**Call for Inputs – Secretary-General’s Report on a moratorium on the use of the death penalty**

**Submitted by**

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1. **Introduction – the moratorium on executions in Sri Lanka**

The death penalty continues to be a penalty for several offences including murder and drug trafficking in Sri Lanka. Sections 286 (b) and (c) of the Code of Criminal Procedure Act No. 15 of 1979 state that the President of Sri Lanka is required to authorize capital punishment for an execution to take place and that executions must be carried out by hanging.

There has been a moratorium on executions in Sri Lanka since 1976, when the last execution took place. Since then, apart from a few events which caused public uproar and led to calls for the resumption of executions, no government has commenced executing persons on death row. However, as the death penalty has not been abolished, persons continue to be sentenced to death.

In 2019, the former President of Sri Lanka Mr. Maithripala Sirisena, influenced by the war on drugs policy of the President of Philippines, announced his intention to commence executing persons sentenced to death for drug trafficking. Despite national and international outcries, the government continued with preparations to resume executions. The gallows situated at the Welikada Prison in Colombo were restored[[1]](#footnote-1) and two hangmen were recruited following an advertisement for executioners being published by the government[[2]](#footnote-2). The Supreme Court in response to fundamental rights petitions lodged by persons on death row against the decision of the president, issued an interim injunction preventing the commencement of executions until the court delivered its determination.[[3]](#footnote-3) While the new government elected in November 2019 has not attempted to resume executions, it has made no moves towards complete abolition of the death penalty either.

Sri Lanka has not ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). However, the government of Sri Lanka has consistently voted in favour of the UN General Resolution calling for a moratorium on the use of the death penalty, including most recently in 2020.[[4]](#footnote-4)

1. **Developments since 16 December 2020**
   1. *Statistics of persons on death row*

As the death penalty has not been abolished, persons continue to be sentenced to death every year. In the year 2020, ninety-three persons were sentenced to death while 144 persons were sentenced to death in the year 2019.[[5]](#footnote-5) Persons on death row remain in prison until they die, or their sentences are commuted to life imprisonment and then a fixed term of twenty years. Due to the number of individuals being sentenced to death each year, without a proportional release of persons on death row, the detention conditions on death row deteriorate each year due to the limited infrastructure of prisons. As of September 2020, 1,284 persons remain on death row in Sri Lanka.[[6]](#footnote-6)

Persons on death row may have their sentences commuted to life imprisonment or a fixed term of twenty years, after which they may be released from prison. However, no statistics are provided on the number of persons whose sentences are commuted.

* 1. *Prohibition on death sentence for persons under the age of eighteen*

Before 2021, persons who were under the age of eighteen at the time the offence was committed could be sentenced to death. Section 53 of the Penal Code of Sri Lanka only prohibited persons from being sentenced to death if they were under the age of eighteen at the time of conviction.[[7]](#footnote-7) However, due to criminal trials continuing for several years, persons who were under the age of eighteen when the offence was committed, would be above the age of eighteen at the time of sentencing and therefore would be sentenced to death. This provision contravened international human rights standards which prohibit the death penalty from being pronounced on persons who are under the age of eighteen when the offence was committed.

The prison study has recorded the experiences of persons on death row, who stated that they were under the age of eighteen when they committed the offence but were nevertheless sentenced to death as they were above the age of eighteen when the trial concluded.[[8]](#footnote-8) Despite Supreme Court judgements in which the justices recommended reform of the law by the legislature to ensure a judicious outcome and ensure Sri Lanka adheres to international human rights standards[[9]](#footnote-9), for offences such as murder, the sentence of death is a mandatory punishment, which leaves no room for judicial discretion in sentencing.

In 2021, the Minister of Justice announced the intention of the government to repeal Section 53 and replace it with a provision that prohibits persons who were under the age of eighteen at the time the offence was committed from being sentenced to death. The Bill was presented in parliament on 7 October 2021 and enacted on 26 October 2021.[[10]](#footnote-10)

While the amendment is welcome, the government has not made any announcements regarding the sentences of persons who, prior to the amendment, were sentenced to death despite being under eighteen at the time the offence was committed. Presumably, such persons continue to languish on death row.

* 1. *Commutation of death row sentences*

In December 2020, following the call by human rights activists and organisations to reduce congestion in light of the threat of COVID-19 in prisons, the government announced a series of measures including the release of persons on bail for minor offences and the release of persons in prison for the non-payment of fines. As part of these measures, the government also announced its intention to commute the sentences of all persons on death row to a fixed term of twenty years. Further, it stated that persons who have already completed twenty years will be released from prison.[[11]](#footnote-11)

The decision by the government was welcome because while the commutation of death row sentences to life imprisonment and then to a fixed term of twenty years was a routine procedure prior to 1999, after 1999, following a public outcry that persons in prison were being released “too early”, the systematic commutation process was halted and ad-hoc commutation committees were appointed to decide on the commutation of death row sentences on a case-by-case basis.

The ad-hoc process has been critiqued by the HRCSL for being arbitrary and based on subjective factors rather than based on objective, standard criteria. The appointment of persons to the commutation committees is also not done in a transparent manner.[[12]](#footnote-12) Despite the abovementioned announcement being made by the government, it has not since been reported whether the sentences of all persons on death row were commuted to life.

* 1. *Presidential pardon*

Article 34 of the Constitution provides the president with a wide discretion to pardon or commute the sentences of prisoners, and is applicable to all offences and crimes, and to all categories of prisoners. Under this provision, the president exercises the power to issue two categories of pardons – special and general pardons. While general pardons are usually awarded to groups of persons who satisfy pre-defined criteria, special pardons are awarded to specific persons at the discretion of the president.[[13]](#footnote-13)

The presidential pardon system in Sri Lanka has been critiqued, especially during the last few years when particular pardons came under public scrutiny. In March 2020, a few months after President Gotabaya Rajapakse assumed office, he pardoned and released from prison staff sergeant Sunil Rathnayake, a man whose conviction was confirmed by the Supreme Court for the murder of eight members of the Tamil community, including a five-year-old and three teenagers in Mirusuvil in Jaffna during the armed conflict in Sri Lanka.[[14]](#footnote-14) The pardon was in line with the stated intention of President Rajapaksa, who himself has been accused of committing war crimes, to “not allow any room for attempts to discredit and destroy the dignity of our war heroes who made countless sacrifices to bring peace to entire Sri Lanka” and, “take every measure always to protect the dignity of our heroic forces”.[[15]](#footnote-15)

In June 2021, President Rajapaksa pardoned a former member of parliament named Duminda Silva who was serving a death sentence after he was convicted in 2016 for the murder of a rival politician and three of his supporters in 2011[[16]](#footnote-16). Both pardons received wide national and international condemnation for undermining the rule of law and need for accountability.

When the president enjoys absolute discretion to pardon any prisoner without needing to provide justification to the public and without considering any relevant factors, such as, the impact on the victim(s) or the severity of the offence, there is a risk of this power being utilized for political purposes, as in the above-mentioned cases, rather than to fulfil the true purpose of system of pardons – which is to rectify an injustice that has occurred in the criminal justice process. For instance, the HRCSL has reported that at least one woman who was sentenced to death for the murder of her husband, after he abused her over a long period of time, and one man who was sentenced to death for an offence he committed when he was below the age of eighteen, continue to be on death row and have not been considered for a presidential pardon.[[17]](#footnote-17)

1. *News First,* “Executioner’s post gets 45 applications”, 28 February 2019. <https://www.newsfirst.lk/2019/02/28/executioners-post-gets-45-applications/> [↑](#footnote-ref-1)
2. *BBC News,* ” Sri Lanka hires first two hangmen in 43 years”, 29 June 2019. <https://www.bbc.com/news/world-asia-48812576#:~:text=Sri%20Lanka%20has%20recruited%20two,been%20in%20place%20since%201976>. [↑](#footnote-ref-2)
3. *Al Jazeera,* “Sri Lanka court suspends executions until October 30”, 5 July 2019. <https://www.aljazeera.com/news/2019/7/5/sri-lanka-court-suspends-executions-until-october-30> [↑](#footnote-ref-3)
4. *International Commission Against Death Penalty*, UNGA Moratorium Resolution Map, [https://icomdp.org/unga/#](https://icomdp.org/unga/) [↑](#footnote-ref-4)
5. *Department of Prisons,* Prisons Statistics 2020. 2021. <http://prisons.gov.lk/web/wp-content/uploads/2021/05/prison-statistics-2021.pdf> [↑](#footnote-ref-5)
6. *State Ministry of Prison Reform and Prisoner’s Rehabilitation,* Progress Report 2020, 2021. <http://www.prisonmin.gov.lk/web/images/pdf/progress-report-2020.pdf> [↑](#footnote-ref-6)
7. S 53, Penal Code Ordinance (No. 2of 1883) “sentence of death shall not be pronounced on or recorded against any person who, in the opinion of the court, is under the age of eighteen, years; but, in lieu of that punishment, the court shall sentence such person to be detained during the President’s pleasure.” [repealed] [↑](#footnote-ref-7)
8. *Human Rights Commission of Sri Lanka*, National Study of Prisons, December 2020 – chapter: Prisoners on Death Row. [↑](#footnote-ref-8)
9. P. D. Nilanka and K. P. Samantha v AG, SC Appeal No. 139/2014, [↑](#footnote-ref-9)
10. *Economy Next* “Sri Lanka to amend laws on capital punishment for minors”, 14 December 2021 <https://economynext.com/sri-lanka-to-amend-laws-on-capital-punishment-for-minors-88817/> [↑](#footnote-ref-10)
11. *News First,* “All prisoners under death sentence will have their sentence reduced to 20 years”, 7 December 2020. <https://www.newsfirst.lk/2020/12/07/all-prisoners-under-death-sentence-will-have-their-sentence-reduced-to-20-years/> [↑](#footnote-ref-11)
12. *Human Rights Commission of Sri Lanka*, National Study of Prisons, December 2020 – chapter: Early Release Measures. [↑](#footnote-ref-12)
13. Ibid [↑](#footnote-ref-13)
14. *Al Jazeera,* ‘Sri Lanka pardons soldier who killed Tamil civilians’, 27 March 2020. <https://www.aljazeera.com/news/2020/3/27/sri-lanka-pardons-soldier-who-killed-tamil-civilians> [↑](#footnote-ref-14)
15. Full text of the speech made by His Excellency the President Gotabaya Rajapaksa at the National Ranaviru Day commemorations on May 19th 2020 - <https://www.un.int/srilanka/news/full-text-speech-made-his-excellency-president-gotabaya-rajapaksa-national-ranaviru-day> [↑](#footnote-ref-15)
16. *British Broadcasting Corporation,* “Duminda Silva: Anger as Sri Lanka frees politician sentenced for murder” 26 June 202, <https://www.bbc.com/news/world-asia-57608573> [↑](#footnote-ref-16)
17. *Human Rights Commission of Sri Lanka*, National Study of Prisons, December 2020 – chapter: Prisoners on Death Row. [↑](#footnote-ref-17)