



# THE UPR PROJECT AT BCU

## **Submitted by:**

The UPR Project at BCU  
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## **About the UPR Project at BCU:**

Birmingham City University's Centre for Human Rights was created in 2014 to promote human rights, ensure access to justice, and enhance the rule of law around the world. We seek to achieve this through leading research, education, and consultancy. We submit expert reports to international human rights regions, provide advisory services to governments and nongovernmental organisations, and draft legal opinions and file legal briefs in domestic courts and international human rights courts.

The Centre for Human Rights established the UPR Project in 2018 as part of our consultancy service. We engage with the Human Rights Council's review process in offering support to the UPR Pre-sessions, providing capacity building for UPR stakeholders and National Human Rights Institutions, and the filing of stakeholder reports in selected sessions. The UPR Project is designed to help meet the challenges facing the safeguarding of human rights around the world, and to help ensure that UPR recommendations are translated into domestic legal change in member state parliaments. We fully support the UPR ethos of encouraging the sharing of best practice globally to protect everyone's human rights. The UPR Project at BCU engages with the UPR regularly as a stakeholder and is frequently cited by the OHCHR. You can read more about the UPR Project here: [www.bcu.ac.uk/law/research/centre-for-human-rights/projects-and-consultancy/upr-project-at-bcu](http://www.bcu.ac.uk/law/research/centre-for-human-rights/projects-and-consultancy/upr-project-at-bcu)

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## INTRODUCTION

1. Indonesia is party to all nine core international human rights treaties for which it should be commended.<sup>1</sup> This includes the International Covenant on Civil and Political Rights (ICCPR) and in line with the Covenant's protection of the right to life and the prohibition against inhuman punishment, this Stakeholder Report focuses upon capital punishment.
2. We make recommendations to the Government of Indonesia on this key issue, implementation of which would also see Indonesia moving towards achieving Sustainable Development Goal 16 which aims for peaceful and inclusive societies, access to justice for all and effective, accountable and inclusive institutions at all levels.
3. We urge the State to make practical commitments in the fourth cycle of the UPR for the abolition of the punishment. As an initial step, we call for the suspension of the capital judicial process through the initiation of an official moratorium on the death penalty. This will enable the government to make a positive commitment towards domestic *de jure* abolition.

## CAPITAL PUNISHMENT

### **A. Indonesia and International Law on the Death Penalty**

4. The death penalty has remained a prominent feature of Indonesia's penal system since the Dutch colonial period with the introduction of the Criminal Code (Kitab Undang-Undang Hukum Pidana – KUHP). Article 10 of the Criminal Code stipulates 'basic punishments' and 'additional punishments'. Basic punishments consist of the death penalty, imprisonment, detention (such as 'city' detention or house arrest) and fines. Additional punishments cover the deprivation of certain rights, the confiscation of assets and the public announcement of court verdicts. The inclusion of the death penalty in other domestic laws is based on its presence in Article 10 of the Criminal Code.
5. Indonesia has not executed anyone since 2016 however, the death penalty continues to remain a lawful punishment for offences and conduct which contravene the evolving jurisprudence on the 'most serious crimes' under international law.<sup>2</sup> Existing domestic laws that provide for the death penalty include: the 1997/2009 Narcotics Law; the 2001 Anticorruption Law; the 2003 Terrorism Law; the 2011 Law on Corruption Eradication; and the Law on the Human Rights Court.
6. The death penalty is mandatory for a range of offences, including non-violent drug offences which account for the large majority of death sentences each year, despite calls from the UN special rapporteurs on summary executions and on torture that "executions for drug crimes amount to a violation of international law and are unlawful killings."<sup>3</sup>
7. Although Indonesia has not executed anyone for the past six years, it has continued to hand down death sentences. It has approximately 482 people awaiting execution, and at least

117 death sentences were handed down in 2020 which is a 46% increase compared to 2019.<sup>4</sup> Figures for 2021 are yet to be released at the time of submission.

### *International Law Promoting the Restriction and Abolition of the Death Penalty*

8. The United Nations' framework for regulating the application of the death penalty comprises a corpus of international human rights law and jurisprudence. Of particular relevance are Articles 6, 7, and 14 ICCPR,<sup>5</sup> its Second Optional Protocol,<sup>6</sup> the ECOSOC Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,<sup>7</sup> the Secretary General's quinquennial reporting,<sup>8</sup> the Secretary General's Question on the Death Penalty,<sup>9</sup> and the Human Rights Committee decisions.<sup>10</sup> Other relevant treaties include the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment<sup>11</sup> and the Convention on the Rights of the Child.<sup>12</sup>

9. The General Comment on the Right to Life<sup>13</sup> provides an interpretive lens on the death penalty and concerning ICCPR Article 6(6), which states, '[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment,' it:

reaffirms the position that States parties that are not yet totally abolitionist should be on an irrevocable path towards complete eradication of the death penalty, de facto and de jure, in the foreseeable future. The death penalty cannot be reconciled with full respect for the right to life, and abolition of the death penalty is both desirable [...] and necessary for the enhancement of human dignity and progressive development of human rights.<sup>14</sup>

10. Furthermore, there has been a consistent increase in state signatures solidifying a global position against this punishment as seen in the UN General Assembly's biennial resolution to impose a global moratorium on the use of the death penalty. The eighth and most recent iteration, passed on 16 December 2020, had a total of 123 votes in favour with 38 votes against and 24 abstentions. Indonesia has abstained in all such resolutions to date.<sup>15</sup>

11. Indonesia's voting record is also reflected in its absence as a signatory to the Joint Permanent Missions' most recent *note verbale* of dissociation, which records a formal objection to the Secretary General of the United Nations on the attempt to create a global moratorium on the death penalty.<sup>16</sup> Both the abstention to the UNGA resolution and absence from the note verbale suggests an anti-death penalty trajectory and also provides the platform for Indonesia to signal its support for a global moratorium in the forthcoming resolution.

### **B. Implementation of Recommendations from Cycle Three in 2017**

12. Indonesia received 225 recommendations in the Third Cycle of which 167 were accepted and 58 were noted.<sup>17</sup> A total of 31 recommendations focused on the death penalty of which four were accepted.<sup>18</sup>

*Recommendations concerning Indonesia's Adoption of International Law*

13. **Hungary** (para 141.4), **Moldova** (para 141.4), **Romania** (para 141.5), **Slovakia** (para 141.51), and **Ireland** (para 141.55) recommended Indonesia to ratify the Second Optional Protocol to the ICCPR. These were all noted and Indonesia has not indicated any change to its position.

*Recommendations concerning Abolition*

14. A number of States recommended a moratorium on the death penalty with a view to abolition. This included **Slovakia** (para 141.51), **Austria, Italy, Namibia** (para 141.52), **Montenegro, Slovenia, Brazil, Mexico, Sweden** (para 141.43), **Norway, United Kingdom, Switzerland, Panama, France, Argentina, Belgium, Iceland, Germany, and Spain** (para 141.54). **Angola** and **Portugal** (para 141.46) recommended the abolition of the death penalty whilst **Lichtenstein** (para 141.47), **Spain** (para 141.47) and **Chile** (para 141.48) recommended Indonesia abolish the punishment for drug-related offences.
15. Whilst such recommendations are welcomed, it is crucial that they remain specific and measurable in order to assess the level of implementation. Broad recommendations, whilst easy to accept, lack any impetus to bring about real change.<sup>19</sup> It is recommended that States adopt a SMART approach to recommendations as recognised by UPRinfo.<sup>20</sup> This would help Indonesia initiate an incremental approach to reducing the scope of the punishment and map out the process for abolition.
16. Belgium and Australia provided more comprehensive recommendations with **Belgium** (para 141.5) recommending that “pending abolition, establish an independent and impartial body to conduct a review of all cases of persons sentenced to death, with a view to commuting the death sentences or at least ensuring fair trials that fully comply with international standards”. **Australia** (para 141.49) recommended the State “enhance safeguards on the use of the death penalty, including: adequate and early legal representation for cases which could attract the death penalty; non-application of the death penalty to those with mental illness; revising the Criminal Code to accord with relevant international human rights laws and obligations; and reinstating a moratorium on the use of the death penalty”. It would prove more beneficial if recommending States make reference to the review criteria which includes “human rights instruments to which a State is party”.<sup>21</sup> For example reference to Article 6 and/or 14 ICCPR, a treaty the State under Review has ratified, would strengthen any death penalty recommendations.
17. Signalling its continuing attachment to the practice, Indonesia emphasised to the Working Group that “the death penalty was still applied, but only after all legal processes had been exhausted and provided the legal rights of the convicted had been respected.”<sup>22</sup> It has since continued to hand down death sentences in contravention to international law.
18. Forty-eight death sentences were reported in 2018,<sup>23</sup> 80 in 2019,<sup>24</sup> and at least 117 in 2020.<sup>25</sup> A total of 101 sentences out of the 117 were for drug-related crimes. This reflects the trend recorded in previous years where courts have administered death sentences for such offences in at least 70% of known cases.<sup>26</sup>

19. Furthermore, it is disappointing to note that the Corruption Eradication Commission (KPK) is advocating for widening the offences liable for the death penalty by asserting that those found guilty of corruption relating to COVID-19 relief funds could face the death penalty.<sup>27</sup>
20. It is also deeply concerning to note that the Government has resorted to sentencing prisoners to death via Zoom and other video apps in the wake of the COVID-19 pandemic. Since early 2020, nearly 100 inmates have been sentenced to death by judges they could only see on a television monitor.<sup>28</sup>
21. In April 2021, 13 members of a trafficking ring, including three Iranians and a Pakistani, learned via video that they would be executed by firing squad for smuggling 400kg (880 pounds) of methamphetamine into Indonesia.<sup>29</sup> Moreover, a Jakarta court sentenced six fighters to death using a video app for the killing of five police officers in a 2018 prison riot.<sup>30</sup> This ‘online trend’ of virtual hearings and issuing death sentences remotely exacerbates the injustice and inhumanity of the death penalty and degrades the rights of those facing the punishment.
22. Virtual hearings can also have the serious disadvantage of leaving defendants unable to fully participate in their trial due to poor internet connections and can therefore expose the defendant to serious violations of their right to a fair trial in accordance with Article 14 ICCPR. Lawyers have also raised concerns about being unable to consult with clients due to restrictions posed by the pandemic and families of the accused have sometimes been prevented from accessing hearings that would normally be open to the public.

### **C. Further Points for Indonesia to Consider**

#### *The Role of the National Human Rights Institution*

23. The National Human Rights Institution (NHRI) of Indonesia, Komnas HAM, is undertaking important work on pushing for the abolition of the death penalty from Indonesia’s legal system, starting by limiting the types of crimes that attract the punishment.<sup>31</sup> The NHRI could also provide public education on how capital punishment renders harmful effects upon society, and demonstrate its ineffectiveness as a penological policy on deterrence. The government could provide Komnas Ham with a mandate to advise on legislative amendment for abolition.

#### *Adopting the UPR Recommendations to Enable the People of Indonesia to Benefit from Advances in Effective Penology*

24. The right to benefit from scientific advancement should also apply to the progress in social science research on the death penalty. The Universal Declaration of Human Rights, Article 27, states, “[e]veryone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits,”<sup>32</sup>

and the ICESCR article 15 (1)(b) recognises the right of everyone, “[t]o enjoy the benefits of scientific progress and its applications.”

25. Roger Hood and Carolyn Hoyle have produced the leading social science and criminological investigations into the death penalty worldwide and have concluded:

[t]hose who favour capital punishment ‘in principle’ have been faced with yet more convincing evidence of the abuses, discrimination, mistakes, and inhumanity that appear inevitably to accompany it in practice. Some of them have set out on the quest to find the key to a ‘perfect’ system in which no mistakes or injustices will occur. In our view, this quest is chimerical.<sup>33</sup>

26. Social science investigations now demonstrate that reflecting appropriate government means that whilst capital punishment could be created within a legitimate parliamentary process,<sup>34</sup> it is now clear that the application of the death penalty renders an illegitimate and inhumane outcome.<sup>35</sup> Abolition in Indonesia would enable the people of the country to benefit from the advancement of the leading social scientific research on punishment policies.

#### *The Universal Periodic Review Recommendations and the Contribution to the Sustainable Development Goals*

27. Indonesia should consider adopting the UPR recommendations as an expression of mutual reinforcement of the government’s commitment to promoting the Sustainable Development Goals.<sup>36</sup> The human rights values expressed in both the UPR and the SDGs can be woven together to promote policy coherence.<sup>37</sup>

28. SDG 16 provides for “Strong Institutions and Access to Justice and Build Effective Institutions,” but the application of the death penalty is inconsistent with this goal. Specifically, SDG 16.1 aims to reduce death rates, promote equal access to justice, and “protect fundamental freedoms,” and to further this, SDG 16.A.1 identifies the importance of relevant national institutions, for building capacity at all levels, to prevent violence and combat terrorism and crime.

29. The use of the death penalty does not signal legitimate strength in institutions, but renders counterproductive and inhumane consequences, including a brutalising effect upon society. This was affirmed in the Special Rapporteur’s report on ‘pay-back’ violence and killings.<sup>38</sup> The death penalty is antithetical to strong institutional processes for the fostering of the human dignity of the people of Indonesia.

#### **D. Recommendations**

We recommend the government of Indonesia to:

- i. Uphold and enforce its international obligations to safeguard the right to life, pursuant to Articles 6, 7 and 14 of the ICCPR.

- ii. Whilst the death penalty continues to be retained by Indonesia, ensure it complies with the ‘most serious crimes’ principle, under Article 6 ICCPR, restricting punishment to crimes of intentional killing only.
- iii. Ratify the Second Optional Protocol to the ICCPR aiming at the abolition of the death penalty.
- iv. Formalise its de facto moratorium, with a view to abolition, within the next three years.
- v. Affirm its commitment to SDG 16 on access to justice and strong institutions through its support at the next biennial vote on the UNGA Resolution on the moratorium on the use of the death penalty.
- vi. Enhance its support for the Asia Pacific Forum of National Human Rights Institutions in their important contribution to the regional abolition of the death penalty.

<sup>1</sup> See <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=80&Lang=EN)>.

<sup>2</sup> See UN Doc CCPR/C/GC/R.36/Rev.2.

<sup>3</sup> ‘Using the death penalty to fight drug crimes violates international law, UN rights experts warn World Day Against the Death Penalty – Saturday 10 October’ (OHCHR) <[www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16581&LangID=E](http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16581&LangID=E)>.

<sup>4</sup> Amnesty International, *Global Report: Death Sentences and Executions 2020* (2021) 28.

<sup>5</sup> International Covenant on Civil and Political Rights (1976) 999 UNTS 171, Article 6 (right to life); Article 7 (the prohibition against torture and inhuman or degrading treatment or punishment); and Article 14 (the right to a fair trial and the principle of equality of arms).

<sup>6</sup> The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, GA Res. 44/128, December 15, 1989.

<sup>7</sup> Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Economic and Social Council Resolution, 1984/50; Additions to the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty as Agreed by the Economic and Social Council Resolution 1989/64; and the Strengthening of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty as Agreed by the Economic Council Resolution 1996/15.

<sup>8</sup> See eg, ECOSOC Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty Report of the Secretary-General UN Doc E/2015/49 (13 April 2015).

<sup>9</sup> See eg, Report of the Secretary General, Question of the Death Penalty, A/HRC/27/23, 30 June 2014.

<sup>10</sup> For example, *Judge v. Canada*, Communication No. 829/1998, U.N. Doc. CCPR/C/78/D/829/1998 (2003).

<sup>11</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 10 December 1984.

<sup>12</sup> Article 37(a) Convention on the Rights of the Child, G.A. Res 44/25, 20 November 1989.

<sup>13</sup> UN Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018.

<sup>14</sup> *ibid* para 50.

<sup>15</sup> Resolution on the Moratorium on the use of the death penalty, UNGA Res. 67/176 20 December 2012, adopted by 111 votes to 41, with 34 abstentions; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 69/186 18 December 2014 *adopted by 117 votes to 37, with 34 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 71/187, 19 December 2016 *adopted by 117 votes to 40, with 31 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 73/175 17 December 2018 *adopted by 121 votes to 35, with 32 abstentions*; Resolution on the Moratorium on the use of the death penalty, UNGA Res. 75/183, 16 December 2020 *adopted by 123 votes to 38, with 24 abstentions*.

<sup>16</sup> UNGA, ‘Note verbale dated 13 September 2019 from the Permanent Mission of Egypt to the United Nations addressed to the Secretary-General’ (16 September 2019) UN Doc A/73/1004.

<sup>17</sup> UNHRC, ‘Report of the Working Group on the Universal Periodic Review – Indonesia’ (19 September 2017) UN Doc A/HRC/36/7/Add.1, para 8.

<sup>18</sup> See UNHRC, ‘Report of the Working Group on the Universal Periodic Review – South Sudan’ (28 December 2016) UN Doc A/HRC/34/13.

<sup>19</sup> Amna Nazir, ‘The Universal Periodic Review and the Death Penalty: A Case Study of Pakistan’ (2020) 4(1) RSIL Law Review 126, 153.

<sup>20</sup> See UPRinfo, ‘For impact on the ground the UPR needs SMART recommendations’ <<https://www.upr-info.org/en/news/for-impact-on-the-ground-the-upr-needs-smart-recommendations>> (21 October 2015).

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- <sup>21</sup> UNHRC Res 5/1 (18 June 2007) UN Doc A/HRC/RES/5/1, para 1(c).
- <sup>22</sup> UNHRC, ‘Report of the Working Group on the Universal Periodic Review – Indonesia’ (19 September 2017) UN Doc A/HRC/36/7, para 22.
- <sup>23</sup> Amnesty International, *Global Report: Death Sentences and Executions 2018* (2019) 11.
- <sup>24</sup> Amnesty International, *Global Report: Death Sentences and Executions 2019* (2020) 11.
- <sup>25</sup> Amnesty International, *Global Report: Death Sentences and Executions 2020* (2021) 12 and 15.
- <sup>26</sup> *ibid* 28.
- <sup>27</sup> Ghina Ghaliya, ‘KPK warns that COVID-19 aid swindlers face death penalty’ (*Jakarta Post*, 30 April 2020) <[www.thejakartapost.com/news/2020/04/29/kpk-warns-that-covid-19-aid-swindlers-face-death-penalty.html](http://www.thejakartapost.com/news/2020/04/29/kpk-warns-that-covid-19-aid-swindlers-face-death-penalty.html)>.
- <sup>28</sup> ‘COVID-hit Indonesia orders executions via Zoom, video apps’ (*Aljazeera*, 23 April 2021) <[www.aljazeera.com/news/2021/4/23/virus-hit-indonesia-orders-executions-online](http://www.aljazeera.com/news/2021/4/23/virus-hit-indonesia-orders-executions-online)>.
- <sup>29</sup> ‘West Java court sentences Iranian-led drugs gang to death’ (*Jakarta Post*, 7 April 2021) <[www.thejakartapost.com/news/2021/04/07/west-java-court-sentences-iranian-led-drugs-gang-to-death-.html](http://www.thejakartapost.com/news/2021/04/07/west-java-court-sentences-iranian-led-drugs-gang-to-death-.html)>.
- <sup>30</sup> Riza Chadija, ‘6 Indonesian Militants Sentenced to Death for Deadly 2018 Prison Riot’ (*Benar News*, 22 April 2021) <[www.benarnews.org/english/news/indonesian/id-terrorism-04222021152615.html](http://www.benarnews.org/english/news/indonesian/id-terrorism-04222021152615.html)>.
- <sup>31</sup> See eg <[www.komnasham.go.id/](http://www.komnasham.go.id/)>.
- <sup>32</sup> It is further recalled that the Human Rights Council determined that the basis of the Universal Periodic Review includes consideration of the Universal Declaration of Human Rights, see, Institution-building of the United Nations Human Rights Council, A/HRC/RES/5/1 18 June 2007.
- <sup>33</sup> Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015) 7-8.
- <sup>34</sup> John Rawls stated, “[a]t some point, the injustice of the outcomes of a legitimate democratic procedure corrupts its legitimacy,” in, *Political Liberalism* (Columbia University Press 2005) 248.
- <sup>35</sup> Austin Sarat stated, “law cannot work its lethal will and ally itself with the killing state while remaining aloof and unstained by the deeds themselves,” in, *When the State Kills: Capital Punishment and the American Condition* (Princeton University Press 2001) 21.
- <sup>36</sup> See the UN Sustainable Development Goals website, <https://sustainabledevelopment.un.org/?menu=1300>.
- <sup>37</sup> The first two cycles of the UPR were reviewed under a data mining procedure and of the circa. 50,000 recommendations, it was possible to link more than 50% of those to SDG targets, see, The Danish Institute for Human Rights, Linking the Universal Periodic Review to the SGGs, p. 2.
- <sup>38</sup> Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Mission to Papua New Guinea (3 to 14 March 2014), A/HRC/29/37/Add.1, 30 March 2015, para. 96, “...several interlocutors shared the opinion that the death penalty might actually lead to further killings... given the payback culture. While the Special Rapporteur condemns the existence of the payback culture, he acknowledges that payback-related killings might increase if the death penalty is carried out.