

# The abolition of the death penalty and its alternative sanction in East Africa: Kenya and Uganda



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# Contents

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<b>Acknowledgements</b>	<b>2</b>
<b>Acronyms</b>	<b>3</b>
<b>Introduction</b>	<b>4</b>
<b>Research methodology</b>	<b>5</b>
<b>Executive summary</b>	<b>6</b>
<b>Country-by-country analysis</b>	
<b>Republic of Kenya</b>	<b>8</b>
<b>Republic of Uganda</b>	<b>23</b>
<b>Comparison of the application and implementation of the death penalty and its alternative sanction in East Africa</b>	<b>46</b>
<b>Annex I: Recommendations from the East African regional roundtable on the death penalty (27 July 2011)</b>	<b>53</b>

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The contents of this document are the sole responsibility of PRI and FHRI and can in no circumstances be regarded as reflecting the position of the European Union.

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## Acronyms

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<b>ARV</b>	Antiretroviral drug
<b>CADP</b>	Coalition Against the Death Penalty (Uganda)
<b>CAT</b>	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>EIDHR</b>	European Instrument for Democracy and Human Rights
<b>EU</b>	European Union
<b>FHRI</b>	Foundation for Human Rights Initiative
<b>GA</b>	General Assembly
<b>GCM</b>	General Court Martial
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>EIDHR</b>	European Instrument for Democracy and Human Rights
<b>ICJ-K</b>	International Commission of Jurists-Kenya
<b>KNCHR</b>	Kenya National Commission for Human Rights
<b>KPS</b>	Kenya Prison Service
<b>MoJCA</b>	Ministry of Justice and Constitutional Affairs (Kenya)
<b>MP</b>	Member of Parliament
<b>NGO</b>	Non governmental organisation
<b>NPM</b>	National Preventative Mechanism
<b>OPCAT</b>	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>PRI</b>	Penal Reform International
<b>TB</b>	Tuberculosis
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNCT</b>	United Nations Country Team
<b>UPDF</b>	Uganda Peoples Defence Force
<b>UPR</b>	Universal Periodic Review
<b>UPS</b>	Uganda Prison Service
<b>USA</b>	United States of America

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# Introduction

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The death penalty is the ultimate cruel, inhuman and degrading punishment. It represents an unacceptable denial of human dignity and integrity. It is irrevocable, and where criminal justice systems are open to error or discrimination, the death penalty will inevitably be inflicted on the innocent. In many countries that retain the death penalty there is a wide scope of application which does not meet the minimum safeguards, and prisoners on death row are often detained in conditions which cause physical and/or mental suffering.

The challenges within the criminal justice system do not end with the institution of a moratorium or with abolition of the death penalty, as the problem of what to do with the most serious offenders remains. Many countries that institute moratoria do not create humane conditions for prisoners held indefinitely on 'death row', or substitute alternative sanctions that amount to torture or cruel, inhuman or degrading punishment, such as life imprisonment without the possibility of parole, solitary confinement for long and indeterminate periods of time, and inadequate basic physical or medical provisions. Punitive conditions of detention and less favourable treatment are prevalent for reprieved death row prisoners. Such practices fall outside international minimum standards, including those established under the EU Guidelines on the Death Penalty.

This research paper focuses on the application of the death penalty and life imprisonment as an alternative to it across the East Africa region. Its aim is to provide up-to-date information about the laws and practices relating to the application of the death penalty in Kenya and Uganda, including an analysis of the alternative sanctions to the death penalty and whether they reflect international human rights standards and norms.

This paper takes a country-by-country approach and focuses on:

- The legal framework of the death penalty and its alternative sanction (life imprisonment).
- Implementation of the sentence, including an analysis of fair trial standards.
- Application of the sentence including an analysis of the method of execution, the prison regime and conditions of imprisonment.

- Statistical information on the application of the death penalty/life imprisonment.
- Criminal justice reform processes.
- Abolitionist and reform movement in each country.

This paper provides detailed and practical recommendations tailored to each country to bring it in line with international human rights standards and norms.

We hope this research paper will assist advocacy efforts towards abolition of the death penalty and the implementation of humane alternative sanctions in the region. We also hope this paper will be of use to researchers, academics, members of the international and donor community, and all other stakeholders involved in penal reform processes including parliamentarians, prison officials and members of the judiciary.

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## Research methodology

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Access to information on the application of the death penalty and its alternative sanction is often unavailable or inaccurate in many countries. Statistical information is not always made available by state bodies, and information provided is not always timely, or lacks clarity. As such, although PRI and FHRI aimed to undertake an in-depth analysis of legal, policy and practice areas within this research paper, access to certain types of information was sometimes beyond the abilities of the researchers, and therefore gaps in the research remain.

A research questionnaire was designed in late 2010 to assist researchers in identifying relevant information. The research questionnaire was designed by PRI in partnership with Sandra Babcock (Northwestern University, USA) and Dirk van Zyl Smit (Nottingham University, UK).

The research was undertaken by PRI and FHRI in both countries and included field visits and desk-based research. ICJ-K facilitated the gathering of research in Kenya.

The researchers looked at primary sources, such as legislation and case law. They interviewed relevant government officials (within the various departments of the Ministries of the Interior, the Ministries of Justice, and the Penitentiary Services), prison officials, national human rights commissions, lawyers and judges, journalists, and members of civil society/human rights defenders in both countries, as well as death row and life-sentenced prisoners where access was made available. The researchers also turned to reports by people or organisations with first-hand experience, including inter-governmental organisations such as the African Commission's Working Group on the Death Penalty, and reports by UN treaty bodies and Special Rapporteurs, as well as reports by international NGOs such as Human Rights Watch, Amnesty International, Death Penalty Worldwide and the World Coalition against the Death Penalty. Reports and articles by journalists and academics were also analysed.

The research was carried out during 2011.

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## Executive summary

Although East Africa is still a largely retentionist region,<sup>1</sup> Kenya and Uganda have not carried out executions since 1987 and 2003, respectively. Both countries are in a situation of flux and have made significant changes in law and policy in recent years to restrict the application of the death penalty in practice. Although both countries continue to hand down death sentences, and neither has established an official moratorium on executions, it is expected that the experiences of Kenya and Uganda will influence the rest of East Africa (Tanzania and South Sudan, who also retain the death penalty).

Kenya retains the death penalty for five offences. It has the highest number of people on death row in East Africa. By the end of 2011 it is estimated that Kenya had 1,140 prisoners on death row (30 of which are women). Steps have been taken by progressive parliamentarians to abolish the death penalty, however the most recent motion was defeated by Parliament in August 2007. In August 2009, President Mwai Kibaki issued the largest known mass commutation: 4,000 death row prisoners had their sentences commuted to life imprisonment. Following President Kibaki's mass commutation, the government was requested to assess whether the punishment of death penalty has any impact on the fight against crime.

By the end of 2011 it was estimated that Uganda has 505 prisoners on death row (35 of which are women). Uganda retains the most death penalty applicable crimes within the region: 28 crimes in total (11 civilian crimes and 17 military crimes). This includes crimes such as robbery, smuggling, acts of treason and terrorism, and non-lethal military offences. An anti-homosexuality bill, which includes the death penalty for some homosexual acts, continues to gather momentum within the Ugandan Parliament.

Neither country has ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). While Kenya abstained from voting in the 2010 United Nations General Assembly

(UN GA) moratorium resolution, Uganda voted against it and signed the *note verbale* of dissociation.

There have, however, been a number of positive legal developments towards reducing the application of the death penalty in both countries. In January 2009, the Supreme Court of Uganda issued a landmark ruling in *Attorney General v. Susan Kigula and 417 Others*.<sup>2</sup> The court found that the mandatory application of the death penalty was unconstitutional, and serving at least three years on death row amounted to cruel and inhuman punishment. Following the *Kigula* judgement, the Kenya High Court also found mandatory death sentences unconstitutional in the 2010 case of *Godfrey Ngotho Mutiso v. the Republic*.<sup>3</sup>

As a result of these two landmark cases, a number of death row prisoners have had their sentences commuted to whole life imprisonment or to a long-term sentence. In some cases, prisoners were immediately released after having spent more than 20 years on death row. A new body of jurisprudence has also sprung up regarding what mitigating factors should be taken into consideration in sentencing trials for capital cases. While this body of jurisprudence is still underdeveloped, members of the judiciary in both countries have initiated processes to develop national guidelines to aid sentencing in capital cases.

In Kenya, the alternative sanction to the death penalty is life imprisonment without the possibility of parole. In Uganda, the question of what the alternative sanction to the death penalty means is undergoing some legal uncertainty. The Uganda Prisons Act defines 'life' as 20 years imprisonment. However, in 2011 the Supreme Court handed down its judgement in *Tigo Stephens v. Uganda*,<sup>4</sup> ruling that life imprisonment means for the natural life of a convict. The *Tigo* judgement has created a legal anomaly whereby the legislature has said 'life' means 20 years, and the judiciary that 'life' means life without the possibility of parole. Added to this confusion is the growing prevalence of judges handing down excessively long determinate sentences: in one case, a sentence of 70 years.<sup>5</sup>

1 East Africa is often used to specifically refer to the area comprising Kenya, Tanzania, and Uganda, and, in a wider sense, also Burundi, Rwanda, and South Sudan. Of the six countries, only Burundi and Rwanda have abolished the death penalty in law.

2 *Attorney General v Susan Kigula & 417 Others* (Constitutional Appeal No. 03 OF 2006) [2009] UGSC 6 (21 January 2009).

3 *Godfrey Ngotho Mutiso v. Republic* [2010] eKLR.

4 *Tigo Stephen v. Uganda* (Criminal Appeal No. 08 Of 2009) [2011] UGSC 7 (10 May 2011).

5 Uganda: Court Jails Child Murderer for 70 Years, *New Vision*, 27 November 2010.

The number of life sentenced prisoners is growing significantly. Kenya has 4,637 lifers (58 of which are women), and Uganda has 329 lifers (124 of which are women). The growing number of life prisoners may in part be related to the number of life sentence applicable crimes. Kenya has 26 crimes for which a life sentence may be imposed, and Uganda has 38. These include crimes such as forgery, counterfeiting, robbery, rioting, cattle rustling, and non-violent military offences.

The growing use of whole life imprisonment as the ultimate and maximum sentence in the region, its disproportionate length and overly punitive nature<sup>6</sup> raise a number of legal and practical issues which indicate that the application of this sentence in both Kenya and Uganda does not meet international human rights standards and norms.

Across the region, people are sentenced to death or life imprisonment after proceedings which fail to meet international standards for a fair trial as guaranteed under Article 14 of the ICCPR, of which both countries are state parties. The fundamental problems include a lack of bail for those accused of committing a capital/life offence, ineffective access to legal aid for indigent defendants, poor investigations and a severe backlog of cases which contribute to prolonged pre-trial detention. Uganda also poses additional problems in its military jurisdiction which operates in almost complete secrecy, is notorious for convicting and executing sentences within a very brief time frame, and has wide disparities from its civilian counterpart. Concerns regarding the lack of legal representation and lack of appeal for defendants compound the ongoing issue of civilians being tried under military law.

A harsh and discriminatory prison regime for both death row and life prisoners reinforce its punitive nature in Kenya and Uganda. Problems of overcrowding, inadequate living conditions, poor access to medical care, and a lack of rehabilitation for those on death row or serving a life sentence

create serious human rights concerns. Financial and other resources are seriously under-committed to the Kenya and Uganda Prison Services, demonstrating a lack of prioritisation by both governments in upholding a human rights model for the administration of justice.

While criminal justice reform processes are severely lacking in both countries, civil society at the national and regional level have become more mobilised in the last two years. An East African coalition against the death penalty was established at the end of 2011 and Kenya and Uganda also have national coalitions. Journalists and the media do report on criminal justice matters; however, they can be biased towards the death penalty.

PRI and FHRI hope that this report will provide detailed analysis and recommendations on the various political, legal and practical issues to be addressed in each of the two countries regarding abolition of the death penalty and of alternatives to it. It is hoped that this report will assist governments within the region in implementing a more holistic approach to penal reform which focuses on rehabilitation and the respect for human dignity, rather than a punitive approach to punishment.

<sup>6</sup> While the purpose of sentencing is ultimately punitive, the nature of the sentence should be proportionate to the seriousness of the offence and individualised to the specificities of the crime, including the circumstances in which it was committed. Sentences should not, therefore, be used to serve wider political purposes or purely to punish the offender. Effectively locking away criminals for life and creating a discriminatory and arbitrary regime purely because of the type of sentence a prisoner is serving fails to tackle the structural roots of crime and violence. Prisoners serving life or long-term imprisonment often experience differential treatment and worse conditions of detention compared to other categories of prisoner. Examples include separation from the rest of the prison population, inadequate living facilities, excessive use of handcuffing, prohibition of communication with other prisoners and/or their families, inadequate health facilities, extended use of solitary confinement and limited visit entitlements. Punitive conditions of detention and less favourable treatment are known to be particularly prevalent for reprieved death row prisoners. Sentences should reflect international human rights standards and norms, and provide the offender with a meaningful opportunity for rehabilitation and reintegration back into society, thereby leading to law-abiding and self-supporting lives after their release.



# Republic of Kenya

## I. Basic country information

*Geographical region:* Kenya is a country in East Africa that lies on the equator with the Indian Ocean to its southeast. It is bordered by Tanzania, Uganda, South Sudan, Ethiopia and Somalia. The capital is based in Nairobi.

*Type of government:* According to Article 4 of the Constitution, Kenya is a sovereign republic. The President is both the head of state and head of government.

*Language:* The official languages of Kenya are English and Swahili.<sup>7</sup>

*Population:* Kenya has a population of nearly 41 million people, representing 42 different cultures including Kikuyu, Luhya, Luo, Kalenjin, Kamba, Kisii, Meru, other African and non-African cultures.

*Religion:* The predominant religion in Kenya is Christianity. Other faiths practised in Kenya are Baha'i, Hinduism, Islam, and traditional African religions.

## II. Overview of the status of the death penalty in Kenya

The death penalty has been part of Kenya's legal system for the last 115 years (70 years through colonialism and more than 45 years since independence). Article 26(3) of the Constitution provides that "[e]very person has the right to life" and "[a] person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law".

The Kenya Penal Code Act makes reference to five death penalty applicable crimes, and while Kenya has not *de jure* abolished capital punishment, practice

*de facto* testifies to the presence of an unofficial moratorium on executions (Kenya has not carried out an execution since 1987). However death sentences continue to be handed down by courts, and there are currently 1,440 prisoners on death row in Kenya.<sup>8</sup>

In the last ten years, progressive steps have been taken at the national and international level to indicate a commitment towards positively reducing and restricting the application of the death penalty in practice, leading to its eventual abolition.

In 2003, President Mwai Kibaki commuted 223 death row convicts to life imprisonment. This included 28 prisoners who were subsequently released after serving between 15 and 20 years on death row. Vice-President Moody Awori, when releasing the 28 death row prisoners, stated his intention to introduce a Bill in Parliament to abolish the death penalty.<sup>9</sup> The then Commissioner of Prisons, Abraham Kamakil, termed the 2003 mass commutation a "historic event", saying that the death penalty should be abolished because it claimed innocent lives. He observed, "We are longing for the day Parliament will remove the death penalty from our Constitution." The same views were echoed by the then Minister for Justice and Constitutional Affairs, Hon. Kiraitu Murungi, who reiterated that the death penalty, being a violation of human rights, should be abolished and death row convicts would soon have their sentences commuted to life.<sup>10</sup>

On 8 August 2009, President Kibaki further commuted another 4,000 death row prisoners to life imprisonment. This was the biggest known mass commutation of condemned prisoners anywhere in the world. Kibaki stated that he made the decision following the advice of a constitutional committee, on the basis that commuting death sentences would alleviate the "undue mental anguish and suffering, psychological trauma and anxiety" that come from "extended stays on death row".<sup>11</sup>

<sup>7</sup> Article 7 of the Constitution of the Republic of Kenya, 2010.

<sup>8</sup> Report by the Kenya Prison Service, 8 July 2011.

<sup>9</sup> Position Paper No. 2 on the Abolition of the Death Penalty, Kenya National Commission on Human Rights (KNCHR), 2007, para. 14.

<sup>10</sup> This was said during a meeting with the KNCHR on 6 June 2005, and was widely reported in both print and electronic media; see, for example, a report in the Daily Nation on 7 June 2005, p. 6.

<sup>11</sup> Kenya's Death Row Inmates Get Life Instead, Nick Wadhams, Time Magazine, 5 August 2009, <<http://www.time.com/time/world/article/0,8599,1914708,00.html>> (accessed 7 February 2012).

The Court of Appeal in a 2010 case commented on the mass commutation, saying that the President may well have been responding to the obvious injustice of the “death row syndrome”.<sup>12</sup>

Following the 2009 commutation, the President invited both state and non-state actors in the criminal justice system to undertake a study on the impact of the imposition of the death penalty in society.

On 8 March 2009, Vice-President Kalonzo Musyoka said the Kenyan government was reviewing the death penalty. The Vice-President said his office was consulting with the Attorney-General and the President’s offices to chart the way forward. He stated that “[s]ome African countries like Rwanda have already abolished the death penalty; we may go in that direction if there is consensus.”<sup>13</sup>

Progressive members of parliament have also made various attempts to abolish the death penalty through legislative amendments. The most recent attempt was made in 2007. The motion, submitted in parliament by opposition lawmaker, Paddy Ahenda, was rejected by both sides of the House. Ahenda said the motion should be considered for approval considering the fact that too many inmates are on death row.<sup>14</sup>

The debate on the possibility of abolishing the death penalty in Kenya arose again during the drafting of the current 2010 constitution. The constitutional drafters undertook a public survey on various issues, among which was to solicit public opinion on the retention of the death penalty. The majority of those surveyed supported the retention of the death penalty, which explains the limitation imposed on the right to life in Article 26(3) of the Constitution.

Although the new Constitution implicitly upholds the application of the death penalty, at a political level Kenya seems to be on the cusp of taking steps towards abolition. In fact, Kenya’s National Report to the UN Human Rights Council in February 2010 makes specific reference to its de facto moratorium

on executions, and states that there is a presidential directive to all relevant Government Ministries and Departments to conduct empirical studies and engage all stakeholders urgently, to determine whether the continued existence of the death penalty in the laws of the land has any value or impact in the fight against crime.<sup>15</sup>

However, Kenyan politicians appear to be hampered in their abolitionist efforts by public opinion. In its statement to the UN Committee against Torture in 2008, the Kenyan representative stated that “[w]e are aware that this [the de facto moratorium] is still not a satisfactory situation, but until a new constitutional dispensation is agreed upon, this is the most humane option so far available. The Government and the Kenya National Commission on Human Rights, in collaboration with civil society organisations, have been educating Kenyans on the global trends on the issue of the death penalty. The Government expects these efforts will be fruitful and that eventually the citizens will be won over and Kenya can then become a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights.”<sup>16</sup>

### III. Legal framework: application of international and regional human rights standards in Kenya

Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of national law.

Article 21(4) of the Constitution provides that “[t]he State shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms”.

Kenya is party to many international human rights instruments relevant to the death penalty.

<sup>12</sup> *Mutiso v. Republic*, Criminal Appeal No. 17 of 2008, para. 16.

<sup>13</sup> The death penalty worldwide report 2010, Hands Off Cain, pp. 63–64, <<http://www.handsoffcain.info/bancadati/index.php?tipotema=arg&idtema=13310629>> (accessed 10 December 2011).

<sup>14</sup> Kenya parliament maintains death penalty, *afrol News*, 2 August 2007, <<http://www.afrol.com/articles/26311>> (accessed 1 February 2012).

<sup>15</sup> National report submitted to the UN Human Rights Council, A/HRC/WG.6/8/KEN/1, 22 February 2010, para. 38.

<sup>16</sup> Statement by the Minister for Justice, National Cohesion and Constitutional Affairs, Hon. Martha Karua, at the Presentation of Kenya’s Initial Report under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Geneva, 13–14 November, 2008.

Kenya acceded to the International Covenant on Civil and Political Rights (ICCPR) on 1 May 1972, but is not a signatory to the First or Second Optional Protocols to the ICCPR. Kenya acceded to the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) on 21 February 1997 without any reservations, but is not a signatory to the Optional Protocol to the Convention Against Torture (OPCAT). It ratified the Convention on the Rights of the Child on 30 July 1990, and the Rome Statute of the International Criminal Court on 15 March 2005.

With regards to its regional commitments, Kenya ratified the African Charter on Human and Peoples' Rights on 23 January 1992, the African Charter on the Rights and Welfare of the Child on 25 July 2000, and the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa on 6 October 2010.

In 2007, 2008 and 2010, Kenya abstained from voting on the United Nations (UN) General Assembly (GA) resolutions calling for a moratorium on the use of the death penalty. However, although Kenya did not vote in favour, it did not sign the *Note Verbale of Dissociation*.

## IV. Legal framework: the death penalty in Kenya

### Death penalty applicable crimes

Although the Constitution of Kenya recognises the right to life, it gives Parliament the power to legislate the extent to which a person may enjoy that right.

The Kenyan Penal Code Act imposes a mandatory death sentence for five offences:

1. Murder: Section 204 of the Penal Code.
2. Treason: Section 40 of the Penal Code.

Treason can include a variety of acts, including sedition, an intention to undermine or overthrow the government, harm or kill the President or instigate or engage in war against Kenya.

3. Aggravated robbery: Section 296(2) of the Penal Code.
4. Attempted robbery with violence: Section 297(2) of the Penal Code.

Aggravated robbery or attempted robbery requires the use or threat of violence with theft.<sup>17</sup> If committed using a weapon, or by a gang, or resulting in actual personal violence to the victim, the offender "shall be sentenced to death".

In 2005, the UN Human Rights Committee expressed concern that Kenyan courts impose the death penalty for robbery or attempted robbery with violence, "which do not qualify as 'most serious crimes' within the meaning of article 6, paragraph 2 of the Covenant [ICCPR]."<sup>18</sup>

Aggravated robbery or attempted robbery with violence constitutes the highest percentage of capital convicts relative in Kenya.<sup>19</sup>

5. Administering an oath purported to bind a person to commit a capital offence: Section 60 of the Penal Code.

### Mandatory sentencing

The five capital offences set out in the Penal Code are all mandatory offences. However, the Court of Appeal issued a landmark judgement in 2010 that abolished the mandatory death penalty for murder (Section 204 of the Penal Code).

The Court in *Godfrey Ngotho Mutiso v. the Republic* held that the automatic nature of the mandatory death penalty violated the right to life, and constituted arbitrariness since it failed to provide convicted individuals with an opportunity to mitigate their death sentence:

<sup>17</sup> Section 295 of the Penal Code.

<sup>18</sup> Concluding Observations of the Human Rights Committee: Kenya, CCPR/CO/83/KEN, 29 April 2005, para. 13.

<sup>19</sup> KNCHR Position Paper on the Death Penalty, supra n. 9, para. 31.

*“not everyone convicted of murder deserves to die, and therefore, a sentencing regime that imposes a mandatory sentence of death on all proven murder cases, or all murders within specified categories, is inhuman and degrading because it requires sentence of death, ... to be passed without any opportunity for the accused to show why such sentence should be mitigated; without consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such sentence might be wholly disproportionate to the accused’s criminal culpability.”*<sup>20</sup>

The Court considered an array of foreign and international jurisprudence from similar jurisdictions, and determined that the mandatory death penalty for murder “is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial.”<sup>21</sup>

Although the *Mutiso* judgement only referred to murder (Section 204 of the Penal Code), the Court of Appeal stated that the same principle might well apply to other offences that attract a mandatory death sentence.<sup>22</sup>

Following *Mutiso* the Attorney-General, through the Director of Public Prosecutions, conceded to the abolition of mandatory death sentences, “[w]e now concede that ... a trial judge still retains a discretion not to impose the death penalty and instead impose such sentence as may be warranted by the circumstances and facts of the particular case. ... The word “shall” in Section 204 should now be read as “may”.”<sup>23</sup>

In June 2011 the High Court issued a judgement in the case of *R v. John Kimita Mwaniki*<sup>24</sup> which applying the *Mutiso* decision created some uncertainty in this area of law. The court in *Mawaniki* refers to the myriad of other statutes in Kenya where the expression

“shall” is deliberately used, specifically referring to the Sexual Offences Act and the Drugs Narcotics and Psychotropic Substances Act. The Court was concerned that the precedent in *Mutiso* would create chaos and engender minimal sentencing. The Court expressed concern that following *Mutiso* the High Court would become inundated with applications for revision from “shall” to “may”. Following this judgement, there is concern by human rights activists and lawyers that the court’s reasoning in *Mawaniki* may restrict future courts in the application of *Mutiso* with regard to other offences which attract a mandatory death sentence.

The Kenya Supreme Court or the Kenya Parliament should confirm that all mandatory death sentences (and not just for crimes of murder) violate the right to life and the prohibition of cruel, inhuman and degrading punishment in Kenya’s Constitution, and subsequently to abolish them in law.

Following *Mutiso* a new body of jurisprudence is being developed regarding the test to be applied when sentencing those who would otherwise have had a mandatory death sentence imposed on them. While this body of jurisprudence is very underdeveloped given that the *Mutiso* judgement is less than two years old, the courts are identifying relevant mitigating factors that should be taken into consideration in a sentencing hearing.

In *Mutiso*, the Court implied that sentencing should consider the “gravity of the offence committed and the circumstances of the deceased’s death.”<sup>25</sup> The court also emphasised passages from other opinions that state or imply that the death penalty should be restricted to aggravated murders. In preparation of his sentencing hearing, *Mutiso* undertook a psychiatric assessment, which was admitted as evidence into his resentencing hearing.<sup>26</sup> The appellant was sentenced to life imprisonment.

20 *Godfrey Ngotho Mutiso v. Republic* [2010] eKLR, para. 27.

21 *Ibid*, para. 36.

22 *Ibid*, para. 36.

23 Death penalty no longer a mandatory sentence in criminal cases, Petronella Mukaindo and Michael Murungi, Kenya Law Review Weekly e-Newsletter, 17 June 2011.

24 *Republic v. John Kimita Mwaniki* [2011] eKLR.

25 *Mutiso v. Republic*, Criminal Appeal No. 17 of 2008, paras 33–34 and 37.

26 Development of the Death Penalty Campaign, Timothy Bryant, paper presented at the regional roundtable on ‘Death Penalty in East Africa: Challenges, Prospects and Comparative Jurisprudence’, 24–27 July 2011.

The High Court in *Mawaniki* took into consideration the defendant's age, family connections, remorsefulness and previous criminal record, and subsequently sentenced him to 30 years' imprisonment without an option for parole for the first 20 years.<sup>27</sup>

Members of the Kenyan judiciary have initiated a process to develop national guidelines on relevant aggravating and mitigating factors that should be taken into consideration during sentencing.<sup>28</sup> The aim of the sentencing guidelines will be to aid lawyers, prosecutors and judges in sentencing cases, and to ensure consistency and fairness in all capital cases.

### Prohibited categories

The death penalty cannot be applied to the following persons:

- **Juveniles:** Section 25(2) of the Penal Code provides that a death sentence shall not be pronounced on any person convicted of an offence if the offence was committed when he or she was under the age of eighteen years.<sup>29</sup> In lieu of a death sentence, the offender shall be "detained at the pleasure of the President... in such place and under such conditions as the President may direct".
- **Mentally ill:** Although the Penal Code does not specifically discuss mental illness as affecting criminal liability for death penalty applicable crimes, Section 12 creates an exemption from criminal liability for persons who had "any disease affecting his mind [making him] incapable of understanding what he is doing, or of knowing that he ought not to do the act". If the offender is found to have been 'insane' at the time of the offence, "the court shall make a special finding ... that the accused was guilty ... but was insane."<sup>30</sup> The President may then order the person to be

detained in a mental hospital, prison or other suitable place of safe custody.<sup>31</sup> Additionally, the Court shall postpone criminal proceedings if the accused is "of unsound mind and consequently incapable of making his defence."<sup>32</sup>

- **Pregnant women:** Sections 211–212 of the Penal Code provides that a pregnant woman convicted of a death penalty applicable crime shall be sentenced to life imprisonment.

## V. Legal framework: alternative sanctions to the death penalty in Kenya

### Length of life imprisonment

Life imprisonment in Kenya means life without parole.

Section 46(1)(ii) of the Kenyan Prisons Acts provides that in no case shall "any remission be granted to a prisoner sentenced to imprisonment for life".

### Life sentence applicable crimes

The Republic of Kenya has 26 life sentence applicable crimes under the Penal Code Act:

1. Concealment of treason: Section 42.
2. Treasonable felony: Section: 43.
3. Treachery: Section 43A.
4. Inciting to mutiny: Section 47.
5. Aiding prisoner of war to escape: Section 50(a).
6. Rioting after proclamation for rioters to disperse: Section 83.

<sup>27</sup> *Republic v. John Kimita Mwaniki* [2011] eKLR, page 26.

<sup>28</sup> The Role of the Judiciary in the Debate, Hon. Justice Musinga, paper presented at the regional roundtable on the death penalty, supra n. 26.

<sup>29</sup> Section 14(1) of the Penal Code provides legal immunity to persons below the age of eight, and Section 14(2) raises a rebuttable presumption of innocence in respect to persons who are below the age of 12 years.

<sup>30</sup> Section 166(1) of the Kenya Criminal Procedure Code.

<sup>31</sup> Section 166(3), *Ibid.*

<sup>32</sup> Section 162(2), *Ibid.*

7. Obstructing proclamation for rioters to disperse: Section 84.
  8. Rioters destroying buildings: Section 85.
  9. Rescue of a person sentenced under death or life imprisonment: Section 122(1).
  10. Attempted murder: Section 220.
  11. Attempted murder by a convict: Section 221.
  12. Being an accessory after the fact to murder: Section 222.
  13. Aiding suicide: Section 225.
  14. Killing unborn child: Section 228.
  15. Disabling in order to commit felony or misdemeanour: Section 229.
  16. Stupefying in order to commit felony or misdemeanour: Section 230.
  17. Doing an act intended to cause grievous harm or prevent arrest: Section 231.
  18. Preventing escape from a wreck: Section 232.
  19. Intentionally endangering the safety of a person travelling by railway: Section 233.
  20. Doing grievous harm: Section 234.
  21. Arson: Section 332.
  22. Destroying or damaging riverbank, wall or navigation work or bridge: Section 339(3).
  23. Sabotage: Section 343.
  24. Forgery of a will, document of title, security, cheque: Section 350.
  25. Counterfeiting coin: Section 365.
  26. Making preparation for coining: Section 366.
- All life sentence applicable crimes are discretionary.

## Prohibited categories

Kenya only makes one restriction on the application of life imprisonment:

- Mentally ill (see definition above).

## VI. Application of the death penalty/life imprisonment: fair trial procedures in Kenya

### Pre-trial rights

Under Kenyan law, a person can be arrested if the police has reasonable grounds to believe that he or she has committed or is about to commit an offence.<sup>33</sup>

An arrested person has a right:

- To be informed in the language he understands of the reason of his arrest.<sup>34</sup>
- To remain silent.<sup>35</sup>
- To communicate with an advocate and other persons whose assistance is necessary.<sup>36</sup>
- Not to be compelled to make any confession or admission that could be used in evidence against the person.<sup>37</sup>
- To be held separately from persons serving a sentence<sup>38</sup> (although this right is often not upheld due to mass overcrowding in the Kenyan Prison system).
- To be brought before a court as soon as reasonably possible, but not later than 24 hours unless he is arrested outside ordinary court hours or on a day which is not an ordinary court day;

<sup>33</sup> Section 29, *Ibid.*

<sup>34</sup> Article 49(1)(a) of the Constitution of the Republic of Kenya, 2010.

<sup>35</sup> Article 49(1)(b), *Ibid.*

<sup>36</sup> Article 49(1)(c), *Ibid.*

<sup>37</sup> Article 41(1)(d), *Ibid.*

<sup>38</sup> Article 49(1)(e), *Ibid.*

in which case he/she has to be presented on the next court day and informed of the reason for his detention continuing or be released.<sup>39</sup>

The Criminal Procedure Code provides that capital defendants must be brought before a judge within 14 days of arrest. However, this right is often not respected in practice. To redress the shortcomings, the court has in some cases released individuals, including those accused of a capital offence, because they had been held longer than legally permitted.<sup>40</sup>

## Right to bail

The right to bail is guaranteed under Article 49(1)(h) of the Constitution. However under Section 123(1) of the Criminal Procedure Code, persons accused of murder, treason, robbery with violence, and attempted robbery with violence do not qualify for bail. This means that under Kenyan law there is no right to bail for those accused of a capital offence.

## Presumption of innocence

Article 50(2)(a) of the Constitution guarantees every accused person the right to be presumed innocent until proven guilty.

## The right to adequate legal assistance

The Constitution guarantees the right to a legal defence.<sup>41</sup> However, there is no legal guarantee that indigent defendants have a right to legal aid in all cases. They are entitled to state funded legal counsel “if substantial injustice would otherwise result.”<sup>42</sup> The Chief Justice or presiding judge may, at any time during a criminal application or appeal, assign a legal representative if “desirable in the interests of justice”.<sup>43</sup> In these cases, the Court covers the

cost of fees and expenses of any assigned legal representative.<sup>44</sup> As such, there is no legal guarantee that an indigent person charged with a crime for which the death penalty or life imprisonment may be imposed would receive legal aid.

Pro bono legal assistance may sometimes be available through NGOs, however this is usually limited to major cities.

Where legal aid is granted, the quality of legal representation is often very poor and ineffective. Legal aid lawyers are poorly remunerated by the state, and the defendant seldom meets their lawyer before trial.

In 2005, the UN Human Rights Committee expressed concern that those accused of murder did not have access to lawyers during initial stages of detention, and recommended that Kenya resolve that issue.<sup>45</sup>

## Trial by jury

The Kenyan legal system does not provide for trial by jury. All cases are tried before a judge. In cases of treason and murder, the deputy registrar of the High Court may appoint three assessors (lay citizens) to sit with the high court judge, and provide an opinion or verdict on the case, although the judge is not bound by those verdicts. The defendant’s lawyers may object to the appointment of individual assessors.

## Language of the court

The language of the courts is English or Swahili.<sup>46</sup> Article 50(2) of the Constitution guarantees the assistance of an interpreter without payment if the defendant does not understand the language of the court. This includes interpreting any evidence given

39 Article 49(1)(f), *Ibid.*

40 2009 Human Rights Report: Kenya, US Dept of State, Bureau of Democracy, Human Rights and Labor, 11 March 2010, Section 1(d) “Arbitrary Arrest or Detention”.

41 See Article 50(2)(g) of the Constitution of the Republic of Kenya, 2010, and Section 137F(1)(a)(vi) of the Criminal Procedure Code.

42 Article 50(2)(h) of the Constitution of the Republic of Kenya, 2010.

43 Section 24(1) Kenya Rules Under Section 5 of the Appellate Jurisdiction Act.

44 Section 24(3), *Ibid.*

45 Concluding Observations of the Human Rights Committee: Kenya, CCPR/CO/83/KEN, 29 April 2005, para. 17.

in open court where the accused is present,<sup>47</sup> and to translate the court judgement.<sup>48</sup>

## Hearings

Article 50(2) of the Constitution guarantees that every accused person has a right to a public trial, that is concluded without unreasonable delay, and to be present during his or her trial.

## Public judgements

The substance of the judgement must be explained either immediately after the trial or at a subsequent time, of which notice is given to both parties.<sup>49</sup>

Court judgements are public records accessible by all. They are available online at <[www.kenyalaw.org](http://www.kenyalaw.org)>.

## Right to an appeal by a court of higher jurisdiction

Under the Constitution, every person has the right “to appeal to, or apply for review by, a higher court as prescribed by law”.<sup>50</sup>

Rule 5(1) of the Kenya Rules of Procedure under Section 5 of the Appellate Jurisdiction Act provides that no sentence of death shall be carried out until the time for giving notice of appeal has expired, or until the appeal has been determined. A notice of appeal in a criminal matter must be filed within 14 days of the court’s decision.<sup>51</sup> Though the High Court may, at its discretion, extend the time for giving notice of intention to appeal, no extensions may be granted to individuals under sentence of death once the warrant for the execution of the death sentence has been granted.<sup>52</sup>

The High Court has a special division that hears serious crimes including capital offences. Individuals may then appeal decisions of the High Court to the Court of Appeals. Following the establishment of the new 2010 Constitution, the Supreme Court was re-established as the highest court in Kenya. The Supreme Court can now determine appeals from the Court of Appeals.

Convicted persons may also petition for a fresh trial where the person’s appeal has been dismissed by the highest appellate court and where new and compelling evidence becomes available.<sup>53</sup>

## Right to seek pardon or commutation of the sentence

Article 133(1)(a)-(d) of the Constitution provides that the President may exercise the power of mercy. The President may grant a free or conditional pardon, postpone the carrying out of a punishment for a specified or indefinite period, substitute a less severe form of punishment, remit all or part of the punishment, or issue a death warrant.

The President exercises the power of mercy in accordance with advice from the Advisory Committee on the Power of Mercy. The Advisory Committee is composed of the Attorney General, the Cabinet Secretary for Correctional Services, and five other members. The Advisory Committee considers the petition for mercy and will take into account the trial notes provided by the judge and, in some cases, the views of the victim.<sup>54</sup>

However, there have been concerns that trial notes provide little or no information on the characteristics of the accused or the circumstances of the crime. This makes it challenging for the President to exercise

46 Section 198(4) of the Criminal Procedure Code.

47 Section 198(a), *Ibid.*

48 Section 170, *Ibid.*

49 Section 168(1), *Ibid.*

50 Article 50(2)(q) of the Constitution of the Republic of Kenya, 2010.

51 Section 59(1) Kenya Rules Under Section 5 of the Appellate Jurisdiction Act.

52 Section 7 of the Kenya Appellate Jurisdiction Act.

53 Article 50(6) of the Constitution of the Republic of Kenya.

54 Article 133(4), *Ibid.*



his power of mercy in cases where the accused lacked a sentencing trial.

Following Kenya's independence, available reports indicate that from 1963 to 1987, 135 prisoners benefited from the presidential prerogative of mercy and their sentences were commuted from death to life imprisonment.<sup>55</sup> In 2003, 223 death row convicts had their sentences commuted and, in 2009, the President commuted an unprecedented 4,000 death row inmates. This means that at least 4,358 prisoners have received a commutation of their death sentence since independence.

## VII. Application of the death penalty in Kenya: statistics

The last execution was carried out in 1987 (against John Ochuka who was convicted for the offence of treason).

Following independence, reports indicate that from 1963 to 1987 alone, 280 persons out of 3,584 people sentenced to death were executed in Kenya.<sup>56</sup>

Death sentences continue to be handed down by the court. In 2011 at least 11 death sentences were issued. This included a case involving 70-year-old Kuria Kihunyu, who was sentenced to death for robbery with violence. Kihunyu was accused of robbing a man of his mobile phone and other personal items in an attack in September 2010.<sup>57</sup> On 26 May 2011, three men were also sentenced to death for stealing a mobile phone and 300 Kenyan shillings while armed with a home-made gun, toy pistols and knives.<sup>58</sup>

According to Amnesty International, in 2010, at least 5 death sentences were issued.<sup>59</sup>

Between 2001 and 2005, 3,741 death sentences were handed down.<sup>60</sup>

The majority of those on death row have been convicted for robbery with violence, and the minority for murder.

Kenya has approximately 1,440 inmates (1,410 men and 30 women) on death row, which represents 2.84 percent of the general prison population.

There are a further 7,263 capital remand cases awaiting trial.

## VIII. Application of life imprisonment in Kenya: statistics

There are currently 4,637 detainees serving a life sentence in Kenya, 58 of whom are women.<sup>61</sup>

## IX. Implementation of the death penalty: method of execution in Kenya

The method of execution in Kenya is by hanging.<sup>62</sup> However, Kenya does not currently retain an executioner as they have not hanged any prisoners for almost twenty-five years.

If the sentence of death were to be carried out, a death warrant must be issued and signed by the President.<sup>63</sup> It must state the place and time for the execution. The death warrant must also provide

55 Capital Punishment: Texas to Kenya, Rober Oduol, 2000, <<http://www.generator21.net/g21archive/africa8.html>> (accessed 7 February 2012).

56 Ibid.

57 70-year-old man sentenced to death for robbery, The Gulf Today, 20 July 2011, <<http://gulftoday.ae/portal/bff2e087-8be4-4233-acc0-06442f8f1b01.aspx>> (accessed at 12 January 2011).

58 Kenya: Mobile Phone Thieves Sentenced to Death, allAfrica.com, 26 May 2011, <<http://allafrica.com/stories/201105270088.html>> (accessed at 12 January 2012).

59 Death sentences and executions 2010, Amnesty International, ACT 50/001/2001, p. 34.

60 KNCHR Position Paper on the Death Penalty, supra n. 9.

61 Report of the Kenya Prison Service, 7 September 2011.

62 Section 69 of the Kenya Prisons Act.

63 Section 332(3)(a) of the Criminal Procedure Code.

directions as to the place of burial or cremation of the body of the person to be executed.

In the past, executions were carried out between 4am and 5am. The hangman summoned the convict, tied his hands behind his back and escorted him to a wooden execution platform. Once there, his ankles were bound and a hood was placed over his head. Finally, the hangman would place the rope over his victim's neck and a lever would be pulled to open the trap under the feet of the convict. The execution took place in the presence of a doctor, a priest, and the commissioner of the prison or his deputy. Before the hanging, the doctor had to certify that the convict was in sound medical condition.<sup>64</sup> The hanged convict was usually buried in a single, unmarked grave inside Kamiti prison.

## X. Implementation of the death penalty/life imprisonment in Kenya: prison regime and conditions

### Location of imprisonment for death row and life-sentenced prisoners

Death row and life-sentenced inmates are incarcerated at the following prisons:

- Kamiti Maximum Security Prison: Nairobi.
- King'ong'o Maximum Security Prison: Nyeri.
- Shimo la Tew Prison: Mombasa.
- Manyani Prison: Voi.
- Naivasha Prison: Naivasha.
- Kodiaga Prison: Kisumu.

Death row inmates are separated from the rest of the prison population. Life sentenced prisoners are held in the same wing as other prisoners serving long-term sentences. They are subject to the same restrictions as long-term prisoners.<sup>65</sup>

### Conditions and treatment of detention

Prisons in Kenya are generally overcrowded. Kenya has 103 prisons with a total capacity of 22,334 prisoners but the Kenya Prison Service currently has approximately 50,720 detainees.<sup>66</sup> 40 percent of those inmates are on remand.

The overcrowded conditions extend to those on death row and those serving a life sentence.

The mass overcrowding is the single most important challenge for the Kenya Prison Service. The conditions make it difficult to provide basic needs to death row and life sentenced prisoners, including adequate living conditions, and access to medical and psychiatric care. There is a lack of appropriate resources allocated to the Kenya Prison Service, including shortage of prison staff and a lack of infrastructure within the prison system to deal with the growing prison population.

Although the problem of overcrowding is being addressed partly by rehabilitation programmes designed for re-integration into society, this does not affect those prisoners on death row or those serving a life sentence.

The Constitution makes a legal guarantee that Parliament should enact legislation that "provides for the humane treatment of persons detained, held in custody or imprisoned; and (b) takes into account the relevant international human rights instruments."<sup>67</sup>

The UN Committee against Torture, in its concluding observations in 2008, raised concerns about the dire conditions of death row, particularly the overcrowding, lack of appropriate health services

<sup>64</sup> Capital Punishment: Texas to Kenya, *supra* n. 55.

<sup>65</sup> Report of the Kenya Prison Service, 31 August 2011.

<sup>66</sup> *Ibid*, 24 July 2011.

<sup>67</sup> Article 51(3) of the Constitution of the Republic of Kenya.

and high levels of violence inside the prisons, including inter-prisoner violence.<sup>68</sup> The Committee recommended that Kenya “take the necessary measures to improve the conditions of detention for persons serving on death row in order to guarantee basic needs and rights.”<sup>69</sup>

Most prison facilities where death row and life inmates are incarcerated lack appropriate sanitation infrastructure. Most cells use buckets as toilets. There are often water shortages, which have in the past led to widespread diseases such as typhoid.<sup>70</sup>

Access to food is rationed due to the large numbers of inmates.

There are inadequate mattresses and bedding for inmates. Most prisoners sleep in single file.

From 2008, prisoners were provided with shoes for the first time.

Death row and life prisoners enjoy regular visitation rights from their family. The right to conjugal visits for married inmates was adopted in 2011.

Female prisoners with young children (up to the age of four), including those on death row and those serving a life sentence, are permitted to be incarcerated with their child in the prison.

Pregnant women share facilities with other female prisoners.

### Access to medical care

Due to the overcrowded and unhygienic prison conditions, tuberculosis (TB) and other diseases are widespread among prisoners in Kenya. HIV/AIDs is prevalent among prisoners, and the inability of the Kenya Prison Service to distribute condoms to prisoners exacerbates the situation.

Those that do require medical attention must use the prison health facilities, which lack the most basic

health care equipment, supplies and personnel. Only when a prisoner’s condition severely deteriorates does the prison permit them to seek treatment in a government hospital outside of the prison.

### Rehabilitation and social reformation programmes

There has been a recent paradigm shift within the Kenya Prison Service (KPS) towards the reintegration and rehabilitation of prisoners back into society, and to address the offending behaviour which led them to prison. However these programmes still lack psychological intervention and support to address issues such as hostility, resentment, hurt and anger that may have contributed to the initial offending behaviour.

Prison industries form a major part of rehabilitation programmes for long-term prisoners. Access to professional studies and trade is also available. Other rehabilitation programmes include education, spiritual welfare and counselling. Primary and secondary education is provided in prison, where inmates can be taught and sit for national examinations with the rest of the country. However, illiteracy remains a great challenge for the prison service.

However the real challenge for the KPS is how to effectively manage those on death row and those serving a life sentence who will never be released back into society, but nonetheless have to live in the prison community in a way that respects their right to human dignity without being a risk to other prisoners or prison staff.

### Conditions for parole

In Kenya, death row and life prisoners are not entitled to parole. They are only entitled to make a request to the President to exercise his/her prerogative of mercy.

68 Concluding observations of the Committee against Torture: Kenya, 19 January 2009, CAT/C/KEN/CO/1, para. 15.

69 Ibid, para. 29.

70 Inside Kenya’s ‘worst’ prison, BBC News, 4 March 2003 <<http://news.bbc.co.uk/2/hi/africa/2816217.stm>> (accessed at 12 January 2012).

## Monitoring of prisoners

Kenya has not yet ratified OPCAT, and does not have a national preventive mechanism to monitor places of detention. However, civil society organisations have permission to visit prisons, and these visits continue to reveal harsh conditions, as well as allegations by prisoners of inhumane treatment, including torture.

In February 2009 the Kenya National Commission on Human Rights (KNCHR), which is mandated to visit and inspect prisoners and other places of detention, and make appropriate recommendations, documented beatings and assault by prison staff of prisoners at Nairobi Remand and Meru Women's Prisons, and in April 2009 at Kisumu Women's Prison.<sup>71</sup>

The media also pays occasional visits to prisoners and helps to highlight the conditions and treatment of detention. These media visits can be undertaken for all prisoners, including those on death row and lifers.

## XI. Transparency and accountability in Kenya

The state does not publish any statistics in regard to the death penalty. However, some information regarding the number of prisoners is available from the prisons department upon request.

A comprehensive database of Kenya's laws and court decisions may be found at <[www.kenyalaw.org](http://www.kenyalaw.org)>.

## XII. Current reform processes in the criminal justice system in Kenya

In 2008, Vice-President and Minister for Home Affairs Kalonzo Musyoka appointed a committee to look into the conditions of prisons, and the prison system as a whole (following a prison warders' mutiny in April 2008). The committee, headed by former legislator Marsden Madoka, proposed radical changes to the penal system. This included the introduction of conjugal visits for prisoners and the improvement of family-friendly visitation facilities. The report also identified corruption, dereliction of duty and sexual harassment by prison officials, and a lack of adequate housing for prison officers which has caused a proliferation of shanties within prison compounds.

Following the release of the Madoka report, the government increased investment in the prison system. New prison facilities and housing for prison staff are being built, and bedding and meals for inmates improved.<sup>72</sup> However, reforms are still inadequate to comply with international standards.

## XIII. Extrajudicial killings in Kenya

Although the discussion of extrajudicial killings in Kenya is technically beyond the remit of this paper, the researchers were unable to ignore the fact that while the state may not be killing death row inmates, the number of extrajudicial killings by police and security forces has become more and more prevalent.

According to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, "[i]mpunity for killings has become entrenched" in Kenya, and "[e]xtrajudicial killings by the police remain pervasive. The excessive use of force by the police continues unaddressed; most of the killings are not investigated and prosecuted."<sup>73</sup>

71 2010 Human Rights Report: Kenya, US Department of State Bureau of Democracy, Human Rights and Labour, 8 April 2011, section 1(c) "Prison and Detention Center Conditions".

72 Ibid.

73 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Follow-up country recommendations – Kenya, A/HRC/17/28/Add.4, 26 April 2011, para. 58.

In the period August 2010 to August 2011, there were 33 reported extrajudicial killings in Kenya, all of them allegedly perpetrated by the police.<sup>74</sup> During 2011, one of the most outrageous examples occurred on 19 January 2011 along Langata Road, Nairobi, where three people were shot dead in broad daylight by the police. According to the Criminal Investigations Department, officers challenged six men to surrender who then drew arms and fired at the police officers leading to a shootout and subsequently the death of three of them.

This account was refuted by four eyewitnesses to the shooting, including photographs presented by one of the eyewitnesses, who claimed that the men were forcibly removed from their vehicle by the police and asked to lie down, “*Laleni vizuri tuwamalize!*” (“Lie down so we can finish you!”). Reportedly, as they lay face down in a prone position on the tarmac, bullets were shot into their bodies for what was reportedly a sustained period.<sup>75</sup>

This incident brought with it public outcry as to the excessive powers of the police and the total disregard for due process. The police have opened an investigation into the incident, but to date no report on the findings of the investigation has been published and no officers have been charged.

The KNCHR published a comprehensive report on extrajudicial killings in 2008.<sup>76</sup> The report made recommendations that a formal inquiry should be instituted into the role of police officers, and that the Attorney General institute an impartial investigation into allegations.<sup>77</sup> However, according to the 2011 report of the Special Rapporteur there has been limited progress made towards investigating police killings, and only one police officer has been convicted of murder in relation to the post-electoral violence.<sup>78</sup>

## XIV. Abolitionist movement in Kenya

The abolitionist movement in Kenya has been relatively unresponsive in recent years. However, during the past eighteen months, a coalition of national human rights organisations has established a Working Group on the Death Penalty to develop and implement a national advocacy strategy and to build up the momentum towards moratorium and abolition in Kenya. The members of the Working Group include:

- International Commission of Jurists – Kenya Section.
- The Kenya National Commission on Human Rights (KNCHR).
- The Kenya Legal Resources Foundation.
- Clear Kenya.

The Kenya Working Group on the Death Penalty has linked up with a newly-established East Africa Coalition and with the Great Lakes Coalition to share examples, strategies and lessons learned within the region on the abolition movement.

74 Information received by the Independent Medico-Legal Unit in Nairobi, Kenya.

75 Kenyan police execute three men point blank, Daily Nation, 19 January 2011, <<http://www.nation.co.ke/News/Kenyan+police+execute+three+men+point+blank/-/1056/1092592/-/106fd16/-/index.html>> (accessed 11 November 2011).

76 The Cry of Blood: Report on Extra-Judicial Killings and Disappearances, KNCHR, September 2008, pp. 6–7.

77 Ibid, pp. 6–7.

78 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, supra n. 73, paras 37 and 39.

## XV. Recommendations to the Republic of Kenya

1. Fully abolish in law the death penalty by eliminating it as a form of punishment from the five Sections in the Penal Code Act, and subsequently amend Article 26(3) of the 2010 Constitution, thereby guaranteeing an unqualified right to life. As an interim measure, reduce the application of the death penalty by abolishing those crimes which do not meet the “most serious crimes” standard, abolish the mandatory death penalty from the Penal Code Act, and establish an official moratorium on sentencing and executions.
2. Undertake a process to commute all death sentences to a fixed term sentence. Each case should be reviewed individually, taking into consideration the length of sentence already served, the character of the prisoner, and the type of crime committed.
3. The Ministry of Justice and Constitutional Affairs (MoJCA) and the Kenya National Commission on Human Rights (KNCHR), together with civil society organisations, should undertake campaigns to educate the public on the need to abolish the death penalty. The campaign should incorporate elements of humane alternative sanctions into its programme.
4. The Government, through the MoJCA and the Office of the Attorney General, should facilitate the immediate ratification and implementation of the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.
5. The MoJCA to reform the system of legal aid in Kenya, ensuring that indigent defendants can obtain free legal assistance at all stages of the case: pre-trial, trial, appellate, pardon and parole. Ensure all legal aid lawyers are independent of the state, adequately paid, have the same rights vis-à-vis the prosecutor, and are well-trained advocates in capital trials and sentencing hearings.
6. Build up the institutional capacity of the judiciary. This should include upholding their independence and integrity, ensuring that judges are well-trained, paid an appropriate salary, and have security of tenure.
7. Employ advanced technologies, including DNA testing, in gathering evidence in criminal proceedings, particularly those regarding serious offences where the accused might be sentenced to death or life imprisonment.
8. Develop national guidelines to harmonise sentencing in capital cases. Sentencing guidelines should include a non-exhaustive list of all aggravating and mitigating factors that could be taken into account at a sentencing hearing. Once approved, full training on the guidelines should be given to judges, lawyers, prosecutors and any other judicial officers.
9. Provide appropriate resources for gathering evidence that can be used for mitigation in sentencing hearings. This should include independent psychological evaluations and social worker reports on the defendant. Prisoners already sentenced to a mandatory offence should be informed of their right to apply for a resentencing hearing.
10. Establish in law an automatic right to apply for bail for those accused of committing a capital offence.
11. Draft and adopt a strategy to reform the penal system with a clear vision that makes specific reference to reforming life imprisonment which is consistent with international human rights standards and norms. Organise a public discussion on the strategy, with participation of all interested parts of civil society.
12. Abolish the use of life without the possibility of parole. All life sentenced prisoners in Kenya should have a realistic right of parole. Ensure that such release procedures are clearly defined in law, are accessible, meet due process safeguards, and are subject to appeal or review.
13. Establish a minimum length of term which a life sentenced prisoner must serve before being able to apply for parole. According to the UN Crime Prevention and Criminal Justice Branch’s 1994 report ‘Life Imprisonment’, all prisoners

sentenced to life should have their suitability for release reviewed after serving between 8 to 12 years of incarceration.

14. Humanise the system of punishment by reducing the number of crimes (currently 26) for which life imprisonment may be prescribed, and limit these cases to only the “most serious crimes”.
15. As part of its penal reform process, the Kenya Prison Service should be transferred from the Ministry of Home Affairs to an independent Department of Correctional Services. The department’s key objective should be restorative justice and rehabilitation of offenders, including those sentenced to death or life imprisonment.
16. Amend national legislation so that it is in accordance with the UN Standards Minimum Rules for the Treatment of Prisoners, and other international human rights standards and norms. Allocate necessary resources to the Kenya Prison Service so that they can effectively implement those international standards and norms.
17. Implement controls to deal with the mass overcrowding in the Kenya Prison Service. This should include addressing the issue of the excessive number of remand prisoners by only using pre-trial detention as a means of last resort in criminal proceedings; developing alternatives to pre-trial detention and alternatives to imprisonment; upholding the right to apply for bail; and ensuring that the justice process takes no longer than necessary without undermining respect for fair trial principles.
18. Ensure that prison conditions for death row and life sentenced prisoners approximate as closely as possible the conditions of life outside the prison system, and offer programmes for rehabilitation and reintegration. This should include the possibility to study, to work, to have contact with the outside world, and to receive psychological and medical treatment (in particular for prisoners suffering with TB, typhoid or HIV/AIDS).
19. Increase resources for the prison system to improve salary and working conditions for prison staff. Ensure all prison staff are appropriately trained in international human rights standards.
20. Ratify the Optional Protocol to the Convention against Torture and establish a National Preventative Mechanism, which is independent, competent to monitor all places where people are deprived of their liberty, and effectively operative in terms of its budget and resources.
21. Provide public access to information and statistics on the Kenyan penal system, including the number of sentenced prisoners and their characteristics, length of sentence, place of sentence and conditions/treatment of detention. Publish historical information on the application of the death penalty.
22. Vote in favour of the upcoming fourth UN GA resolution calling for a moratorium on the death penalty scheduled for 2012, and any other relevant resolutions. Make use of bilateral relations to advocate for other states to either support the resolution, or at a minimum, abstain from voting against it.
23. Encourage further collaboration between government officials and civil society, including journalists, on criminal justice issues.
24. Encourage relevant international organisations and donor states in a position to do so to promote and support criminal justice reforms within Kenya at both the financial and political level.

# Republic of Uganda

## I. Basic country information

*Geographical region:* Uganda is a landlocked country that borders the Democratic Republic of the Congo, Kenya, Rwanda, South Sudan and Tanzania. The capital is based in Kampala.

*Type of government:* According to Article 5 of the Constitution, Uganda is a republic. The president is both head of state and head of government.

*Language:* The official language of Uganda is English, although other languages are spoken in the country including Swahili.

*Population:* Uganda has a population of approximately 34 million people, composed of various ethnic groups including the Baganda, Banyakole, Basoga, Bakiga, Iteso, Langi, Acholi, Bagisu, Lugbara and Bunyoro.

*Religion:* The majority of Ugandans are either Roman Catholic or Protestant.

last death sentence issued by a civilian court was on 12 August 2011 and by the military court on 12 September 2011).

There are approximately 505 death row inmates in Uganda.<sup>79</sup> Overwhelmingly, death sentenced prisoners are poor, uneducated and from rural areas.<sup>80</sup>

The application of the death penalty as a form of punishment in Uganda dates back as far as pre-colonialism. However, the culture of traditional justice in Uganda was restorative and aimed at reconciliation, settlement and reparations. Cleansing and reintegration rituals were performed in respect of a person who had killed another. Murder could be compensated after evidence of remorse was shown by the killer. The system aimed at reconciling the families of the offender with the families of the victim. Executions were the very last resort.

The death penalty as a legal remedy was heavily influenced by the country's colonial experience<sup>81</sup> and is largely referred to as a colonial legacy.<sup>82</sup> The power to impose the death sentence remained in the powers of the colonial government until independence.

## II. Overview of the status of the death penalty in Uganda

Article 22 of the Constitution provides that “no person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court with competent jurisdiction in respect of a criminal offence and the conviction and sentence having been confirmed by the highest appellate court”.

The Republic of Uganda retains the death penalty for 28 civilian and military offences, however no execution has been carried out since 1999 (civilians) and 2003 (military). While some could argue that an unofficial moratorium on executions is in place, the government routinely defends its right to maintain the death penalty in the statute books, and the judiciary continue to hand down death sentences (the

In the drafting of the new constitution in 1962, effort was made to accommodate the pre-colonial structures into the new Uganda. The constitution adopted a number of fundamental human rights clauses however the right to life was qualified by the new constitution: “No person shall be deprived of life intentionally except in execution of a sentence of a court in respect of a criminal offence under the laws of Uganda of which he has been convicted.”

In 1967 the Constitution was amended following the rise of Milton Obote to power. This Constitution had less regard to fundamental rights and freedoms. During this era the government was empowered to impose states of emergency without limitation, and exercised extremely broad powers of search, seizure and arrest without trial.<sup>83</sup> Article 8 (right to life) of the 1967 Constitution adopted the same wording as the 1962 Constitution.

<sup>79</sup> FHRI interview with Mr. Naatkunda Aliyo, Assistant Superintendent of Prisons, 15 September 2011.

<sup>80</sup> Uganda: Challenging the Death Penalty, Report of the international fact-finding mission of the International Federation of Human Rights and FHRI, October 2005, p. 22.

<sup>81</sup> Commonwealth Africa, John Hatchard and Simon Coldham, in Peter Hodgkinson and Andrew Rutherford, *Capital Punishment: Global Issues and Prospects*, Water side Press (1996), p. 155.

<sup>82</sup> The constitutionality of the Death Penalty in Uganda: A Critical Inquiry, Apollo Makubuya, 6(2) East African Journal of Peace and Human Rights (2000), p. 222.

<sup>83</sup> Protection of Fundamental Human Rights in the Uganda Constitution, Francis Sekandi & Cos Gitta, 26 Columbia Human Rights Law Review 191 (1994).



The debate on the possibility of abolishing the death penalty was initiated during the process that led to the enactment of the current 1995 Constitution. The Constitution Drafts Commission, headed by the current Chief Justice of Uganda, considered whether the death penalty ought to be abolished. A national survey was carried out to solicit public opinion on various issues including the proposal to abolish the death penalty. The results of the survey indicated that 75 percent of those interviewed were in favour of retaining the death penalty.<sup>84</sup> This outcome influenced the drafting of the 'right to life' clause in the current constitution, whose wording is similar to that of the 1962 and 1967 constitutions.

Interestingly, public opinion on the death penalty has undergone a noticeable change since the 1995 survey. In 2001, the government established a Constitution Review Commission to address diverse elements of the constitution including the sovereignty of the people, political systems, democracy and good governance, with particular focus on the possibility of abolishing the death penalty. A survey was carried out and the findings showed that of those polled 42.5 percent favoured abolishing the death penalty, and 57.7 percent were in support of its retention (a drop of 17 percent since the 1995 survey). The survey also showed that those polled who were in favour of retaining it believed it should be used restrictively and only for the most heinous crimes such as murder and defilement of minors, and opposed it for treason.<sup>85</sup> While the 2001 statistics demonstrated a drift in public opinion away from the death penalty, public opinion nevertheless continued to play an important role in its retention in Uganda when the Constitution was amended in 2005.

In 2008, FHRI commissioned the Steadman Group to undertake a study of the human rights situation in Uganda. The study included a survey on public opinion regarding the death penalty. The survey showed that a minority of 39 percent were still in favour of retaining the death penalty, and 42 percent in favour of abolition.<sup>86</sup> In only 13 years, public opinion in favour of the death penalty had dropped by 36 percent, and only a minority of the population are in favour of its retention.

### III. Legal framework: international human rights standards in Uganda

Article 13 of the 1995 Constitution provides that the President may enter into treaties, conventions or agreements between Uganda and any other country, international organisation or body in respect of any matter.

Under Ugandan law, the various human rights instruments are not directly enforceable by the courts or other administrative authorities. For a ratified instrument to become national law, a law needs to be adopted by Parliament.

Uganda is party to a number of international human rights instruments relevant to the death penalty.

Uganda ratified the International Covenant on Civil and Political Rights (ICCPR) on 21 June 1995, and the First Optional Protocol to the ICCPR on 14 November 1995, however is not a signatory to the Second Optional Protocol. Uganda ratified the Convention against Torture and Other Cruel and Degrading Treatment or Punishment (CAT) on 3 November 1986, but is not a signatory to its Optional Protocol (OPCAT). It ratified the Convention on the Rights of the Child on 17 August 1990, and the Rome Statute for the International Criminal Court on 14 June 2002.

In terms of its regional commitments, Uganda has ratified the African Charter on Human and Peoples' Rights (10 May 1986), the African Charter on the Rights and Welfare of the Child (17 August 1994), and the Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (22 July 2010).

Uganda voted against the three United Nations (UN) General Assembly (GA) resolutions calling for a moratorium on the death penalty, which were adopted in 2007 under resolution 62/149; in 2008 under resolution 63/168; and in 2010 under resolution 65/206. Uganda also signed the *Note Verbale of Dissociation* following each of the three resolutions.

<sup>84</sup> The Search for the National Consensus; The making of the 1995 Constitution, Benjamin Odoki, Fountain Publishers (2005) p.186.

<sup>85</sup> The Report of the Commission of Inquiry (Consultation Review): Findings and Recommendations, Chair: F.E. Ssempebwa, 10 December 2003.

<sup>86</sup> National Human Rights Perception Survey report, Steadman Group (U) Ltd (on behalf of FHRI), 10 December 2008.

In 2011, Uganda underwent its Universal Periodic Review (UPR) by the UN Human Rights Council. The report of the Working Group on the UPR, issued in December 2011, recommended that Uganda ratify the Second Optional Protocol to the ICCPR, amend the constitution to abolish any provisions that provide for death penalty, and to commute all death sentences to life imprisonment.<sup>87</sup>

## IV. Legal framework: the death penalty in Uganda

### Death penalty applicable crimes

Uganda currently has 28 death penalty applicable crimes in three different statutes (the Penal Code Act 2007; the Anti-Terrorism Act 2002; and the Uganda Peoples Defence Forces Act 1992).

The Penal Code Act sets out eight offences where a sentence of death may be imposed:

1. Murder: Section 189 states that “[a]ny person convicted of murder shall be sentenced to death”. The provision by its nature precludes the court from exercising its discretion in sentencing.

Murder comprises the majority of crimes alleged to those on remand for capital cases in Uganda. As of 31 March 2011, among the 7,465 remand inmates, 2,872 (38.5 percent) were facing murder charges.<sup>88</sup> Of the 505 inmates on death row, 347 were convicted for murder (69 percent).

Despite efforts towards limiting the application of death penalty through the exercise of judicial discretion (see section on *mandatory sentences* below), judges continue to pass the death sentence for murder. Of the seven death sentences handed down in 2010, five were for murder.

2. Aggravated Robbery: Section 286(2) defines aggravated robbery to mean robbery where the offender “uses or threatens to use a deadly weapon or causes death or grievous bodily harm to any person”. Deadly weapon includes any instrument made or adapted for shooting, stabbing or cutting and any instrument which, when used for offensive purposes, is likely to cause death.

At present the number of remand detainees facing aggravated robbery charges stands at 1,553 out of the total remand population (21 percent).<sup>89</sup> Of the 505 inmates on death row, 155 were convicted for aggravated robbery (31 percent).

3. Rape: Section 123.

There are currently 415 detainees on remand facing rape charges (5.6 percent of those on remand).<sup>90</sup> It is important to note that as of January 2012 there were no prisoners on death row who had been convicted of rape. In practice most rape convictions end up with a long-term or life sentence.

4. Aggravated defilement: Section 129(1) of the Penal Code Amendment Act 2007 defines aggravated defilement as “a sexual act with another person who is below the age of 14 years, or where the offender is infected with HIV, or where the offender is a parent or guardian of or a person in authority over the person against whom the offence is committed, or where the victim of the offence is a person with disability or where the offender is a serial offender”.

According to the prison records there are 2,498 detainees on remand facing defilement charges<sup>91</sup> (however statistics do not indicate how many of those are charged with aggravated defilement). Like rape, there are no prisoners on death row who have been convicted of aggravated defilement; in practice life or long-term sentences are handed down.

<sup>87</sup> Report of the Working Group on the Universal Periodic Review: Uganda, A/HRC/19/16, 22 December 2011, see for example recommendations by Sweden, France, Switzerland, Turkey, the Holy See, Spain, Romania, and Costa Rica.

<sup>88</sup> Summary of UPS prisoners statistical returns, March 2011.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

5. Treason and offences against the state: Section 23 of the Penal Code creates a number of wide-reaching offences which warrant the death penalty, including any person who:
- Levies war against Uganda.
  - Unlawfully causes or attempts to cause the death of the President, or unlawfully wounds or does any harm to the President, or aims at the President any gun, offensive weapon, pistol or any firearm, whether it contains any explosive or destructive substance or not.
  - Contrives any plot, act or matter to overturn the Government; aids or abets another person in the commission of the foregoing acts, or becomes an accessory before or after.
  - Forms an intention to compel by force or constrain the Government or to intimidate or overawe Parliament.
  - Instigates any person to invade Uganda with an armed force, and manifests such intention by an overt act or by any utterance or by publishing any printing or writing.
  - Incites any person to commit an act of mutiny or any treacherous or mutinous act.
  - Incites any such person to make or endeavour to make a mutinous assembly.
  - Attempts to seduce any person serving in the armed forces or any member of the police force or prison services or any other security service, by whatever name called, from his or her duty and allegiance to the Constitution.

Although the government has reportedly arrested and charged unprecedented numbers of people with treason offences, their number is not reflected in the death row population. Individuals arrested and charged with treason and offences against the state are rarely prosecuted through formal courts, and are detained in ungazetted places of detention or 'safe houses'. There are currently 12 detainees on remand facing treason

charges. As of January 2011, three people on death row had been convicted of treason.<sup>92</sup>

The crime of treason in Uganda has in practice been used as a means of preventing non-violent political opposition leaders from expressing their dissenting views. Furthermore, in 2005 the UN Committee against Torture recommended that Uganda abolish the use of "ungazetted" or unauthorised places of detention or "safe houses",<sup>93</sup> however it appears that this recommendation has not yet been implemented. For example, the Rapid Response Unit<sup>94</sup> in Kireka maintains a "safe house" in Kampala.

6. Kidnap with intent to murder: Section 243 provides that any person who kidnaps with intent or knowledge that such person may be murdered or put in danger of being murdered is liable to receive the death penalty.

Evidence indicates that the death penalty is rarely applied for this crime; there are currently no persons on death row convicted of kidnapping.<sup>95</sup>

7. Smuggling while armed: Section 319(2) provides that where in the course of smuggling the offender is armed with, uses or threatens to use a deadly weapon or causes death or grievous harm to any person or authorised officer, the offender and any person jointly concerned in committing the offence of smuggling shall, on conviction, be sentenced to death. There are currently no persons on death row convicted with smuggling while armed.
8. Detention with sexual intent: Section 134 provides that where a person is detained in custody, any person having authority to detain that person or any inmate who has unlawful sexual intercourse with the detained person is liable to suffer death.

However, although this offence exists, there have not been any cases in the past five years, and there are currently no persons on death row convicted for detention with sexual intent.

<sup>92</sup> Ibid, January 2011.

<sup>93</sup> Conclusions and recommendations of the Committee against Torture: Uganda, CAT/C/CR/34/JGA, 21 June 2005, para. 10(i).

<sup>94</sup> This has been recently disbanded and renamed the Special Investigations Unit (SIU).

<sup>95</sup> Summary of UPS prisoners statistical returns, January 2011.

The Anti-Terrorism Act 2002 makes wide-ranging provisions for the sentence of death in three Sections:

9. Engaging in or carrying out acts of terrorism: under Section 7(1), a mandatory death sentence applies if any person engages in or carries out any act of terrorism that results in the death of any person, and a discretionary death sentence for all other cases where acts of terrorism have been carried out.

The Act does not provide a definition of “act of terrorism” but rather gives vague and undefined situations that may amount to an “act of terrorism”. Section 7(2) provides that a person commits an act of terrorism who, for purposes of influencing the Government or intimidating the public or a section of the public and for a political, religious, social or economic aim, indiscriminately without due regard to the safety of others or property, carries out all or any of the following acts—

- Intentional and unlawful manufacture, delivery, placement, discharge or detonation of an explosive or other lethal device, whether attempted or actual, in, into or against a place of public use, a State or Government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury, or extensive destruction likely to or actually resulting in major economic loss.
- Direct involvement or complicity in the murder, kidnapping, maiming or attack, whether actual, attempted or threatened, on a person or groups of persons, in public or private institutions.
- Direct involvement or complicity in the murder, kidnapping, abducting, maiming or attack, whether actual, attempted or threatened on the person, official premises, private accommodation, or means of transport or diplomatic agents or other internationally protected persons.
- Intentional and unlawful provision or collection of funds, whether attempted or actual, with the intention or knowledge that any part of the funds may be used to carry out any terrorist activities.

- Direct involvement or complicity in the seizure or detention of and threat to kill, injure or continue to detain a hostage, whether actual or attempted in order to compel a State, an international intergovernmental organisation, a person or group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.
- Unlawful seizure of an aircraft or public transport or the hijacking of passengers or group of persons for ransom.
- Serious interference with or disruption of an electronic system.
- Unlawful importation, sale, making, manufacture or distribution of any firearms, explosive, ammunition or bomb.
- Intentional development or production or use of, or complicity in the development or production or use of a biological weapon.
- Unlawful possession of explosives, ammunition, bomb or any materials for making of any of the foregoing.

10. Aiding and abetting terrorism: Section 8 provides that any person who aids or abets or finances or harbours, or renders support to any person, knowing or having reason to believe that the support will be applied or used for or in connection with the preparation or commission or instigation of acts of terrorism, commits an offence.

11. Establishment of terrorist institutions: Section 9 provides that any person who establishes, runs or supports any institution for promoting terrorism; publishing and disseminating news or materials that promote terrorism; or training or mobilising any group of persons or recruiting persons for carrying out terrorism or mobilising funds for the purpose of terrorism is liable for the death penalty

Article 28(12) of the Constitution provides that “no person shall be convicted of a criminal offence unless the offence is defined”. However, the Anti-Terrorism Act covers a wide range of activities, seemingly overlapping with other statutory crimes,

and uses vague terminology that could be used in a discriminatory fashion or for political gains.

There is growing concern among civil society about the misuse of this offence against certain sections of society, including against vocal human rights activists. For example, Al'Amin Kimathi, the Executive Director of Muslim Human Rights Forum in Nairobi, was arrested, together with Kenyan Lawyer Mbugu Mureithi, during his visit to Kampala to observe the hearing of six Kenyans charged with terrorism in connection with the July 2010 bomb attacks. While Mureithi was released after three days and deported to Kenya, Kimathi was held incommunicado for six days before being charged with terrorism and murder on 21 September 2010. FHRI and other international human rights organisations have demanded that details of the charges be provided, but to date this has not occurred. Kimathi was released on 12 September 2011.

There are currently 47 detainees on remand facing terrorism charges.<sup>96</sup> Most of these charges are linked to the 11 July 2010 bombings in Kampala.

The Uganda Peoples Defence Forces (UPDF) Act 1992 sets out a further 17 offences for which the death penalty might be imposed:

12. Treachery (Section 16).
13. Mutiny (Section 18).
14. Failing to execute one's duties where such failure results in failure of an operation or loss of life (Section 20).
15. Offences related to prisoners of war where a prisoner of war fails to rejoin the army when able to do so, or serves with or aids the enemy (Section 21).
16. Cowardice in action where it results in failure of operation or loss of life (Section 29).
17. Failure by person in command to bring officers under his command into action, or failure to encourage officers under his command to fight courageously or gives premature orders to attack, resulting into failure of operation or loss of life (Section 30).

18. Breaching concealment (Section 31).
19. Failure to protect war materials (Section 32).
20. Failure to brief or give instructions for an operation leading to failure or operation or loss of life (Section 35).
21. Disclosure of confidential information to the enemy or unauthorised persons, or discussion of confidential information in unauthorised places, and anything deemed to be prejudicial to the security of the army (Section 37).
22. Spreading harmful propaganda where there is failure of operation or loss of life (Section 38).
23. Desertion if the desertion endangers life, or leads to loss of life, or if the person deserts with ammunition or war materials or joins the enemy (Section 39).
24. Failure to defend a ship or vessel when attacked or cowardly abandons it (Section 50).
25. Inaccurate certification of an air craft or air material (Section 54).
26. Dangerous acts in relation to an aircraft which may result in loss of life or bodily injury (Section 55).
27. Attempt to hijack an aircraft or vessel used by the army or belonging to the army (Section 58).
28. Causing fire where fire results in death (Section 61)

According to Section 15 of the UPDF Act, any person who aids or abets a person subject to military law, or who is found to be in unlawful possession of arms, ammunition or equipment deemed to be the monopoly of the army is also subject to this law. This includes civilians as well as members of the military.

<sup>96</sup> Summary of UPS prisoners statistical returns, March 2011.

## Potential death penalty applicable crimes

Uganda has one of the widest ranges of death penalty applicable crimes across all East Africa. In 2004, the UN Human Rights Committee expressed concern about the broad array of death penalty crimes.<sup>97</sup> Unfortunately, Uganda has not done anything to reduce the number of death penalty applicable crimes.

Aside from the 28 Sections already in force, a new Bill was presented to Parliament in 2009 which mandates the death penalty for active homosexuals living with HIV or in cases of same-sex rape. “Serial offenders” also could face capital punishment, although the Bill does not define the term. Anyone convicted of a homosexual act would face life imprisonment. Parliament adjourned in May 2011 without voting on it. However the cabinet discussed it again in August 2011 and decided unanimously that current laws making homosexuality illegal were sufficient. Unfortunately the debate was reopened again on 8 February 2012, where the Bill was re-tabled on the floor of the House and has been referred to Parliament’s Legal and Parliamentary Affairs Committee for scrutiny. The committee is expected to examine it and conduct public hearings, and then report back to the House for a formal debate on the bill.<sup>98</sup>

## Mandatory sentences

According to Ugandan legislation, the offences of murder, treason and aggravated robbery attract a mandatory death penalty. This is also the case for terrorism, if it directly results in the death of any person.

In 2009, the Ugandan Supreme Court issued a landmark judgement which found the mandatory death penalty to be unconstitutional in Uganda.

In *Susan Kigula & 417 Others v. the Attorney General* the Court found that a mandatory sentence was inconsistent with the principle of equality before the law. “*Not all murders are committed in the same circumstances, and all murderers are not necessarily of the same character.*”<sup>99</sup> The Court found that a mandatory sentence denied a mitigation hearing, and as “*mitigation is an element of fair trial*”<sup>100</sup> it undermined Article 22 of the Constitution which provides that “[n]o person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial”. Thereby the Court declared that any law that fetters discretion is inconsistent with the Constitution.<sup>101</sup>

Although the Court in *Kigula* did not go as far as finding the death penalty unconstitutional, it did urge the legislature to:

*“reopen the debate on the desirability of the death penalty in our Constitution, particularly in light of findings that for many years no death sentences have been executed yet individuals concerned continue to be incarcerated on death row without knowing whether they were pardoned, had their sentences remitted, or are to be executed. The failure, refusal or neglect by the Executive to decide on those death sentences would seem to indicate a desire to do away with the death penalty.”*<sup>102</sup>

Following the judgement, the Supreme Court ordered that all prisoners (this was approximately one third of the convicts on death row at the time) whose cases were pending before the appellate courts were remitted back to the High Court to have a sentencing hearing. Those prisoners on death row who had exhausted the appellate process were entitled to undergo a resentencing hearing. At least 38 cases had their death sentences quashed and substituted with alternative sanctions (four in 2009, 15 in 2010, and 19 between January and July 2011). There was no policy to fast-track the process to ensure that

97 Concluding observations of the Human Rights Committee: Uganda, CCPR/CO/80/UGA, 4 May 2004, para. 13.

98 Uganda’s anti-gay bill returns to parliament, Elias Biryabarema, Reuters Africa, 8 February 2012, <<http://af.reuters.com/article/topNews/idAFJ0E81701A20120208>> (accessed 8 February 2012).

99 *Attorney General v Susan Kigula & 417 Others* (Constitutional Appeal No. 03 OF 2006) [2009] UGSC 6 (21 January 2009), p. 43.

100 *Ibid.*, p. 39.

101 *Ibid.*, p. 45.

102 *Ibid.*, p. 63.

these cases were handled expeditiously, and due to case backlogs, resource constraints and the absence of some of the original trial judges (due to death or retirement) mitigation hearings are still ongoing.

However, the judgement in the *Kigula* case also created a number of challenges. This includes the resentencing of individuals who may have been on death row for an extensive period of time. Mitigation generally requires that the case go back to the trial judge who initially ruled in the matter. However where the individual concerned has been on death row for an extended period of time, the initial trial judge may not be available. Other challenges have included identifying lawyers with relevant mitigation experience and skills to carry out this task (often on a pro bono or legal aid basis), and a lack of reliable jurisprudence on what type of mitigating factors can be taken into consideration at a sentencing hearing.

Positive steps have been taken by the judiciary and members of the legal profession to develop sentencing jurisprudence. Such examples include:

*Juma Muwonge v. Uganda*:<sup>103</sup> a death sentence was quashed due to mental illness.

*Musitwa Lubega v. Uganda*:<sup>104</sup> the court released the convict due to suffering from an advanced stage of HIV.

*Bagatagira Mujuni v. Uganda*:<sup>105</sup> the Court took into account the length of time already served on death row (seven years) and the mental anguish experienced after a prolonged period waiting to be executed, and the Court handed down a sentence of life imprisonment.

*Losike Apanapira Peter v. Uganda*:<sup>106</sup> the court took into consideration the character of the convict and his ability to reform. In particular, the court admitted as evidence reports from the prison primary school, various Bible correspondence course certificates, attendance at a peace-maker course, a report by the prison

mental health specialists, and letters from both the prisoner's family and the family of the victim regarding reconciliation attempts.

*Uganda v. Bwenge Patrick*:<sup>107</sup> the court took into account the convict's mental disorder linked to excessive alcohol consumption, his family contacts and support network, and remorse for his crime gauged by a prison assessment report. The Court imposed a prison sentence of two years, taking into account the period already served in incarceration (17 years).

Since the *Kigula* judgement, jurisprudence indicates that, at a minimum, the following factors will be taken into consideration at a sentencing hearing:

- The mental state of the defendant, including any addictions (such as alcohol) or any degrees of diminished responsibility.
- The character of the defendant including his/her education, family connections, religious links, and any other prison-run courses.
- The physical and mental health of the convict, including any inoperable diseases.
- The capacity of the defendant to reform and their continuing dangerousness.
- Length of time already served in prison.
- Remorse.
- Attempts at reconciliation with the victim and/or their family.
- The views of the victim's family.
- Age of the defendant at the time the crime was committed.

However, there are still serious concerns regarding the consistency of sentencing hearings. More technical support is needed for sentencing hearings,

<sup>103</sup> *Juma Muwonge v. Uganda*, Criminal Appeal No. 338/2003 (judgement issued 1 February 2010 by the Court of Appeal).

<sup>104</sup> *Musitwa Lubega v. Uganda*, Criminal Appeal No. 73/2003 (judgement issued 2010).

<sup>105</sup> HCT-05-SC-0137 of 2000.

<sup>106</sup> Criminal Appeal No. 022/2005.

<sup>107</sup> HCT-03-CR-SC-190/1996.

such as evaluations by independent psychologists and social workers.

Often the type of sentence a defendant receives depends heavily on the lawyer and their expertise and experience of investigating mitigating evidence and advocating at a sentencing hearing. There is also limited knowledge among prisoners on the benefits of a sentencing hearing. There are examples of convicts who have specifically instructed their counsel not to raise any mitigating evidence thereby denying them of an opportunity to have their sentence reduced.<sup>108</sup> The importance, therefore, of intensifying the education and training of the legal fraternity in this area cannot be overemphasised. The government needs to commit more resources to legal aid in capital offences in order to facilitate the right to a fair trial both at the trial of the merits of the case and at the sentencing stage.

In *Kayondo Andrew and Ssenyomo Emmanuel v. Uganda*<sup>109</sup> the Court of Appeal stated that the appellants did not raise a specific grounds of appeal against the sentence. During the trial their counsel did not attempt to provide any mitigating evidence to the court in consideration of reducing the death sentence.

In *Etoori John Robert*,<sup>110</sup> Counsel for the Appellant raised the issue of sentence in the memorandum of appeal but abandoned the ground and did not address the Court on it to the detriment of the Appellants. The death sentence was confirmed.

Although the sentencing practice post *Kigula* varies from case to case, it is important to note that the judiciary in Uganda have begun work to develop national sentencing guidelines. We believe that once these guidelines are adopted they will become the yardstick used in sentencing hearings and streamline sentencing policy.

Finally, although the Supreme Court has established the death penalty as a discretionary sentence in Uganda, the *Kigula* judgement has not been followed up by the executive, and legislation which prescribes a mandatory death sentence has not been amended accordingly.

### Prohibited categories

According to the Trial on Indictment Act, the death penalty cannot be applied to the following persons:

- Juveniles: persons under 18 years of age at the time the crime was committed.<sup>111</sup>
- Pregnant women: the law provides that where a pregnant woman is found guilty of an offence punishable by death she will be sentenced to imprisonment for life instead of a sentence of death.<sup>112</sup>
- Mentally ill: A person is not criminally responsible if he or she was mentally ill at the time of the crime and incapable of understanding his or her actions.<sup>113</sup> The court must find that he or she was “suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind, or any inherent causes or induced by disease or injury, as substantially impaired his or her mental responsibility for his or her acts and omissions in doing or being a party to the murder”.<sup>114</sup> On a charge of murder, it shall be for the defence to prove that the person charged was suffering from such abnormality of mind. Where a finding of mental illness is made, the court shall not sentence the person convicted to death but shall order him or her to be detained in safe custody.<sup>115</sup>

108 *Mpande David and Wasswa Kalinaki alias Nasuru Wabui*, Criminal Appeal No. 174/2003 (judgement issued 2011).

109 *Kayondo Andrew and Ssenyomo Emmanuel v. Uganda*, Criminal Appeal No. 02/2003 (judgement issued 2 November 2010).

110 *Etoori John Robert v. Uganda*, High Court Criminal Case No.95/2007.

111 Section 105 of the Trial on Indictment Act.

112 Section 103, *Ibid.*

113 Section 11 of the Penal Code Act.

114 Section 194, *Ibid.*

115 *Juma Muwonge v. Uganda*, Criminal Appeal No. 338/2003 (judgement issued on 1 February 2011): the court quashed the conviction of a mentally ill offender and ordered that he be kept in a mental facility.



## V. Legal framework: alternative sanctions to the death penalty in Uganda

### Length of life imprisonment

The alternative sanction to the death penalty is life imprisonment. However, the question of what ‘life’ means is undergoing some legal uncertainty.

Section 47(6) of the Uganda Prisons Act, which came into force in 2006, states that “[f]or the purpose of calculating remission of a sentence, imprisonment for life shall be deemed to be twenty years’ imprisonment.” The Prisons Act seems to provide a straightforward definition that ‘life’ means 20 years.

Following the *Kigula* judgement, 181 prisoners had their sentences commuted to life imprisonment<sup>116</sup>, and therefore became eligible for release at the end of the 20 years. In fact, five prisoners were immediately released, having already spent more than 20 years on death row.

The Courts have, however, begun interpreting the meaning of ‘life’ beyond what is set out in Section 47(1) of the Prisons Act. The extension of sentencing beyond 20 years was initiated by the Court handing down very long sentences rather than life imprisonment. Under Section 108(1) of the Trial on Indictment Act, the judiciary has discretion to either sentence a person to life or another alternative sentence, which has resulted in judges issuing very long sentences that de facto are a whole life sentence.

*Olowo Wandera v. Uganda*:<sup>117</sup> the defendant was charged with murder and sentenced to death. On appeal the death sentence was set aside and substituted with imprisonment for 40 years.

*Maliro Abas alias Mabale v. Uganda*:<sup>118</sup> the defendant had his sentence changed from death to imprisonment for a period of 36 years.

The confusion over what ‘life’ meant was put to rest by the 2011 judgement in *Tigo Stephens v. Uganda*.<sup>119</sup> The Supreme Court stated: “we note that in many cases in Uganda, Courts have imposed specific terms of imprisonment beyond twenty years instead of imposing life imprisonment. It would be absurd if these terms of imprisonment were held to be more severe than life imprisonment.” As such, the Court ruled that “life imprisonment means for the natural life term of a convict, though the actual period of imprisonment may stand reduced on account of remissions earned.”

The *Tigo* judgement has created a legal anomaly whereby the legislature said that ‘life’ means 20 years, and the judiciary that ‘life’ means life without the possibility of parole.

Although the Constitution guarantees judicial discretion in sentencing, it also provides that the judiciary be subject to the law, and that judicial power must be exercised in conformity with the law.<sup>120</sup> The *Tigo* judgement is not in conformity with Section 47(6) of the Uganda Prisons Act. Therefore, the Executive must clarify this issue at their earliest opportunity.

### Life sentence applicable crimes

There are currently 38 Sections in two statutes which proscribe life imprisonment in Uganda.

Ugandan Penal Code Act-

1. Manslaughter: Section 190.
2. Defilement: Section 129 (1).
3. Attempt to commit Rape: Section 125.
4. Alarming, annoying, or ridiculing the president: Section 24.
5. Promoting war on chiefs: Section 27.
6. Aiding prisoners of war to escape: Section 31.

<sup>116</sup> Summary of UPS prisoners statistical returns, September 2010.

<sup>117</sup> *Olowo Wandera v. Uganda*, Criminal Appeal No. 141/2008.

<sup>118</sup> *Maliro Abas alias Mabale v. Uganda*, Criminal Appeal No. 98/2007.

<sup>119</sup> *Tigo Stephens v. Uganda*, Criminal Appeal Case No. 08 of 2009 (judgement issued on May 2011).

<sup>120</sup> Article 126 of the Constitution of the Republic of Uganda.

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7. Administering or presence during administering of unlawful oaths: Section 45.
  8. Rioters demolishing a building: Section 72.
  9. Rescuing a person sentenced to death or life imprisonment from lawful custody: Section 108.
  10. Having carnal knowledge of any person or animal or allowing a male person to have carnal knowledge on a woman or man against the laws of nature: Section 145.
  11. Incest where one of the parties is below the age of 18: Section 149.
  12. Attempted murder: Section 204.
  13. Aiding suicide: Section 209.
  14. Killing of an unborn child: Section 212. It is a felony when a woman is about to deliver if a person through an act or omission prevents the child from being born alive.
  15. Causing grievous bodily harm to any person: Section 216.
  16. Intentionally endangering persons travelling by railway: Section 218.
  17. Cattle rustling: Section 266.
  18. Simple robbery: Section 286.
  19. Arson: Section 327.
  20. Casting away ships: Section 332.
  21. Forgery of wills: Section 348.
  22. Counterfeiting coins: Section 363.
- Uganda Peoples Defence Force Act-
23. Subversion: Section 17.
  24. Mutiny: Section 18.
  25. Disobeying lawful orders, where it results in failure of operation or loss of life: Section 19.
  26. Failing to execute one's duties, where it results in failure of operation or loss of life: Section 20.
  27. Cowardice in action, where it results in failure of operation or loss of life: Section 29.
  28. Offences by persons in command of a vessel, aircraft, defense establishment or unit of the army when in action: Section 30.
  29. Breaching concealment, where it results in failure of operation or loss of life: Section 31.
  30. Personal interests endangering operational efficiency: Section 32.
  31. Careless shooting in operation, in such a manner as to endanger lives of other fighters in operation: Section 34.
  32. Offences relating to operations: Section 36.
  33. Spreading harmful propaganda, where there is failure of operation or loss of life: Section 38.
  34. Desertion: Section 39.
  35. Malingering or maiming: Section 43.
  36. Disobedience of commander's orders: Section 56.
  37. Causing fire: Section 61.
  38. Possession of firearms: Section 119(1)(h).
- The majority of life sentences have been issued for the crime of defilement (Section 129 of the Penal Code Act). However life sentences for robbery (Section 286 Penal Code) are on the rise.
- Life imprisonment is not mandatory. According to Section 108(1) of the Trial on Indictment Act, the courts retain their discretion to decide the length of sentence that can be handed down: "A person liable to imprisonment for life or any other person may be sentenced for any shorter term". Hence the growing use of long fixed-term sentences as opposed to life imprisonment.
- ### Prohibited categories
- Uganda only makes one restriction on the application of life imprisonment:
- Mentally ill (see definition above).
-

## VI. Application of the death penalty/life imprisonment: fair trial procedures in Uganda

Given the wide disparities between the civilian and the military justice systems, we shall address both separately.

### 1. Civilian justice system

#### Pre-trial rights

In Uganda, the Constitution guarantees an arrested person's right to be promptly informed of the nature of the charges against him/her in a language which they can understand.<sup>121</sup> However, inmates interviewed by researchers at Luzira and Kirinya maximum prisons state that this is not always the case.<sup>122</sup>

Article 23(4)(b) of the Constitution and Section 25 of the Police Act both provide that arrested persons shall be brought before a court as soon as possible, but in any case not later than forty-eight hours from the time of his or her arrest.

From the interviews conducted with the prisoners in Luzira and Kirinya prisons, it appears that this right is rarely respected. Several prisoners, especially those facing terrorism and treason charges, testified that they were detained in "safe houses", army barracks and several other locations before being brought to a judge. During FHRI's monitoring visits in Luzira, out of the 46 detainees that were interviewed, at least 35 reported that they had been held beyond the 48-hour rule for periods ranging between four days and one month.<sup>123</sup>

The Constitution also imposes a duty on the security organs to inform the next of kin of his arrest, and inform the accused of their right to a lawyer and a doctor and to allow him access to them as soon as practicable.<sup>124</sup> However, in practice the police do not always respect that. In several interviews conducted by FHRI, prisoners stated that the police do not always permit consultation with a lawyer until the end of the initial interrogation.<sup>125</sup>

#### Right to bail

The Constitution also guarantees that an arrested person charged with an offence triable by the High Court (all capital offences fall into this category) are eligible to apply for bail after spending 120 days on remand.<sup>126</sup> If a suspect has been held pending investigation for more than 360 days for a capital offence, then that person is entitled to automatic bail.<sup>127</sup> This means that persons facing a capital offence can be detained for up to a year without trial. The UN Committee Against Torture has expressed concern about the possibility of detaining treason and terrorism suspects for up to 360 days without bail.<sup>128</sup> There is, however, no time limit on how long one can be held on committal before being actually tried. In the past suspects have spent five years in detention pending trial because they were waiting for their names to be put on the case list.

There is a further serious threat to the right to bail for persons charged with capital/life offences such as murder, treason, defilement, rape, rioting and economic sabotage. During 2011, the media reported that the President is determined to table legal amendments before the ninth parliament to deny bail to such suspects, and subsequently to amend the Constitution in this regard.<sup>129</sup> However, there has been reluctance in the House to support the proposal.<sup>130</sup> The President has proposed to refer this matter to a

<sup>121</sup> Article 23(3), *Ibid.*

<sup>122</sup> FHRI interviews conducted with death row inmates in Luzira Upper prison, 12 January 2011.

<sup>123</sup> FHRI interview with Jackie Atim, State Attorney, Lira district, 6 September 2010.

<sup>124</sup> Article 23(5) of the Constitution of the Republic of Uganda.

<sup>125</sup> FHRI interviews with death row inmates in Luzira Upper Prison, 12 January 2011.

<sup>126</sup> Article 23(6) of the Constitution of the Republic of Uganda.

<sup>127</sup> Article 23(6), *Ibid.*

<sup>128</sup> Conclusions and recommendations of the Committee against Torture, *supra* n. 93, para. 6 (a).

<sup>129</sup> Proposed law on bail will tame the corrupt in government, Enock Musinguzi, *Daily Monitor*, 13 May 2011.

<sup>130</sup> MP's reject amending the constitution, Yasiim Mugerwa, *Daily Monitor*, 29 May 2011.

public referendum, should Parliament fail to approve the proposal.

## Presumption of innocence

The presumption of innocence is legally guaranteed under Article 28(3)(a) of the Constitution. The prosecution bears the burden to prove an accused person's guilt beyond reasonable doubt.

## The right to adequate legal assistance

Article 28 of the Constitution guarantees the right to a legal defence, and to appear in court with a lawyer of his or her choice. In a case which carries a sentence of death or imprisonment for life, the accused is entitled to legal representation at the expense of the state.<sup>131</sup> However, the state has insufficient funds to provide satisfactory legal aid for those facing a capital or life sentence.

About 75 percent of capital defendants are represented by "state briefs" who are private lawyers required to provide *pro bono* assistance. The remuneration offered to state lawyers is exceptionally low. This means that many poor defendants facing a capital offence may be subjected to inexperienced or uninterested lawyers, affecting the quality of legal representation and infringing on the right to a fair trial. State-appointed counsel in capital offences do not thoroughly investigate cases or present all the possible evidence in court, sometimes leading to wrongful convictions.<sup>132</sup>

Through several interviews conducted by FHRI with prisoners on death row, it appears that in many cases the accused met their lawyer for the first time during their trial, and were often not interviewed by their briefs prior to trial. During the trial, briefs only provided information from the case file, which is often inaccurate or incomplete.<sup>133</sup>

*FHRI interview with Fred, 27 years: "I was arrested on 24 May 2010 by police for aggravated defilement of a 14-year-old girl. I was detained at Kyegegwa police station for two weeks and then taken to court on 6 June 2010. I have been going to court for the last two months. I was given a lawyer by the state but I only see him when I go to court. I just know his first name and I do not even know where he works. He has never interviewed me."<sup>134</sup>*

*FHRI interview with Philimon, 34 years: "I was arrested in 2008 and detained at Lira Central Police Station. After two days I was taken to court and charged with murder. I was assigned a state lawyer but he is not really helping me. I last saw him the day I went to court. I just hope he comes to court when I go back in September."<sup>135</sup>*

There are a number of organisations in Uganda that provide free legal assistance, including the Legal Aid Clinic, the Legal Aid Project and the Public Defender's Association. However, because of limited resources these services are rarely extended to persons charged with capital offences, leaving the majority of those facing a death sentence or life imprisonment at the mercy of state lawyers.

## Trial by jury

Uganda does not have a system of trial by jury. In capital cases the trial is conducted by a judge with the aid of assessors (lay citizens) who give an opinion at the end of the trial.<sup>136</sup> The number of assessors is two, or more as the court thinks fit. The assessor's opinion is not binding on the trial judge.

## Language of the courts

The Constitution guarantees the assistance of an interpreter, if the accused cannot understand the language used at the trial.<sup>137</sup>

<sup>131</sup> Article 28(3)(e) of the Constitution of the Republic of Uganda.

<sup>132</sup> Uganda: Challenging the Death Penalty, Report of the international fact-finding mission of the International Federation of Human Rights and FHRI, October 2005, p. 26.

<sup>133</sup> FHRI interview with death row inmates, 22 May 2010.

<sup>134</sup> FHRI interview with Byayesu Fred, a remand prisoner at Fortportal Prison, 14 September 2011.

<sup>135</sup> FHRI interview with Mr Philimon, a remand prisoner at Lira Prison, 1 July 2011.

<sup>136</sup> Section 3 of the Trial on Indictment Act.

<sup>137</sup> Article 28(3)(f) of the Constitution of the Republic of Uganda.

According to one human rights activist:

*“There are no qualified court interpreters, yet 85–90 percent of cases are done through interpretation, so they are mostly court clerks. Since it is a hierarchal system, clerks are not inclined to ask for clarification or repetition if they do not follow or understand something. At the same time, they do not want the process to drag on so they are not inclined to voice the doubts or concerns that may be expressed by the defendant.”<sup>138</sup>*

This was also confirmed by the Acting Registrar of the Judicial Service Commission, who noted that there are no trained interpreters.<sup>139</sup>

## Hearing

Article 28(1) of the Constitution guarantees the right to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.

## Pre-trial detention

Pre-trial detention represents 54.4 percent of prisoners in Uganda.<sup>140</sup> With mass overcrowding being a serious problem in Ugandan prisons, the very high number of those in pre-trial detention raises worrying concerns for the protection of human rights for detainees. Those charged with capital offences have some of the longest periods of remand,<sup>141</sup> and undermines the Constitutional right to a speedy trial.

The UN Country Team in Uganda found that prolonged periods of pre-trial detention are linked to a number of legal and procedural concerns. Usually investigations only start once a suspect is put into custody, which means that often they are held beyond the 48-hour constitutional guarantee before being brought to Court for charges. Police bond and court bail are not commonly granted; detainees themselves are not aware that they are entitled to these. Delays in investigations and backlog of cases also contribute to prolonged pre-trial detention.<sup>142</sup>

One of the key concerns regarding those on remand for capital cases is the lack of resources provided to the High Court to deal with its high case load. It is important to note that only the High Court in Uganda can grant bail for capital cases, and there are a limited number of High Courts and High Court judges.<sup>143</sup> Inadequate legal representation also means that detainees have no one to advocate for a speedy trial and no one to fairly and effectively represent them once their trial date is finally set. Not only are there major delays in appointing defence advocates, there is also a significant shortage of defence lawyers in the country.<sup>144</sup>

## Right to appeal by a court of higher jurisdiction

Following conviction and sentence by the High Court, an accused has a right to appeal to the Court of Appeal<sup>145</sup> and then to the Supreme Court<sup>146</sup> on a matter of law or fact or both.<sup>147</sup> The Supreme Court's verdict is final.

138 FHRI interview with Ms Katja Kerschbaumer, Advisor, Access to Justice-Danida.

139 FHRI interview with Mr Mwebembezi Julius, Acting Registrar Judicial Service Commission, 3 November 2011.

140 Figure obtained from the International Centre for Prison Studies <[www.prisonstudies.org](http://www.prisonstudies.org)> (date accessed 2 February 2012).

141 Presumed innocent, behind bars: the problem of lengthy pre-trial detention in Uganda, *Avocats Sans Frontières* and the International Human Rights Program at the University of Toronto, May 2011, page 20.

142 Submission to the Universal Periodic Review, United Nations Country Team in Uganda, Twelfth UPR Session October 2011, <<http://lib.ohchr.org/HRBodies/UPR/Documents/session12/UG/UNCT-eng.pdf>>, p. 7.

143 State of Pain: Torture in Uganda, Human Rights Watch, March 2004, p.63.

144 See for example, Lengthy Pre-Trial Detention: Law, Practice and Challenges, paper presented by Roy Byaruhanga, Registrar for Research and Training, during a training program for Magistrates, Advocates, and Civil Society organised by *Avocats Sans Frontières* and the Judicial Studies Institute, Pan Africa Hotel Gulu, 28–30 January 2009, p. 8; and see also State of Pain: Torture in Uganda, Human Rights Watch, March 2004, pp. 63–64.

145 Section 45 of the Criminal Procedure Code.

146 Section 4 of the Judicature Act.

147 Section 132 of the Trial on Indictments Act.

Following the *Kigula* judgement, there has been a remarkable increase in the number of successful appeal cases. Between January 2010 and July 2011, 49 death sentences were successfully appealed in Uganda and replaced with either long- or life-term sentences.<sup>148</sup>

### Right to seek pardon or commutation of the sentence

Once a sentence has been confirmed by the Supreme Court the last option for the condemned prisoner is for the President to exercise his prerogative of mercy.

According to Article 121(5) of the Constitution, when someone is sentenced to death, a written report of their case and any other relevant information from their record will be submitted to the Advisory Committee on the Prerogative of Mercy. The Advisory Committee consists of the Attorney General as Chairperson and six “prominent” citizens of Uganda (excluding members of Parliament, the District Council, or the Uganda Law Society). It is not public knowledge who the citizens are that make up the Committee, or what criteria make them a “prominent” citizen.

The Committee then reviews the prisoner’s case and makes a recommendation to the President as to whether the death sentence should be upheld; the President makes the final decision. The President can choose to sign the death warrant, grant the accused a conditional or unconditional pardon, grant the accused a fixed or unspecified period of reprieve, or commute the sentence to a less harsh form of punishment.<sup>149</sup>

Only two appeals for executive clemency have been successful in the last six years, the last being that of Chris Rwakasisi (a former politician in Obote II’s government) on 20 January 2009 (the announcement of clemency was made on the eve of the Supreme Court ruling on the *Kigula* case).

The actual composition of the Committee is unknown, and their deliberations are confidential, thus preventing any information from being given on the motives of this institution or the profile of its members.

During FHRI’s interview with one of the state attorneys in the Ministry of Justice and Constitutional Affairs, the researchers were informed that the Committee only sits to consider applications of prominent prisoners.<sup>150</sup>

The Constitutional Court’s 2005 ruling in the *Kigula* case stated that “it is important that the procedure for seeking pardon or commutation of the sentence should guarantee transparency and safeguard against delay.”<sup>151</sup>

## 2. Military justice system

Military law also has a place in Uganda under the Uganda People’s Defence Force (UPDF) Act 2005. It comprises, in hierarchical order: Unit Disciplinary Committee, Field Court Martial, Division Court Martial, General Court Martial, and Court Martial Appeal Court. The latter two sit as appellate courts, with the Court Martial Appeal Court acting as the highest appellate court in the military judicial system.

The trial process under the military justice system raises a number of serious concerns due to the worrying lack of due process safeguards, a lack of independent defence counsel, the quickness of the trial process, a lack of independent oversight or scrutiny for the Court Martial process, and a lack of transparency in court proceedings.

FHRI undertook a number of visits to various court martial processes in 2009, 2010 and 2011 to locate and obtain trial transcripts. FHRI found that most of the files had no records, rendering it very difficult to prepare case files for appeal or mitigation.

Army lawyers act for both the defence and prosecution, with army officers presiding over the case. In many cases military defence lawyers are

<sup>148</sup> Court of appeal records obtained on the 27 June 2011.

<sup>149</sup> Article 121(4) of the Constitution of Uganda.

<sup>150</sup> Name withheld. Interview conducted by FHRI on 12 July 2011.

<sup>151</sup> *Attorney General v Susan Kigula & 417 Others* (Constitutional Appeal No. 03 OF 2006) [2009] UGSC 6 (21 January 2009).

not appropriately trained. The trials are very brief, sometimes lasting between two hours and two days.

In February 2009, the Constitutional Court issued a ruling relating to the prosecution of cases against soldiers.<sup>152</sup> It ruled that the March 2002 execution of two Uganda Peoples Defence Force (UPDF) soldiers in Kotido district by Field Court Martial was illegal because they were denied the right to appeal.

Private Abdallah Mohammed and Corporal James Omedio were executed after a trial for the murder of an Irish Catholic priest, the Rev. Fr. Declan O'Toole and two other civilians. They were convicted, sentenced to death and immediately executed by a firing squad. The accused were not given time or facilities to enable them to prepare for their trial. They were not allowed to be represented by a counsel of their choice or any lawyer at all. They were not accorded services of an interpreter and were not allowed to call witnesses or to cross-examine them. The chairman of the Field Court Martial was the commanding officer who was also involved in the investigation, and the rest of the members of the Court were his junior officers. There was no opportunity for the accused to appeal the Field Court Martial, or to petition the president under his prerogative of mercy. Three hours after their indictment they were executed by a firing squad. Moreover, the two men were executed in the presence of approximately 1,000 members of the public, including children.

The UPDF Act does provide a right to petition the President to exercise his prerogative of mercy, however for crimes under the UPDF Act the President is advised by the Military High Command<sup>153</sup> instead of the Advisory Committee on the Prerogative of Mercy. The High Command is made up of the President, the Minister for Defence, and other various military personnel including the army commander, the army chief of staff, chief of combat operations, chief of personnel and administration.<sup>154</sup>

The UPDF does not publish statistics on the number of individuals condemned or executed under this act, however the researchers of this report were able to ascertain that there are currently 62 death row inmates sentenced under military law.<sup>155</sup>

### Trial of civilians in the military justice system

According to Section 15 of UPDF Act, any person who aids or abets a person subject to military law, or who is found to be in unlawful possession of arms, ammunition or equipment deemed to be the monopoly of the army is also subject to this law. In the past this has meant that the UPDF Act was applicable to non-military personnel. However on 9 July 2008, the Supreme Court ruled that the trial of civilians by the General Court Martial (GCM) is unconstitutional, as the GCM is an inferior court to the High Court and other courts of record.<sup>156</sup>

This was a long-awaited ruling rendered as a judgement in the case of twenty-five men who were arrested in March 2003 by the army, charged for treason before the GCM on 16 April 2003, and remanded on 15 May 2003 to Makindye military prison. For more than two years, the men were detained and High Court orders ignored for the suspects to be given access to lawyers and their relatives and to be granted bail.

However, the UN Country Team (UNCT) for Uganda has indicated that Military Court Martials continue to try civilians and issue death sentences in 2011.<sup>157</sup>

*In September 2010, Judith Koriang was sentenced to death by the 3rd Division Court Martial in Moroto for the murder of her soldier husband. Judith was found guilty of killing her husband on 1 May 2009 after a domestic quarrel in which he threatened to send her away from his home because she had tested positive for HIV while he had tested negative.*<sup>158</sup>

<sup>152</sup> *Uganda Law Society & Anor v The Attorney General* (Constitutional Petitions No.2 & 8 of 2002) [2009] UGCC 1 (5 February 2009).

<sup>153</sup> Section 92 of the Uganda Peoples Defence Forces Act 1992.

<sup>154</sup> Section 11, *Ibid.*

<sup>155</sup> Summary of UPS prisoners statistical returns, January 2011.

<sup>156</sup> *Attorney General vs Joseph Tumushabe* (Constitutional Appeal No 3 of 2005) [2008] UGSC 9 (9 July 2008).

<sup>157</sup> Submission to the Universal Periodic Review, United Nations Country Team in Uganda, <<http://lib.ohchr.org/HRBodies/UPR/Documents/session12/UG/UNCT-eng.pdf>>, p. 6.

<sup>158</sup> Court martial sentences soldier's wife to death, Stephen Ariong, *The Daily Monitor*, 17 September 2010.

## VII. Application of the death penalty in Uganda: statistics

The last civilians executed in Uganda took place on 28 May 1999, where 28 men were hanged at Luzira Prison.

In the preceding period it is known that at least 27 people were executed between 1989 and 1996. Three people were executed for murder and rape in 1996. 12 people were executed in 1993. Nine people were executed for aggravated robbery and murder in 1991. Three people were executed for murder in 1989. The 1989 hangings were the first to take place since the 1970s.<sup>159</sup>

The last military execution took place on 3 March 2003, where Privates Wigir, Ssenyonji and Okech were shot for murder.<sup>160</sup>

It is important to note that there are no comprehensive statistics published by the government on the application of the death penalty in Uganda.

Death sentences continue to be handed down by the courts. In 2010, seven death sentences were issued by the High Court, 19 death sentences confirmed by the Court of Appeal and one confirmed by the Supreme Court. In 2011, five death sentences were issued by the High Court.

The number of death sentences issued through court martial is unavailable.

There are currently 505 death row prisoners in Uganda (470 men and 35 women).

There are at least 4,899 prisoners on remand in Uganda for capital crimes (murder, aggravated robbery, rape, treason and terrorism).

It should be noted that the overwhelming majority of people sentenced to death in Uganda have the same characteristics: they are poor, have little or no education, and live in rural and/or upcountry areas, away from the main urban centres.<sup>161</sup>

## VIII. Application of life imprisonment in Uganda: statistics

There are currently 329 detainees serving life sentences in Uganda: 205 men and 124 women.<sup>162</sup>

## IX Implementation of the death penalty in Uganda: method of execution

The mode of execution in Uganda is by hanging.<sup>163</sup> Executions are held in private. Those present include the prison warden or officer-in-charge, a religious leader, the hangman, an assistant hangman and a doctor.<sup>164</sup> The family of the executed prisoner are not notified of the date of execution, and they are not given the body. The executed prisoner is buried in a prison cemetery.<sup>165</sup> Many of the convicts families claim that they only learn about their relative's execution after an inordinate period of time, and are not informed about the place of burial.

The Government of Uganda continues to employ a hangman and an assistant hangman, although executions have not been carried out for over twelve years.

According to the Commissioner General of the Uganda Prison Service executions can be traumatic experiences even for the prison staff. Many prisoners have been on death row for an extended period

<sup>159</sup> Uganda: Challenging the Death Penalty, Report of the international fact-finding mission of the International Federation of Human Rights (FIDH) and FHRI, October 2005, p. 16.

<sup>160</sup> Executions to resume with hangings of 28 people, Amnesty International, AFR 59/013/1999, 27 April 1999.

<sup>161</sup> Fact-finding mission of FIDH and FHRI, supra n. 159, p. 22.

<sup>162</sup> Summary of UPS prisoners statistical returns, January 2011.

<sup>163</sup> Section 99(1) of the Trial on Indictments Act.

<sup>164</sup> PRI interview with Dr Johnson Byabasajja, Commissioner General of Prisons, 21 July 2011.

<sup>165</sup> Statement by Dr Johnson Byabasajja, Commissioner General of Prisons, at the regional roundtable on death penalty, supra n. 26.



of time, and have become “part of the prison’s household.”<sup>166</sup>

Firing squad is the method of execution used in the military justice system.<sup>167</sup> Executions normally take place immediately, or within hours of the Court Martial delivering its verdict, which often prohibits the accused from exercising any right of appeal. The last two military executions (in 2002 and in 2003) were both reportedly carried out in public.

## X. Implementation of death sentence/life imprisonment in Uganda: prison regime and conditions

*“The function of the [Uganda Prison] Service shall be to ensure that every person detained legally in a prison is kept in humane, safe custody.”<sup>168</sup>*

### Location of imprisonment for death row and life sentenced prisoners

Death row and life sentenced prisoners are held at Luzira Upper Prison in Kampala, and in Kirinya Prison in Jinja.

Death row prisoners are held in a maximum security wing which is separated from the general section of the prison by three gates. Lifers are detained in the general section together with other long-term sentenced prisoners.

### Conditions and treatment of detention

Prisons in Uganda are generally very overcrowded.<sup>169</sup> Uganda has 223 prisons, designed to house 14,334 inmates. In April 2011, the Uganda Prison Service was housing 30,649 inmates (29,199 male and 1,282 female).<sup>170</sup> Of the 30,649 prisoners, 16,658 were on remand.

Luzira Upper Prison has capacity for 600 inmates, but currently houses 2,790 inmates.

According to the Commissioner General of the Uganda Prison Service (UPS), their budget has been tripled in the last four years, which means that new prisons are now being built at a rate of three per year, each with a capacity of 400. However, the Commissioner General did note that due to the cost of reforms, if each prison houses 800 prisoners (as opposed to 400), that will be considered an acceptable level.<sup>171</sup>

Cellblocks lack adequate sanitation facilities, with just one toilet to be accessed by an average of 37–150 inmates occupying a cell.<sup>172</sup> In Luzira Women’s Prison, a bucket is provided in each cell to serve as a toilet during night time.

There is a limited supply of bedding among all prisons in Uganda. During FHRI’s visit to Luzira Women’s Prison researchers were informed by the officer-in-charge that beds and mattresses were not enough for the number of inmates, and that at times two inmates were required to share a mattress, and about 40 percent of the inmates had no bed.<sup>173</sup> However, the Commissioner General of the UPS confirmed that all female prisoners now have access to mattresses and, starting from the next financial year male prisoners will also have mattresses.<sup>174</sup>

<sup>166</sup> Ibid.

<sup>167</sup> Fact-finding mission of FIDH and FHRI, supra n. 159.

<sup>168</sup> Section 5(a) of the Uganda Prisons Act.

<sup>169</sup> FHRI interview with Ronald Kalai, Officer-in-Charge of Luzira Upper Prison, 4 July 2011.

<sup>170</sup> Summary of UPS prisoners statistical returns, April 2011.

<sup>171</sup> PRI interview with Dr Johnson Byabasajja, Commissioner General of Prisons, 21 July 2011.

<sup>172</sup> FHRI prison visit on 4 April 2011.

<sup>173</sup> FHRI interview with Stella Nabunya, Officer-in-Charge, Luzira Women’s Prison, 4 July 2011.

<sup>174</sup> PRI interview with Dr Johnson Byabasajja, Commissioner General of Prisons, 21 July 2011.

Prisoners are entitled to two meals a day (posho<sup>175</sup> and beans) and can access water as and when they require.<sup>176</sup> Luzira Women's Prison has two cows that supply milk for expectant mothers and children in prison. Pregnant and nursing mothers complained to researchers about poor food and nutrition.<sup>177</sup>

It is important to note that a child may be kept in prison up to the age of two years with the mother before being handed over to relatives or to a charitable organisation.

The prisoners have on average two prison uniforms each, although some have as many as five.

Prisoners are allowed to receive visits from their relatives and friends on specified days. The conditions for visitation vary from prison to prison. In Luzira Upper Prison, prisoners interviewed stated that they were allowed to receive visitors twice a week. Many inmates interviewed said that they do not receive visits because most of them are from the country and their relatives are unable to afford the fares to visit them in prison.

In 2011, UNCT for Uganda stated that the conditions of detention present a series of human rights challenges, despite considerable efforts of the UPS.

*“Overcrowding, poor infrastructure and insufficient training and poor work conditions for officers are persistent problems. Scarcity of resources has led to gaps in provision of adequate food, water, medical care, bedding and sanitation for prisoners. The Prison Service does not budget adequately for provision of services to pregnant women or women with children in prisons. Women often have to share convenience facilities with men and there are inadequate separate*

*detention spaces for children. Several HIV/AIDs positive prisoners report not having access to ARV treatment.”<sup>178</sup>*

The UN Human Rights Council issued its report of the Working Group on the Universal Periodic Review for Uganda in December 2011. Recommendations raised by delegations included to “[i]mprove overall conditions of prisons and adopt relevant measures to tackle the problems such as overcrowding, unsatisfactory state of prisons and shortcomings in the supply of health care”,<sup>179</sup> and to accelerate the improvement of the judicial, police and prison systems in line with international human rights standards.<sup>180</sup>

### Access to medical care

There are serious concerns regarding access to medical care across the UPS. This can be characterised by poor medical supplies and drugs, and a high rate of infectious diseases such as tuberculosis or HIV/AIDs. Efforts have been made among the prison authority to isolate infected persons by putting them in separate rooms and limiting visitation rights and movement within the prisons. However those inmates who are infected with HIV complained to FHRI that they had not received any ARV drugs for two months prior to the FHRI visit.<sup>181</sup> Inmates with HIV infection also complained of poor diet and irregular meals, which affect their immune system.<sup>182</sup>

Doctors and nurses can visit the prisons. Referrals can also be made to hospitals in Murchison Bay and Mulago (both in Kampala) if an illness is severe. However, the inmates state that only a nurse can recommend that a prisoner see a doctor; the inmates themselves are not allowed to request a doctor's appointment.

175 Posho is a type of maize meal cooked with water.

176 FHRI interview with Richard Bagenda, inmate facing charges of aggravated defilement, Luzira Upper Prison, 4 July 2011.

177 FHRI prison visit 4 July 2011.

178 UNCT submission to the UPR, supra n. 157, p. 6.

179 Report of the Working Group on the Universal Periodic Review, supra n. 87, para. 111.43.

180 Ibid, recommendation by the Holy See, para. 111.61.

181 FHRI interview with death row inmates at Luzira condemned section, 4 July 2011; interview with Ronald Kalai, Officer-in-Charge of Luzira Upper Prison (stated that one of the challenges for the prison is a shortage of drugs, particularly for those suffering from TB), 4 July 2011.

182 FHRI interview with Ms. Stella Nabunya, Officer-in-Charge of Luzira Women's prison (stated that one of the challenges is the poor diet especially for HIV patients), 4 July 2011.

## Rehabilitation and social reformation programmes

Under Sections 5(b) and (c) of the Ugandan Prisons Act, the functions of the Prisons Service include: facilitating the “social rehabilitation and reformation of prisoners through specific training and education programmes”; and easing the “re-integration of prisoners into their communities”.

Prisoners on death row enjoy access to free primary and secondary education and, since very recently, university and tertiary education. In fact one prisoner has been enrolled on a law degree through a correspondence course with a university in the United Kingdom.<sup>183</sup> Although prisoners under sentence of death attend formal education, they are exempted from attending rehabilitation programmes which presents a challenge in the eventuality that they might be released from prison.

## “Death row” syndrome

The 2009 landmark *Kigula* judgement made a ruling on the question of “death row syndrome”. In Uganda, the average length of stay on death row was ten years, although some persons spent as long as 18 or 20 years on death row without a decision by the President as their fate.

The Court found that such a long delay was unconstitutional, and to execute them after such a delay would amount to cruel, inhuman punishment, contrary to Articles 24 and 44(a) of the Uganda Constitution. The Court stated “[a] *condemned person does not lose all his other rights as a human being. He is still entitled to his dignity within the confines of the law until his sentencing is carried out*”.<sup>184</sup>

As the conditions in the condemned section of Luzira prison were considered “*not acceptable by Ugandan standards and also by civilised international communities*”, the Court found that if at the end of

a period of three years after the highest appellate court had confirmed a sentence of death, and if the President had not exercised his prerogative in one way or another, the death sentence shall be “*commuted to life imprisonment without remission*.”<sup>185</sup>

Following the *Kigula* judgement, 181 death row prisoners had their sentences commuted to life. This group were transferred from the death row section to the general section in the maximum security prisons. In fact, five prisoners were immediately released, having already spent more than 20 years on death row.

As a result of the *Kigula* judgement, the death row population, which stood at almost 900 inmates in 2009, dropped to 505 in 2011, while the population of those serving long-term sentences has become larger and continues to grow.

## Conditions for parole

Although ‘life’ imprisonment in Uganda now means a whole life sentence, Section 47(6) of the Prisons Act makes provisions for remission after twenty years. Section 47(1) of the same Act provides that a person sentenced to imprisonment may earn a remission of one third of the remaining period of their sentence if they can demonstrate good conduct or by industry. A prisoner may lose remission as a result of its forfeiture as a punishment for an offence against prison discipline and shall not earn any remission in respect of any period spent in a hospital through his or her own fault, while malingering, or while undergoing confinement as a punishment in a separate cell.

Even the *Tigo* judgement provides “that life imprisonment means imprisonment for the natural life of a convict, though the actual period of imprisonment may stand *reduced on account of remissions earned*.” [emphasis added]<sup>186</sup>

Section 49 of the Prisons Act provides that the Prison Commissioner should submit a report to the Advisory

<sup>183</sup> PRI interview with Dr Johnson Byabasajja, Commissioner General of Prisons, 21 July 2011.

<sup>184</sup> *Attorney General v Susan Kigula & 417 Others* (Constitutional Appeal No. 03 OF 2006) [2009] UGSC 6 (21 January 2009), p. 47.

<sup>185</sup> *Ibid*, p. 57.

<sup>186</sup> *Tigo Stephen v. Uganda* (Criminal Appeal No. 08 Of 2009) [2011] UGSC 7 (10 May 2011), p. 11.

Committee on the general condition and conduct of every prisoner undergoing imprisonment for life or for a term exceeding seven years. A follow-up report shall be submitted every four years after this initial report.

The review of the prisoner shall include a statement by the officer-in-charge of the prison where the prisoner is detained which evaluates the conduct of the prisoner and his attitude towards work; a report prepared by the prison medical officer on the mental and physical health of the prisoner with particular reference to the effect of imprisonment on his health; and a report from the prison social worker on the prisoner's attitude towards the community and his possible reintegration.

### Prison staff and management

According to the Officer-in-Command at Luzira Upper Prison, the management of long-term prisoners is becoming increasingly difficult. There are prisoners serving long-term sentences who are mentally ill, and incidents like an assault on a prison guard by an inmate are reported occasionally. However, attempts to transfer inmates with mental disabilities to psychiatric institutions have been futile.

The other challenge is the meagre budget allocated to the Prisons department. Prison staff are poorly remunerated and the prisoner to staff ratio is low.<sup>187</sup> The Uganda Prison Service employs 6,700 staff, including six physicians.<sup>188</sup>

## XI. Transparency and accountability in Uganda

Court judgements can be accessed by the public in court registries and libraries.

The prison headquarters publish statistics on the number of prisoners.

No official statistics are available on the application of the death penalty.

## XII. Current reform processes in the criminal justice system of Uganda

The Speaker of the Ugandan Parliament has expressed a commitment to establish a dedicated human rights committee.

## XIII. Abolitionist/reformist movement in Uganda

The national Coalition Against the Death Penalty (CADP) was spearheaded by FHRI in 2005. CADP was formed to provide a forum for human rights experts, legal aid providers and faith-based groups in Uganda to unite in order to strengthen the public debate on the death penalty. While the CADP has worked well together in the past, especially surrounding the *Kigula* case, its strategy now needs to be re-established and to link up with other coalitions within the East African region.

The leading human rights organisations who work on the death penalty or related criminal justice reforms in Uganda include:

- Foundation for Human Rights Initiative (FHRI).
- African Centre for Treatment and Rehabilitation of Torture Victims (ACTV).
- Refugee Law Project.
- Legal Aid Project.

An East African coalition was established in October 2011 to link up civil society in Kenya, Uganda, Tanzania and South Sudan. The CADP plan to take a leadership role in the work of the East African coalition.

<sup>187</sup> FHRI interview with Magom Wilson, Office-in-Charge of Luzira Upper Prison, 28 November 2011.

<sup>188</sup> Programme 04 Prisons Medical Services: Work Plan and Budget FY 2010/11, Uganda Prison Service, August 2010.

## XIV. Recommendations to the Republic of Uganda

1. Fully abolish in law the death penalty by eliminating it as a form of punishment from the 28 Sections in the Penal Code Act, the Anti-Terrorism Act, and the Uganda Peoples Defence Forces Act initially. Amend Article 22 of the 1995 Constitution, thereby guaranteeing an unqualified right to life. As an interim measure, reduce the application of the death penalty by abolishing those crimes which do not meet the “most serious crimes” standard, abolish the mandatory death penalty from the Penal Code, and establish an official moratorium on sentencing and executions.
2. Undertake a process to commute all death sentences to a fixed-term sentence. Each case should be reviewed individually, taking into consideration the length of sentence already served, the character of the prisoner and the type of crime committed.
3. Undertake a campaign to educate the public on the need to abolish the death penalty. The campaign should incorporate elements of implementing humane alternative sanctions.
4. Ratify and implement the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.
5. Urge the Parliament to definitively abort the anti-homosexuality Bill.
6. Reform the system of legal aid in Uganda to ensure that indigent defendants accused of an offence for which death or life imprisonment may be imposed can obtain free legal assistance at all stages of the case: pre-trial, trial, appellate, pardon and parole. Ensure all legal aid lawyers are independent of the state, adequately paid, have the same rights vis-à-vis the prosecutor, and are well-trained in advocacy methods for capital trials and sentencing hearings.
7. Build up the institutional capacity of the judiciary. This should include upholding their independence and integrity, ensuring that judges are well-trained, paid an appropriate salary and have security of tenure.
8. Develop national guidelines to harmonise sentencing in capital cases. Sentencing guidelines should include a non-exhaustive list of all aggravating and mitigating factors that could be taken into account at a sentencing hearing. Once approved, full training on the guidelines should be given to judges, lawyers, prosecutors and any other judicial officers.
9. Provide appropriate resources for gathering evidence that can be used for mitigation in sentencing hearings. This should include independent psychological evaluations and social worker reports on the defendant. Prisoners already sentenced to a mandatory offence should be informed of their right to apply for a resentencing hearing.
10. Establish a legal definition of “mentally ill” in accordance with international standards with regard to those who are not criminally liable.
11. Uphold the legal right to bail for those accused of committing a crime for which death or life imprisonment may be imposed.
12. Uphold the Supreme Court ruling which prohibits civilians being tried through court martial.
13. Draft and adopt a strategy to reform the penal system with a clear vision that makes specific reference to reforming life imprisonment which is consistent with international human rights standards and norms. Organise a public discussion on the strategy, with participation of all interested parts of civil society.
14. The Executive to definitively uphold the Prisons Act definition of life imprisonment, and abolish the use of life without the possibility of parole. All life sentenced prisoners in Uganda should have a realistic right of parole. Ensure that such release procedures are clearly defined in law, are accessible, meet due process safeguards, and are subject to appeal or review.
15. Establish a minimum term which a life sentenced prisoner must serve before being able to apply for parole. According to the UN Crime Prevention

and Criminal Justice Branch's 1994 report 'Life Imprisonment', all prisoners sentenced to life should have their suitability for release reviewed after serving between 8 to 12 years of incarceration.

16. Humanise the system of punishment by reducing the number of crimes (currently 38) for which life imprisonment may be prescribed, and limit these cases to only the "most serious crimes".
17. Amend national legislation so that it is in accordance with the UN Standard Minimum Rules for the Treatment of Prisoners, and other international human rights standards and norms. Prioritise resources of the Uganda Prison Service so that they can effectively implement those international standards and norms.
18. Implement controls to deal with the mass overcrowding in the Uganda Prison Service. This should include addressing the issue of the excessive number of remand prisoners by only using pre-trial detention as a means of last resort in criminal proceedings; developing alternatives to pre-trial detention and alternatives to imprisonment; upholding the right to apply for bail; and ensuring that the justice process takes no longer than necessary without undermining respect for fair trial principles.
19. Ensure that prison conditions of life-sentenced prisoners approximate as closely as possible to the conditions of life outside the prison system, and offer programmes for rehabilitation and reintegration. This should include the possibility to study, to work, to have contact with the outside world, and to receive psychological or medical treatment (in particular for prisoners suffering from tuberculosis or HIV/AIDs).
20. Increase resources for the prison system to improve salary and working conditions for prison staff. Ensure all prison staff are appropriately trained in international human rights standards.
21. Ratify the Optional Protocol to the Convention against Torture and establish a National Preventative Mechanism, which is independent, competent to monitor all places where people are deprived of their liberty, and effectively operative in terms of its budget and resources.
22. Provide public access to information and statistics on the Ugandan penal system, including the number of sentenced prisoners and their characteristics, length of sentence, place of sentence and conditions/treatment of detention. Publish historical data on the application of the death penalty including informing family members of the place of burial.
23. Vote in favour of, or at a minimum abstain from voting against, the upcoming fourth UN GA resolution calling for a moratorium on the death penalty scheduled for 2012, and do not sign the *note verbale* of dissociation.
24. Encourage further collaboration between government officials and civil society, including journalists, on criminal justice issues.
25. Encourage relevant international organisations and donor states in a position to do so to promote and support criminal justice reforms within Uganda at both the financial and political level.

# Comparison of the application and implementation of the death penalty and its alternative sanction in East Africa

	Republic of Kenya	Republic of Uganda
<b>Death Penalty</b>		
<b>1. Death penalty status</b>	Abolitionist in practice	Retentionist
<b>2. Date abolished, if applicable</b>	N/A	N/A
<b>3. Date of last execution</b>	1987	1999 (civil law); 2003 (military law).
<b>4. Date last death sentence</b>	19 July 2011	August 2011 (civil law); and September 2011 (military law).
<b>5. Death penalty applicable crimes</b>	<p><b>Kenya Penal Code Act:</b></p> <ol style="list-style-type: none"> <li>1. Murder (s. 204).</li> <li>2. Treason (s. 40).</li> <li>3. Aggravated Robbery (s. 296(2)).</li> <li>4. Attempted robbery with violence (s. 297(2)).</li> <li>5. Administering an oath purported to bind a person to commit a capital offence (s. 60).</li> </ol>	<p><b>Uganda Penal Code:</b></p> <ol style="list-style-type: none"> <li>1. Murder (s. 189).</li> <li>2. Rape (s. 123).</li> <li>3. Aggravated defilement (s. 129(1)).</li> <li>4. Aggravated robbery (s. 286(2)).</li> <li>5. Kidnapping or detaining with intent to murder (s. 243).</li> <li>6. Treason and offences against the state (s. 23).</li> <li>7. Smuggling while armed (s. 319(2)).</li> <li>8. Detention with sexual intent (s. 134).</li> </ol> <p><b>Anti-Terrorism Act:</b></p> <ol style="list-style-type: none"> <li>9. Engaging in or carrying out acts of terrorism (s. 7(1)).</li> <li>10. Aiding and abetting terrorism (s. 8).</li> <li>11. Establishment of terrorist institutions (s. 9).</li> </ol> <p><b>Uganda Peoples Defence Forces Act:</b></p> <ol style="list-style-type: none"> <li>12. Treachery (s. 16).</li> <li>13. Mutiny (s. 18)</li> <li>14. Failing to execute one's duties where such failure results in failure of an operation or loss of life (s. 20).</li> <li>15. Offences related to prisoners of war (s. 21).</li> <li>16. Cowardice in action where it results in failure of operation or loss of life (s. 29).</li> <li>17. Failure by person in command to bring officers under his command into action, or failure to encourage officers to fight courageously or gives premature orders to attack, resulting into failure of operation or loss of life (s. 30).</li> <li>18. Breaching concealment (s. 31).</li> <li>19. Failure to protect war materials (s. 32).</li> <li>20. Failure to brief or give instructions for an operation leading to failure or operation or loss of life (s. 35).</li> </ol>

	Republic of Kenya	Republic of Uganda
5. Death penalty applicable crimes (continued)		<p>21. Disclosure of confidential information to the enemy or unauthorised persons, or discussion of confidential information in unauthorised places, and anything deemed to be prejudicial to the security of the army (s. 37).</p> <p>22. Spreading harmful propaganda where there is failure of operation or loss of life (s. 38).</p> <p>23. Desertion if the desertion endangers life, or leads to loss of life, or if the persons deserts with ammunition or war materials or joins the enemy (s. 39).</p> <p>24. Failure to defend a ship or vessel when attacked or cowardly abandons it (s. 50).</p> <p>25. Inaccurate certification of an air craft or air material (s. 54).</p> <p>26. Dangerous acts in relation to an aircraft which may result in loss of life or bodily injury (s. 55).</p> <p>27. Attempt to hijack an aircraft or vessel used by the army or belonging to the army (s. 58).</p> <p>28. Causing fire where fire results in death (s. 61).</p>
6. Is the death sentence mandatory?	Mandatory death sentence for murder was abolished by the Court of Appeal in July 2010 in the case of <i>Mutiso v. the Republic</i> . However, a mandatory sentence remains for the other four death penalty applicable crimes.	All mandatory death sentences abolished by the Constitutional Court in January 2009 in the case of <i>Susan Kigula and 417 others v. Attorney General</i> .
7. Prohibited categories for application of the death penalty	<ul style="list-style-type: none"> <li>• Juveniles under the age of 18 at the time of the crime.</li> <li>• Pregnant women.</li> <li>• Mentally ill.</li> </ul>	<ul style="list-style-type: none"> <li>• Juveniles under the age of 18 at the time of the crime.</li> <li>• Pregnant women.</li> <li>• Mentally ill.</li> </ul>
8. Is there a moratorium?	There is no official moratorium in Kenya.	There is no official moratorium in Uganda.
9. Have there been any death row commutations?	In 2003, 223 death row prisoners were commuted to life imprisonment. In August 2009, the President commuted a further 4,000 death row inmates to life imprisonment.	Following the 2009 Kigula judgement, 181 prisoners had their death sentences commuted to life imprisonment for 20 years. Of those 181, 5 prisoners were subsequently released as they had served over 20 years on death row.
10. Method of execution	Hanging.	Hanging (civilian), shooting (military).
11. Are relatives informed about the place of burial?	Yes.	The families of the executed are notified after the execution has taken place; they are not notified of the place of burial.



	Republic of Kenya	Republic of Uganda
<b>12. Location of death row</b>	Death row inmates are separated from other prisoners and incarcerated at the following maximum security prisons: <ul style="list-style-type: none"> <li>• Kamiti Prison: Nairobi.</li> <li>• King'ong'o Prison: Nyeri.</li> <li>• Shimo la Tew Prison: Mombasa.</li> <li>• Manyani Prison: Voi.</li> <li>• Naivasha Prison: Naivasha.</li> <li>• Kodiaga Prison: Kisumu.</li> </ul>	Death row prisoners are held in a maximum-security wing at Luzira Upper Prison, Kampala, and in Kirinya Prison in Jinja. Death row prisoners are separated from the general section of the prison by three gates.
<b>13. Number of prisoners on death row</b>	1,440 (1,410 men and 30 women).	505 (470 men and 35 women).
<b>14. Right to apply for clemency / pardon</b>	Yes (Article 133 of the Constitution). The President exercises the prerogative of mercy, with assistance from an Advisory Committee on the Power of Mercy.	Article 121 of the Constitution of Uganda provides that prisoners have a right to apply for clemency or pardon. The President exercises the prerogative of mercy, with assistance from an Advisory Committee on the Prerogative of Mercy.
<b>15. Number of death sentences in 2010 and 2011</b>	2011 – 11 death sentences 2010 – 5+ death sentences.	2011 – 5 death sentences. 2010 – 7 death sentences.
<b>16. Number of executions in 2010 and 2011</b>	None.	None.
<b>17. Have there been any recent opinion polls on death penalty, and if so, what were the key findings?</b>	No.	A poll was conducted in 2008 by the Steadman Group. The survey showed that 42 per cent were against the death penalty, 39 per cent supported the death penalty, and 19 per cent did not comment.
<b>Alternative Sanctions</b>		
<b>18. Alternative sanction to death penalty</b>	Life imprisonment without parole.	Section 47 of the Uganda Prisons Act provides that life imprisonment means 20 years. However in May 2011 the Supreme Court ruled in the case of <i>Steven Tigo v. Uganda</i> , that life imprisonment now means a whole life sentence without any opportunity for parole.
<b>19. Is there a mandatory life sentence?</b>	No.	No.

	Republic of Kenya	Republic of Uganda
<b>20. Life imprisonment applicable crimes</b>	<ol style="list-style-type: none"> <li>1. Concealment of treason.</li> <li>2. Treasonable felony.</li> <li>3. Treachery.</li> <li>4. Inciting to mutiny.</li> <li>5. Aiding prisoner of war to escape.</li> <li>6. Rioting after proclamation for rioters to disperse.</li> <li>7. Obstructing proclamation for rioters to disperse.</li> <li>8. Rioters destroying buildings.</li> <li>9. Rescue of a person sentenced under death or life imprisonment.</li> <li>10. Attempted murder.</li> <li>11. Attempted murder by a convict.</li> <li>12. Being an accessory after the fact to murder.</li> <li>13. Aiding suicide.</li> <li>14. Killing unborn child.</li> <li>15. Disabling in order to commit felony or misdemeanour.</li> <li>16. Stupefying in order to commit felony or misdemeanour.</li> <li>17. Doing an act intended to cause grievous harm or prevent arrest.</li> <li>18. Preventing escape from a wreck.</li> <li>19. Intentionally endangering the safety of a person travelling by railway.</li> <li>20. Doing grievous harm.</li> <li>21. Arson.</li> <li>22. Destroying or damaging riverbank, wall or navigation work or bridge.</li> <li>23. Sabotage.</li> <li>24. Forgery of a will, document of title, security, cheque.</li> <li>25. Counterfeiting coin.</li> <li>26. Making preparation for coining.</li> </ol>	<ol style="list-style-type: none"> <li>1. Manslaughter.</li> <li>2. Defilement.</li> <li>3. Attempt to commit Rape.</li> <li>4. Alarming, annoying, or ridiculing the president.</li> <li>5. Promoting war on chiefs.</li> <li>6. Aiding prisoners of war to escape.</li> <li>7. Administering or presence during administering of unlawful oaths.</li> <li>8. Rioters demolishing a building.</li> <li>9. Rescuing a person sentenced to death or life imprisonment from lawful custody.</li> <li>10. Having carnal knowledge of any person or animal or allowing a male person to have carnal knowledge on a woman or man against the laws of nature.</li> <li>11. Incest where one of the parties is below the age of 18.</li> <li>12. Attempted murder.</li> <li>13. Aiding suicide.</li> <li>14. Killing of an unborn child. It is a felony, when a woman is about to deliver a person, through an act or omission to prevent the child from being born alive.</li> <li>15. Causing grievous bodily harm to any person.</li> <li>16. Intentionally endangering persons travelling by railway.</li> <li>17. Cattle rustling.</li> <li>18. Simple robbery.</li> <li>19. Arson.</li> <li>20. Casting away ships.</li> <li>21. Forgery of wills.</li> <li>22. Counterfeiting coins.</li> <li>23. Subversion.</li> <li>24. Mutiny.</li> <li>25. Disobeying lawful orders, where it results in failure of operation or loss of life.</li> <li>26. Failing to execute one's duties, where it results in failure of operation or loss of life.</li> <li>27. Cowardice in action, where it results in failure of operation or loss of life.</li> <li>28. Offences by persons in command of a vessel, aircraft, defense establishment or unit of the army when in action.</li> </ol>

	Republic of Kenya	Republic of Uganda
20. Life imprisonment applicable crimes (continued)		<p>29. Breaching concealment, where it results in failure of operation or loss of life.</p> <p>30. Personal interests endangering operational efficiency.</p> <p>31. Careless shooting in operation, in such a manner as to endanger lives of other fighters in operation.</p> <p>32. Offences relating to operations.</p> <p>33. Spreading harmful propaganda, where there is failure of operation or loss of life.</p> <p>34. Desertion.</p> <p>35. Malingering or maiming.</p> <p>36. Disobedience of commander's orders.</p> <p>37. Causing fire.</p> <p>38. Possession of firearms.</p>
21. Prohibited categories for application of life imprisonment	Mentally ill	Mentally ill.
22. Location of life-sentenced prisoners	<p>Lifers are imprisoned with other long-term prisoners at the following maximum security prisons:</p> <ul style="list-style-type: none"> <li>• Kamiti Prison: Nairobi.</li> <li>• King'ong'o Prison: Nyeri.</li> <li>• Shimo la Tew Prison: Mombasa.</li> <li>• Manyani Prison: Voi.</li> <li>• Naivasha Prison: Naivasha.</li> <li>• Kodiaga Prison: Kisumu.</li> </ul>	Lifers are detained in the general section at Luzira Prison in Kampala, and in Kirinya Prison in Jinja together with other long-term sentenced prisoners.
23. Number of lifers	4,637 lifers (4,579 men and 58 women).	329 (205 men and 124 women).
24. Can lifers apply for a pardon / clemency?	Yes (Article 133 of the Constitution). The President exercises the prerogative of mercy, with assistance from an Advisory Committee on the Power of Mercy.	Article 121 of the Constitution of Uganda provides that prisoners have a right to apply for clemency or pardon. The President exercises the prerogative of mercy, with assistance from an Advisory Committee on the Prerogative of Mercy.
25. Number of life sentences issued in 2010 and 2011	Unknown.	Unknown.
26. Number of lifers paroled in 2010 and 2011	Unknown.	Unknown.

	Republic of Kenya	Republic of Uganda
<b>Fair Trial Standards</b>		
<b>27. Presumption of innocence</b>	Presumption of innocence is legally guaranteed by Article 50(2)(a) of the Constitution of Kenya 2010.	Presumption of innocence is legally guaranteed by Article 28(3) of the Constitution of Uganda.
<b>28. Trial by jury</b>	There is no jury system in Kenya. A trial is conducted with the aid of three assessors (lay citizens), although the judge is not bound by their opinion when reaching a judgement.	Uganda has no jury system. However there is a provision for two or more assessors (lay citizens) to give an opinion at the end of the trial. The assessors may also put questions to the witnesses by leave of the judge.
<b>29. Access to legal aid</b>	Article 50(2)(g) of the Constitution guarantees the right to a legal defence. However, there is no legal guarantee that indigent defendants have a right to legal aid in all cases. They are entitled to state-funded legal counsel "if substantial injustice would otherwise result" (Article 50(2)(h) Constitution).	Article 28(3)(e) of the Constitution of Uganda provides that a person charged with a criminal offence that carried the death sentence or life imprisonment is entitled to legal representation at the expense of the state.
<b>30. Appeal process</b>	<p>The right to appeal is legally guaranteed under Article 50(2)(q) Constitution and s. 330 Criminal Procedure Code.</p> <p>The High Court has a special division to hear serious crimes, and individuals may appeal from the High Court to the Court of Appeals, and then to the Supreme Court. A notice of appeal must be filed within 14 days of the court's decision.</p>	A person may appeal a decision of the High Court to the Court of Appeal on a matter of law or fact or both as a right (s. 49 Criminal Procedure Code). That decision can then be appealed to the Supreme Court (s. 4 Judicature Act). In the military system, death sentences can be appealed to the Court Martial Appeal Court.
<b>Transparency</b>		
<b>31. Information of official statistics and information on the death penalty and its alternative sanctions.</b>	The state does not publish any statistics in regard to the death penalty. However, the Kenya Prison Service provides information on the number of inmates in detention, including those on remand. The most recent information received was in September 2011.	The Uganda Prison Service provides information on the prison population based on the sentence a convict is serving and the remand population. The most recent information received was in April 2011.
<b>Civil Society</b>		
<b>32. Key civil society organisations working on abolition / alternative sanctions</b>	<ul style="list-style-type: none"> <li>• Clear Kenya.</li> <li>• International Commission of Jurists – Kenya Section (ICJ-K).</li> <li>• The Kenyan Legal Resources Foundation.</li> <li>• Kenyan National Commission on Human Rights (KNCHR).</li> <li>• Kenya Working Group on the Death Penalty.</li> </ul>	<ul style="list-style-type: none"> <li>• African Centre for the Treatment and Rehabilitation of Torture Victims (ACTV).</li> <li>• Foundation for Human Rights Initiative (FHRI).</li> <li>• Legal Aid Project.</li> <li>• Refugee Law Project.</li> <li>• Uganda Coalition Against the Death Penalty (CADP).</li> </ul>

	Republic of Kenya	Republic of Uganda
<b>International and regional human rights standards</b>		
<b>International Covenant on Civil and Political Rights (ICCPR)</b>	1 May 1972	21 June 1995
<b>First Optional Protocol ICCPR</b>	Unsigned	14 November 1995
<b>Second Optional Protocol ICCPR</b>	Unsigned	Unsigned
<b>Convention Against Torture (CAT)</b>	21 February 1997	3 November 1986
<b>Optional Protocol CAT (OPCAT)</b>	Unsigned	Unsigned
<b>Convention on the Rights of the Child</b>	30 July 1990	17 August 1990
<b>International Criminal Court / Rome Treaty</b>	15 March 2005	14 June 2002
<b>African Charter on Human and Peoples' Rights</b>	23 January 1992	10 May 1986
<b>Protocol of the African Charter on Human and Peoples' Rights on the Rights of Women in Africa</b>	6 October 2010	22 July 2010
<b>African Charter on the Rights and Welfare of the Child</b>	25 July 2000	17 August 1994
<b>2007 UN GA moratorium resolution 62/149</b>	Abstain	No – signed Note Verbale of Dissociation
<b>2008 UN GA moratorium resolution 63/168</b>	Abstain	No – signed Note Verbale of Dissociation
<b>2010 UN GA moratorium resolution 65/206</b>	Abstain	No – signed Note Verbale of Dissociation

# Annex I: Recommendations from the East African regional roundtable on the death penalty

## Roundtable on Death Penalty in East Africa: Challenges, Strategies and Comparative Jurisprudence

*24–27 July, 2011: Silver Springs Hotel, Nairobi, Kenya*

Organised by Foundation for Human Rights Initiative (FHRI), Penal Reform International (PRI), the International Commission of Jurists – Kenya Section (ICJ-K), and the Judicial Studies Institute (JSI), and with the financial support of the European Union.

### RECOMMENDATIONS

On 27 July, 2011, participants at the “Roundtable on Death Penalty in East Africa” considered the following recommendations in an open and collaborative forum, which identified the challenges, strategies and comparative jurisprudence on the progressive steps taken towards abolition in the East African region.

Conference delegates included members of the Supreme Court of Kenya and Uganda, retired Chief Justice of Tanzania, members of the Constitutional Court of Kenya, members of the Court of Appeal of Uganda, members of the High Court of Kenya and Uganda, magistrates, Prison Commissioners of Kenya and Uganda, lawyers and law associations, academics, members of civil society from Kenya, Uganda, Tanzania and Rwanda, the media, and members of development partners (the European Union and the Foreign & Commonwealth Office).

All conference participants agree to take every step possible to implement, promote and disseminate these recommendations using their good offices, where possible.

**These recommendations are based on best practices from across the region and the evolving standards of decency that mark the progress of the maturing East African society:**

1. In recognition of the inherent right to life, as provided for in Article 3 of the Universal Declaration of Human Rights, and mindful that offenders must take responsibility for their actions, all stakeholders in the East African region should take steps necessary to progressively reduce death penalty applicable crimes to only the ‘most serious crimes’, and only where intentional loss of life is involved in brutal and gruesome circumstances, such as aggravated homicide.
2. In recognition of the right to a fair trial and the importance of judicial discretion, states that have not already done so should endeavour to abolish mandatory death sentences. The Court should take into account the nature of the offence and the circumstances of the case, including the characteristics of the accused, in order to arrive at a fair and proportionate sentence.
3. In recognition of the severity of the death penalty, and in recognition of the right that all persons shall be equal before the courts, all states in the East African region should consider developing national sentencing guidelines to harmonise sentencing in capital cases. Such guidelines should not be prescriptive or fetter judicial discretion, but should aim to streamline sentencing practices. Sentencing guidelines should aim to incorporate examples of best practice from across the East Africa region, and elsewhere. Consultative processes on establishing sentencing guidelines should include all relevant key stakeholders, including judges, lawyers, prosecutors and civil society. Once approved, full training for judges, magistrates and any other judicial officers on the newly established sentencing guidelines and mitigation hearings should be carried out.

4. In recognition of the suffering of victims of violent crime and their loved ones, the justice systems of East Africa should ensure that all victims be treated with dignity, respect and equality throughout the criminal process in recognition of our traditional restorative values of justice. States should establish a victims' compensation fund, and address the rights of victims to reconciliation or mitigation with the offender where appropriate, and any other psycho-social support.
  5. In recognition of the importance of public opinion, all stakeholders across the region should engage in massive civic education to inform the public on the effect and efficacy of the death penalty in practice, and on alternative sanctions to the death penalty. The issue of maintaining the death penalty should be regularly reviewed through national and public debates and dialogue to discover whether the views of the people have changed. Awareness-raising campaigns should also attempt to increase public trust in the justice system.
  6. In recognition of the role of the legislature as the legislative arm of the state, strong political will should be demonstrated by enacting into law the progressive steps taken by the judiciary towards reducing and restricting the application of the death penalty. In the interests of consistency, clarity and certainty in the justice system, the legislatures should also provide a clear definition of 'life' imprisonment, which takes into consideration the primary aim of incarceration, including implementation of justice, the rights of the victim, and the rehabilitation and social reformation of the offender. The legislature should undertake further debates on the issue of the death penalty and alternative sanctions with a view to introducing appropriate amendments to the Constitution and other enabling laws.
  7. In recognition of the overcrowding of prisons in the East African region, stakeholders should aim to reduce the use of long sentences, include time spent on remand into consideration at the sentencing stage, make use of alternatives to imprisonment including community service orders, restorative justice based on customary African law, and better use of the prerogative of mercy, and to improve prison infrastructure and facilities.
  8. In recognition that prisoners are entitled to basic human rights, stakeholders should take steps towards implementing international minimum standards, and to take into consideration the special needs of vulnerable prisoners, including women and mothers of young children, and juveniles. States should consider excluding from life/long-term imprisonment special groups such as mothers and juveniles.
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