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THE DEATH PENALTY IN ZAMBIA: A COUNTRY ON THE VERGE OF ABOLITION

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Executive summary

On September 12, 2022, it was reported that President Hakainde Hichilema had stated that the Ministry of Justice had concluded the drafting of a law that seeks to repeal the provisions of the Penal Code relating to the imposition of the death penalty. This is a follow up to the President's announcement on May 25, 2022, in which the President stated that Zambia has taken a decision to abolish the death penalty. When announcing this decision, President Hichilema stated that *"We [Zambians] believe in showing strength of our compassion... We believe in rights for all citizens, including the right to life."* President Hichilema announced this decision on the eve of Africa Freedom Day, a holiday that *"symbolises our collective commitment to secure a better future for all."* During this announcement President Hichilema also committed to *"work with Parliament to run this process as we transition away from the death penalty and focus on the preservation and rehabilitation of life while still delivering justice for all."*

President Hichilema's commitment follows decades of incremental progress towards the abolition of the death penalty in Zambia. Whilst Zambia retains the death penalty in law, it has been abolitionist in practice for almost 25 years, and successive Governments of Zambia have regularly commuted the sentences of all persons on death row.

This summary gives a brief overview of the national and regional landscape on the death penalty, before outlining the main arguments in support of President Hichilema's decision to abolish the death penalty. These arguments are:

- i. The retention of the mandatory death penalty in law violates human rights law
- ii. The mandatory death penalty strips judges of their vital decision-making function
- iii. The retention of the death penalty in law in Zambia, irrespective of whether it is a mandatory or discretionary sentence, constitutes a violation of the absolute prohibition on torture
- iv. The death penalty is not an effective deterrent
- v. The death penalty compounds economic injustice
- vi. Abolishing the death penalty will strengthen Zambia's position in the region

Progress towards death penalty abolition in Zambia

In Zambia, the Constitution is the supreme law of the land. Article 12(1) of the constitution provides for the protection of the right to life. Article 12 reads:

No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.

As is evident from the wording of Article 12(1), although the Constitution protects the right to life, the right to life is not absolute. The protection of the right to life can be abrogated as provided by law. As such, it is the case that, in Zambia, a person who is found guilty of murder, aggravated robbery, or treason will automatically be sentenced to death.¹

As stated by the Zambia Law Development Commission, "the primary Act that codifies crimes and provides for their corresponding penalties is the Penal Code Chapter 87 of the Laws of

¹ When a challenge to the death penalty was brought in 2000 arguing that it was cruel and inhumane, contrary to Article 15 of the Constitution, the Supreme Court of Zambia relied on the language of Article 12(1) to find the death penalty constitutional.

Zambia (PC).”² Additionally, the Criminal Procedure Code (CPC) – Chapter 88 of the Laws of Zambia– is the primary ACT that prescribes the process to be followed during the sentencing of a person accused of committing a crime.³ The PC and the CPC contain provision that permit the courts to issue a death sentence. The relevant provisions are:

1. PC, Article 24: “The following punishments may be inflicted by a court: (a) death”⁴
2. CPC, Article 303: “When any person is sentenced to death, the sentence shall direct that he shall be hanged by the neck till he is dead.”
3. CPC, article 305(4): “The President shall issue a death warrant, or an order for the sentence of death to be commuted, or a pardon, under his hand and the seal of the Republic, to give effect to the said decision. If the sentence of death is to be carried out, the warrant shall state the place where and the time when execution is to be had, and shall give directions as to the place of burial of the body of the person executed.”

Although courts continue to pass the death sentence no Zambian President has issued a death warrant since 1997.⁵ As such, it is the case that although Zambia retains the death penalty in law, the state is abolitionist in practice. For 25 years Zambia has refrained from executing any of the people on its death row. This decision has been deliberate, showcasing the lack of appetite in Zambia for executions: consecutive Zambian presidents in the past two decades have imposed official or de facto moratoriums, with Presidents Mwanawasa, Banda, Sata, and Lungu refusing to sign executions warrants while in office.

Successive Zambian Governments have also commuted the sentences of people sentenced to death on a regular basis. On May 24, 2018, President Lungu exercised his prerogative mercy powers and pardoned 413 inmates and 51 people on death row.⁶ There were further commutations in May 2019, when President Edgar Lungu pardoned 2,182 prisoners, including commuting the death sentences of 16 individuals.⁷ Most recently, in January 2021, the Zambian executive commuted the sentences of 246 people on Zambia’s death row.⁸

Other political bodies in Zambia also demonstrate the state’s commitment to abandoning capital punishment. The Human Rights Commission of Zambia publicly called for the abolition of the death penalty in October 2020, commending Zambian presidents for not executing anyone since 1997 and calling on the government to join the growing number of African nations who have abolished the death penalty. Mweelwa Muleya, the Human Rights Commission spokesperson, said: “*the Commission is calling for members of the public and various stakeholders to make submissions to the Zambia Law Development Commission to appropriately amend the penal code and the criminal procedure acts in order to enhance respect for the right to life.*”⁹ The Human Rights Commission has long supported abolition, commenting in 2016 that

² Zambia Law Development Commission, Review of the Penal Code Act, Chapter 87 of the Laws of Zambia and the Criminal Procedure Code ACT, Chapter 88 of the Laws of Zambia, p.8.

³ Id.

⁴ It ought to be noted that The Penal Code provides for two categorical bars to the administration of the death penalty: women who are pregnant at the time of sentencing and juveniles under eighteen years of age at the time of the offence cannot be sentenced to death. See Penal Code, § 25(2) (regarding juveniles) and 25(4) (regarding pregnant women).

⁵ Id at p.17

⁶ Xinhua, *Zambian president pardons 464 prisoners as part of Africa Freedom Day Commemoration*, (24 May 2018), available at: http://www.xinhuanet.com/english/2018-05/24/c_137204093.htm.

⁷ The East African, *Zambia President Lungu pardons 2,000 prisoners*, (24 May 2019), available at: <https://www.theeastafrican.co.ke/news/africa/Zambia-President-Lungu-pardons-2000-prisoners/4552902-5115154-g34j23z/index.html>.

⁸ World Coalition Against the Death Penalty, *246 People Removed From Death Rows in Zambia*, (last accessed 18 January 2022), available at: <https://worldcoalition.org/2021/01/29/246-people-removed-from-death-rows-in-zambia/>.

⁹ Xinhua, *Zambia Human Rights Body Calls for Abolishment of Death Penalty*, (13 October 2020) available at: http://www.xinhuanet.com/english/2020-10/13/c_139437690.htm.

they sought to “*educat[e] the public, to widen the understanding that [the] death penalty is against human rights.*”¹⁰

Additionally, church leaders¹¹ have spoken out in favour of the abolition of the death penalty. For instance, Caritas Zambia welcomed President Hichilema’s stated intentions to abolish the death penalty.¹² In another instance, Father Gabriel Mapulanga, director of the Catholic charitable agency’s Zambia programmes, stated that abolition of the death penalty is “*a visible manifestation of a heightened moral awareness and other methods of punishment are conform more with human dignity*”.¹³ In yet another instance, Bishop David Masupa, president of the Independent Churches of Zambia, said his organisation welcomed the government’s decision because it was in line with God’s teachings and in conformity with Christian values. ‘*Only God can take a life because he created it, and our country being a Christian nation, we have to uphold that.*’

The need for abolition

This progress towards abolition culminated in a commitment by President Hichilema on 25 May 2022 to work with Parliament to abolish the death penalty. This briefing supports President Hichilema’s decision to abolish the death penalty and outlines six key arguments in favour of abolition.

i. The retention of the mandatory death penalty in law violates human rights law

The jurisprudence is unequivocal: mandatory death penalty schemes are unlawful under international human rights law. Zambia’s retention of the mandatory death penalty violates the international legal requirement that states must examine the individual circumstances of an offender and their offence before imposing a death sentence. This is because the death penalty must only be imposed in cases considered to be the “worst of the worst,” meaning that capital punishment is reserved for the very worst of cases and the worst of offenders.¹⁴ To establish whether a case is “worst of the worst” requires courts to examine the individual circumstances of an offender and offence before sentencing a person to death.

Accordingly, the African Court on Human and Peoples’ Rights held in 2019 that the mandatory death penalty violates an individual’s human rights under articles 4 and 7 of the African Charter as it deprives an individual of due process of law by forcing judges to hand down a sentence without any regard for the individual’s “particular situation.”¹⁵ This ruling on the mandatory

¹⁰ Prudence Phiri, *Its Neighbours Ban the Death Penalty But Zambia Has 252 – and Counting – on Death Row*, Global Press Journal (29 August 2018) available at: <https://globalpressjournal.com/africa/zambia/neighbors-ban-death-penalty-zambia-252-counting-death-row/>.

¹¹ Church leaders form a vital part of Zambia’s social fabric as Zambia is a declared Christian nation.

¹² Mwansu Pintu, Catholic News Service, *Christians Welcome Zambian Plans to End Death Penalty*. UCAnews. (August 26, 2022). <https://www.ucanews.com/news/christians-welcome-zambian-plans-to-end-death-penalty/98541>.

¹³ Id.

¹⁴ Prudence Phiri, *Its Neighbours Ban the Death Penalty But Zambia Has 252 – and Counting – on Death Row*, Global Press Journal (29 August 2018) available at: <https://globalpressjournal.com/africa/zambia/neighbors-ban-death-penalty-zambia-252-counting-death-row/>.

¹⁵ African Court on Human and Peoples’ Rights, *Ally Rajabu v. Republic*, App No. 007/2015 (2019), para 102. See also Human Rights Committee, General Comment No. 36, (2018) on Article 6 of the ICCPR, on the Right to Life, U.N. Doc CCPR/C/G/36 (HRC 30 Oct. 2018) para 37; Human Rights Committee, *Lubuto v. Zambia*, UN Doc. CCPR/C/55/D/390/1990/Rev.1, para 7.2 (HRC 1995).

death penalty was again reaffirmed by the African Court in 2021, in the case of *Amini Juma v. United Republic Tanzania*.¹⁶

ii. The mandatory death penalty strips judges of their vital decision-making function

In Zambia, a person who is found guilty of murder, aggravated robbery, or treason will automatically be sentenced to death; the court cannot exercise its discretion to impose a lesser sentence, no matter the circumstances of the offence or the offender.

This undermines the separation of powers. Parliament (the legislature) is seeking to do the work of the judiciary, whose function is to decide cases and impose punishments. The mandatory death penalty also transfers more power to the executive as sentencing discretion is transferred from the judge to the police and the prosecutor as the sentence now depends on the charges laid.

Further, in curtailing judicial discretion and scrutiny, mandatory sentencing undermines the rule of law. The independence of the judiciary is a key principle of the rule of law and judges play a vital role in determining fair, proportionate, and effective sentences. Judges ought to consider each case on their respective merits and determine sentences according to the specific factual underpinning of the case. Furthermore, for a criminal trial to be fair the judge must be independent and not be swayed by public opinion or political objectives of parliament. Mandatory sentencing undermines the rule of law as a judicial discretion and scrutiny is curtailed by parliament.

iii. The retention of the death penalty in law in Zambia, irrespective of whether it is a mandatory or discretionary sentence, constitutes a violation of the absolute prohibition on torture

Whilst Zambia maintains a de facto moratorium on the death penalty, these moratoriums are infamously fragile. This was sadly illustrated in August 2022 when Myanmar lifted a 34-year moratorium and executed four political prisoners. Individuals sentenced to death live in constant fear not knowing if today will be the day the moratorium is lifted.

These torturous effects of the death penalty are known as *death row phenomenon*. Death row phenomenon refers to the anxiety, fear, and dread that results from long-term incarceration on death row and the mental anguish caused by the constant threat of death.

Courts across Africa recognise that a long stay on death row is a form of psychological torture that turns a prisoner into “a living corpse.”¹⁷ This psychological torture worsens with time;¹⁸ the infliction of this suffering over a period of years causes severe mental harm and constitutes cruel, inhuman, and degrading treatment or punishment.¹⁹

¹⁶ African Court on Human and Peoples’ Rights, *Amini Juma v United Republic of Tanzania*, App No. 024/2016 (2021), available at: <https://www.african-court.org/epmt/storage/app/uploads/public/615/bf4/f09/615bf4f09e55a745995400.pdf>.

¹⁷ High Court of Malawi, *Republic v Edson Khwalala*, (Sentence Rehearing Cause No. 70 of 2015) (unreported) (“One should not stay a long time under the weight of death sentence before it is carried out since one is always haunted by it. One becomes a living corpse. This is a ghastly experience. [...]”).

¹⁸ Report of the Special Rapporteur on torture and other cruel, inhuman, or degrading treatment and punishment, (2015), para 78, available at: <https://www.refworld.org/docid/550827ed7.html>.

¹⁹ European Court of Human Rights, *Al Saadoon and Mufhadi v UK* (2010); Constitutional Court of Uganda, *Attorney General v Kigula*, Constitutional Appeal No 3 of 2006, 55 (2006).

Across the continent, courts have set different limits on the length of time for which a person can be incarcerated on death row before suffering cruel and inhuman treatment. The Zimbabwe Supreme Court found in two separate cases that 52 months and 72 months between the imposition of the death sentence and execution was inhuman or degrading.²⁰ In the case of *Attorney General v Kigula*, the Ugandan Supreme Court found that a delay of 3 years would render a death sentence inhuman and unconstitutional.²¹ Similarly, High Courts in Malawi have stated that prolonged confinements under death sentence amounts to cruel and degrading punishment.^{22,23} Though there is little consensus on the length of time, regional courts have consistently agreed that lengthy periods on death row cause a person severe psychological harm amounting to torture.

To be clear, if Zambia reinstated executions this would also violate the absolute prohibition on torture as the method of execution which Zambian law provides for - hanging - also amounts to torture. In *Ally Rajabu v. United Republic of Tanzania*, the African Court found that imposing the death penalty by hanging constituted torture.²⁴ It would also not suffice for Zambia to merely alter its method of execution. The African Commission on Human and Peoples' Rights recently established that no existing execution method was compatible with international law.²⁵

iv. The death penalty is not an effective deterrent

During the 2016 constitutional review in Zambia, some voters who supported retaining the death penalty cited its supposed deterrent effect on crime as the reason for their vote.²⁶ However, successive studies in North America, Asia and Sub-Saharan Africa have demonstrated that there is no causal relationship between the death penalty and crime rates.

For example, in South Africa, crime rates actually declined following the abolition of the death penalty and the murder rate fell by an average of 4% a year.²⁷ In Canada, the murder rate also fell by 44% in the 27 years following abolition of the death penalty. In the US, retentionist southern states have the highest murder rates, while abolitionist northeastern states have the lowest murder rates.²⁸

Countries that reintroduced the death penalty after a period of abolition have also documented the absence of a deterrent effect. In Trinidad and Tobago, an increase in the number of executions had no deterrent effect on murder rates²⁹ and in the Philippines the revival of the death penalty in 1993 did not reduce the rate of violent crime there.³⁰

²⁰ Supreme Court of Zimbabwe, *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General*, No S.C 73/93 (24 June 1993).

²¹ Constitutional Court of Uganda, *Attorney General v Kigula*, Constitutional Appeal No 3 of 2006, 55 (2006).

²² High Court of Malawi, *Republic v Yale Maonga* (Sentence rehearing Cause No 29 of 2015) (unreported).

²³ High Court of Malawi, *Republic v Edson Khwalala* (Sentence rehearing No 70 of 2015) (unreported).

²⁴ African Court on Human and Peoples' Rights, *Ally Rajabu v. Republic*, App No. 007/2015 (2019).

²⁵ African Commission on Human and Peoples' Rights, *Interights & Ditshawanelo v The Republic of Botswana*, Communication 319/06 (2016), para 85.

²⁶ See Prudence Phiri, *Its Neighbours Ban the Death Penalty But Zambia Has 252 – and Counting – on Death Row*, Global Press Journal (29 August 2018) available at: <https://globalpressjournal.com/africa/zambia/neighbors-ban-death-penalty-zambia-252-counting-death-row/>.

²⁷ Anna Kreigler and Mark Shaw, *Analysis: Why South Africa's murder rates today are not higher than ever* (22 July 2016) available at: <https://africacheck.org/2016/07/22/analysis-why-sas-murder-rates-today-arent-higher-than-ever/>.

²⁸ Death Penalty Information Centre, *Fact Sheet* (last accessed 18 January 2022) available at: <https://deathpenaltyinfo.org/documents/FactSheet.pdf>.

²⁹ David Greenberg and Biko Agozino, *Executions, Imprisonment, and Crime in Trinidad and Tobago*, 52 *British Journal of Criminology* 113 (2012).

³⁰ Balita, *Death Penalty Has no Place in Civilized Society*, available at: <http://www.balita.ca/2012/11/17/death-penalty-has-no-place-in-civilized-society/>.

v. The death penalty compounds economic injustice.

There is increasing recognition among the international community that the death penalty primarily affects those with fewer economic means. The intersection between the death penalty, economic inequality, and poverty is stark. In the words of the former Special Rapporteur on Extreme Poverty and Human Rights, “the *death penalty is reserved for those who cannot buy themselves out of arrest, cannot afford a decent appeal, and carry no weight in the eyes of the government.*”³¹ The poorest in society are less likely to be able to afford a lawyer and in turn enjoy their right to effective representation and their right to an appeal. It is therefore of no surprise that individuals currently on death row around the world are overwhelmingly from poor backgrounds.³²

Families also suffer economically when a loved one is sentenced to death. Poor families are disproportionately impacted if the breadwinner of the family is sentenced to death,³³ In other cases, the stigma of having a loved one on death row can lead to financial difficulty. In neighboring Malawi, a recent survey of traditional leaders, found that many expressed their concern about the socioeconomic harm suffered by both families and the community as a result of the death penalty, with one leader explaining that “[t]he whole community was traumatised when they [learned of the] death sentence.”³⁴

vi. Abolishing the death penalty will strengthen Zambia’s position in the region

The majority of Zambia’s southern African neighbours have either abolished the death penalty or are abolitionist in practice, meaning that Zambia’s retention of the death penalty risks making it an outlier amongst key trade and security allies and partners.

Seven SADC countries have fully abolished the death penalty: South Africa, Mozambique, Angola, Namibia, Madagascar, Mauritius, and Seychelles. A further three—Malawi, Eswatini, and Tanzania—are abolitionist in practice and are home to strong movements for legal abolition. Moreover, Malawi and Eswatini have both abolished the mandatory death penalty. A similar commitment to abolition can be found in other African regions: every country in West Africa, with the exception of Nigeria, has abolished the death penalty in law or in practice.³⁵

The widespread commitment to abolition across Africa is often tied to an increasing recognition in political, public, and academic discourse that the death penalty is a legacy of colonialism.³⁶

³¹ United Nations Human Rights Office of the High Commissioner (OHCHR), *Death row “reserved for the poor”* (16 October 2018) available at: <https://www.ohchr.org/en/newsevents/pages/deathpenaltyisabane.aspx>.

³² Cornell Center on the Death Penalty Worldwide, *Representing Individuals Facing the Death Penalty: A Best Practices Manual* (1 June 2017) available at: <https://deathpenaltyworldwide.org/publication/representing-individuals-facing-the-death-penalty-a-best-practices-manual/>.

³³ The Rights Practice. “Life and Death: Access to Justice for the Poor in Death Penalty Cases”. December 2017. <https://www.rightspractice.org/Handlers/Download.ashx?IDMF=4c39c7ea-7761-4744-a6ad-cee845bfd81a>

³⁴ PASI and Cornell Law School, *Malawian Traditional Leaders’ Perspectives on Capital Punishment: A targeted survey of traditional leaders affected by the Malawi Capital Resentencing Project*, (2017), available at: <https://reprieve.org.uk/wp-content/uploads/2018/04/Malawian-Traditional-Leaders-Perspectives-on-Capital-Punishment.pdf>.

³⁵ See Death Penalty Information Center, *Abolitionist and Retentionist Countries*, <https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries> (information accurate as of December 2020).

³⁶ See African Commission on Human and Peoples’ Rights, *Launch of the Document on the Study of the Death Penalty in Africa* (19 April 2012) available at: <https://www.achpr.org/news/viewdetail?id=165>; Caleb Okereke, *The Death Penalty Isn’t African. It’s a Legacy of Colonialism*, *Foreign Policy* (11 November 2021) available at:

As noted by the Zambia Law Development Commission, the PC was enacted in 1931 and the CPC was enacted in 1933 (to facilitate the application of the PC).³⁷ The PC and the CPC were enacted by the colonial government.³⁸ Further, neither the PC nor the CPC have been comprehensively reviewed since they were enacted.³⁹ There is a need for Zambia to enact laws “born out of, and reflective of the social and political values of the Zambian people”.⁴⁰

Some southern African countries are also beginning to reject the death penalty not just as a colonial relic, but as anathema to traditional African values of community, dignity, and rehabilitation. This is best exemplified by the related concepts of Ubuntu/Umunthu. In South Africa and Malawi criminal justice system actors have recognised the death penalty as contrary to the humanity and mutual care at the heart of these philosophies.⁴¹ As the Constitutional Court of South Africa noted in its landmark decision abolishing the death penalty, “To be consistent with the value of ubuntu, ours should be a society that wishes to prevent crime, ...[not] to kill criminals simply to get even with them.”⁴²

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<https://foreignpolicy.com/2021/11/11/the-death-penalty-isnt-african-its-a-legacy-of-colonialism/>; Dior Kante, *For African Nations, Capital Punishment is a Grim Colonial Legacy That Lingers On*, The Guardian (10 October 2021) available at: <https://www.theguardian.com/global-development/2021/oct/10/african-nations-capital-punishment-colonial-legacy-racism>.

³⁷ Zambia Law Development Commission, Review of the Penal Code Act, Chapter 87 of the Laws of Zambia and the Criminal Procedure Code ACT, Chapter 88 of the Laws of Zambia, p.9.

³⁸ Id.

³⁹ Id.

⁴⁰ Id.

⁴¹ In South Africa, the landmark Supreme Court decision of *S v. Makwanyane* cited Ubuntu as a reason for abolishing the death penalty. Ubuntu is a southern African concept centering community, life, and human dignity in a society. The Constitutional Court in *Maywanyane* said: “To be consistent with the value of *ubuntu* ours should be a society that ‘wishes to prevent crime [not] kill criminals simply to get even with them.’” *The State v T Makwanyane and M Mchunu*, CCT/3/94 (Constitutional Court of South Africa, 1995) para 131. Relatedly, in Malawi, the concept of Umunthu is increasingly central to public policy around punishment and incarceration. Umunthu is the capacity to express compassion, reciprocity, dignity, and humanity in the interests of building and maintaining caring and just communities. See Tutu, D, “No future without forgiveness”, New York: Doubleday.

⁴² *The State v T Makwanyane and M Mchunu*, CCT/3/94 (Constitutional Court of South Africa, 1995) para 131.