on death penalty</p>
	<p>(3) Continue to reduce the number of offences for which the death penalty may be imposed, expand the list of sentenced persons who are not subject to the application, execution and memorandum of death penalty, by amending the Penal Code, the Law on Execution of Temporary Custody and Detention, the Law on Enforcement of Criminal Judgements, the Criminal Procedure Code and any other relevant legal documents. In this regard, Viet Nam should review the concept of “most serious crimes” to ensure the conformity with the scope of “most serious crimes” under international human rights law and Article 6 of the ICCPR</p>
	<p>(4) Consider imposing a moratorium on executions as a significant preparatory step towards the eventual and total abolition of the death penalty</p>
	<p>(5) Conduct further studies on alternative sanctions, on the basis of Vietnam's practices and international experience, to provide relevant recommendations while ensuring humanity in Vietnam's criminal policy, and the requirements to fight against crime</p>



QUESTIONNAIRES

Study on the possibility of Viet Nam ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty

Introduction

The International Covenant on Civil and Political Rights was adopted and opened to signature, ratification and accession by the United Nations General Assembly Resolution number 2200 (XXI) of 16 December 1966. It entered into force on March 23, 1976. Viet Nam ratified this Convention on 24 September 1982.

This Covenant has two optional protocols. The second one is about the abolition of capital punishment (hereinafter referred to as the Death Penalty Abolition Protocol).

Although Viet Nam has not ratified this Protocol, the Party and State's criminal policy since the Penal Code in 1985 until today has been developed to gradually reduce the application of capital punishment and move towards the total abolition of the death penalty in law and in practice.

With the support of UNDP, we are conducting a preliminary study to assess the possibility of Viet Nam's ratification of the Second Optional Protocol aiming at the Abolition of Death Penalty.

The purpose of this interview is to explore and consult with experts, academics, policymakers, practitioners and managers to hear their viewpoints on the possibility of Viet Nam ratifying the Protocol.

We appreciate your collaboration to share your opinions on this very important and significant issue.

Your comments will only be used for our study. Personal information will remain confidential. Thank you

Part 1. General information

Question 1: Please provide your field of work (policy maker, manager or investigator, prosecutor, judge, ...)

Question 2: Please provide us the name of your working department or unit?

Question 3: How long have you been working as a policy and law maker/ academic/ investigator/prosecutor/ judge/ lawyer? In your work, have you ever been involved in research, policy and law making on the death penalty or participated in the investigation, prosecution, trial or defense in cases where the accused persons are likely to be subject to the death penalty?

Part 2. Opinions on the possibility of Viet Nam's accession to the Second Optional Protocol aiming at the abolition of death penalty

Question 4: In your view, why does our Criminal Code still provide for the death penalty? What does the maintenance of capital punishment mean to you?

Question 5: The new Penal Code in 2015 still maintains the death penalty for 18/314 crimes (5.73%) of 07/14 groups criminal crime. How relevant do you think this law is to the requirement to ensure human rights and citizen's rights including the right to life as provided in the 2013 Constitution 2013? Should we continue to reduce the number of crimes for which the death penalty applies?

Question 6: If the Penal Code continues to provide for the death penalty, what type of crimes and cases should this apply to?

Question 7: In your opinion, will the death penalty be abolished in our country? If so, when could this happen?

Question 8: What conditions do we need to meet in order to abolish capital punishment?

Question 9: What are the most important aspects to take into account in relation to the abolition of capital punishment (political considerations, issues of criminal law or the de facto application of the death penalty – or all three aspects)? How can we abolish the death penalty?

Question 10: Are you aware of the Second Optional Protocol aiming at the abolition of the death penalty?

Question 11: In your opinion, how is Viet Nam's process of international integration being impacted by the fact that Viet Nam has not ratified the Second Optional Protocol aiming at the abolition of capital punishment?

Question 12: In your opinion, should Viet Nam ratify the Second Optional Protocol aiming at the abolition of the death penalty? If so, when would be the most appropriate time?



REPORT ON THE RESULT OF THE INTERVIEWS

To serve the drafting of the Report “Study on the possibility of Viet Nam ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty”

During the process of drafting the Report on the “Study on the possibility of Viet Nam ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty”, the Research Team conducted a number of interviews to gather comments on the death penalty and the possibility of Viet Nam’s accession to the Second Optional Protocol to the ICCPR.

1. Objective of the Interviews

The objective of the Interviews was to consult the opinions of experts, scientists, policy makers, officials, practitioners and managers on the possibility of Viet Nam to accede to the Second Optional Protocol, in order to inform the drafting of the Report on the subject matter.

2. The participants were selected from 5 groups

- The Ministry of Justice, the Ministry of Public Security, the Ministry of Foreign Affairs, the Supreme People’s Court, the Supreme People’s Procuracy, Government Office, Office of the President, Some Committees of the National Assembly (e.g. Justice, Legal, Social Affairs, External Relations);
- Persons participating in the investigation, prosecution, adjudication and execution of criminal judgments (officials of police offices, procurators and courts);
- Lawyers and legal assistants representing defendants in death penalty cases;
- Academics who work in criminal law researching and teaching at research and training institutions (for example: Ho Chi Minh National Political Academy, Judicial Academy, Institute of Legal Study, Hanoi Law University, Faculty of Law, Hanoi National University);
- Legal experts.

3. Content of the Interview

The content of the Interview focused on three groups of main issues:

- Reasons why the Penal Code of Viet Nam still retains the death penalty and whether the scope and application of the death penalty should be reduced.
- Conditions that would need to be met for Viet Nam to abolish the death penalty, including interim steps to gradually reduce the application of the death penalty pending total abolition.
- The to-do list for the reduction and abolition of death penalty, as a precondition for Viet Nam's accession to the Second Optional Protocol aiming at the Abolition of the Death Penalty.

4. Interview methods

The methods used were in-person interviews and the collection of written questionnaires during the process of drafting and completion of the Report.

In addition to some questions related to personal information of the respondents, the questionnaires include 10 questions focusing on three groups of main issues.

5. Result of the Interviews

Due to the limited time available, the interviews were conducted at a relatively small scale, with a limited number of participants (30 informants). However, efforts were made to ensure that the sample group was diverse and representative of a variety of professions and backgrounds. During the process of conducting the interview, the Research Team interviewed and discussed with legal experts from some Ministries (such as Ministry of Justice, the Ministry of Public Security, Office of the President Supreme People's Court and Central Committee of Viet Nam Fatherland Front); Persons participating in the investigation, prosecution and adjudication of criminal cases (such as Police of Ben Tre, Binh Duong, Da Nang Dong Thap, Dong Nai, Tien Giang, Can Tho City; An Giang People's Procuracy, Dong Thap People's Procuracy, Ben Tre People's Court, Dong Thap People's Court, Tien Giang People's Court, Vinh Long People's Court, Ho Chi Minh High Court); lawyers (Lawyer Associations of An Giang, Ben Tre, Tien Giang) and academics who work in research and training institutions (Hanoi Law University).

Throughout the interviews, Research Team noted that most participants preferred to express their views through direct conversations rather than written documents. Therefore, the Research Team only received 10 written questionnaires.

The study shows that most of the interviewees were of the opinion that now is not the right time to completely abolish the death penalty in our country. The interviewees felt that the crimes committed are still very complex, and that they are increasing in both quantity and

nature and are becoming more violent. In addition, they felt that these crimes should be punishable as they seriously violate people's lives and health, as well as the interests of the State and society. The interviewees also asserted that in many cases, the criminals committed particularly serious crimes that society would not be able to forgive, such as murder and rape of children. Many were of the view that these were crimes that deserve the death penalty, as a means of prevention and a way to raise public awareness of the severe consequences of such criminal conduct. It was felt that the maintenance of death penalty was necessary in response to prevailing social and economic realities. It was also regarded as a necessary measure to fight corruption and prevent the proliferation of serious crime. The interviewees further felt that there was at present no alternative punishment that could replace capital punishment as an effective crime deterrent. In their view, the application of the death penalty had to some extent proven effective in the prevention of crimes and as a means of general education to reduce criminal behaviour.

However, the participants also agreed that the death penalty negated the right to life – the most fundamental of human rights. It also eliminates the chance to reintegrate offenders into society and allow them to improve their ways. Therefore, it was felt that there is a need to gradually narrow the scope of application and move towards the abolition of death penalty in the future. There was one individual opinion asserting that the death penalty should only apply to certain kinds of crimes, such as those resulting in serious violations of the life and health of people or when the national interest and public security are being compromised. Examples of such crimes are treason, murder, terrorism and drug-related offenses.

With respect to the possibility of Viet Nam's accession to the Second Optional Protocol to the ICCPR, all participants shared the view that now was not the right time to table such a proposal. The interviewees observed that the current laws of Viet Nam were still inconsistent with the Protocol and felt that this form of punishment was still needed to prevent the most serious crimes. In order to move forward towards the eventual accession to the Second Optional Protocol, Viet Nam should continue to take preparatory steps to reduce the application of the death penalty pending its total abolition./.

the fact that the \mathbb{R}^n -valued function \mathbf{f} is continuous at \mathbf{a} if and only if each of its components f_i is continuous at \mathbf{a} . This is a useful result because it allows us to reduce the study of the continuity of a vector-valued function to the study of the continuity of its components.

Another important result is the Intermediate Value Theorem for vector-valued functions. It states that if \mathbf{f} is a continuous function from a closed interval $[a, b]$ to \mathbb{R}^n , then the image of $[a, b]$ under \mathbf{f} is a connected subset of \mathbb{R}^n . This is a generalization of the Intermediate Value Theorem for real-valued functions.

Finally, we mention the concept of a path in \mathbb{R}^n . A path is a continuous function \mathbf{f} from a closed interval $[a, b]$ to \mathbb{R}^n . The image of $[a, b]$ under \mathbf{f} is called the path of \mathbf{f} . Paths are important in many areas of mathematics, including physics and geometry.

In conclusion, the study of vector-valued functions is a rich and important area of mathematics. It provides a natural way to describe motion in space and has many applications in science and engineering. The results discussed here are just a few of the many interesting facts about these functions.

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