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reform worldwide



67th Session of the UNGA: Report of the Secretary General on the implementation of a moratorium on the use of the death penalty

Submission by Foundation for Human Rights Initiative (FHRI) and Penal Reform International (PRI) on Kenya and Uganda

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Brief about Foundation for Human Rights Initiative

The Foundation for Human Rights Initiative (FHRI) is an independent, non-governmental, non-partisan and not-for-profit human rights advocacy organisation established in December 1991. It seeks to remove impediments to democratic development and meaningful enjoyment of the fundamental freedoms enshrined in the 1995 Uganda Constitution and other internationally recognised human rights instruments.

Brief about Penal Reform International

Penal Reform International (PRI) is an international non-governmental organisation with Consultative Status at the United Nations Economic and Social Council (ECOSOC) and the Council of Europe, and Observer Status with the African Commission on Human and People's Rights and the Inter Parliamentary Union. It aims to develop and promote international standards for the administration of justice, reduce the unnecessary use of imprisonment and promote the use of alternative sanctions which encourage reintegration while taking into account the interests of victims. PRI also works for the prevention of torture and ill-treatment and for a proportionate and sensitive response to women and juveniles in conflict with the law, and promotes the abolition of the death penalty and the implementation of humane alternative sanctions.

Republic of Kenya

- Status: retentionist
- Last execution: 1987
- Last death sentence: July 2011
- Approximate number of prisoners on death row: 1,440 (1,410 men and 30 women)
- Abstained from voting in all three UN GA moratorium resolutions

There have been a number of positive legal developments towards reducing the application of the death penalty in Kenya. In July 2010 the High Court found the mandatory death sentence for murder unconstitutional in *Godfrey Ngotho Mutiso v. the Republic*¹. However, the mandatory death penalty remains for four other offences, and while Kenya has not executed anyone for over twenty years, it has the highest number of death row inmates in the region, and courts continue to sentence people to death.

Following the *Mutiso* judgement, a new body of jurisprudence has developed regarding what mitigating factors should be taken into consideration in sentencing trials for capital cases. While this body of jurisprudence is still relatively new, members of the Kenyan judiciary have initiated a process to develop national guidelines on aggravating and mitigating factors that should be taken into consideration during sentencing.² The aim of the sentencing guidelines will be to aid lawyers, prosecutors and judges in sentencing, and to ensure consistency and fairness in all capital cases.

In 2011, a coalition of national human rights organisations 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: reports on prison conditions
- Clear Kenya

In October 2011, an East African coalition against the death penalty was established to bring together civil society in Kenya, Uganda, Tanzania and South Sudan.

On 31 March 2012, at an inter-regional conference against the death penalty in Kinshasa, DRC, a Central African Coalition against the Death Penalty was established. This brings together key countries in the region: Cameroon, Congo-Brazzaville, Burundi, Uganda, Kenya, CAR, DRC, Chad and Tanzania. The Coalition aims to advance the regional abolitionist movement and to break the isolation of some African organisations while promoting the

¹ *Godfrey Ngotho Mutiso v. Republic* [2010] eKLR.

² The Role of the Judiciary in the Debate, Hon. Justice Musinga, paper presented at a "Roundtable on Death Penalty in East Africa: Challenges, Strategies and Comparative Jurisprudence", 24-27 July 2011, Nairobi, Kenya.

implementation of joint regional strategies for the abolition of capital punishment.

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

Republic of Uganda

- Status: retentionist
- Last execution: 1999 (civil); 2003 (military)
- Last death sentence: August 2001 (civil); September 2011 (military)
- Approximate number of prisoners on death row: 505 (470 men and 35 women)
- Voted against all three UN GA moratorium resolutions and signed all three Note Verbale's of Dissociation

There have been a number of positive legal developments towards reducing the application of the death penalty in Uganda. In January 2009, the Supreme Court issued a landmark ruling in *Attorney General v. Susan Kigula and 417 Others*³ which found: 1) the mandatory application of the death penalty unconstitutional; and 2) serving at least three years on death row amounted to cruel and inhuman punishment. Following the judgement, 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).

A new body of jurisprudence has also sprung up regarding what mitigating factors should be taken into consideration in sentencing trials for capital cases. Following an East African regional conference⁴ hosted by PRI and FHRI on 24-27 July 2011 in Nairobi, Kenya, members of the judiciary agreed to initiate a process to develop national guidelines to aid sentencing in capital cases. The Ugandan sentencing guidelines were issued and launched in November 2011.

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" could also 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

³ *Attorney General v Susan Kigula & 417 Others* (Constitutional Appeal No. 03 OF 2006) [2009] UGSC 6 (21 January 2009).

⁴ For more information on the "Roundtable on Death Penalty in East Africa: Challenges, Strategies and Comparative Jurisprudence", including recommendations agreed by the participants, see here: <http://www.penalreform.org/news/pri-speaks-out-against-death-penalty-east-africa-24-27-july>

unanimously that current laws making homosexuality criminally liable 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.⁵

In 2011 and 2012, the Ugandan Coalition Against the Death Penalty (CADP) linked up with a newly-established East Africa Coalition and with the Central African Coalition to share examples, strategies and lessons learned within the region on the abolition movement.

On 22 December 2011, the Working Group of the Universal Periodic Review (UPR) submitted its report regarding Uganda. State parties expressed concern on the continued use of the death penalty in Uganda. The Working Group recommended that Uganda ratify the Second Optional Protocol to the ICCPR and amend the constitution to abolish any constitutional provision that provide for the death penalty; establish a moratorium on all executions and consider abolishing the death penalty altogether.⁶ Uganda rejected all recommendations regarding the death penalty.

FHRI and PRI initiatives towards abolition of the death penalty in Kenya and Uganda

On 24-27 July 2011, FHRI in partnership with PRI and the International Commission of Jurists (Kenya section) hosted a regional conference entitled "Death Penalty in East Africa: Challenges, Strategies and Comparative Jurisprudence". The conference was held in Nairobi, Kenya, and brought together approximately 60 participants from Kenya, Uganda, Tanzania, Burundi and Rwanda including members of the judiciary, prison officials, lawyers, academics, members of civil society, the media, and members of the international donor community (the EU and the British FCO). The discussions focused on prospects of reducing the application of death penalty across the region, including reducing the number of death penalty applicable crimes, developing sentencing guidelines for capital cases, reducing long-term sentences and improving prison conditions. Conference participants agreed eight key recommendations, which can be accessed here:

<http://www.penalreform.org/files/Recommendations%20East%20African%20Workshop%20Death%20Penalty%20270711.pdf>

FHRI has also been working closely with the Parliament of Uganda to promote the passing of legislation that is in conformity with internationally agreed human rights standards. Through its advocacy efforts FHRI has called for the formation of a human rights committee. In March 2012 a stand-alone

⁵ 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).

⁶ Report of the Working Group on the UPR: Uganda, 22 December 2011, A/HRC/19/16.

Parliamentary Committee on Human Rights was created to enable parliamentarians to better prioritise and focus on human rights issues more critically than before.

FHRI, in partnership with PRI, have also carried out a multi-pronged strategy comprised of prison inspections, court inspections, public debates and dialogues with government and civil society on the death penalty, and in-depth research into the implementation of the death penalty and its alternative sanctions (life imprisonment) in Kenya and Uganda. Research findings have been analysed and compiled and discussed with various stakeholders, and were published in March 2012. A copy of the research report can be downloaded here:

<<http://www.penalreform.org/publications/abolition-death-penalty-and-its-alternative-sanction-east-africa-kenya-and-uganda>>

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