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Foundation for Human Rights Initiative (FHRI) and Penal Reform International (PRI) submission to the UN Secretary General on the question of the death penalty in East Africa: Kenya and Uganda

April 2012

Changes in law and practice

To date, Kenya and Uganda have not signed the Second Optional Protocol to the International Covenant on Civil and Political Rights and are not party to any international or regional treaty prohibiting the death penalty. While Kenya abstained from voting in the 2010 UN General Assembly moratorium resolution, Uganda voted against it and signed the note verbale of dissociation.

There are however a number of positive legal developments towards reducing the application of the death penalty in both countries. In *Attorney General v. Susan Kigula and 417 Others*¹ the Ugandan Supreme Court made two important rulings. Firstly, that the mandatory application of the death penalty was unconstitutional, and secondly, serving more than three years on death row after confirmation of the sentence by the highest court amounted to cruel and inhuman punishment. Following the *Kigula* judgment, the Kenya High Court also found mandatory death sentences unconstitutional in the case of *Godfrey Ngotho Mutiso v. the Republic*². These landmark cases have been instrumental in developing a new body of jurisprudence regarding what mitigating factors should be taken into consideration in sentencing hearings for capital cases. Members of the judiciary in both countries initiated processes in 2011 to develop national guidelines to aid sentencing in capital cases.

As a result of these two landmark cases, a number of death row prisoners have had their cases commuted to life or to a long-term sentence. In Uganda, following the *Kigula* judgement, 181 death row prisoners had their sentences commuted to life. Five prisoners were immediately released after having spent more than 20 years on death row.

Although there have been positive changes to the law in Uganda, it is important to note that 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.³

¹ *Attorney General v. Susan Kigula and 417 Others* (Constitutional Appeal No. 03 of 2006) [2009] UGSC 6 (21 January 2009).

² *Godfrey Ngotho Mutiso v. the Republic* [2010] eKLR.

³ *Uganda's anti-gay bill returns to parliament*, Elias Biryabarema, Reuters Africa, 8 February 2012.

Enforcement of the death penalty

The death sentence continues to be handed down although no executions have been carried out since 1999 in Uganda (2003 by Uganda's military jurisdiction), and in 1987 in Kenya. While Kenya no longer retains a hangman, Uganda still employs a hangman and assistant hangman.

In 2011, at least 11 death sentences were issued in Kenya including a case involving a 70 year old, who was sentenced to death for robbery with violence in January 2011. Kuria Kihuyu was accused of robbing a man of his mobile phone and other personal items in September 2010.⁴ On 26 May 2011, three men were sentenced to death for stealing a mobile phone and 300 Kenyan shillings while armed with a homemade gun, toy pistols and knives.⁵ Kenya has approximately 1,440 death row inmates (1,410 men and 30 women).

Uganda also continues to issue death sentences. On 22 April 2011, three Pakistani nationals were sentenced to death by the Kampala High Court for murdering two Indians in March 2009.⁶ On 4 June 2011, the Kampala High Court sentenced Grace Karungi and four men to death for the murder of her husband on 9 March 2009.⁷ On 12 August 2011, the Kampala High Court sentenced Tom Nkurungira to death for the murder of his girlfriend.⁸ Uganda has approximately 505 death row inmates (470 men and 35 women).

International developments

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.⁹ Uganda rejected all recommendations regarding the death penalty.

Acknowledging the reports of poor prison conditions, it was recommended that Uganda undertakes overall improvement of its prisons and adopt relevant measures to tackle the problems such as overcrowding and health among others.¹⁰

Recently the UN Country Team to Uganda found that prolonged periods of pre-trial detention are linked to a number of legal and procedural concerns. In most of the cases investigations start once a suspect is put into custody, which means that often they are held beyond the 48 hour rule enshrined in the Constitution before being brought to court for charges. Police bond and court bail are rarely awarded where the person is facing criminal charges of a capital offence; worse still detainees themselves are not aware that they are entitled to these rights. Delays in investigations and backlog of cases also contribute to prolonged pre-trial detention.¹¹

During the UPR of Kenya in 2010, the Working Group also made recommendations¹² that Kenya

⁴ *70 year old man sentenced to death for robbery*, The Gulf Today, 20 July 2011.

⁵ *Kenya: Mobile Phone Thieves sentenced to death*, all africa.com, 26 May 2011.

⁶ *3 Pakistani nationals to hang over murder*, Anthony Wesaka, Daily Monitor (24 April 2011).

⁷ *Ugandan Woman to hang for killing muzungu husband*, Hillary Nsambu, Newvision (4 June 2011)

⁸ *Tonku guilty of killing girlfriend*, Andante Okanya and Edward Anyoli, Newvision (13 August 2011).

⁹ Report of the Working Group on the UPR: Uganda, A/HRC/19/16, 22 December 2011.

¹⁰ Ibid.

¹¹ Submission to the UPR, United Nations Country Team in Uganda, October 2011, <<http://lib.ohchr.org/HRBodies/UPR/Documents/session12/UG/UNCT-eng.pdf>>.

¹² Report of the Working Group on the Universal Periodic Review: Kenya, A/HRC/15/8, 17 June 2010.

continues to review legislation on the death penalty and work towards establishing *de jure* abolition. It was also recommended that the state takes leadership role in raising public awareness against the death penalty through public forums and conducting periodic surveys of the views of the public. In 2011, Kenya committed to engage various stakeholders on the subject, seek judicial interpretation on the death penalty, and carry out awareness raising campaigns including through media talk shows.¹³

NGOs initiatives towards the abolition of the death penalty

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 (see Annex I).

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 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 sanction (life imprisonment) in Kenya and Uganda. Research findings have been compiled and discussed with various stakeholders, and were published in March 2012 (see Annex II).

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¹³ *From commitments to Action: The Stakeholders Outcomes Charter on the Universal Periodic review of Kenya*, Prepared by Kenya stakeholders coalition to the UPR in partnership with the Kenya National Commission on Human Rights, February 2011, <http://www.upr-info.org/IMG/pdf/kenya_KNCHR_followup_report.02.2011.pdf>.