



The death penalty, due process violations, murder by decree and extra-legal killings: A typology of 'murder by governments'

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Introduction

Recent scholarship on the death penalty and on harm reduction has explored the relationship between judicial and extrajudicial killings of drug offenders, arguing that there is either a unidirectional or else an inverse relationship between the two.¹ Such research tends to presume that a significant legal dividing line is whether or not the defendant's conduct has been judged in a courtroom before execution. In this article we observe that, for the purposes of United Nations (UN) and non-governmental organisation (NGO) advocacy based on international human rights law, this is not the only way to differentiate between types of state killings carried out by commission.

Here, we set out to legally define the 'death penalty' as against other forms of premeditated state killings, with special attention to drugs cases in East and Southeast Asia. This is an important regional issue because of the recent spread of lethal anti-drugs campaigns carried out by law enforcement officers in Asia, such as in Thailand, Indonesia, the Philippines and Bangladesh. A human dignity approach demands that abolitionists strive to minimise all kinds of state killings, not least those directed at non-violent drug offenders.

There are broadly four types of state killings perpetrated by commission under international law:² executions following the judicially-imposed death penalty, 'summary' executions, other

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‘arbitrary’ executions and the remaining category of ‘extrajudicial’ or ‘extra-legal’ killings – listed in approximate order of formality and legal compliance. Each are examples of what Clark has broadly termed ‘murder by governments’.³ As we illustrate below, premeditated state killings take place on a sliding scale, and are sometimes difficult to distinguish from each other.

Executions following sentences pronounced by courts of law, often referred to as the ‘death penalty’, or as ‘capital punishment’, still tend to dominate the public and academic discourse on state killings, including for drugs. There are good reasons to focus scholarly attention on the judicial death penalty as opposed to other forms of state killing, even if state killings conducted extrajudicially are objectively an even more serious and (far) more frequent violation of human rights throughout the world, both in nominally retentionist and abolitionist states.⁴ For one, using the judicial death penalty dramatically asserts, to both domestic and international audiences, the right of a state to kill in a premeditated manner for certain types of crimes and against certain categories of persons. In other words, the judicial death penalty makes a fundamental statement about the state’s power vis-à-vis individuals. The judicial death penalty also attracts detailed regulatory scrutiny from the major human rights treaties, more so than does extrajudicial killing. Moreover, the debate over the legality, efficacy and collateral consequences of the death penalty (including for drug offences) is very much a live one throughout the world, and hence a field where academic work and legal advocacy stand to achieve a real impact. Extrajudicial executions, in the way they are often falsely justified by perpetrating states as emergency, national security or self-defence measures,⁵ are the exceptions that prove the rule. States that kill away

from the solemnity of the court process often attempt to do so in secret.⁶

For the same reasons as judicial executions, summary executions and other arbitrary executions also deserve academic and activist attention, because they represent premeditated killings by the state and its agents that occur within a legal setting, however unfair and rudimentary. Yet, our effort here is to contribute research that minimises all instances of state killings in breach of international human rights law, including extrajudicial killings in countries that have abolished capital punishment, such as the Philippines. Adopting a human dignity standpoint, all lives hold equal value, whether the victims of state lethality have enjoyed recourse to the legal process, or not.

1. Historical and institutional background

Special Rapporteurs form part of the Special Procedures of the Human Rights Council within the UN human rights system. Their role extends to advising and producing reports on human rights contraventions on thematic issues or on particular jurisdictions.⁷ In line with the UN’s evolving norm against capital punishment and in favour of the right to life and in preventing violations thereof, the UN Economic and Social Council first established the mandate of the Special Rapporteur on Summary or Arbitrary executions in 1982 but did not itself define what would constitute a ‘summary’ or an ‘arbitrary’ execution.⁸ The UN Commission on Human Rights widened the title of the mandate 10 years later to include ‘extrajudicial’ in addition to ‘summary or arbitrary’ executions, but again left the three concepts undefined.⁹ Similarly, the UN General Assembly resolution endorsing the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary*

Executions in 1989 did not differentiate between the three forms of state killing.¹⁰ The International Covenant on Civil and Political Rights (ICCPR), which prohibits the arbitrary deprivation of life in Article 6(1), likewise does not attempt to define the term ‘arbitrary’.¹¹

The first Special Rapporteur on Summary or Arbitrary Executions, Amos Wako (1982–1992), attempted to provide basic definitions for ‘summary’, ‘arbitrary’ and ‘extra-legal’ executions that we refer to in each thematic section below. The Special Rapporteurs that succeeded Wako¹² did not define or clarify the meaning of the concepts but listed examples of the types of killings covered by the mandate. Asma Jahangir, for instance, in her 2001 report, listed violations of the right to life upon which the Special Rapporteur will take action:

- Genocide;
- Violations of the right to life during armed conflict, especially of the civilian population and other non-combatants, contrary to international humanitarian law;
- Deaths due to attacks or killings by security forces of the State, or by paramilitary groups, death squads, or other private forces cooperating with or tolerated by the State;
- Deaths due to the use of force by law enforcement officials or persons acting in direct or indirect compliance with the State, when the use of force is inconsistent with the criteria of absolute necessity and proportionality;
- Deaths in custody owing to torture, neglect, or use of force, or life-threatening conditions of detention;
- Death threats and fear of imminent extrajudicial executions by State officials, paramilitary groups, private individuals, or

groups cooperating with or tolerated by the Government, as well as by unidentified persons who may be linked to the categories mentioned above;

- Expulsion, refoulement, or return of persons to a country or a place where their lives are in danger, as well as the prevention of persons seeking asylum from leaving a country where their lives are in danger through the closure of national borders;
- Deaths due to acts of omission on the part of the authorities, including mob killings. The Special Rapporteur may take action if the State fails to take positive measures of a preventive and protective nature necessary to ensure the right to life of any person under its jurisdiction;
- Breach of the obligation to investigate alleged violations of the right to life and to bring those responsible to justice;
- Breach of the additional obligation to provide adequate compensation to victims of violations of the right to life, and failure on the part of Governments to recognize compensation as an obligation;
- Violations of the right to life in connection with the death penalty.¹³

Most of these categories clearly amount to extrajudicial killings, as they take place outside of any recognisable legal framework, but are nonetheless perpetrated by the state or its agents. The final category listed by Jahangir is the sole exception, involving violations of the most fundamental human right in connection with judicially sanctioned capital punishment. As we explain below, scholars and UN human rights experts now tend to categorise these as ‘summary’ executions.

Most recently, in 2016, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Agnes Callamard, explained that the mandate covers a wide range of deprivations of life, and differentiated between two dimensions of the right to life: (i) the substantive, which requires states to prevent the 'arbitrary' deprivation of life under ICCPR Article 6(1), including through an appropriate framework of laws; and (ii) the procedural, which requires states to 'investigate potentially unlawful deaths, assign responsibility and remedy violations'.¹⁴ In this article, we focus on the former – defining unlawful state killings in an effort to prevent them, rather than defining unlawful state killings in order to provide remedies to family members after the fact, including through the prosecution of perpetrators.¹⁵

The key takeaway implications from the UN's history of statements on the matter are that a) the judicial death penalty is not per se incompatible with international law;¹⁶ b) summary, arbitrary and extrajudicial executions are, however, incompatible with treaty-based *and* customary international law and therefore should attract the attention of the relevant UN actors and agencies,¹⁷ but c) the differences between these four modes of state killing are subtle and might be helpfully further delineated by human rights experts and academicians.¹⁸ Yet for the more recent UN Special Rapporteurs, legally distinguishing between types of state killing has largely taken a back seat, given that summary, arbitrary and extrajudicial executions each breach international human rights law. The mandate holders have instead sought to focus on normative issues regarding state killings,¹⁹ favouring a 'constructive blurring' of the four categories.²⁰ Special Rapporteur Callamard concluded her term arguing that the mandate should be reformulated to cover all arbitrary (i.e. illegal, in this sense of the word) deprivations of the

right to life, 'a label that is meaningful to the public at large, rather than [one that currently satisfies] the nit-picking of a few lawyers'.²¹

In this article, we do however wish to revisit the different categories of state killings one by one. The practical significance of identifying legal and conceptual distinctions between judicial, summary, other arbitrary and extrajudicial executions comes in asserting which domestic and international law protections attach to which category, what the most effective legal and political advocacy strategies are for governments, international organisations and civil society campaigners, and delineating which killings fall under the Special Rapporteur's own mandate, not to mention within the budgetary constraints and priorities of NGOs. Moreover, academic analysis of criminal justice phenomena across a diverse set of legal and political systems and across historical eras benefits greatly from this kind of fine categorisation.²² The following sections delve further into international law definitions of the 'judicial death penalty', 'summary executions', 'arbitrary executions' and 'extrajudicial killings', and provide regional examples of each in relation to drug crimes.

2. Judicial death penalty: Definitions and use in the region

'Death penalty' executions take place on a sliding scale, after quick summary trials by revolutionary courts at one end and many years after arrest following 'super due process' in the United States at the other.²³ Yet, for the purposes of the UN Special Rapporteur's mandate, technically only judicially sanctioned killing that is carried out strictly in compliance with the fair trial and other due process rights established by the ICCPR, in Articles 6, 14 and 15, amounts to the 'death penalty'. Any other judicially imposed capital punishment will amount to

an unlawful ‘summary’ execution and will therefore attract closer international human rights scrutiny from the UN human rights system and from civil society. Classifying state killings as the judicial death penalty has significant advocacy implications, as it directs immediate efforts towards preventing executions through judicial, administrative and clemency appeals, while simultaneously pushing for incremental procedural reforms to the state’s capital punishment system. We see its apotheosis in the ‘super due process’ death penalty system in the US, designed to carefully minimise the occurrence of wrongful executions.²⁴ Through successful court challenges and political lobbying, US anti-death penalty lawyers and activists have gradually narrowed the categories of persons that can be executed in states that retain capital punishment by law, and have expanded the available grounds for postconviction review.²⁵

When a person is accused of a capital offence, ICCPR Articles 14–15 guarantee the following due process rights: to equality; to a fair and public hearing by a competent, independent and impartial legal tribunal; to a public judgment; to innocence until proven guilty; to be informed about the charges against him; to adequately prepare a defence; to communicate with chosen counsel; to be tried without delay; to appear at trial in person or through counsel; to have counsel assigned free of charge; to call witnesses; to cross-examine the prosecution’s witnesses; to receive the assistance of an interpreter free of charge; not to self-incriminate; not to be tried or punished for the same crime twice, and not to be punished retrospectively. Article 6 further guarantees the general right not to be arbitrarily executed, meaning unlawfully executed;²⁶ not to be executed before a final judgment or before seeking pardon or commutation, and that amnesty, pardon and commutation should not be automatically

foreclosed for any particular category of capital case. Article 6 also states that persons under 18 years of age (at the time of the offence) shall not be sentenced to death and women shall not be executed while pregnant.

Given all of these fundamental rights, the bar is set high for judicial capital punishment to be legally classified as such. Indeed, Schabas has argued that it is now practically impossible to carry out judicial executions without contravening the ICCPR’s due process and right to life provisions,²⁷ and hence straying into the summary killings category. In this conception, the legally permissible use of state killing as the judicial death penalty has now reached a vanishing point, whereas the definition of summary killings has expanded to take their place.

Within East and Southeast Asia, the nations that presently retain the death penalty in law are listed below – although several have not executed for more than 10 years and have an established policy or practice of not carrying out executions, and hence are currently classified as ‘abolitionist in practice’ by the NGO Amnesty International.²⁸ Asia is by far the world’s most prolific death penalty region,²⁹ with 13 legally retentionist jurisdictions in its sub-regions East and Southeast Asia:

- Brunei (abolitionist in practice, last execution 1957);	- China;
- Indonesia;	- Japan;
- Laos (abolitionist in practice, last execution 1989);	- Malaysia;
- Myanmar;	- North Korea;
- Singapore;	- South Korea (abolitionist in practice, last execution 1997);
- Taiwan;	- Thailand;
- Vietnam.	

Of this list, only Japan does not legally allow for judicial executions for drug crimes. According to Harm Reduction International,³⁰ Brunei, Myanmar, South Korea and Taiwan employ the death penalty for drug crimes only ‘symbolically’, leaving seven remaining nations who continue to execute drug offenders, or whose state policy indicates a willingness to do so in the near future: China, Indonesia, Malaysia, North Korea, Singapore, Thailand and Vietnam. The list has a distinctly Southeast Asian flavour, featuring five of the ten Association of Southeast Asian Nations (ASEAN) member states, reflecting drug offences’ perceived status as the most serious criminal threat in the region.³¹ Even in the Philippines, although the death penalty was congressionally abolished (for a second time) in 2006, there were renewed calls for reinstatement during the presidency of Rodrigo Duterte (2016–2022). However, these attempts were thwarted after a groundswell of mobilisation from different sectors opposed the reimposition.³²

Various UN bodies, human rights organisations and legal scholars have affirmed that, no matter how ‘fair’ the procedures employed are, the use of the death penalty for drug-related offences is always a violation of international human rights law.³³ The ICCPR’s Article 6(2) notably restricts the application of the death penalty to the ‘most serious crimes’, which the Human Rights Committee has interpreted as applying to cases where ‘there was an intention to kill which resulted in the loss of life’.³⁴ General Comment Number 36, issued in 2019, stresses that:

The term ‘the most serious crimes’ must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. Crimes not resulting directly and intentionally in death, *such as ... drug ... offences*, although serious in nature,

can never serve as the basis, within the framework of Article 6, for the imposition of the death penalty.³⁵

Other UN bodies have repeatedly affirmed that drug offences do not meet the threshold of ‘most serious crimes’ to which capital punishment might lawfully be applied.³⁶ Of the 12 East and Southeast Asian states in the above list which retain the death penalty for drug offences in law, Indonesia, Laos, North Korea, South Korea, Thailand and Vietnam are ICCPR states parties. Taiwan is not a member of the UN but has accepted the jurisdiction of the Covenant. Brunei, China, Malaysia, Myanmar and Singapore are the remaining non-states parties. Yet, while each of these 12 jurisdictions claim to retain the judicial ‘death penalty’ for drug offences, the reality is that they usually plan or conduct what amount to summary executions, due to overt breaches of the ICCPR’s fair trial rights.³⁷ We now turn to summary executions.

3. Summary executions: Definitions and examples

In a legal context, according to the Oxford English Dictionary, the term ‘summary’ denotes a legal process that is:

carried out quickly, without the customary formalities or procedures; *esp.* conducted without a jury, or without a trial. Also: designating a legal judgment or sentence given in this way.³⁸

As a starting point, the dictionary definition thus suggests that summary trials and punishments take place within a legal setting, yet without some or all of the key procedural protections.³⁹ Those protections have been identified by the various Special Rapporteurs as due process protections, including the fair trial rights present in the ICCPR.

The first Special Rapporteur on Summary or Arbitrary Executions, Amos Wako, presented the definition of summary execution as follows:

‘Summary executions’ [involve] the arbitrary deprivation of life as a result of a sentence imposed by the means of summary procedure in which the due process of law and in particular the minimum procedural guarantees as set out in Article 14 of the [ICCPR] are either curtailed, distorted or not followed.⁴⁰

In Wako’s conception, capital trials where the results are predetermined, which are adjudicated by courts evincing no real separation of powers from the executive, where defendants have not had a chance to make a robust defence, to appeal the verdict, or which see trials held behind closed doors, among other violations of Article 14, will each result in ‘summary’ executions, whether or not the host state is a party to the ICCPR.⁴¹ Subsequent analysis has added further due process violations in breach of Articles 6 and 15,⁴² any of which will move a judicial execution into the ‘summary’ category. Based on these criteria, most of the East and Southeast Asian nations identified above have carried out regular summary executions, including for drug offences, in recent history.

Nevertheless, ‘summary’ executions breaching the ICCPR’s due process standards do remain part of the broader death penalty paradigm, whereas ‘extrajudicial’ executions, committed outside the legal process altogether, do not.⁴³ Locating ‘summary’ executions within the death penalty paradigm alongside judicial executions, some critics may argue, lends false legitimacy to ‘sham’ trials designed to disguise predetermined outcomes, or at least to jurisdictions where the odds are stacked against capital defendants, in contrast to reputedly infallible procedures in ‘super due process’ US death

penalty cases. Yet neglecting even ‘sham’ trials compromises one of the instrumental reasons for their inclusion within death penalty research and advocacy: to improve the present system for defendants during investigation, trial and appeal.⁴⁴ Specific advocacy strategies targeting states that conduct summary executions focus on promoting compliance with the ICCPR and the UN Economic and Social Council’s 1984 Death Penalty Safeguards.⁴⁵ As we explain below, advocacy strategies in the face of extrajudicial killings tend to be distinct. In the East and Southeast Asian context, the irony in this approach is that drug-related executions cannot be conducted lawfully under ICCPR Article 6(2), regardless of how closely the legal process comports with Article 14’s due process requirements.⁴⁶

Among the most egregious examples of summary executions in recent East and Southeast Asian history are the following. First, the ad hoc ‘People’s Courts’ convened in South Vietnam after the fall of Saigon in 1975 tried former South Vietnamese soldiers and collaborators. In these courts, prosecutors doubled as judges in most cases, accused persons were not entitled to a legal defence nor to an appeal, were convicted regardless of the available evidence, and were often given a death sentence and summarily executed following the demands of onlookers.⁴⁷ Similar ‘revolutionary courts’ have tried and executed perceived enemies of the state in Maoist China or in modern day North Korea.⁴⁸ Internationally unrecognised rebel movements holding territory have also carried out executions following cursory judicial processes in Southeast Asia, such as in Myanmar’s borderlands,⁴⁹ or in the Southern Philippines.⁵⁰ Remaining in Myanmar, the special military tribunals set up since the 2021 coup have been criticised for dispensing summary justice, including death sentences which have so far led to

at least four confirmed executions for political offences.⁵¹

We can add to these examples the regular capital drug trials and executions conducted in the majority of East and Southeast Asian jurisdictions listed above. As a general rule, the more authoritarian the jurisdiction's governing authority (such as those in remaining communist states China, Vietnam and North Korea, or in military-ruled Myanmar after the 2021 coup), the more likely that all executions, including drug killings, will be summary in nature. One-party states or military dictatorships evincing no genuine separation of powers between the judicial and political branches of government tend to hold capital trials with predetermined outcomes and few procedural protections for defendants. Although limited domestic avenues exist for securing acquittals and non-lethal sentences in individual cases,⁵² these approaches often yield minimal results. Instead, anti-death penalty activists and abolitionist governments may achieve greater success through imparting political pressure from outside the jurisdiction to reform in line with international human rights standards.⁵³ There are examples in recent history of authoritarian states in greater Asia that have limited or abolished capital punishment without causing an existential threat to the regime then in power.⁵⁴

4. Arbitrary executions: Definition and examples

The Oxford English Dictionary relevantly defines 'arbitrary', in a legal context, as: 'discretionary, not fixed'.⁵⁵ By reference to the ICCPR's Article 6(1), a broad definition of life taken 'arbitrarily' refers to any state killing carried out illegally, in breach of international human rights law.⁵⁶ However, when considered alongside summary and extrajudicial executions, a narrower, residual, definition of

arbitrary executions instead emerges.⁵⁷ The key component of this narrower definition is that the legal decision as to whether an accused person lives or dies is made by a person or body subjectively, without reference to predetermined legal standards. Premeditated state killing thus becomes arbitrary without a prior sentence from a tribunal or court of law, even when conducted in a formal setting that appears to comply with the host state's laws.⁵⁸ 'Murder by decree' is an apt way of describing this category of state killing. According to Amos Wako:

'Arbitrary execution' is the arbitrary deprivation of life as a result of the killing of persons carried out by the order of a government or with its complicity or tolerance or acquiescence without any judicial or legal process.⁵⁹

Some comparative scholars continue to include arbitrary executions within a broad definition of capital punishment, given their premeditated and legally authorised nature. These authors include Weissbrodt,⁶⁰ Boyle⁶¹ and Maogoto.⁶² Yet arbitrary executions, as defined above, invite different kinds of anti-death penalty advocacy strategies when compared with summary or judicial executions: personal appeals to the decision-makers involved in individual cases (not unlike executive clemency),⁶³ delaying tactics to open the door for political negotiations, and imploring legal reforms toward court trials, however flawed these may initially turn out to be.

The power of the Thai Prime Minister to order targeted killings within Thailand's various military constitutions is an important historical example from Southeast Asia.⁶⁴ In East Asia, the North Korean leadership's power to order state killings by decree, bypassing even onsite summary trials, is a similarly arbitrary means of ending human life.⁶⁵

Both procedures have, in the past, led to drug-related arbitrary executions.

5. Extrajudicial killings: Definitions and examples

Extrajudicial killings, at the other end of the scale, do not involve the legal process at all, let alone trials and judgments pronounced by courts. As such, extrajudicial executions typically fall outside the death penalty paradigm for the purposes of academic scholarship, and likewise for the purposes of developing any advocacy strategy.

Initially, the Special Rapporteur's mandate extended to 'extra legal executions', further defined by Amos Wako as:

killings committed outside the judicial or legal process, and at the same time, illegal under relevant national and international laws. Accordingly, in certain circumstances 'arbitrary execution' as defined above can be an 'extra legal execution'.⁶⁶

Wako thus suggests that while arbitrary executions may be legal domestically, 'extra legal executions' such as those conducted by state security forces are not, excepting necessary and proportionate self-defence or the defence of others.⁶⁷ Such non-legal killings are pre-planned and consistent with government policy, being 'proactive' rather than proportionally 'reactive' to a violent threat.⁶⁸ They are arbitrary in the sense that they are illegal under international human rights law, but also extra-legal in the sense that they do not even accord with the domestic law of the host state. States carry direct responsibility under international law for such killings which are carried out by non-state actors 'at the behest of the Government or with its knowledge or acquiescence'.⁶⁹

More recently, UN agencies and NGOs have begun using the term 'extrajudicial killings' to describe this most prolific category of state lethality. Amnesty International delegates first replaced the term 'extralegal' with 'extrajudicial' at a conference in 1982, whereas the Special Rapporteur's mandate adopted the term 'extrajudicial' in 1992.⁷⁰ In 2001, Amnesty International defined extrajudicial killing as:

unlawful and deliberate killing carried out by order of a government or with its acquiescence. Extrajudicial killings are killings which can reasonably be assumed to be the result of a policy at any level of government to eliminate specific individuals as an alternative to arresting them and bringing them to justice. These killings take place outside any judicial framework.⁷¹

Examples of extrajudicial executions include: where victims are taken into custody or made to 'disappear' before being killed; those unlawfully killed in the course of military operations;⁷² those 'assassinated by uniformed members of the security forces, or by "death squads" operating with official connivance'; and persons killed during peaceful demonstrations.⁷³

Academic authors have provided further definitions that differ slightly from UN and civil society views. For example, Aceves, writing in a 2018 law review article,⁷⁴ argued that extrajudicial killing occurs when:

1. a public official or other person acting at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity;
2. whose acts were intentional or negligent;
3. and resulted in one or more deaths;

4. and who knew or should have known that death may result from their acts;
5. and who failed to comply with any relevant standards regarding the use of force, including the principles of necessity, distinction, proportionality, and precaution;
6. and whose acts were not authorized by legal process or complied with the rule of law.⁷⁵

In Southeast Asia's modern history, important examples of extrajudicial killings include the mass killing of alleged communist sympathisers, regional separatists and petty criminals within Suharto's 'New Order' regime in Indonesia (1967–98).⁷⁶ Indonesian and Thai security forces have also, at different stages in each nation's modern history, been accused of killing political dissidents and terrorist suspects rather than bringing members of each group to trial.⁷⁷ Myanmar's military, the Tatmadaw, has carried out tens of thousands of unlawful killings during the country's long history of civil conflict.⁷⁸ In East Asia, land reform in postrevolutionary Communist regimes in Vietnam and China led to the targeted deaths of many thousands of landowners,⁷⁹ whereas non-judicial killings of suspected leftists and spies were also frequent in Cold War-era South Korea and Taiwan, both jurisdictions being under military dictatorship at the time.⁸⁰ Yet in the majority of East and Southeast Asian nations, the extrajudicial killing of political opponents has declined and even disappeared since the end of the Cold War,⁸¹ Myanmar and North Korea being the most ruthless exceptions. Instead, the elimination of narcotic drugs and those involved in their manufacture and distribution has become a new measure which autocratic Asian governments' 'performance legitimacy' is based upon.⁸² The following section discusses the extrajudicial executions of drug suspects in East and Southeast Asia.

6. Extrajudicial killings in relation to drugs

Many cases of extrajudicial killings have been linked to drugs. In some Asian countries, punitive drug policies have led to thousands of extrajudicial killings. Most notably, in the Philippines, former President Rodrigo Duterte's anti-illicit drugs campaign, widely referred to as the country's 'war on drugs', resulted in the killing of 12,000 to 30,000 people from 2016 to 2019.⁸³ The International Criminal Court (ICC) observed that these extrajudicial killings 'appear to have been committed pursuant to an official State policy of the Philippine government', noting that high-level officials publicly and repeatedly spoke in support of extrajudicial killings, which 'created a culture of impunity for those who committed them'.⁸⁴ Rodrigo Duterte now faces trial at the ICC over his role in directing the campaign. On the precise mechanics of the campaign, the ICC's Pre-Trial Chamber further observed:

Information obtained by the Prosecution suggests that state actors, primarily members of the Philippine security forces, killed thousands of suspected drug users and other civilians during official law enforcement operations. Markedly similar crimes were committed outside official police operations, reportedly by so-called 'vigilantes', although information suggests that some vigilantes were in fact police officers, while others were private citizens recruited, coordinated, and paid by police to kill civilians.⁸⁵

Other recent Asian examples are as follows. In Indonesia, at least 49 suspected drug dealers were killed by the police in the first seven months of 2017, following repeated pronouncements by

senior government officials expressing support for Duterte's drug war.⁸⁶ More than one third of those killings occurred after the suspects had already surrendered to police.⁸⁷ In Bangladesh, reports of extrajudicial executions increased sharply in 2018 following the launch of the government's anti-narcotics drive, with nearly 500 people killed, a threefold increase from 2017.⁸⁸ Amnesty International observed:

people have been 'picked up' from homes or streets by members of the security forces who subsequently denied knowledge of their whereabouts to family members. This may amount to enforced disappearance. In some cases, family members witnessed their loved ones being taken away by security forces only to be found later in the morgues. In the media, some reports repeat official narratives of 'gunfights' with security forces – such as the police, the Rapid Action Battalions (RAB) or unknown armed persons – leading to deaths of suspected drug dealers.⁸⁹

Thailand's most notorious anti-drug campaign, launched in February 2003 under the leadership of Prime Minister Thaksin Shinawatra, resulted in police killings of about 2,800 people within its first three months.⁹⁰ Rather than serving as a warning about the scale of human rights violations that can ensue through unchecked punishments administered by security forces outside of the judicial process, Shinawatra's domestically popular campaign seems to have inspired several of the later extrajudicial killing sprees in different parts of Asia, mentioned above,⁹¹ as well as smaller scale continuation in Thailand itself.⁹²

Conclusion

It is notoriously difficult to engage with authoritarian and semi-authoritarian regimes on their practice of state-sponsored killings for drug offences.⁹³ Since the mid-1970s, in the view of many East and Southeast Asian governments, drug use and trafficking has replaced ideological dissidence as an existential criminal threat to state security.⁹⁴ In such a difficult policy landscape, the legal and conceptual distinctions between the four modes of state killing documented here suggest different advocacy strategies, both within and outside of the UN human rights system, in order to achieve incremental change.⁹⁵ Extrajudicial killings, once minimally sanctioned under the domestic legal process, become either arbitrary (i.e. standardless decree-based) or summary (i.e. judicial but unfair) executions. Under the narrow definition of the term, arbitrary executions cease to be arbitrary in nature if they are conducted after trials, however imperfect. In turn, summary executions cease to be summary in nature once the due process protections within ICCPR Articles 6, 14 and 15 are fulfilled, and instead count as the judicial 'death penalty'. Ultimately, such judicial capital punishment may fall into disuse and then be abolished in law. Abolitionist states may additionally ratify the ICCPR's Second Optional Protocol to 'lock in' abolition's legal status and may vote affirmatively in the biennial UN General Assembly resolution calling for a moratorium on capital punishment, in an effort to convince other member states to make domestic legal changes.

While several categories of state killings are often practised within the same jurisdiction contemporaneously, a relative 'scale of shame' may induce authoritarian states, despite their enunciated security concerns, to shift their state killing laws and practices along this social control

continuum from chaotic informality to rhetorical legality to cautious restraint and finally to outright repugnance. Across East and Southeast Asian jurisdictions, phasing out extrajudicial killings is the most important step from a utilitarian perspective,

given their greater incidence overall. Yet from a moral or symbolic standpoint, the most important step is surely the final one: abolishing judicial executions in law, which fundamentally resets the relationship between the state and its citizens.

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² Nonetheless, states may also become liable for the summary, arbitrary or extrajudicial killings discussed here by their omissions, for example through failure to exercise a strict chain of command over security forces, and failure to publicly denounce or investigate such killings. See the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (UN Economic and Social Council Resolution 1989/65, 24 May 1989) UN Doc E/RES/1989/65.

³ Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton University Press 2001) 117.

⁴ David T Johnson and Franklyn E Zimring, *The Next Frontier: National Development, Political Change, and the Death Penalty in Asia* (OUP 2009) 443.

⁵ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (n 2); Clark (n 3) 113.

⁶ Clark (n 3) 113.

⁷ United Nations Human Rights, 'About Special Procedures' (2025) <<https://www.ohchr.org/en/special-procedures-human-rights-council>>.

⁸ 'Summary or arbitrary executions' (UN Economic and Social Council Resolution 1982/35, 7 May 1982) UN Doc E/RES/1982/35.

⁹ 'Extrajudicial, summary or arbitrary executions' (UN Commission on Human Rights, Resolution 1992/72, 5 March 1992) UN Doc E/CN.4/RES/1992/72.

¹⁰ Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (n 2). The principles were later endorsed by 'Human rights in the administration of justice' (UN General Assembly Resolution 44/162, 15 December 1989) UN Doc A/RES/44/162. A companion to the Economic and Social Council Principles is: UN Office of the High Commissioner for Human Rights, 'Minnesota Protocol on the Investigation of Potentially Unlawful Death' (2016) UN Doc HR/PUB/17/4 <<https://www.ohchr.org/sites/default/files/Documents/Publications/MinnesotaProtocol.pdf>>.

¹¹ ICCPR, Article 6(1).

¹² See United Nations, 'Special Rapporteur on extrajudicial, summary or arbitrary executions' (*United Nations Office of the High Commissioner for Human Rights*, 2025) <<https://www.ohchr.org/en/special-procedures/sr-executions>> for a full list.

¹³ UN Commission on Human Rights, 'Report of the Special Rapporteur, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights resolution 2000/31' (11 January 2001) UN Doc E/CN.4/2001/9, para 7.

¹⁴ UN General Assembly, 'Extrajudicial, Summary or Arbitrary Executions' (2 September 2016) UN Doc A/71/372, paras 19–20.

¹⁵ For relevant literature on procedural elements of the right to life, see Stuart Casey-Maslen, *The Right to Life Under International Law: An Interpretative Manual* (CUP 2021) and Philip Alston, Christof Heyns, Sarah Knuckey and Thomas Probert (eds), *Alston and Heyns on Unlawful Killings* (Pretoria University Law Press 2020).

¹⁶ William A Schabas, *The Abolition of the Death Penalty in International Law* (3rd ed, CUP 2002) 63. Cf n 27 and associated text below.

¹⁷ On this point, see William A Schabas, 'International Law and the Abolition of the Death Penalty' (1998) 55(3) Washington and Lee Law Review 797, 824.

¹⁸ CK Boyle, 'The Concept of Arbitrary Deprivation of Life' in Bertie G Ramcharan (ed), *The Right to Life in International Law* (Brill 1985) 222.

¹⁹ Alston, Heyns, Knuckey and Probert (n 15) v.

²⁰ *ibid* 8.

²¹ UN Human Rights Council, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnès Callamard' (12 May 2023) UN Doc A/HRC/47/33, paras 8–12.

²² See generally Philip L Reichel, *Comparative Criminal Justice Systems: A Topical Approach* (3rd ed, Prentice Hall 2002).

²³ Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th ed, OUP 2015) 46; Schabas (n 16) 101. 'Super due process' refers to extensive procedural protections afforded to capital defendants in the United States, including bifurcated trials, legal representation, automatic appeals, and multiple layers of post-conviction review, which collectively create a more rigorous legal process than in non-capital cases.

²⁴ Hood and Hoyle (n 23) 46. Of course, no death penalty apparatus is infallible. There are many examples of wrongful executions in the United States' recent history. See Death Penalty Information Center, 'Executed but Possibly Innocent' (2025) <<https://deathpenaltyinfo.org/policy-issues/policy/innocence/executed-but-possibly-innocent>> for a partial list.

²⁵ Carol S Steiker and Jordan M Steiker, 'The Court and Capital Punishment on Different Paths: Abolition in Waiting' (2023) 29 Washington and Lee Journal of Civil Rights and Social Justice 1, 24, 34–35, 59.

²⁶ Alston, Heyns, Knuckey and Probert (n 15) 68.

²⁷ William A Schabas, 'International Law and the Abolition of the Death Penalty' in Carol S Steiker and Jordan M Steiker (eds), *Comparative Capital Punishment* (Edward Elgar 2019) 218. See also Hood and Hoyle (n 23) 646.

²⁸ See Amnesty International, 'Death Sentences and Executions in 2024' (April 2025) 43

<<https://www.amnesty.org/en/documents/act50/8976/2025/en/>>.

²⁹ Extending also to South Asia, Central Asia and the Middle East.

³⁰ Harm Reduction International, 'The Death Penalty for Drug Offences: Global Overview 2024' (2025) 38–39

<<https://hri.global/wp-content/uploads/2025/03/HRI-GlobalOverview-2024-FINAL.pdf>>.

³¹ Ralf Emmers, 'The Threat of Transnational Crime in Southeast Asia: Drug Trafficking, Human Smuggling and Trafficking, and Sea Piracy' UNISCI Discussion Papers (Universidad Complutense de Madrid May 2003) 1

<<https://www.ucm.es/data/cont/media/www/pag-72539/Ralf.pdf>>; Pascoe (n 1) 22.

³² Mai Sato and Leavides Domingo-Cabarrubias, 'Leadership from below? Networked governance in preventing the reintroduction of the death penalty in the Philippines' in Wing-Cheong Chan, Mai Sato and Michael Hor (eds), *Capital Drug Laws in Asia* (CUP 2025).

³³ See e.g. UN Human Rights Committee, 'General comment No. 36 – Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, para 35; UN Economic and Social Council, 'Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, Report of the Secretary-General' (18 December 2009) UN Doc E/2010/10, para 67; UN Commission on Human Rights, 'Extrajudicial, summary or arbitrary executions – Report of the Special Rapporteur, Ms. Asma Jahangir: Country situations' (6 January 1999) UN Doc E/CN.4/1999/39/Add.1, para 236; UN General Assembly, 'Extrajudicial, summary or arbitrary executions: Note by the Secretary-General' (7 October 1996) UN Doc A/51/457, para 107.

³⁴ UN Human Rights Council, 'Civil and Political Rights, Including the Questions of Disappearances and Summary Executions Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston' (29 January 2007) UN Doc A/HRC/4/20, para 53.

³⁵ UN Human Rights Committee (n 33) para 35 (citations omitted, emphasis added).

³⁶ See UN Economic and Social Council (n 33) para 67; UN General Assembly (n 33) para 107; UN Commission on Human Rights (n 33) para 236.

³⁷ While they invariably breach ICCPR Article 6(2), it is in theory possible for retentionist states to carry out 'judicial executions' for drug crimes which are not 'summary' in nature, if due process protections are strictly respected. However, that drug executions tend to be carried out in authoritarian political contexts suggests that this is unlikely to happen.

³⁸ 'OED: Oxford English Dictionary' (OUP 2025) <<https://www.oed.com/?tl=true>>.

³⁹ See also David S Weissbrodt, 'International Measures Against Arbitrary Killings by Governments' (1983) 77 Proceedings of the Annual Meeting (American Society of International Law) 378, 379.

⁴⁰ Quoted in Katja Luopajarvi, *Extrajudicial, summary or arbitrary executions – the scope of the mandate of the Special Rapporteur* (Åbo Akademi University 2001), citing UN Economic and Social Council, 'Summary or Arbitrary Executions: Report by the Special Rapporteur, Mr. S. Amos Wako' (31 January 1983) UN Doc E/EC.4/1983/16, para 66. See also Alston, Heyns, Knuckey and Probert (n 15) 64.

⁴¹ n 40 and associated text.

⁴² See Weissbrodt (n 39) 379, based on the text of 'Arbitrary or summary executions', UN General Assembly Resolution 35/172 (15 December 1980) UN Doc A/RES/35/172.

⁴³ Weissbrodt (n 39) 380; Daniel Pascoe, 'Researching the Death Penalty in Closed or Partially-Closed Criminal Justice Systems' in Mary Bosworth, Carolyn Hoyle and Lucia Zedner (eds), *Changing Contours of Criminal Justice* (OUP 2016) 197, 203.

- ⁴⁴ Pascoe (n 43) 203.
- ⁴⁵ UN Economic and Social Council, 'Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty' (25 May 1984) UN Doc E/RES/1984/50.
- ⁴⁶ See n 37.
- ⁴⁷ Pascoe (n 43) 202.
- ⁴⁸ Ning Zhang, 'Crimes of counterrevolution and politicized use of the death penalty during the Mao era' in Bin Liang B and Hong Lu (eds), *The Death Penalty in China: Policy, Practice and Reform* (Columbia University Press 2015) 73–75; Amnesty International, 'Death Sentences and Executions 2019' (2020) 28 <<https://www.amnestyusa.org/wp-content/uploads/2020/03/Amnesty-Death-Sentences-and-Executions-2019.pdf>>.
- ⁴⁹ Carolyn Strange, Daniel Pascoe and Andrew Novak, 'The politics of abolition: Reframing the death penalty's history in comparative perspective' (2025) 27(3) *Punishment and Society* 486, 496–498.
- ⁵⁰ US State Department, 'Philippines' (2017) 16 <<https://2009-2017.state.gov/documents/organization/160099.pdf>>.
- ⁵¹ Jonathan Liljeblad, 'Myanmar's Regression on Capital Punishment: A Pariah in Southeast Asia' (2023) 24(1) *Australian Journal of Asian Law* 35, 36. A more recent yet unconfirmed report suggests that two further political dissidents were executed on explosives charges in September 2024: 'Rights groups warn Myanmar military executing more anti-coup activists' (*Al Jazeera*, 24 September 2024) <<https://www.aljazeera.com/news/2024/9/24/rights-groups-warn-myanmar-military-executing-more-anti-coup-activists>>.
- ⁵² Including through legal actions emphasising mitigation, political lobbying and procuring sympathetic coverage of the case in state-controlled media.
- ⁵³ Johnson and Zimring (n 4) 334–337, 348.
- ⁵⁴ Particularly the five Central Asian states: Turkmenistan, Tajikistan, Uzbekistan, Kazakhstan and Kyrgyzstan, plus Azerbaijan (ibid 18 n 4).
- ⁵⁵ 'OED: Oxford English Dictionary' (OUP 2025) <<https://www.oed.com/?tl=true>>.
- ⁵⁶ Alston, Heyns, Knuckey and Probert (n 15) 68, 420.
- ⁵⁷ One way of thinking about the difference is that 'arbitrary executions/killings' are a specific legal category, whereas lives taken 'arbitrarily' (as in ICCPR, Article 6(1)) can include each of the summary, arbitrary and extrajudicial killing categories.
- ⁵⁸ Alston, Heyns, Knuckey and Probert (n 15) 86, 550; UN Human Rights Council (n 34).
- ⁵⁹ n 40. See also n 57.
- ⁶⁰ Weissbrodt (n 39) 378–379.
- ⁶¹ Boyle (n 18) 224.
- ⁶² Jackson Nyamuya Maogoto, 'Now You See, Now You Don't: The State's Duty to Punish Disappearances and Extra-Judicial Executions' (2002) 9 *Australian International Law Journal* 176, 185–186.
- ⁶³ See ICCPR, Article 6(4).
- ⁶⁴ Pascoe (n 43) 203.
- ⁶⁵ Alex J Bellamy, *East Asia's Other Miracle: Explaining the Decline of Mass Atrocities* (OUP 2017) 31; FIDH, *The Death Penalty in North Korea* (May 2013) 7 <<https://www.fidh.org/IMG/pdf/en-report-northkorea-high-resolution.pdf#page=4>>.
- ⁶⁶ n 40.
- ⁶⁷ See Alston, Heyns, Knuckey and Probert (n 15) 68, 207.
- ⁶⁸ Johnson and Zimring (n 4) 444.
- ⁶⁹ Alston, Heyns, Knuckey and Probert (n 15) 256.
- ⁷⁰ Clark (n 3) 123–124.
- ⁷¹ Amnesty International, 'Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings' (21 February 2001) <<https://www.amnesty.org/en/documents/mde15/005/2001/en/#page=2>>. 'Extrajudicial killings' is not a perfect moniker. Arbitrary executions, in the narrow sense of the word, also take place outside any judicial framework, yet they are, by definition, legal under national law. In our view, the hybrid expression 'extra-legal killings' (not 'executions') may thus be the most accurate descriptor for this category.
- ⁷² Note that international human rights law still applies in full, with no special derogations permitted to the ICCPR's Article 6, during times of armed conflict (Alston, Heyns, Knuckey and Probert (n 15) 184–185).
- ⁷³ Amnesty International, *14-Point Program for the Prevention of Extrajudicial Executions* (February 1993) <<https://www.amnesty.org/en/wp-content/uploads/2021/06/pol350021993en.pdf>>.
- ⁷⁴ William J Aceves, 'When Death Becomes Murder: A Primer on Extrajudicial Killing' (2018) 118(50) *Columbia Human Rights Law Review* 117, 144–145.
- ⁷⁵ See also: Maogoto (n 62) 184–186; Edy Kaufman and Patricia Weiss Fagen, 'Extrajudicial Executions: An Insight into the Global Dimensions of a Human Rights Violation' (1981) 3 *Human Rights Quarterly* 81.
- ⁷⁶ Pascoe (n 43) 202.
- ⁷⁷ Pascoe (n 1) 208–209.
- ⁷⁸ Lindsay Maizland, 'Myanmar's Troubled History: Coups, Military Rule, and Ethnic Conflict' (*Council on Foreign Relations*, 31 January 2022) <<https://www.cfr.org/backgrounder/myanmar-history-coup-military-rule-ethnic-conflict-rohingya>>.
- ⁷⁹ Edwin E Moïse, *Land Reform in China and North Vietnam: Consolidating the Revolution at the Village Level* (University of North Carolina Press 1983) 217.
- ⁸⁰ Johnson and Zimring (n 4) 156, 158, 197, 218, 444, 449; Choe Sang-Hun, 'Excavating a Horror That Some Koreans Wish Would Stay Buried' (*The New York Times*, 5 July 2019) <<https://www.nytimes.com/2019/07/05/world/asia/korean-war-vigilante-killings.html>>.
- ⁸¹ Johnson and Zimring (n 4) 310–311.

- ⁸² Michelle Miao, 'The Penal Construction of Drug-Related Offenses in the Context of "Asian Values": The Rise of Punitive Anti-Drug Campaigns in Asia' (2017) 1(1) *International Comparative, Policy & Ethics Law Review* 46, 70.
- ⁸³ International Criminal Court, 'Situation in the Philippines: Decision on the Prosecutor's request for authorisation of an investigation pursuant to Article 15(3) of the Statute' No. ICC-01/21 (15 September 2021) para 67.
- ⁸⁴ International Criminal Court, 'Pre-Trial Chamber I: Situation in the Republic of the Philippines' No. ICC-01/21 OA (18 July 2023) para 3.
- ⁸⁵ International Criminal Court (n 84) para 2 (citations omitted).
- ⁸⁶ Dave McRae, 'Is Indonesia embarking on a Philippines-style war on drugs?' (*University of Melbourne*, 8 August 2017) <<https://indonesiaatmelbourne.unimelb.edu.au/is-indonesia-embarking-on-a-philippines-style-war-on-drugs/>>.
- ⁸⁷ Phelim Kine, 'Duterte's "Drug War" Migrates to Indonesia' (*New Mandala*, 23 August 2017) <<https://www.newmandala.org/DUTERTES-DRUG-WAR-MIGRATES-INDONESIA>>.
- ⁸⁸ Amnesty International, 'Killed In "Crossfire": Allegations of Extrajudicial Executions in Bangladesh in the Guise of a War on Drugs' (2019) <<https://www.amnesty.org/ar/wp-content/uploads/2021/05/ASA1312652019ENGLISH.pdf>>.
- ⁸⁹ *ibid.*
- ⁹⁰ 'Thailand's "war on drugs"' (*Human Rights Watch*, 12 March 2008) <<https://www.hrw.org/news/2008/03/12/thailands-war-drugs>>.
- ⁹¹ Pascal Tanguay, 'Duterte's drug policy following in Thailand's footsteps' (*East Asia Forum*, 8 September 2016) <<https://eastasiaforum.org/2016/09/08/dutertes-drug-policy-following-in-thailands-footsteps/>>; Gideon Lasco, 'Drugs and drug wars as populist tropes in Asia: Illustrative examples and implications for drug policy' (2020) 77 *International Journal of Drug Policy* <<https://www.sciencedirect.com/science/article/pii/S0955395920300098>>.
- ⁹² Jonathan Hasson and Carolyn Hoyle, 'Thai Drugs Offenses and Narcotic Charges: Tracing Thailand's Drug Control and Capital Punishment History' (2024) 49 *Brooklyn Journal of International Law* 361, 408.
- ⁹³ Cf Harm Reduction International, 'Gaining Ground: How States Abolish or Restrict Application of the Death Penalty for Drug Offences' (2024) 17–21 <https://hri.global/wp-content/uploads/2024/07/HRI_Gaining-Ground-FINAL.pdf>, on death penalty abolition specifically for drug offences in Nigeria (1986), Pakistan (2023), Tajikistan (2003), Turkey (1990), and Uzbekistan (2001).
- ⁹⁴ Pascoe (n 1) 2 n 5, 21–22.
- ⁹⁵ An alternative view of the direction of policy change in retentionist states is provided by Hood and Hoyle, who assert a 'new dynamic' in death penalty abolition, whereby states proceed quickly from enthusiastic executioners to *de jure* abolitionists: Roger Hood and Carolyn Hoyle, 'Abolishing the Death Penalty Worldwide: The Impact of a "New Dynamic"' (2009) 38(1) *Crime and Justice* 1, 6–10.