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APPENDIX: The case of Lubuto v. Zambia, UN Human Rights Committee 1995

ZAMBIA

Time to abolish the death penalty

1. Introduction

The death penalty is a violation of the most fundamental of human rights: the right to life. The evidence in support of abolition of the death penalty becomes more compelling with each passing year. Everywhere experience shows that executions brutalize those involved in the process. Nowhere has it been shown that the death penalty has resulted in a reduction in crime. The death penalty is used disproportionately against the poor. It is often used as a tool of political repression, and is imposed and inflicted arbitrarily. It is an irrevocable punishment which frequently involves the execution of people innocent of any crime.

Zambia is a country where the right to life is enshrined in the constitution. Nevertheless, the death penalty remains in force. Amnesty International has been campaigning for the abolition of the death penalty in Zambia for many years. This report aims at focusing attention on the country's use of the death penalty, particularly as Zambia does not apply international standards for fair trials in its use of the death penalty.

There has been public debate on the death penalty in Zambia for several years. Already in 1994, the Government was considering whether Zambia should become a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), abolishing the death penalty. However, it decided to carry out a large-scale consultation process prior to the final decision. As a result of that process, the government concluded that the death penalty should be retained, due to public concern over the rising rate of crime. The Constitutional Review Commission reported in 1995 and concluded that the death penalty should remain.¹

Since then a number of non-governmental organizations have undertaken public awareness programs, the most recent one being a campaign by the Catholic Commission for Justice and Peace (CCJP) during 1999-2000. This culminated in a conference in September 2000, where the then Minister of Justice expressed his desire to abolish the death penalty as soon as the public would accept it.

There have been important steps towards abolition across Southern Africa in recent years. Angola, Mauritius, Mozambique, Namibia, Seychelles and South Africa have all abolished the death penalty. In addition the President of Malawi has given an undertaking not to authorize any executions as long as he is in office.

¹ John Hatchard and Simon Coldham, "Commonwealth Africa", in *Capital Punishment, Global Issues and Prospects*, Waterside Press, 1996, page 160.

Although Amnesty International welcomes the fact that there has not been a high rate of executions in recent years and that no executions have taken place since 1997, the organization is concerned that use of the death penalty has been extended and that 59 death penalties were imposed in 1999 following a treason trial in which there were serious allegations of torture and unlawful detention.

This report is meant as a tool to help raise the level of awareness around the death penalty in Zambia, and to contribute to the campaigns by CCJP and others to inform the public debate. Amnesty International believes that it is now time to move beyond debate and take steps to abolish the death penalty. This report shows where Zambia is in breach of international human rights law and gives recommendations on the way towards the final aim for any truly humane society: the abolition of the death penalty and the commutation of all death sentences.

2. The Zambian Legal System

2.1 The law

Zambia has a common law legal system, derived from the law of England and Wales, due to its colonial history under British rule. Much of the law has been codified over the past decades and is published in the "Laws of Zambia". However, where Zambian law is silent on a particular issue, the current law of England and Wales applies. Similarly, when arguing a legal point, decisions of United Kingdom (UK) and other common law courts are influential in the Zambian courts. In the Supreme Court, when dealing with criminal matters, law and procedure accord closely with the law and practice observed in the Court of Criminal Appeal in England. In civil cases, the English rules of procedure apply.

2.2 The judiciary

At the top of the court system is the Supreme Court, which consists of nine judges. Under Article 93 of the Constitution, they are appointed by the President, subject to ratification by the National Assembly. They have security of tenure until the retirement age of 65. Judges may only be removed for inability to perform the functions of office "arising from infirmity of body or mind, incompetence or misbehavior", following a recommendation from a tribunal appointed by the President (Constitution of Zambia, Article 98 (2)). Below the Supreme Court is the High Court, which has 25 judges. This court deals with the larger civil disputes, serious criminal trials including capital trials, and appeals from the lower courts. The lower courts are presided over by a single magistrate, who is either a qualified lawyer or a layperson. They deal with the vast majority of criminal cases, and also act as juvenile courts. There are currently only 23 magistrates in Zambia to cover the 72 magistrate positions across the country.² In addition there are a number of local

² The Chief Administrator of the Courts, 16 February 2001, interview with Amnesty International.

courts, which can impose punishments of up to two years' imprisonment but where the Justice is not required to be a qualified lawyer.

2.3 The legal profession

Legal training is undertaken either at the University of Zambia in Lusaka or abroad. As of May 2001, there were 462 lawyers in private practice who possess practicing certificates registered with the Law Association of Zambia, the professional body. It is widely reported that there is a shortage of lawyers in Zambia. The pay rates in several neighbouring countries are higher, and it is easy for qualified Zambian lawyers to practise in those countries. Consequently, some emigrate after a few years.

Professional education is provided at the Zambian Institute of Advanced Legal Education. The Law Association of Zambia is currently attempting to introduce a professional requirement for all lawyers to undertake at least five cases every year for no fee (*pro bono*), or for a very reduced fee. The proposal is that four cases, civil or criminal, should be undertaken for a fee of 400,000 Kwacha (less than £100) and a fifth for no fee at all.

There are approximately 40 lawyers who work for the government as legal advisers. There are also 23 lawyers who appear on behalf of the government as state advocates in the High Court.

For indigent defendants, representation is provided by the Department of Legal Aid, which in February 2001 employed only 10 lawyers to cover the whole country. They are responsible for defending virtually all the cases in the High Court. That includes all cases of murder, treason and armed robbery, all of which carry the death penalty, as well as other cases such as manslaughter and rape that are not punishable by death. There are 12 two-week sessions of the High Court each year, and there are between 20 and 30 cases heard in each session in Lusaka, as well as cases in at least nine other towns. Each of the Legal Aid lawyers covers up to 50 cases. More than 40 Legal Aid lawyers are estimated to be required in order to provide adequate representation to all defendants requiring free assistance.³

³ The Chief Administrator of the Courts, 16 February 2001, interview with Amnesty International.

The Legal Aid lawyers are civil servants, directly employed by the government, not private lawyers, getting paid for taking cases where legal aid is required. Many of them will return to work in other areas of government legal work. It appears that working in the Legal Aid department is considered a very low status appointment. This could potentially have an impact on their independence and their ability to defend their clients fearlessly.⁴ The Legal Aid Act 2001 makes provision for private lawyers to be paid on a case-by-case basis for undertaking criminal cases. As yet, it is not clear whether this new system will ensure adequate legal representation for defendants in capital cases.

There is also a shortage of legal literature. It takes several years for the *Zambian Law Reports* to be printed, and they are not widely available. Many lawyers are forced to rely on out-of-date copies of English legal textbooks for use in the High Court. Representatives of Amnesty International visiting Zambia in February 2001 observed lawyers using reference books some 10 years out of date.

3. Scope of the death penalty

3.1 Use of the death penalty in Zambia

Between independence in 1964 and 1978, 406 people were sentenced to death and 34 were executed.⁵ To Amnesty International's knowledge some 140 prisoners remained on death row in the 1980s. On 27 December 1985 11 prisoners were hanged, and at least 18 were hanged in 1989.⁶ There were no further executions until 1997 when eight people were executed.⁷ Between 1998 and 2000, at least 97 people were sentenced to death -- at least 20 in 1998, 66 in 1999 and 11 in 2000. They included 59 who were convicted of treason following an attempted coup in 1997 (see point 4.2.1 below for information about Amnesty International's particular concerns in this case).⁸ When Amnesty International

⁴ All lawyers are required to abide by the UN Basic Principles on the Role of Lawyers, regardless of their term of employment.

⁵ Kalombo Mwansa, "Aggravated Robbery and the Death Penalty in Zambia: an Examination of the 1974 Penal Code Amendment Act (No.2)", *Zambia Law Journal*, 1984, page 73.

⁶ Amnesty International, "When the State Kills: The Death Penalty v. Human Rights", London, 1989, page 237. Amnesty International Reports 1986 and 1990.

⁷ Amnesty International Report 1998, London 1998, page 364.

⁸ Amnesty International Reports 1999 to 2001.

representatives visited Zambia in February 2001, there were more than 200 prisoners on death row.⁹

Under section 201 of the Penal Code, the sentence for murder is death. However, following an amendment in 1990, section 201(1)(b) states that the death penalty need not be imposed where there are "extenuating circumstances". This is defined in section 201(2) as being "any fact associated with the offence which would diminish morally the degree of the convicted person's guilt" considering the "standard of behaviour of an ordinary person of a class of the community to which the convicted person belongs".

⁹ The delegation had some difficulty in establishing the exact number of people on death row. The Chief Administrator of the Courts stated that the total was 209, but prison authorities informed a local NGO that as of 29 March 2001 the figure was 263.

The courts have found "extenuating circumstances" in a number of different cases. These have included the fact that the deceased started a fight,¹⁰ the fact that the accused was only 23 years old and had got into a fight¹¹ and the fact that the murder occurred in circumstances where general drunkenness was prevailing.¹² Automatism, self-defence, infancy, necessity, provocation or witchcraft could amount to extenuating circumstances, apart from being defences to murder. It appears that while the courts have some freedom to consider the individual that is being sentenced, there does not appear to be any defined system in which to decide whether such extenuating circumstances exist or not; in all the above cases the sentence was reduced on appeal, not by the trial court. Consequently, it would appear that the use of the death penalty for murder is conducted in an extremely arbitrary fashion, where it is difficult to ascertain which defendant will receive which sentence, who will live and who will die.

However, the Courts have no such latitude in cases of treason or armed robbery. Under section 43(1) of the Penal Code, Chapter 87, Laws of Zambia, the only possible sentence on a conviction for treason is the death penalty. Similarly, the sentence for aggravated robbery while armed with a firearm is also death under section 294 of the Penal Code. Formerly, the penalty applied for aggravated robbery was imprisonment, where the convicted prisoner had to serve not less than 15 years. Following concern over the frequency of armed robberies, the Penal Code was amended in 1974 to provide for a mandatory death penalty for aggravated robbery with a firearm.¹³

In Zambia an increase in crime is used as the justification for extending the use of the death penalty. However, international studies have consistently failed to show that use of the death penalty leads to any significant reduction in serious crimes. Professor Roger Hood, an expert on the death penalty, has examined the various studies that have been made as to its deterrent effect. He concludes that:

¹⁰ *The People v Bunda, Mumba & Kamwata*, High Court, 29th January 1992, [1990-92] Zambia Law Reports (Z.R.) 194.

¹¹ *Mwandama v The People*, Supreme Court, 9th May 1996, [1995-97] Z.R. 133.

¹² *Bwalya v The People*, Supreme Court, 7th May 1996, [1995-97] Z.R. 168.

¹³ Section 294(2) of the Penal Code.

"Research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment and such proof is unlikely to be forthcoming. The evidence as a whole still gives no positive support to the deterrent hypothesis..."¹⁴

Deterrence can never be used to justify the state's taking the life of an individual. Amnesty International believes there is no justification for the use of the death penalty, but the organization is particularly concerned that this justification is still used by the Zambian government since it contributes to the public belief that the death penalty is deterring crime.

3.2 New legislation to further extend the use of the death penalty

A new law was recently presented to Parliament which, if enacted, would extend the use of the death penalty: the State Security (Amendment) Bill of 1999 makes large-scale demonstrations near government buildings potentially "treasonous" acts, and may consequently make participation in such a demonstration a capital offence. This bill therefore considerably extends the definition of treason, for which the death penalty is mandatory.

Section 4 of the bill states:

"(1) A person commits treason and shall be liable to death upon conviction if that person...

(b) prepares or endeavours to procure by force any alteration of the law or the policies of the Government."

"By force" is given further definition in section 4(2):

"(a) force used in such a manner as, whether by reason of the number of persons involved or the means used or both, to endanger or be likely to endanger the safety of the state or to cause death or grievous harm or serious damage to property; or

(b) a show of force calculated to arouse reasonable apprehension that force will be used in such a manner as is described in paragraph (a)."

¹⁴ Roger Hood, *The Death Penalty, A World-Wide Perspective*, Clarendon Press, Oxford, 1996. Para. 328.

The definition of "by force" has been drafted exceptionally broadly, such that if a policeman is of the opinion that there is a "reasonable apprehension" that, "by reason of the number of persons involved," there might be "serious damage to property," the demonstrators could be detained without charge or trial for long periods of time on suspicion of treason.

Section 24(6) states that if a police officer of the rank of Sub-Inspector or above states in oral evidence that *in his opinion* a person has committed the above offence, that opinion is admissible as evidence of the matter stated.

Anyone suspected of treason may be arrested under section 8 of the bill and detained without charge for a period of 14 days, which may be extended by further 14-day periods without a formal court hearing. Such a lack of judicial control over police detention would be a clear breach of international law, and allow opportunities for torture or ill-treatment of detainees.

The bill was withdrawn by the government after its second reading in parliament, but there is still concern that it may be reintroduced. An extension of the use of the death penalty would be of particular concern in the lead-up to a general election, due before mid-November 2001. This law, if enacted, could potentially be used to detain those involved in demonstrations without charge or trial for substantial periods of time, and threatens them with the death penalty. This could have an impact on freedom of expression and assembly during the general election campaigning.

3.2.1 International standards on the scope of the death penalty

Extending the scope of the death penalty is in breach of international standards. Since 1984, Zambia has been a party to the International Covenant on Civil and Political Rights (ICCPR).

Article 6 of the ICCPR states that:

- (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
- (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime...

The ICCPR's monitoring body, the UN Human Rights Committee, has issued a number of "general comments" on the interpretation of the Covenant. In interpreting the provision of Article 6, the Committee has stated that:

- "(1) The right to life enunciated in Article 6 of the Covenant has been dealt with in all State reports. It is the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation... It is a right which should not be interpreted narrowly...
- (6) While it follows from Article 6(2) to (6) that States parties are not obliged to abolish the death penalty totally, they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes". Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the "most serious crimes". The article also refers generally to abolition in terms which strongly suggest that abolition is desirable. ..
- (7) The Committee is of the opinion that the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure. ..."¹⁵

Further guidance is given by various bodies within the United Nations (UN). In 1984, the UN Economic and Social Council (ECOSOC) adopted nine safeguards with regard to the implementation of the death penalty, the Safeguards guaranteeing the rights of those facing the death penalty. These Safeguards were subsequently adopted by the UN General Assembly.¹⁶

The first Safeguard states that:

"In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences."

¹⁵ *General Comment 6(16)*, UN Doc CCPR/C/21/Add.1, UN Doc A/37/40, Annex V, UN Doc CCPR/3/Add.1.

¹⁶ ECOSOC Res. 1984/50, annex. GA Res. 29/118, 1984.

Consequently, the extension of the death penalty in the State Security (Amendment) Bill to encompass non-violent demonstrations as treasonous acts will be a violation of international human rights standards which restrict the use of the death penalty to the "most serious crimes".

In addition, the proposed introduction of such a law a few months prior to a general election has potentially serious consequences for other human rights issues, such as freedom of expression and freedom of assembly.

3.3 The mandatory death penalty

In Zambia the death penalty is mandatory for treason and armed aggravated robbery, and there is a presumption in favour of the death penalty for murder, with limited judicial discretion to give a lesser sentence.

International law suggests that the imposition of a mandatory death penalty is forbidden. Article 6(1) of the ICCPR states that "No one shall be arbitrarily deprived of his life". If the judge is not able to consider the circumstances of the accused and his personal mitigation in deciding whether or not to impose the death penalty or a life sentence, the decision is clearly arbitrary, because, as Article 6(2) requires the death penalty only to be imposed for the "most serious crimes", there must be some discretion for a judge to decide whether each individual case can truly be considered to be "the most serious".

Zambia has signed and ratified the first Optional Protocol to the ICCPR, which gives individuals the right of application to the UN Human Rights Committee.

In the case of *Lubuto v Zambia*, the UN Human Rights Committee was asked to consider a complaint with regard to the fact that the death penalty was the mandatory punishment for armed aggravated robbery, that is, a robbery where the defendant was in possession of a firearm. The Committee found Zambia in violation of the ICCPR in 1995, stating that:

*"Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2, of the ICCPR."*¹⁷

¹⁷ The complete UN Human Rights Committee's findings are attached to this document as an

Under the obligations which Zambia accepted by becoming a party to the First Optional Protocol to the ICCPR, the government should take appropriate measures to ensure that similar violations do not occur in the future.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has reported on the proper standards required by international law in death penalty cases. Included in those recommendations is the requirement that "all mitigating factors must be taken into account."¹⁸

appendix.

¹⁸ Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Document No. E/CN.4/1997/60, 24 December 1996, paragraph 81.

Other common law jurisdictions also prohibit the mandatory death penalty. In India, the Supreme Court has given guidelines to judges to assist them in deciding which cases are appropriate for the use of the death penalty and which are not. These include a presumption in favour of life imprisonment and imposing the death penalty only where there are "special reasons" for doing so. These would include the offence being especially depraved or heinous or the offender being a source of grave danger to society at large.¹⁹

Even in the United States of America, the use of a *mandatory* death penalty is prohibited in law. The concern was that such a sentence was arbitrary, in that it did not allow for the individual circumstances of the offender to be considered, and was therefore unconstitutional.²⁰

In April 2001, the Eastern Caribbean Court of Appeal held that the mandatory nature of the death penalty was an arbitrary deprivation of the right to life, not allowing any rational connection between the offender and the offence, and not allowing any consideration of individual mitigation.²¹

Consequently, the mandatory nature of the death penalty as prescribed in Sections 43 and 294 is in breach of Zambia's commitments under international law.

In addition, the use of the death penalty for offences where there has been no death, or even an injury, violates the restriction of the death penalty to the "most serious crimes" as required in international law.

4. Fair trial concerns

4.1 Fair trial standards under *Zambian law*

Amnesty International is concerned that the lack of proper legal representation during trial and appeal constitutes a major breach of national and international law.

In any trial, it is important to ensure that legal proceedings conform to international standards. Without this, there is a risk that innocent people may be

¹⁹ *Bachan Singh v. State of Punjab* (1980) 2 S.C.C.475.

²⁰ *Lockett v. Ohio*, U.S. 586 (1978).

²¹ *Spence and Hughes v The Queen*, ECCA, 2 April 2001.

wrongly convicted. In death penalty cases, this is clearly of fundamental importance, as the punishment is irrevocable and therefore final. Furthermore, where there are only limited grounds of appeal, normally on points of law only -- rather than an appeal on the basis of the law and the evidence -- it is very difficult to correct mistakes.

Under the Constitution of Zambia, there is no absolute right to be represented by a lawyer.

Under Part III of the Constitution dealing with "Protection of Fundamental Rights and Freedoms of the Individual" the guarantees are outlined as follows:

"Article 18. Provisions to Secure Protection of Law.

(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Everyone who is charged with a criminal offence - ...

(c) shall be given adequate time and facilities for the preparation of his defence;

(d) shall unless legal aid is granted him in accordance with the law enacted by Parliament for such purpose be permitted to defend himself before the court in person, or at his own expense, by a legal representative of his own choice".

Under the Legal Aid Act, provision is made for those accused of crimes in the High Court, which includes all capital offences, to be provided with a Legal Aid lawyer. However, the system suffers from serious deficiencies as described in section 2.3 below.

4.1.1 Fair trial standards in international law

Article 14 of the ICCPR requires minimum standards of legal representation, including time to prepare a defence and to have free legal assistance where it is required in the interests of justice. The UN Human Rights Committee has held in a number of cases that defendants have an absolute right to *effective* counsel, which must mean legally aided counsel if so required.²²

²² *Robinson v. Jamaica*, UNHRC Communication no. 223/1987, decided 30 March 1989.

In death penalty cases, the requirements are, not surprisingly, more strict. Article 5 of the ECOSOC Safeguards guaranteeing protection of the rights of those facing the death penalty states:

"Capital Punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the ICCPR, including the right of anyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."

In a further resolution ECOSOC has stated that an accused facing the death penalty should be provided with "adequate assistance of counsel at every stage of the proceedings, above and beyond the protection afforded in non-capital cases."²³

To have only 10 lawyers defending all the serious crimes in the whole country when at least 40 are required means that the system of representation by the Legal Aid department is institutionally inadequate. The damaging effect that this has on the Zambian legal system is compounded by the use of torture and also the failures of the appeal procedure (see below).

4.2 The use of evidence obtained by torture

The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) of 1984 was signed and ratified by Zambia in 1998, as meaning:

*"Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."*²⁴

²³ ECOSOC Resolution 1989/64, 24 May 1989, UN Doc: E/1989/INF/7, at 128.

²⁴ Article 1, Convention against Torture.

Article 15 of the Zambian Constitution states that *"No person shall be subjected to torture, or to inhuman or degrading punishment or other like treatment."*

International human rights law and standards state that evidence obtained in breach of the prohibition against torture should not subsequently be used in evidence. The UN Human Rights Committee has interpreted Article 14(3)(g) of the ICCPR -- the right not to be compelled to testify against oneself or to confess guilt -- in the following way:

*"[It] must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to Article 7 of the Covenant in order to extract a confession."*²⁵

Also, Article 15 of the Convention against Torture states:

"Any statement which is established to have been made as a result of torture or other cruel, inhuman or degrading treatment or punishment may not be invoked as evidence against the person concerned or against any other person in any proceedings."

The equivalent obligation under Article 7 of the ICCPR has been interpreted by the UN Human Rights Committee as meaning that *"the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment."*²⁶

Regional human rights treaties uphold the same standards. The European Commission of Human Rights has made it clear that evidence obtained by maltreatment cannot be used in criminal proceedings, as it would amount to a breach of the fundamental human rights of the defendant to admit confessions obtained by torture or ill-treatment.²⁷

²⁵ Kelly v Jamaica, (253/1987), 8th April 1991, Report of the HRC, (A/46/40) 1991.

²⁶ UN Human Rights Committee General Comment 20, para. 12.

²⁷ Austria v. Italy, (19AFR 63) 6 Yearbook 740.

4.2.1 The 1997 Coup attempt

The use of torture in the *Zambian* legal process has been officially recognised in a report by the *Commission of Inquiry into the allegations of torture, abuse and violation of human rights on the persons suspected of involvement in the attempted coup of 28th October 1997*, led by High Court Judge Mr Justice Japhet Banda. This report arose out of the arrest, detention and trial of 104 men following an attempted coup in Zambia on 28 October 1997. A total of 59 were convicted and sentenced to death. Following allegations of torture made in court during the trial, the government set up the Commission of Inquiry. It heard evidence from 84 of the 104 original detainees, as well as 36 police officers, 10 prison officers and eight medical doctors. In its report the Commission concluded that torture had been used against suspects, in the form of beatings, burning, electric shocks, enforced painful postures, sexual harassment and suffocation. There was also mental torture, taking the form of simulated execution, solitary confinement, degradation, insults, threats and witnessing torture.

The Commission found a pattern of torture which was linked to demands to confess and which continued until an incriminating statement was signed, normally written by the investigating officers. The Commission concluded that the torture was so severe that it "destroyed the dignity and impaired the capability of the victims to continue with their normal lives and activities." Importantly, the Commission also found that "the victims were both physically and mentally affected to the extent that they had no choice but to make incriminating statements."

The 59 men are currently being held on death row.

These men have not been convicted of any offence which caused the death or injury of another, and consequently international standards would prohibit the use of the death penalty against them. Furthermore, it appears that their confessions were forced by torture and other ill-treatment, and the evidence was subsequently used against them in their trials. To execute these men would be a violation of international law. Therefore their sentences should be commuted and a retrial held without evidence tainted by torture.

5. Appeal and Clemency Procedures

5.1 Appeal to the Supreme Court

Anyone who is convicted of a capital offence has under Zambian law a right to appeal to the Supreme Court of Zambia.²⁸ Under Zambian Law, there is further an automatic stay of execution whilst any appeals are outstanding.²⁹

The requirement in international standards is for a mandatory appeal. Article 6 of the ECOSOC Safeguards guaranteeing protection of the rights of those facing the death penalty states:

"Anyone sentenced to death has the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory."

Amnesty International therefore urges the Government of Zambia to take steps to ensure that there is an automatic right to appeal to the Supreme Court in cases where a person has been sentenced to death.

5.2 Clemency procedures

Under Article 59 of the Zambian Constitution, the President has the prerogative to pardon a convicted person or to reduce the sentence in any way. Article 60 provides for an Advisory Committee, set up by the President, whose members he appoints. The procedure followed is different for capital and non-capital offences. For capital crimes, Section 305 of the Criminal Procedure Code lays down the procedure as follows:

²⁸ Section 22, The Supreme Court Rules, Chapter 25, Laws of Zambia.

²⁹ Section 18(1)(a) Supreme Court of Zambia Act.

- If no appeal is pending, the presiding Judge must forward as soon as convenient notes of evidence taken on trial with a report in writing signed by him containing any recommendations or observations on the case that he thinks fit.³⁰
- The President must receive the advice of the Advisory Committee on the Prerogative of Mercy regarding each case where a convicted person is seeking clemency.³¹
- The President must communicate his decision to the presiding Judge or his successor in office. The Judge shall cause the tenor and substance thereof to be entered in the records of the Court. If clemency is declined, the president shall issue a death warrant.³²
- If otherwise, he must under his hand and the seal of the Republic so state.³³

This prerogative power is discretionary and therefore liable to abuse unless international standards regarding fair trial are respected. There is no special hearing held by the Advisory Committee to enable the claimant for clemency to state his case with the aid of lawyers. In the case of *Lubuto v Zambia* before the UN Human Rights Committee, the Zambian government argued that any unfairness in the earlier proceedings could be cured by the fact that every prisoner under sentence of death was able to appeal to the President for mercy. This procedure is clearly inadequate for remedying any defects at trial.

³⁰ Criminal Procedure Code, Section 305(1).

³¹ Criminal Procedure Code, Section 305(3).

³² Criminal Procedure Code, Section 305(4).

³³ Criminal Procedure Code, Section 305(4).

Recently, the clemency procedure in Jamaica and other Caribbean common law countries was considered by the Judicial Committee of the Privy Council sitting in London.³⁴ The system in Jamaica is similar to that in Zambia, requiring the Governor-General to act on the advice of a committee (in this case, the Jamaican Privy Council) after having received a report from the judge. There is no active part played by the defendant in the process. The Privy Council in London concluded that this system was not fair, and that the exercise of a prerogative could be challenged as could any other part of the legal process: *"The act of clemency is to be seen as part of the whole constitutional process of conviction, sentence and the carrying out of the sentence"*. They went on to say: *"The importance of the consideration of a petition for mercy being conducted in a fair and proper way is underlined by the fact that the penalty is automatic in capital cases. The sentencing judge has no discretion, whereas the circumstances in which murders are committed vary greatly."*

The Privy Council in London concluded that *"the state's obligation internationally is a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review."*

Amnesty International is concerned that for many prisoners on death row in Zambia, the clemency procedure provides the only opportunity for any consideration of their individual circumstances and is clearly inadequate. Such an important decision should be made with the full fair trial guarantees of the ICCPR, rather than in secret and with no right to a proper hearing. Consequently, the clemency procedure should be modified so as to allow for a full and impartial consideration of each petitioner's case, reviewable in the courts.

6. Detention on death row

6.1 Prison conditions on death row

Prisoners under sentence of death -- "condemned prisoners" -- are detained at the Mukobeko maximum security prison near Kabwe, 100 km north of the capital, Lusaka. The "condemned section" of the prison was originally built to house 48 prisoners. There are now more than 200 in the same cells.

³⁴ *Lewis v Attorney-General of Jamaica, PC*, [2000] 3 W.L.R. 1785. (The Privy Council is the final court of appeal for many Caribbean and Commonwealth countries).

The cells are arranged on either side of a yard, with 24 cells on two levels on either side. The cells are approximately three metres by two metres in size. Some of them hold six people. The prisoners are locked in their cells between 4.00 pm and 6.30 am. There are reports of a number of cases of tuberculosis, as well as other diseases, within the prison. There is virtually no access to medical care. The prisoners all wear a form of prison uniform, which in some cases consists of rags of material crudely stitched together.

International law prohibits torture, and requires proper conditions of detention. Article 10 of the ICCPR states that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." This has been interpreted by the UN Human Rights Committee as encompassing *inter alia* the duty to provide adequate medical care, basic sanitary facilities, adequate food and recreational facilities for people held under sentence of death.³⁵

In particular, international law provides for the right of access to medical treatment for those in custody under Principle 24 of the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment adopted by the UN General Assembly in 1988, which states that:

"A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."

The UN Human Rights Committee has stated that this means that detained persons be given prompt and regular access to doctors.³⁶

The Zambia Permanent Human Rights Commission, an independent commission set up by Government of Zambia Act 39 of 1996, has been critical of the conditions in prisons. In 1997, in finding breaches of international human rights standards in prison conditions in Zambia, the Commission concluded that:

³⁵ *Kelly v. Jamaica*, (253/1987) 8 April 1991, Report of the HRC, UN Doc: A/46/40, 1991, at 241; *Henry and Douglas v. Jamaica*, (571/1994), 25 July 1996, UN Doc: CCPR/C/37/D/571/1994 at para 3.8; *Linton v Jamaica*, (255/1987), 22 October 1992, Report of the HRC, UN Doc: A/48/40, 1993.

³⁶ UN Human Rights Committee, General Comment 20, para. 11.

*"The deplorable condition in which our prisons are is no longer news. Almost all are not fit for human habitation. Many other people have said so before the Human Rights Commission."*³⁷

6.2 Delay on death row

Some prisoners are detained on death row for many years. Amnesty International has heard reports of prisoners in Zambia who have been under sentence of death for over 25 years, and it appears that there are at least 30 who have waited between eight and 25 years.

The problem of delay on death row has concerned many international courts. It has long been considered that to hold someone under threat of execution for a long period of time is inherently cruel, inhuman, or degrading. This has become known as "the death row phenomenon".

In the case of *Pratt and Morgan v Attorney-General for Jamaica*, [1994] 2 A.C. 1, the Judicial Committee of the Privy Council held that holding a convicted prisoner on death row for 14 years amounted to inhuman or degrading punishment in violation of Section 17(1) of the Constitution of Jamaica.

It concluded that: "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'."

³⁷ Statement of the Permanent Human Rights Commission, Press Conference, Hotel Intercontinental, Lusaka, 1st December 1997. Annual Report 1997, page 77.

Other common law jurisdictions have decided that delays measured in years are not acceptable. The Supreme Court of Zimbabwe ruled that being held for between four and six years under sentence of death constituted "inhuman or degrading punishment."³⁸

The Constitutional Court of South Africa found in *Makwanyane and Mchunu v. The State* that the death penalty was unconstitutional, and that the "death row phenomenon" was part of the problem which caused them to come to that decision.³⁹

Recently, the Supreme Court of Canada has decided that it is not permissible to extradite someone to the United States without an assurance from the US that the death penalty will not be sought. One of the reasons is the "death row phenomenon", together with fear of executing the innocent, which would mean that to extradite them without assurances would be a breach of the Canadian Charter of Fundamental Rights.⁴⁰

³⁸ *Catholic Commission for Justice & Peace in Zimbabwe v. Attorney-General*, 14 Hum.Rts.L.J. 323 (1993).

³⁹ (1995) 16 HRLJ 154.

⁴⁰ *United States v. Burns*, 2001 SCC 7.

The European Court of Human Rights considered the same issue in 1989 in the case of *Soering v. UK*. Soering was due to be extradited for murder to West Virginia, where there was the possibility that he would face the death penalty, with an average wait of seven to eight years on death row. The judgement in the case of *Soering* held that such treatment was in violation of the prohibition of cruel and degrading punishment in Article 3 of the European Convention of Human Rights.⁴¹

Such a wealth of jurisprudence from international human rights law and other common law jurisdictions considering the same issues which are relevant in Zambia is obviously of great persuasive significance for the Zambian Courts. Consequently, the government should immediately commute the sentences in those cases where people have been detained on death row for more than five years.

7. The constitutionality of the death penalty

In a case currently before the High Court of Zambia, the death penalty is being challenged on the grounds that it is unconstitutional. The appeal is made by two men, Benjamin Banda and Cephas Kufa Miti, who were charged with aggravated robbery on 2 February 1998. It was alleged that on 12 December 1996, they robbed a man in Lusaka whilst armed. The victim of the robbery attempt chased the two men and shots were fired between them. Consequently, they were found guilty of aggravated robbery and sentenced to death on 13 October 1999.

The two men have petitioned to the High Court of Zambia to reverse their death sentences on the basis that to execute them would be unconstitutional and in breach of international standards on the following grounds:

- Hanging the appellants would be a breach of Article 15 of the Convention against Torture which prohibits cruel, inhuman or degrading punishment.
- The delay which is likely to occur while they remain condemned is also a breach of Article 15.
- The death penalty is in violation of the preamble to the Constitution which declares Zambia a Christian nation.

The other arguments, which were advanced in the appeal, derive from the right to life combined with international law and jurisprudence:

⁴¹ Series A, No. 161; (1989) 11 EHRR 439.

- The sentence is disproportionate as they were not convicted of homicide.
- The arbitrary nature of the mandatory death penalty for aggravated robbery.
- The death penalty itself is no longer acceptable in a civilised society.
- The death penalty is prohibited by various international treaties.

The High Court heard oral arguments from the petitioners in December 2000. The State was not ready to respond to the argument on that occasion, and the case was adjourned. The Attorney-General responded on 5 March 2001, when he stated that Zambia had deliberately chosen not to accede to international treaties abolishing the death penalty, and therefore it was permissible according to the Constitution. He described the petition as "premature" and "incompetent". The Court has yet to come to a judgment, but it is expected that the matter will go to the Supreme Court of Zambia on appeal.

8. Recommendations

Amnesty International opposes the death penalty in all circumstances as being the ultimate violation of the right to life established in international law.

Amnesty International's main recommendations therefore are the commutation of all death sentences and full abolition of the death penalty in law and practice.

However, until such time as the death penalty is abolished, Amnesty International makes a number of recommendations, short of abolition, to the Zambian government to:

- Declare an immediate moratorium on the death penalty, for Zambia to be in accordance with international and regional trends towards abolition of the death penalty;
- Revoke statutes which enlarge the scope of the death penalty. In particular, not to seek the death penalty for anyone charged under the 1999 State Security (Amendment) Bill, if it is enacted into law;
- Change the law to abolish the mandatory death penalty to allow for individualised sentencing for each defendant;
- Commute all death sentences of those convicted under the mandatory death sentence;

- Provide adequate and effective legal representation, if necessary without charge, for all those accused of capital offences at both the trial and appellate stage, and in any clemency procedure;
- Commute the death sentences of all those on death row convicted using evidence obtained under torture, including the 59 convicted after the 1997 coup attempt. For this trial and every other trial, where all or part of the evidence introduced at the original trial was obtained through torture, there should be retrials;
- Address the conclusions of the report of the Commission of Inquiry led by High Court Judge Mr Justice Banda into the allegations of torture of people suspected of involvement in the 1997 coup attempt, when presenting the government's first report to the UN Committee on Torture in November 2001;
- Provide an open clemency process with the right for the condemned to make representations with legal assistance and the right to challenge the presidential prerogative of clemency in the courts in all cases involving the death penalty;
- Provide adequate and regular medical attention for prisoners on death row.

With regards to the international community Amnesty International recommends:

- that the UN Human Rights Committee investigates the continued failure of Zambia to implement the decisions of the Committee and the ongoing violations of the ICCPR;
- assistance be provided with the training of lawyers and magistrates and other measures required to strengthen the administration of justice.

APPENDIX TO: ZAMBIA - Time to abolish the death penalty (AI Index: AFR 63/004/2001)

Lubuto v. Zambia, Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995). **Submitted by:** Bernard Lubuto

Victim: The author

State party: Zambia

Date of communication: 1 January 1990 (initial submission)

Date of decision on admissibility: 30 June 1994

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 31 October 1995,

Having concluded its consideration of communication No. 390/1990, submitted to the Human Rights Committee by Mr. Bernard Lubuto under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts its Views under article 5, paragraph 4, of the Optional Protocol.

1. The author of the communication is Bernard Lubuto, a Zambian citizen, currently awaiting execution at the Maximum Security Prison in Kabwe, Zambia.

The facts as presented by the author:

2.1 The author was sentenced to death on 4 August 1983 for aggravated robbery, committed on 5 February 1980. On 10 February 1988, the Supreme Court of Zambia dismissed his appeal.

2.2 The evidence led by the prosecution during the trial was that, on 5 February 1980, the author and two co-accused robbed a certain Marcel Joseph Mortier of a motor vehicle (a Datsun vanette). One of the co-accused held Mr. Mortier at gun-point, while stepping into his car. The author and the other co-accused were standing nearby in the bushes. The man with the gun fired shots at one of Mr. Mortier's labourers, who had been in the car and tried to run away from the spot. The man then drove off with the car, with Mr. Mortier still in it. Mr. Mortier then threw himself out of the vehicle and fell on the ground. Gunshots were fired at him, but did not hit him. The author was later identified at an identification parade and the prosecution produced a statement signed by the author, in which he admits his involvement in the robbery.

2.3 The author testified during the trial that he had been arrested by the police in the evening of 4 February 1980, after a fight in a tavern. He was kept in the police station overnight; in the morning of 5 February, when he was about to be released, he was told that a robbery had taken place. He was taken to an office, where one of Mr. Mortier's labourers said that he answered the description of the robber. The author was then returned to the cells, but kept denying any involvement in the robbery. On 7 February 1980, he participated in an identification parade and was identified as one of the robbers by the labourer whom he had met earlier at the police station.

2.4 The author's testimony was rejected by the Court on the basis of the entries in the police register, which showed inter alia that the author was arrested late in the evening of 5 February 1980.

The complaint:

3.1 The author claims that the trial against him was unfair, since the judge accepted all evidence against him, although a careful examination would have shown discrepancies in the statements made by the witnesses. He further claims that his legal aid lawyer advised him to plead guilty and that, when he refused, the lawyer failed to cross-examine the witnesses. The author claims that the death sentence imposed on him is disproportionate, since no one was killed or wounded during the robbery.

3.2 The author claims that he was tortured by the police to force him to give a statement. He alleges that he was beaten with a hose pipe and cable wires, that sticks were put between his fingers and that his fingers were then hit on the table, and that a gun was tied with a string to his penis and that he was then forced to stand up and walk. The allegations were produced at the trial, but the judge considered, on the basis of the evidence, that the author's statement to the police was given freely and voluntarily.

3.3 Although the author does not invoke the provisions of the Covenant, it appears from the allegations and the facts which he submitted that he claims to be a victim of a violation by Zambia of articles 6, 7 and 14 of the Covenant.

The Committee's admissibility decision:

4.1 During its 51st session, the Committee considered the admissibility of the communication. It noted with concern the lack of cooperation from the State party, which had not submitted any observations on admissibility.

4.2 The Committee considered inadmissible the author's claims concerning the conduct of the trial. It recalled that it is, in principle, not for the Committee to evaluate facts and evidence in a particular case and it found that the trial transcript did not support the author's claims. In particular, it appeared from the trial transcript that author's counsel did in fact cross-examine the witnesses against the author.

4.3 The Committee considered that the length of the proceedings against the author might raise issues under article 14, paragraph 3(c), and, as regards the appeal, article 14, paragraph 5, of the Covenant. The Committee further considered that the author's claim that the imposition of the death sentence was disproportionate, since no one was killed or wounded during the robbery, might raise issues under article 6, paragraph 2, of the Covenant, and that his claim that he was tortured by the police to force him to give a statement might raise issues under article 7 of the Covenant which should be examined on the merits.

4.4 Consequently, on 30 June 1994, the Human Rights Committee declared the communication admissible in so far as it appeared to raise issues under articles 6, 7 and 14, paragraphs 3(c) and 5, of the Covenant. The State party was requested, under rule 86 of the Committee's rules of procedure, not to carry out the death sentence against the author while his communication was under consideration by the Committee.

The State party's submission on the merits and author's comments thereon:

5.1 By submission of 29 December 1994, the State party acknowledges that the proceedings in Mr. Lubuto's case took rather long. The State party requests the Committee to take into consideration its situation as a developing country and the problems it encounters in the administration of justice. It is explained that the instant case is not an isolated one and that appeals in both civil and criminal cases take considerable time before they are disposed of by the courts. According to the State party, this is due to the lack of administrative support available to the judiciary. Judges have to write out every word verbatim during the hearings, because of the absence of transcribers. These records are later typed out and have to be proofread by the judges, causing inordinate delays. The State party also refers to the costs involved in preparing the court documents.

5.2 The State party further points out that crime has increased and the number of cases to be decided by the courts have multiplied. Due to the bad economic situation in the country, it has not been possible to ensure equipment and services in order to expedite the disposal of cases. The State party submits that it is trying to improve the situation, and that it has recently acquired nine computers and that it expects to get 40 more.

5.3 The State party concludes that the delays suffered by the author in the determination of his case are inevitable due to the situation as explained above. The State party further submits that there has been no violation of article 14, paragraph 5, in the instant case, since the author's appeal was heard by the Supreme Court, be it with delay.

5.4 As regards the author's claim that the imposition of the death sentence was disproportionate since no one was killed or wounded during the robbery, the State party submits that the author's conviction was in accordance with Zambian law. The State party explains that armed robberies are prevalent in Zambia and that victims go through a traumatic experience. For this reason, the State party sees aggravated robbery involving the use of a fire arm as a serious offence, whether or not a person is injured or killed. Finally, the State party submits that the author's sentence was pronounced by the competent courts.

5.5 Furthermore, the State party points out that under articles 59 and 60 of the Constitution, the President of the Republic of Zambia can exercise the prerogative of mercy. The author's case has been submitted and a decision is awaited. The State party further states that the delay in the hearing of the appeal and the fact that no one was injured in the attack are taken into account by the Advisory Committee on the exercise of the Prerogative of Mercy.

5.6 With regard to the author's claim that he was tortured by the police in order to force him to give a statement, the State party submits that torture is prohibited under Zambian law. Any victim of torture by the police can seek redress under both the criminal and civil legal systems. In this case, the author did not make use of any of these possibilities, and the State party suggests that, had the author's allegations been true, his counsel at the trial would have certainly advised him to do so.

5.7 The State party further explains that, if an accused raises during trial that he was tortured by the police in order to extract a confession, the Court is obliged to conduct a "trial within a trial" to determine whether the confession was given voluntarily or not. In the author's case, such a trial within a trial was held, but it appeared from the testimonies given that the accused claimed that they were merely ordered to sign a statement without having made a confession. The Court then continued with the main trial, and the question of whether the author made a statement or not was decided upon the basis of all the evidence at the end of the trial. It appears from the trial transcript that the judge concluded that the author had not been assaulted. He based his conclusion on the fact that the investigating magistrate, before whom the author and his co-accused appeared on 8 February 1980, had not recorded any injuries or marks of beating nor had the author complained to him about maltreatment; he further took into account discrepancies in the author's testimony as well as evidence led by the police officers that the accused had been cooperative. There was no record of the author having been medically treated for injuries which might have been caused by maltreatment.

5.8 Finally, the State party confirms that, pursuant to the Committee's request, the appropriate authorities have been instructed not to carry out the death sentence against the author while his case is before the Committee.

6. In his comments on the State party's submission, the author explains that he first appeared before a judge on 4 July 1981, and that the trial was then adjourned several times because the prosecution was not ready. At the end of July 1981, the case was

transferred to another judge, who did not proceed with it, and then only on 22 September 1982, again before a different judge, the trial actually started.

Issues and proceedings before the Committee:

7.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

7.2 The Committee notes that the author was convicted and sentenced to death under a law that provides for the imposition of the death penalty for aggravated robbery in which firearms are used. The issue that must accordingly be decided is whether the sentence in the instant case is compatible with article 6, paragraph 2, of the Covenant, which allows for the imposition of the death penalty only "for the most serious crimes". Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2, of the Covenant.

7.3 The Committee has noted the State party's explanations concerning the delay in the trial proceedings against the author. The Committee acknowledges the difficult economic situation of the State party, but wishes to emphasize that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe. Article 14, paragraph 3(c), states that all accused shall be entitled to be tried without delay, and this requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that the period of eight years between the author's arrest in February 1980 and the final decision of the Supreme Court, dismissing his appeal, in February 1988, is incompatible with the requirements of article 14, paragraph 3(c).

7.4 As regards the author's claim that he was heavily beaten and tortured upon arrest, the Committee notes that this allegation was before the judge who rejected it on the basis of the evidence. The Committee considers that the information before it is not sufficient to establish a violation of article 7 in the author's case.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of articles 6, paragraph 2, and 14, paragraph 3(c), of the International Covenant on Civil and Political Rights.

9. The Committee is of the view that Mr. Lubuto is entitled, under article 2, paragraph 3(a), of the Covenant to an appropriate and effective remedy, entailing a commutation of sentence. The State party is under an obligation to take appropriate measures to ensure that similar violations do not occur in the future.

10. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the Committee's Views.