

Report

International Fact-finding Mission

Uganda: Challenging the Death Penalty

Foreword: Why Mobilise Against the Death Penalty?	5
Introduction	8
I. Background of the Country	9
II. The Organisation of the Judiciary	13
III. The Death Penalty in Uganda	17
IV. Conclusion and Recommendations	45
Appendix	47

Table of Contents

Foreword: Why Mobilise Against the Death Penalty?	5
1. The Death Penalty Contradicts Human Dignity and Liberty.	5
2. The Death Penalty Is Futile	6
3. Arguments from International Human Rights Law.	6
Introduction.	8
I. Background of the Country	9
1. Political History.	9
2. The Protection of Human Rights	10
a. Legal Provisions.	10
i. Ugandan Framework	10
ii. Ratification of International Human Rights Instruments	10
b. The Uganda Human Rights Commission.	10
3. Public Opinion and the Death Penalty.	11
II. The Organisation of the Judiciary	13
1. Military Justice	13
2. Ordinary Courts	13
a. The Judicial Hierarchy	13
b. Criminal Procedure	14
i. Arrest and Custody.	14
ii. Preliminary Procedure and Judgment Hearing.	14
III. The Death Penalty in Uganda	16
1. Statistical Information	16
2. Legal Framework: Death Sentences under Ugandan Law.	17
a. Offences Punishable by Death	17
b. The Notion of Most Serious Crimes.	18
c. New Crimes Entailing the Death Penalty.	19
d. Mandatory Death Sentences.	19
e. Vulnerable Groups	20
3. Who Are the Convicts?	21
a. Charges	21
b. Socio-economic Background of the Detainees Sentenced to Death	22
c. Low-ranking Soldiers	23
d. Political Opponents	24
4. The Trial Stage	24
5. Available Remedies	27
a. The Appeal.	27
b. Mercy	27
i. An Opaque Procedure for Civilians	27
ii. No Mercy for the Military.	28
6. Conditions of Detention	28
a. The Uganda Prisons Act.	28
b. General Remarks.	29
c. Health Care	29
d. Accommodation and Sanitation	31

Uganda: Challenging the Death Penalty

e. Adequate Food	33
f. Visits	33
g. Education, Training and Other Activities	34
h. Discipline and Punishment	34
7. The Method of Execution	35
a. The Procedure Applied once the Execution Is Decided	36
b. Hanging, a Painful Method Leading to Many Botched Executions	38
c. The Impact on the Prison Staff and the Other Detainees	40
8. Challenging the Death Penalty: The Road to Abolition?	41
IV. Conclusion and Recommendations	44
Appendix: Persons Met by the Mission	46

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The opinions expressed in this document are those of the FIDH only and can not be attributed to the European Union.

Foreword: Why Mobilise against the Death Penalty?

The FIDH strongly opposes the death penalty. The FIDH maintains that the death penalty is contrary to the very essence of the notions of human dignity and liberty; furthermore, it has no deterrent effect whatsoever. As a result, neither principles nor utilitarian considerations can justify the use of capital punishment.

1. The Death Penalty Contradicts Human Dignity and Liberty

Human rights and human dignity are now universally acknowledged as the supreme principles and as absolute norms in any politically organised society. The death penalty directly contradicts this very premise and is based on a misconception of justice.

Justice is based on freedom and dignity: a criminal can and should be punished because s/he freely committed an act contravening the legal order. It is for this reason that children or insane persons cannot be held responsible for their actions in a criminal justice system. The death penalty is a contradiction in terms, since it means that at the very moment of conviction, when the criminal is held responsible, and is thus deemed to have acted freely and consciously, s/he is being denied this very freedom because the death penalty is irreversible. Human freedom is indeed also defined as the possibility to change and improve the orientation of one's existence.

The irreversibility of the death penalty contradicts the idea that criminals can be rehabilitated and resocialised and for this reason it simply contradicts the notion of freedom and dignity.

The irreversibility argument has another aspect. Even in the most sophisticated legal system, with all its judicial safeguards and guarantees of due process, miscarriages of justice are possible. Capital punishment can result in the execution of innocent people. This is the very reason why Governor Ryan decided to impose a moratorium in Illinois, after discovering that thirteen detainees awaiting execution were innocent of the crimes they had been accused of, and decided in January 2003, to commute 167 death sentences to life imprisonment. The report of the Commission stressed that: "no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again

sentenced to death." In this case, "society as a whole -i.e. all of us- in whose name the verdict was reached becomes collectively guilty because its justice system has made the supreme injustice possible" said R. Badinter, French Minister of Justice, in 1981. For a society as a whole, accepting the possibility of condemning innocent people to death flies in the face of its core principles of inalienable human dignity, and of the concept of justice itself.

Justice is based on human rights guarantees: the existence of human rights guarantees is the distinguishing feature of a reliable judicial system; notably, these include the guarantees arising from the right to a fair trial -including e.g. the rejection of evidence obtained through torture or other inhuman treatments. In that perspective, the FIDH is convinced that the full respect of those human rights guarantees and the rejection of legally sanctioned violence are at the core of the credibility of any criminal justice system. Justice, especially where the most serious crimes are concerned and life is at stake, should not rely on chance and fortune; an individual's life should not depend on random factors such as the jury selection, media pressure, the competence of a defence attorney, etc. The rejection of inhuman sentences, and first and foremost the death penalty, clearly contributes to building a judicial system based on universally acceptable principles, in which vengeance has no place and that the population as a whole can trust.

The "**death row phenomenon**" refers to the conditions of detention of a person condemned to death while awaiting the execution of the sentence. Those conditions of detention -due mainly to the prolonged period of detention, solitary confinement, the uncertainty of the moment of the execution, and the lack of contact with the outside world, including sometimes with family members and legal counsel- often amount to inhuman treatment.

Justice is fundamentally different from vengeance. The death penalty is nothing but a remnant of an old system based on vengeance: that s/he who has taken a life should suffer from the same fate. If applied consistently, this would mean stealing from the stealer, torturing the torturer, raping the rapist. Justice has risen above such a traditional notion of punishment by adopting a principle of a symbolic, yet proportional sanction for the harm done -fines, imprisonment, etc., which preserves the dignity of both victim and culprit.

Furthermore, **the FIDH does not believe in the supposed necessity of the death penalty out of regard for the victims and their relatives.** The FIDH reaffirms that the victim's right to justice and compensation is fundamental in a balanced and fair justice system, and that solemn and public confirmation by a court of criminal responsibility and the suffering of the victim plays an important role in order to substitute the need for vengeance ("judicial truth"). But the FIDH nonetheless holds that answering this call for justice by the death penalty serves only to relieve the basest emotional cries for vengeance, and does not serve the cause of justice and dignity (even that of the victims) as a whole. Paradoxically, the victim's dignity is itself better served by rising above vengeance. The victim's status as civil party in the criminal procedure contributes to answering his/her overwhelming need to be recognised as a victim. Providing psychological support and financial compensation to the victims also helps them believe that justice has been done and that private vengeance is unnecessary and would have no added value. In light of those elements, the victim's need for vengeance as an argument in favour of the death penalty appears irrelevant.

Finally, the FIDH notes that the death penalty is used in a discriminatory way, e.g. in the USA, where it affects ethnic minorities in particular, or in Saudi Arabia where foreigners are its principal victims.

2. The Death Penalty Is Futile

One of the most common arguments in favour of the death penalty is that of its usefulness: the death penalty supposedly protects society from its most dangerous elements and acts as a deterrent for future criminals. Neither of these arguments can be held to have any validity, as has been proved again and again.

Is the death penalty a protective element for society? It does not appear so. Not only are societies which advocate capital punishment any less protected from crime than societies which do not, but other sanctions are available in order to protect society, notably imprisonment. The protection of society does not imply the physical elimination of criminals. In addition, it can be argued that the precautions taken to avoid suicide by death row inmates demonstrate that the physical elimination of the criminal is not the main aim of death penalty: what seems to matter is that the sanction is executed against the criminal's consent.

With regard to the exemplariness of the death penalty or other cruel punishments, their efficiency as deterrents against criminality has repeatedly been proved wrong. All systematic studies show that the death penalty has never helped lower the crime rate anywhere. In Canada for example, the homicide rate per 100,000 of population fell from a peak of 3.09 in 1975, the year before the abolition of the death penalty for murder, to 2.41 in 1980. In 2000 however, the police in the United States reported 5.5 homicides for every 100,000 of population whilst the Canadian police reported a rate of 1.8.

The most recent survey of research on this subject, conducted by Roger Hood for the United Nations in 1988 and updated in 2002, concluded that "the fact that the statistics... continue to point in the same direction is persuasive evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty."¹

This should obviously come as no surprise: a criminal does not commit a crime by calculating the possible sanction, and by thinking that he will get a life sentence rather than the death penalty. Furthermore, as Beccaria noted in the 18th century, "it seems absurd that the laws, which are the expression of the public will, and which hate and punish murder, should themselves commit one, and that to deter citizens from murder, they should decree a public murder."

Finally, the FIDH notes that the death penalty is very often a barometer of the general human rights situation in the countries concerned: it proves to be a reliable indicator of the level of respect for human rights, as is the case, for example, with regard to the situation of human rights defenders.

3. Arguments from International Human Rights Law

The evolution of international law tends towards the abolition of the death penalty: the Rome Statute of the International Criminal Court and the UN Security Council resolutions establishing the International Criminal Tribunals for the Former Yugoslavia and for Rwanda do not provide for the death penalty in the range of sanctions although those courts have been established to try the most serious crimes.

Specific international and regional instruments have been adopted which aim to abolish capital punishment: the UN second optional protocol to the ICCPR aimed at the abolition

1. Roger Hood, *The Death Penalty: A Worldwide Perspective*, third edition (London: Oxford University Press, 2002), p.214.

Uganda: Challenging the Death Penalty

of the death penalty, the Protocol to the American Convention on Human Rights to abolish the death penalty (Organization of American States), the Protocol 6 and the new Protocol 13 to the European Convention on Human Rights (Council of Europe). The Guidelines to EU Policy Towards Third Countries on the Death Penalty, adopted by the European Union on 29 June 1998 stress that one of the EU objectives is “to work towards the universal abolition of the death penalty as a strongly held policy view agreed by all EU member states.” Moreover, “the objectives of the European Union are, where the death penalty still exists, to call for its use to be progressively restricted and to insist that it be carried out according to minimum standards (...). The EU will make these objectives known as an integral part of its human rights policy.” The newly adopted EU Charter of fundamental rights also states that “no one shall be condemned to the death penalty, or executed.”

At universal level, even if the ICCPR expressly provides for the death penalty as an exception to the right to life and surrounds it by a series of specific safeguards, the General comment adopted by the Committee in charge of the interpretation of the Covenant states very clearly that article 6 on the right to life “refers generally to abolition in terms

which strongly suggest that abolition is desirable... all measures of abolition should be considered as progress in the enjoyment of the right to life.”

Moreover, in its resolution 1745 of 16 May 1973, the Economic and Social Council invited the Secretary General to submit to it, at five-year intervals, periodic updated and analytical reports on capital punishment. In its resolution 1995/57 of 28 July 1995, the Council recommended that the five-yearly reports of the Secretary General should also cover the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty.²

Every year since 1997, the UN Commission on Human Rights calls upon all states that still maintain the death penalty “to establish a moratorium on executions, with a view to completely abolishing the death penalty.”³

On 8 December 1977, the UN General Assembly also adopted a resolution on capital punishment stating that “the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment.”⁴

2. ECOSOC resolution 1984/50 of 25 May 1984.

3. See notably resolution 2002/77, 2001/68, 2000/65 and 1999/61.

4. UN General Assembly resolution 32/61, 8 December 1977, paragraph 1.

Introduction

Alarmed by reports regarding the administration of the death penalty in Uganda, and aware that a petition filed in September 2003 against the death penalty, signed by 417 death row inmates, was pending before the Constitutional Court of Uganda (see below), the FIDH decided to send an international fact-finding mission to the country.

The mandate of the mission was to inquire into the administration of the capital punishment in Uganda, including the conditions of detention on death row. The objective was also to assess the possibility of Uganda abolishing the death penalty, or adopting a moratorium on capital punishment, as a first step towards its abolition, and to issue recommendations in that regard.

According to Amnesty International, there were at least 525 inmates on death row in Uganda in December 2004. No civilians have been executed since May 1999, when 28 death row inmates were hanged at Luzira Prison. Three soldiers were executed by firing squad in March 2003.⁵

The mission was composed of three delegates: Mr. Eric Mirguet, lawyer (France), Mr. Thomas Lemaire, lawyer (France) and Ms. Mary Okosun, Coordinator-administration of the

Justice programme, Civil Liberties Organisation (Nigeria). They visited Uganda from 19 to 27 March 2005.

The cooperation of the civilian authorities was fully satisfactory since the FIDH mission was able to meet with a number of officials, including the Minister of Internal Affairs and the Chief Justice of Uganda; the delegates were also able to visit the Kirinya (Jinja) prisons (Jinja Remand Prison and Jinja Main Prison) and to meet death row prisoners.

The general feeling of NGOs and abolitionists in Uganda is that the most pressing issue is the situation of ordinary prisoners, while the death penalty as administered by the military should be addressed at a second stage. The questions relating to the military are sensitive issues in Uganda, which might also explain that position. The focus of the present report is consequently mainly on the death sentences pronounced by ordinary criminal courts.

The FIDH would like to thank all the persons met by the mission, and extends a special thanks to the Foundation for Human Rights Initiatives (FHRI), its member organisation in Uganda, which closely cooperated in the preparation of the mission.

5. Amnesty International Annual Report 2005.

I. Background of the Country

Uganda is a land-locked country lying on the Equator, more than 2,000 km West of the Indian Ocean. It borders Kenya to the East, the United Republic of Tanzania and Rwanda to the South, Democratic Republic of Congo to the West, and Sudan to the North. The total area of the country is about 241,000 sq km, 16 percent of which consists of lakes, rivers and marshes. Most of the land forms a high plateau at an altitude of between 900 to 1,500 meters above sea level. At the Eastern and Western borders the land rises to over 2,000 m forming the shoulders of the Rift Valley. Here lie Lake Victoria, Lake Kyoga and the Rwenzori mountain range where the snow-capped mount Magherita is among the highest in Africa.

Uganda has a population of 26.8 million people.⁶ More than half are children under 18 years (15 million). The country is one of the least urbanized in Africa with almost 90 percent of the population living in the countryside. This leaves about 12 percent of the people in urban areas. 77 percent of the population is engaged in agriculture. The population tends to be concentrated in the more fertile agricultural areas particularly around the shores of Lake Victoria. Uganda is a comparatively densely populated country with about 85 persons per sq km.

In terms of ethnicity, Uganda has more than 40 distinct ethnic groups. The main divisions are between the Nilotic groups (25 percent) and the Bantu (60 percent). The other ethnic groups are the Nilo-Hamitic speaking groups in the East and the Pygmies in the South and West of the country.

English is the official language and Swahili is spoken widely along with other indigenous dialects.

Uganda can be said generally to be a secular country but freedom of religion is guaranteed by the Constitution. A total of 44.5 percent of the people are Catholic, 39.2 percent Anglican, 10.5 percent Muslim and 5.7 percent belong to other denominations (1991 census).

1. Political History

Pre-colonial Uganda (before 1894) was characterised by administration in centralised and decentralised societies. The South, Central and Western parts had a system of government modelled on a monarchical structure, notably kingdoms. The Eastern and Northern parts had chiefdoms and

principalities. In almost all societies, administration was hereditary. In 1894, Uganda was declared a Protectorate of Britain. During the colonial era, under British Administration (1894-1962) the power of the kings and chiefs was reduced and the system of indirect rule was introduced.

Uganda has passed through a turbulent political history since it became independent in 1962. There have been seven changes of Government since its independence.

The 1962 Independence Constitution established a multi-party system. This Constitution was replaced in 1967 by a new one under President Apollo Milton Obote, who was overthrown by General Idi Amin in 1971.

There were no political parties during General Amin's regime. Up to 300,000 people were murdered under Idi Amin's eight year reign of terror. The Uganda National Liberation Front (UNLF) overthrew him in 1979.

The UNLF created an "umbrella" political system, which disintegrated in May 1980 and which saw Dr. Apollo Milton Obote reinstated as President of the Republic of Uganda. Massive violations of human rights occurred during the government of Obote, commonly known as Obote II. In June 1985 Dr. Obote was overthrown again in a coup d'Etat led by General Tito Okello Lutwa, who took over the Government. Six months later, in January 1986, the National Resistance Army (NRA) led by Yoweri Kaguta Museveni overthrew the Tito Okello Lutwa Government. Yoweri Museveni is currently the President of the Republic of Uganda.

The years 1994-95 saw the election of a Constituent Assembly and the amendment and rewriting of the old 1967 Constitution, resulting in the 1995 Constitution of the Republic of Uganda.

In 1996, Uganda held another general election, which brought President Yoweri Museveni into power as the democratically elected president, and resulted in a new Parliament of the Republic of Uganda for a term of 5 years. In 2001, the incumbent President Museveni won the presidential election again, for the term 2001-2006, making him the longest serving president of the Republic of Uganda. In June 2001, the people of Uganda elected the seventh Parliament, also mandated to sit for 5 years. Presidential and parliamentary elections are scheduled for 2006.

6. 2002 Uganda Population and Housing Census, released on 20 March 2005 (compiled by the Uganda Bureau of Statistics).

2. The Protection of Human Rights

a. Legal Provisions

i. Ugandan Framework

A chapter on Human Rights has been part of the Constitution since Independence. The former colonial regime insisted on a Bill of rights being incorporated in the Independence Constitution. The rights and freedoms adopted by the 1962 Constitution were largely those included in the 1948 Universal Declaration of Human Rights.

International Human Rights instruments were ratified later, including the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR) in 1987, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1986 and the Convention on the Rights of the Child in 1990. In order to incorporate those instruments into domestic legislation and give them legal force in national courts, many new provisions were added in the Constitution of 1995. Under Ugandan law, the various human rights instruments are not directly enforceable by the courts or other administrative authorities. They first have to be incorporated into domestic legislation or administrative arrangements. For a ratified instrument to become national law, a law needs to be adopted by the Parliament. The rights to education and to the family, the rights of women and children and the rights of minorities were added to the original political and civil rights enshrined in the Constitution of 1962.

This new Bill of Rights lays down a foundation on which positive discrimination may be applied for the emancipation of women, the empowerment of persons with disabilities and the protection of children. Economic, social and cultural rights are now recognized in the Constitution.

ii. Ratification of International Human Rights Instruments

Uganda is a State party to seven of the major international Human Rights treaties (the ICESCR, the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on

the Rights of the Child, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families), as well as to the First Optional Protocol to the ICCPR and the two Optional Protocols to the Convention on the Rights of the Child (on the involvement of children in armed conflicts and on the sale of children, child prostitution and child pornography), the African Charter on Human and Peoples' Rights and the Protocol to the African Charter on Human and Peoples' rights on the establishment of an African Court on Human and Peoples' rights).

Uganda is also a party to the main international humanitarian law instruments, in particular the Geneva Conventions of 12 August 1949 for the protection of victims of war, and the Additional Protocols thereto, of 1977.

On 14 June 2002, Uganda ratified the Rome Statute of the International Criminal Court, and later, in December 2003, the Government of Uganda submitted a referral to the Court on the situation in Northern Uganda.⁷ In June 2004, the situation in Uganda was assigned to the Preliminary Chamber II, and the Prosecutor announced the launch of an investigation in Uganda in July 2004.

The Treaty of Rome setting up the International Criminal Court excludes recourse to the death penalty for the most serious international crimes (genocide, war crimes and crimes against humanity). Ugandan authorities declare themselves very committed to the struggle against impunity in the framework of the newly established international criminal system. It is consequently contradictory for the authorities to keep the death penalty in the domestic legislation for a number of crimes, including some that are not the most serious.

In addition, an implementing legislation should be adopted as soon as possible, in order to match declarations of support to the ICC with facts. That legislation should be fully conform with the spirit and the letter of the ICC Statute.

b. The Uganda Human Rights Commission

While drafting the 1995 Constitution, the Constituent Assembly realised that it was necessary to create and empower a permanent body for the promotion and protection of Human Rights.

7. For nearly eighteen years the insurgency of the Lord's Resistance Army (LRA), led by Joseph Kony, has produced great suffering in Northern Uganda, including some 1.5 million internally displaced persons (IDPs). UN Under-Secretary-General for Humanitarian Affairs Jan Egeland recently termed the situation among the worst humanitarian disasters in the world. In February 2004, in one of the most horrific atrocities since the conflict began, the LRA massacred approximately 200 civilians, revealing serious deficiencies in the government's capacity to defend the population and defeat the insurgency. The conflict seriously mars the record of President Yoweri Museveni's National Resistance Movement (NRM).

Uganda: Challenging the Death Penalty

Article 51 of the Constitution was therefore written specifically for this purpose. It creates the Uganda Human Rights Commission (UHRC) with quasi-judicial functions.⁸

The Commission possesses large powers to protect the respect of Human Rights, including to investigate, at its own initiative or on complaint made by any person or group of persons against the violations of any human right;⁹ to have access to and monitor detention conditions; to conduct educational and other activities to promote human rights awareness; and to monitor and make recommendations for Government compliance with its international obligations.

The Commission is empowered to subpoena any witness, to request any document, to order the release of any detained person, and recommend payment or compensation, or any other legal remedy after it finds the existence of human rights abuse. However, the Commission cannot investigate any matters pending before a court of law, matters relating to Uganda's dealings with other countries or international organizations, or matters relating to the prerogative of mercy.¹⁰

The Commission's Tribunal handles a large number of complaints each year, and often awards generous compensation to the victims.¹¹ The Government departments responsible for those human rights violations include the Uganda People's Defence Force (UPDF) and the Uganda Police Force (UPF).¹²

Unfortunately, 90% of the awards granted by the Commission's Tribunal have not been honoured by the Attorney General.¹³

3. Public Opinion and the Death Penalty

The majority of the people met by the FIDH mission were in favour of keeping the death penalty, at least for certain crimes (murder, rape). The media are also generally favourable to the death penalty. The prison officials were the most opposed

to capital punishment, probably because of the involvement of the prison staff in the executions and the resulting trauma (see below).

Prison officials like Vincent Oluka, Principal Officer II working with the Uganda Government Prison Service says that his interaction with condemned prisoners for 14 years and observing their character, behaviour and attitude whilst in prison has led him to form the view that these prisoners are poor and misguided people who engaged in antisocial behaviour when they were outside. He said that he interacts frequently with them and they have never attacked him.

No opinion was expressed about the death penalty imposed by military court, in spite of the fact that this is clearly a parody of justice. Matters relating to the military seem particularly sensitive, which might explain the silence.

A recurrent argument by officials in favour of the death penalty is that it is cheaper to execute death row inmates than to imprison them long term. However, Joseph A. A. Etima argues to the contrary. According to his research into the prison system in Uganda, the percentage of prisoners on death row is negligible compared to the number of other prisoners and therefore their upkeep is negligible. He supported this finding with the prison statistics that showed that in 2000 out of the general prison population of 15,391 only 225 were on death row, representing only 1.5% of the entire prison population. He also argued that these prisoners can be made to contribute significantly to their upkeep and, by far the strongest argument, he argued that the value of human life cannot be quantified in monetary terms.¹⁴

Some members of the executive support the death penalty. This is particularly true of Hon. Ruhakana Rugunda, the Ugandan Minister for Internal Affairs, because Uganda has a terrible history of security forces using force freely to maim

8. See also the Uganda Human Rights Commission Act No. 4 of 1997.

9. In 2003, the Commission handled 2,050 complaints, a large increase compared to the previous years, because of the opening of regional offices. Most violations were in relation to deprivation of personal liberty, torture, cruel, inhuman and degrading treatment (219 violations of liberty, 149 cases of torture, 70 of cruel treatment).

Source: 6th annual report of the Uganda Human Rights Commission, 2003 accessed at <http://www.uhrc.org/publications.php>

10. The powers, functions, and structure of the Human Rights Commission are implemented in greater detail by the Uganda Human Rights Commission Act passed by the Parliament in 1997.

11. In the case Giddu Stephen, UHRC 210/99, Kampala, 23 February 2003, the Tribunal awarded 59 million Ugandan Shillings (about 27,000 Euros). More recently, in the case Idris Kasekende, 20 January 2005, the Tribunal granted 40 million.

12. Among the 21 cases handled by the Tribunal in Kampala, 12 involved the Police. See page 6 of the 2004 Annual report of the Ugandan Human Rights Commission.

13. The Human rights Committee expressed its concern "about the frequent lack of implementation by the State party of the Commission's decisions concerning both awards of compensation to victims of human rights violations and the prosecution of human rights offenders in the limited number of cases in which the Commission has recommended such prosecution." Concluding Observations of the UN Human Rights Committee, Uganda, CCPR/CO/80/UGA, 4 May 2004.

14. See paragraph 11(a)-(c) of A.A. Etima's affidavit.

Uganda: Challenging the Death Penalty

and kill. Given this background of gross human rights abuse, he is of the view that the only way to stem the tide is to apply the Mosaic law of an eye for an eye a tooth for a tooth. In his interview with FIDH he said that the death penalty has promoted respect for human rights.

He also mentioned that it is necessary to assess the extent to which local circumstances in Uganda would permit the operation of human rights instruments. In his view, some of the international human rights instruments are not relevant to local circumstances.

It should also be noted that the Ugandan Human Rights Commission did not recommend the full abolition of the death penalty, but recommended to the Constitutional Review Commission the amendment of the legislation to remove politically related offences from the list of crimes punishable by death.¹⁵

However, even if abolition is a long way off, the June 2005 ruling of the Uganda Constitutional Court (see below) proves that Ugandan society is now open to further debate on the possible abolition of capital punishment.

15. Ugandan Human Rights Commission, 6th Annual Report, 2003, paragraph 10.13.4, page 98.

II. The Organisation of the Judiciary

1. Military Justice

Justice for military personnel is provided for under the Uganda People's Defence Forces Act CAP 307 of the laws of Uganda vol. XII.

Sections 14-44 spell out persons and circumstances subject to military law. Sections 45-71 spell out the miscellaneous offences punishable under military law, while section 72-94 provides for the due process to be followed in the arrest, trial and punishment of military offenders.

Some of the offences are: interfering with the process of law, unlawful detention of a person in custody, treachery, subversion, conspiracy, disobeying lawful orders and obstruction of police duties.

The Act under sections 77, 78, 80, 81 and 84 provides for the composition and powers of the following courts respectively; Unit Disciplinary Committee, Field Court Martial, Division Court Martial, General Court Martial and Court-Martial Appeal Court.

A Unit Disciplinary Committee (UDC) is based at each army unit. It has powers to try and determine all cases other than those involving murder, manslaughter, robbery, rape, treason, terrorism and disobedience of unlawful orders resulting in loss of life.

The Field Court Martial is provided for under section 78: "[it]...shall only operate in circumstances where it is impracticable for the offender to be tried by a unit disciplinary committee or division court-martial."

The division court martial on the other hand is based at the division and has unlimited jurisdiction to try any offence under the Act. It is chaired by an officer no below the rank of a major.

The General Court Martial provided for under section 81(1) has both original and appellate jurisdiction over all offences and persons under the Act.

The Court Martial Appeal Court is the highest appellate court under the army structure.

While structure is well laid out however, there have over the years been problems related to jurisdiction especially of Unit Disciplinary Committees and the field court martial. There have also been complaints about malicious convictions under the Unit Disciplinary Committees.

Military justice has also been and continues to be riddled with the absence of appellate structures. In May 2003, FHRI received a petition from 17 army men, all sentenced to death by UDCs but they had not been allowed to appeal for the previous 8-10 years. All of them complained that the charges against them were trumped up. There are scores of such prisoners strewn in different prisons throughout the country.

In 2002 two soldiers, Cpl James Omedio and Pte Abdallah Mohammed, were subjected to a military trial and executed shortly after for killing an Irish Priest and two of his staff. This trial and punishment did not follow proper due process (see below), in violation of the Ugandan Constitution.¹⁶

Moreover, these two soldiers were tied on trees, and executed in public and in the presence of children. Public executions constitute a cruel, inhuman and degrading treatment. The UN Commission on Human Rights asks States not to carry out capital punishment in public or in any other degrading manner.¹⁷

2. Ordinary Courts

a. The Judicial Hierarchy

Article 129 of the Constitution states:

The judicial power of Uganda shall be exercised by the Courts of Judicature which shall consist of:

- (a) the Supreme Court of Uganda;
- (b) the Court of Appeal of Uganda;
- (c) the High Court of Uganda; and

16. 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 of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court." In our opinion, a Field Court Martial is not exempted from the provisions of this Article.

Article 28 guarantees every accused person the right to a fair trial. This right, according to Article 44 is non-derogable and therefore must be respected by all courts. The two soldiers' right to a fair trial was violated. The fairness in especially the UDCs and the Field Court Martial is very questionable.

17. Res. 2005/59 on the Question of the Death Penalty.

(d) such subordinate courts as Parliament may by law establish, including Qadhis' courts for marriage, divorce, inheritance of property and guardianship, as may be prescribed by Parliament.

At the top of the judicial hierarchy is the Supreme Court. Its powers are established by Article 130 and subsequent of the Constitution. This court decides both in law and in fact. It can under certain circumstances sit as a Constitutional Court. It is composed of the Chief of Justice and not less than five members.

Below the Supreme Court is the Court of Appeal, created by the 1995 Constitution; its powers are fixed by Articles 134 and subsequent of the Constitution. It is composed of the Deputy Chief of Justice and such number of Justices of Appeal not being less than seven as Parliament may prescribe by law.

Below the Court of Appeal is the High Court. It is chaired by the Principal Judge and its powers are fixed by Art 138 and subsequent of the Constitution. It sits both as an appeal court for the lower courts (Magistrates courts...) and in the first instance for certain cases, notably those which can carry the death sentence.

At the bottom of the hierarchy are the Local Courts I, II et III and the Magistrates Court Grade I and II, which have territorial jurisdiction and cover minor offences.

b. Criminal Procedure

i. Arrest and Custody

Article 23 of the Constitution states that: "No person shall be deprived of personal liberty" except in a number of cases enumerated in the same provision, such as in execution of the sentence or order of a court, for the purpose of preventing the spread of an infectious or contagious disease, in the case of a person of unsound mind or addicted to drugs or alcohol, etc.

In case of arrest, the Constitution guarantees the rights of the person in custody (Article 23).

- A person arrested, restricted or detained shall be kept in a place authorised by law.

- A person arrested or detained shall be informed immediately, in a language that the person understands, of the reasons for the arrest, restriction or detention.

- A person arrested has the right to a lawyer of his or her choice.

- The next-of-kin of that person shall, at the request of that person, be informed as soon as practicable of the restriction or detention.

- The lawyer and personal doctor of that person shall be allowed reasonable access to the person arrested or detained.

- A person arrested shall be allowed access to medical treatment.

However, in practice, the persons in custody do not see their constitutional rights fully respected. This difference between the legal safeguards and reality is self-evident at every stage of the procedure.

Most of the persons in custody cannot read or write, are very poor and come from the rural areas. Consequently they do not ask for a lawyer immediately, nor for a doctor, as allowed by the Constitution (see below). This is worrying since the subsequent proceedings are based on the detainee's statement during the pre-trial detention.

According to Article 23-4(b) of the Constitution, a person arrested upon reasonable suspicion of his or her having committed or being about to commit a criminal offence under the laws of Uganda, shall, if not earlier released, be brought to court as soon as possible but in any case not later than forty-eight hours from the time of his or her arrest.

ii. Preliminary Procedure and Judgment Hearing

At the end of the period of custody, the detainee will appear before a judge who will hold a "preliminary hearing." On that occasion, the Director of Public Prosecution (DPP) must present the evidence that will later be used during the trial. This evidence must be given to the judge, who will record it.

After that preliminary hearing, the judge writes a memorandum which is read and explained to the accused. The case is then sent for judgment in the High Court.

The aim of the preliminary hearing is to inform the accused of the charges against him/her and to leave him/her the possibility to prepare his/her defence, assisted by a lawyer.

It should be noted that the law specifies a time limit for the investigations: 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. That does not mean, however, that

Uganda: Challenging the Death Penalty

he/she will not be prosecuted later. After 360 days, committal of capital offenders to High Court takes place. However, there is no limit to how long one can be held on committal before actually being tried. This means that suspects spend even 5 years in detention pending trial because they are waiting until their name gets on to the cause list.

That procedure appears to respect the right to defence. It seems that the accused, aware of the charges against him/her, will be able to prepare his/her defence. However, as for the person in custody, that possibility is merely theoretical and is hardly ever applied in practice.

The FIDH mission visited the JINJA detention facility where it was able to question 116 detainees awaiting trial.¹⁸ Among them, 114 had no lawyer and seemed never to have thought of appointing one since they believed that it is a privilege of the

rich. Only a father and his son had contacted a lawyer; the latter never came to meet with them, had only asked to be paid and promised that he would be present the day of the trial.

Indeed, in the couple of years between the preliminary hearing and the judgment hearing, nothing happens, no lawyer visits the accused to prepare his/her case, no evidence will be looked for in order to establish his/her innocence. S/he will only be summoned before the High Court, where s/he will meet for the first time a state-appointed lawyer. S/he will be as powerless before the judgment court as during the preliminary hearing.

The accused, who has not been able to gather any evidence, is faced with the Director of Public Prosecution (DPP) in charge of the prosecution, whose powers are established by Article 120 of the Constitution.

18. Individual interviews were carried out with 13 of them.

III. The Death Penalty in Uganda

1. Statistical Information

The first hangings since the 1970s following condemnations by the High Court took place on 15 March 1989 when Kassim Obura, Lukoda Mugaga and Thomas Ndaigana were executed in Luzira prison. Kassim Obura, who was a member of the public safety Unit, a government security unit responsible for gross human rights violations under the government of Idi Amin, was convicted of murdering a prisoner in November 1973. He had been in prison for almost 10 years.

There were no further executions under the Uganda Penal Code until 29 June 1991, when nine prisoners convicted of aggravated robbery or murder were hanged in Luzira prison. Among them were three UNLA soldiers¹⁹, William Otasono, Milton Ongom and Nicholas Okello, who were stationed at Mbuya General Headquarters near Kampala, and who had been convicted in July 1984 of robbing and murdering a man. Their appeal to the Supreme Court was rejected in March 1989.

In a report published in September 1992, Amnesty International reported 40 executions since 1987.²⁰

No civilians have been executed since May 1999, when 28 death row inmates were hanged at Luzira Prison. Two soldiers were executed by firing squad in 2002, and three soldiers were executed in March 2003.²¹

It should be noted that there are no exhaustive, clear and transparent statistics on the number of people sentenced to death or executed in Uganda.

Every year, the UN Commission on Human Rights reiterates its call upon states that still maintain the death penalty “to make available to the public information with regard to the imposition of the death penalty and to any scheduled execution.”²² As noted by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, “secrecy prevents any informed public debate about capital punishment within the relevant society (...). Countries that have maintained the death penalty are not prohibited by international law from making that choice, but they have a clear obligation to disclose the details of their application of the penalty.”²³ Uganda should consequently abide by the obligation to release such statistics publicly.

Statistics of Application of the Death Penalty in the Last 15 Years

Year	Clemency Cases	No. of Executions	Names of the Executed	Offence(s)
1989		3	Kassim Obura, Lukoda Mugaga & Thomas Ndaigana	Murder
1990	3		Unknown	Unknown
1991	5	9	Milton Ongom, William Otasono & Nicholas Okello	Aggravated Robbery and Murder
1993	9	12	Joesph Kizza, Kelly Omuge, Kalist Ssebugwawo & Robert Kasolo	
1996		3	Suleman Ndamagye, Salim Mulumba & Dominic Oboth	Murder and Rape
1999	13	28	William Bataringaya, Haj Ssebirumbi, Emmanuel Kasujja & Leo Mwebaza	Murder

Source: Uganda Prisons Headquarters, quoted by Mr. Emmanuel Kasimbazi, National Coordinator of the BHCL Death Penalty Project, Uganda, and Dean of the Faculty of Law at Makerere University, Paper presented at the First International Conference on the Application of the Death Penalty in Commonwealth Africa organized by the British Institute of International & Comparative Law held in Entebbe, Uganda from 10 to 11 May 2004.

19. UNLA (Uganda National Liberation Army) is the military arm of the Uganda National Liberation Front (UNLF). The UNLF was formed by exiled Ugandans in the late 1970's. It was the Ugandan force that fought with the Tanzanian People's Defence Force (TPDF) to topple from power the regime of Idi Amin in Uganda.

After the overthrow of Amin on 11 April 1979, the UNLA became the national army of Uganda until it was defeated on 25 January 1986 by the guerrillas of the National Resistance Army (NRA) led by Yoweri Museveni.

20. See *Uganda: The failure to safeguard human rights* (AFR 59/05/92), published by Amnesty International in September 1992.

21. Amnesty International Annual Report 2005.

22. Res. 2004/67.

23. E/CN.4/2005/7, paras. 57 and 59.

**Uganda:
Challenging the Death Penalty: The Road to Abolition?**

Benjamin Odoki, Chief Justice, told the FIDH delegates that about 60% of the detainees awaiting trial in the Ugandan prisons are charged with the offence of defilement.

Number of Prisoners on the Death Row per Year

December 1997	More than 1,000
December 1999	269 (including 150 soldiers)
December 2000	More than 260
December 2002	354
December 2003	At least 432
December 2004	525

Source: Amnesty International Annual Reports

Uganda's Death Row as at the 1st January, 2004

Offence	Length of Stay in Prison						Total
	<1 Year	1-5 Years	5-10 Years	10-15 Years	15-20 Years	More than 20 Years	
Murder	84	165	48	8	2	---	307
Robbery	36	79	16	8	1	---	140
Treason	---	---	---	4	---	---	4
Kidnap					1	1	2
Mutiny	---	3	---	---	---	---	3
Cowardice	1	---	---	---	---	---	1
Total	121	247	64	20	4	1	457

Source: Uganda Prisons Headquarters, quoted by Mr Emmanuel Kasimbazi, National Coordinator of the BHCL Death Penalty Project, Uganda, and dean of the Faculty of Law at Makerere University, Paper presented at the First International Conference on the Application of the Death Penalty in Commonwealth Africa organized by the British Institute of International & Comparative Law held in Entebbe, Uganda from 10 to 11 May 2004.

2. Legal Framework: Death Sentences under Ugandan Law

a. Offences Punishable by Death

In the Penal Code eight offences carry death sentences.

These offences are:

- Treason contrary to Section 23 (1), (2), (3) and (4) of the Penal Code

- Smuggling where the offender is armed with, uses or threatens to use a deadly weapon, Section 319 (2)

- Detention with sexual intent, where a person having authority to detain or keep the victim in custody participates in or facilitates unlawful sexual intercourse, Section 134 (5)

- Murder contrary to Section 189 of the Penal Code

- Kidnapping with intent to murder contrary to Section 243 of the Penal Code Act

- Rape contrary to Section 124 of the Penal Code Act

- Defilement contrary to Section 129 (1) of the Penal Code Act²⁴

- Robbery with aggravation contrary to Section 286 (2) of the Penal Code

The Uganda People's Defence Forces Act (formerly called the National Resistance Army Statute) established the military justice system of the Uganda People's Defence Forces (UPDF) and came into force on 20 March 1992. It includes a long list of offences which can entail the death penalty: treachery,

24. Defilement is having sex with a minor.

mutiny, disobeying lawful orders, failing to execute one's duties, offences relating to prisoners of war, cowardice in action, offences by persons in command when in action, breaching concealment, failure to protect war materials, failure to brief, offences relating to security, spreading harmful propaganda, desertion, offences relating to convoys, losing, stranding or putting vessels in danger, wrongful acts in relation to aircraft, inaccurate certificate, dangerous acts in relation to aircraft, attempt to hijack aircraft, fire-raising.²⁵

Under the Anti-Terrorism Act, 2002, additional offences are punishable by death.

Section 7(2) of the Act states 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..." The definition of the offence is vague and broad, and has been criticised by the Uganda Human rights commission.²⁶ It is an offence punishable, on conviction, by death if the offence directly results in the death of any person.

Section 8 of the Act defines other terrorist offences. These include aiding, abetting, financing, harbouring or rendering 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. Conviction on these offences also carries a penalty of death.

b. The Notion of Most Serious Crimes

The fact that the Ugandan legislation provides for the death penalty for a great number of crimes, including non-violent crimes, constitutes a violation of international human rights standards. In that regard, it should be noted that in 2004, the UN Human Rights Committee expressed its concern about the broad array of crimes for which the death penalty may be imposed and urged the Ugandan authorities to limit the number of offences punishable by death.²⁷ However, up to now, the Ugandan legislation has not been amended accordingly.

According to para. 1 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, "capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences."

In its general Comment on article 6 of the ICCPR, the UN Human Rights Committee stated that "While it follows from article 6 (2) to (6) that States parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the 'most serious crimes'. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the 'most serious crimes'." The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable ... The Committee "is of the opinion that the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure."²⁸

In addition, it should be noted that in 1999 the African Commission Human and Peoples' Rights called the member States of the African Union to limit the imposition of the death penalty only to the most serious crimes.²⁹

People are rarely condemned for the offence of treason in Uganda. Those cases are political cases whereby the prosecution is used as a tool to eliminate or isolate political opponents and to stifle dissent; the offence of treason is political and should not entail the death penalty. It should be noted that the Ugandan Human Rights Commission recommended to the Constitutional Review Commission the amendment of the legislation to remove the politically related offences from the list of crimes carrying a death sentence.³⁰

In 2002, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions said that these restrictions exclude the possibility of imposing death sentences for economic and other so-called victimless offences, actions relating to prevailing moral values, or activities of a religious or political nature - including acts of treason, espionage or

25. Sections 16 to 39, Uganda People's Defence Forces Act.

26. See the special issue of the UHRC "UHRC scrutinises anti-terrorism Bill", Your Rights, December 2001. See also the "Country Human Rights Reporter 2001-2002", published by the FHRI, April 2003.

27. Concluding Observations of the UN Human Rights Committee, Uganda, CCPR/CO/80/UGA, 4 May 2004.

28. Human Rights Committee General Comment No. 6 on the right to life (art. 6), 30/04/1982, paras 6 and 7.

29. Cf. Resolution urging the states to envisage a moratorium on the death penalty, November 1999.

30. Ugandan Human Rights Commission, 6th Annual Report, 2003, paragraph 10.13.4, page 98.

Uganda: Challenging the Death Penalty

other vaguely defined acts usually described as “crimes against the State.”³¹ (emphasis added)

Political opponents should not be seen as criminals or enemies. A culture of political debate and democratic transition has to be developed in the country, in the interest of the whole population.

As a State party to the ICCPR, and as a first step towards abolition, Uganda should restrict the scope of the death penalty to the most serious crimes only.

c. New Crimes Entailing the Death Penalty

As noted above, a 2002 enactment added the crime of terrorism and related offences to the list of crimes entailing the capital punishment. Since Uganda ratified the ICCPR in 1987, it means that this new offence was clearly added while the Covenant was already into force in Uganda.

In its resolutions 2004/67 and 2005/59, the U.N Commission on Human Rights called upon all States that still maintained the death penalty “to progressively restrict the number of offences for which it could be imposed and, at least, not to extend its application to crimes to which it did not at present apply.”³²

Unfortunately, and in contradiction with those resolutions, the Anti-Terrorism Act includes the death penalty as a sentence. In addition, recent amendments under discussion in Uganda raise further concern.

The FIDH regrets the recent extension of offences attracting death penalty under Ugandan Law, with the adoption of the Anti-Terrorism Act, 2002, in its Article 7. FIDH is also very concerned by the Penal Code (Amendment) Bill 2004 concerning the crime of aggravated robbery.³³ The object of this Bill is to amend Section 286 (2) of the Penal Code Act, to provide that mere possession of a deadly weapon at the time of or, immediately before or immediately after the time of robbery is sufficient to constitute robbery punishable by death. At present, according to the interpretation given by the Courts of this Section, it only applies when an offender uses or threatens to use a deadly weapon, and in cases where the weapon is a gun, it must be fired at the scene of the crime.

If the new amendment is adopted, the possession of the weapon will be sufficient, thus increasing the number of cases, and the number of offenders sentenced to death (aggravated robbery is one of the offences with mandatory sentencing).

In 1995, the UN Human Rights Committee ruled that the imposition of the death penalty for armed robbery not resulting in the death or the wounding of any person violates Article 6(2) of the ICCPR.³⁴ The planned amendment contravenes this ruling, and should therefore be abandoned.

It should be remembered that the General Comment on Article 6 of the ICCPR adopted by the UN Human Rights Committee clearly states that this provision “refers generally to abolition in terms which strongly suggest that abolition is desirable.” As a State party to this instrument, Uganda should pursue the way to abolition, and refrain from adopting new provisions entailing the death penalty.

d. Mandatory Death Sentences

Another subject of concern for the FIDH is that many of these offences carry a mandatory death penalty sentence, which is clearly in contravention of international standards.

According to Ugandan legislation, the offences of murder, treason and aggravated robbery attract a mandatory death penalty on conviction. This is also the case for Terrorism, if it directly results in the death of any person (section 7.1.a, Anti-Terrorism Act, 2002).

The vast majority of the detainees awaiting execution in the Ugandan prisons have been sentenced to death through a mandatory sentencing. Among the 417 death row detainees who lodged a petition to the Constitutional court in 2004, 415 had been convicted for murder or aggravated robbery, both carrying a mandatory sentence of death.

As emphasized by Samuel Serwanga Sengendon, Advocate of the High Court of Uganda in his affidavit given in support of the Petition, “over 99% of the Petitioners have had no opportunity to appeal their sentences or to raise mitigating and exculpatory factors at their trials to reduce their sentences, which right is generally available to people

31. Report of Ms. Asma Jahangir, Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2002/74, 9 January 2002.

32. The UN Commission on Human Rights adopted Resolution 2004/67 on the question of death penalty on 21 April 2004, and resolution 2005/59 on 20 April 2005. It was the eighth time such a resolution was adopted by the Commission on Human Rights since 1997.

33. Bills Supplement No 1, Uganda Gazette No7, Volume XCVII dated 13th February 2004

34. See Luboto v. Zambia, Communication no 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev.1(1995)

Uganda: Challenging the Death Penalty

accused of lesser offences.”³⁵ The petitioners have raised this issue in their Petition.³⁶

As noted by the UN Special Rapporteur on Extrajudicial Executions in his 2005 annual report, “the legislation of a significant number of States provides for the death penalty to be mandatory in certain circumstances. The result is that a judge is unable to take account of even the most compelling circumstances to sentence an offender to a lesser punishment, even including life imprisonment. Nor is it possible for the sentence to reflect dramatically differing degrees of moral reprehensibility of such capital crimes.”

The last resolution on the question of the death penalty adopted by the UN Commission on Human Rights urges all states that still maintain the death penalty to ensure that it is not imposed as a mandatory sentence.³⁷

The Human Rights Committee stated in *Eversley Thompson v. St-Vincent and the Grenadines*³⁸ that “such system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case.” The Committee pointed out that the possibility of a pardon or a commutation of sentence would not change this result, so that “the existence of a right to pardon or commutation...does not secure adequate protection to the right to life, as these discretionary measures by the Executive are subject to a large range of other considerations compared to judicial review in all aspects of a criminal case.”

In *Edwards and Others v. The Bahamas*³⁹, the Inter-American Commission found that the imposition of the mandatory death penalty violated numerous provisions of the American Declaration on the Rights and Duties of Man.

The Eastern Caribbean Court of Appeal, in the case *Peter*

*Hugues and Newton Spence v. The Queen*⁴⁰, held that the mandatory imposition of the death penalty was unconstitutional, as it amounted to inhuman and degrading punishment.

Following this movement, the Justices of the Constitutional Court of Uganda, in a very significant ruling delivered on 10 June 2005, found that Ugandan laws that mandate the death penalty as punishment for certain serious crimes were unconstitutional and must be amended by the Parliament.

Although adopted by a narrow three to two margin, the terms of the decision are clear. Justice Okello, the leading judge at the hearing of the constitutional petition, wrote that “Courts are compelled to pass the death sentence because the law orders them to do so but not all the offences can be the same.” Justice Amos Twinomujuni added that “it is the duty of the judiciary to impose any sentence after due process.” In commenting on the distinction between the application of the sentence of death and other sentences, Justice Okello commented that “I can think of no possible rationale at all for that distinction yet, a person facing death sentence should be the most deserving to be heard in mitigation.”⁴¹

Mr. Livingstone Ssewanyana, of the Uganda Foundation for Human Rights Initiative, expressed his satisfaction on the issue when leaving the Courthouse, pointing that “death row prisoners can now seek redress in court to have their case reconsidered, which was not possible before.”⁴²

e. Vulnerable Groups

In accordance with established international standards, in particular Article 6 para 5 of the ICCPR, Ugandan legislation states that minors and pregnant women cannot be executed. Section 105 of the Trial on Indictments Act provides that “sentences of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the

35. Affidavit of Samuel Serwanga, volume 4 of the Petition, given in August 2003, and reiterated during the hearings in January 2005.

36. Issue No. 3, “Whether the various laws of Uganda that prescribe mandatory death sentences upon conviction, and bar appeals from these sentences are inconsistent with or in contravention of the constitution”, in *Susan Kigula, Fred Tindigwihura, Ben Ogwang and 414 others versus the Attorney General*.

37. UN Commission on Human Rights, Resolution 2005/59.

38. *Eversley Thompson v. St-Vincent and the Grenadines*, Communication No. 806/1998, U.N. Doc. CCPR/C/70/D/806/1998 (2000).

39. Report No. 48/01 (4th April 2001), Annual Report of the Inter-American Commission on Human Rights (IACHR) 2000

40. *Peter Hugues and Newton Spence v. The Queen*, 2 April 2001, Eastern Caribbean Court of Appeal, Criminal Appeals 17/1997 and 20/1998.

41. It is important to notice here that these laws include the recent Anti-Terrorism Act, 2002.

42. Advocate John W. Katende explained a few hours after receiving the copies of the judgment that a large number of the petitioners could now seek to obtain a review of their sentence, mentioning those who had their sentence confirmed for more than two years and for whom the Government had not exercised its prerogative of mercy in their favour, those who had not yet exhausted their right of appeal are now entitled to appeal against the death sentence and raise any points of mitigation, and those who have not yet been sentenced are entitled to raise any points of mitigation.

Court that at the time when the offence was committed he or she was under the age of eighteen.” Under Section 103 of the same Act, where a woman convicted of an offence punishable with death is found to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment for life instead of a sentence of death.

According to para. 3 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, “the death sentence [shall not] be carried out on persons who have become insane.” The last resolution on the death penalty adopted by the UN Commission on Human Rights urges the States who retain the death penalty “not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person.”⁴³

Uganda does not fully comply with this requirement since the Penal Code states that “a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission, he or she is through *any disease* affecting his or her mind incapable of understanding what he or she is doing or of knowing that he or she ought not to do the act or make the omission.”⁴⁴ The FIDH considers that this provision, by including a direct reference to a disease, is imposing a more restrictive interpretation of the notion of “any mental or intellectual disabilities” and should therefore be amended. In addition, it only refers to the situation of the convict at the time the crime was committed, and does not address the situation whereby the person condemned subsequently becomes mentally or intellectually disabled.

Dr Margaret Mungherera, the only specialist forensic psychiatrist⁴⁵ amongst the twelve (12) psychiatrists who are all based in Kampala, is a notable figure in favour of the abolition of the death penalty. For her, it is not the job of the criminal justice system to execute prisoners because the system itself has failed to perform certain conditions precedent regarding certain medical examinations to determine the mental state of the offender before ascribing criminal responsibility. She also added a sociological dimension to criminality in Uganda thereby suggesting that if offenders enjoy certain socio-economic rights, then the crime rate will abate. As a result of treating several death row inmates in Luzira upper prison, Dr Mungherera attributed the

causes of crime in Uganda to lack of parental love, care and guidance, low social economic status, child abuse and neglect, sexual abuse, parental alcohol abuse, undetected illness and the lack of quality rehabilitative services for juvenile delinquents.⁴⁶ She noted that she has observed from her studies and research and prison interviews that legal, judicial and psycho-analysts need the help of professionally trained psychiatrists, psychiatric equipment, psychologists and psychoanalysts to examine and deal with the mental state of offenders before their trials. Because evidence of the mental state of the offender at the time of the commission of the offence is not an issue during the trial, many offenders are sentenced to death instead of being acquitted due to diminished responsibility/ mental incapacity or being sent hospital psychiatric wards for treatment. She also noted that this diminished responsibility or mental incapacity can be temporary hence the need for such examination before trial as only this can detect the existence of such mental problems.⁴⁷

Sadly, the FIDH confirmed this assertion of Dr Mungherera as the legal and police systems (key institutions in the administration of criminal justice) in Uganda do not require compulsory medical and psychiatric examinations and assessments of capital offenders after the commission of the crimes and before their trials. Furthermore, the Police investigation services do not make use of social workers and trained psychiatrists to ask the families of the prisoners about the prisoners’ behaviour and family mental history and to investigate the mental state of prisoners at the time of the commission of the crimes.

3. Who Are the Convicts?

a. Charges

The vast majority of the death row inmates have been charged with murder and aggravated robbery. As of January 1st, 2004, 307 death row inmates awaiting execution had been charged with murder (67%), 140 with aggravated robbery (30,6%), 4 with treason (0,8%), 2 with kidnapping (0,43%), 3 with mutiny (0,65%) and 1 with cowardice (0,21%).⁴⁸

43. UN Commission on Human Rights, Resolution 2005/59.

44. Section 11, The Penal Code Act, Chapter 120 of the Laws of Uganda.

45. *Ibid.* para. 13.

46. *Ibid.* para. 6.

47. *Ibid.* para. 7.

48. Source: Uganda Prisons Headquarters.

Uganda: Challenging the Death Penalty

Murder and aggravated robbery also represent the highest number of cases awaiting trial that could attract the death penalty, amounting to 85% of these cases: out of a total of 671 cases, 54% are murder cases (365 cases), 31 are aggravated robbery (207 cases). Rape and treason cases account for 15% of the total.⁴⁹

While the FIDH mission was visiting Uganda, the High court of Jinja sentenced seven people to death, five of whom were murderers and two were robbers.⁵⁰ Among the detainees met by the mission, 9 were charged or convicted with murder (4 convicted, 5 charged), 4 with aggravated robbery (two convicted, 2 charged), out of a total of 13 detainees interviewed by the mission.⁵¹

It should be remembered that all these detainees were sentenced to death, due to the mandatory sentencing attached to murder and aggravated robbery. Mandatory sentencing is maintained contrary to the established international standards (see above).

b. Socio-economic Background of the Detainees Sentenced To Death

The overwhelming majority of the people sentenced to death in Uganda have the same characteristics: they are poor, have little or no education, and live in rural and/or up-country areas, away from the main urban centres. Mr. Moses Kakungulu Wagabaza, Assistant Commissioner of Prisons, carried out research into death row prisoners at Luzira Prison, Kampala, in 1996.⁵² The findings of research into the prisoners on death row in 1995-97 were as follows: 94% of all prisoners on death row were from the lower classes of the society, while only 6% came from the middle and upper class. Among them, 72% were either peasants or small traders, 22% were soldiers, 4% farmers and 2% politicians. Mr. Wagabaza also found that 12% of the prisoners had no education at all, 56% had some sort of primary school education, 24% had some form of secondary education, 4% had

a college/university education, 2% had post-university education and 2% had vocational training. It showed that 68% of the prisoners had no education at all or had rudimentary primary education.

Father Tarciso Agostoni, a determined force⁵³ in the fight against death penalty in Uganda, expressed the same observation: "I know from my dealings with the condemned prisoners in Uganda that the overwhelming majority of them are poor, rural, illiterate, uneducated peasants."⁵⁴

Lawyer, Mr. Samuel Serwanga Sengendo confirms these observations. In 2003, he interviewed the 417 death row inmates who supported the Petition in the Constitutional Court. His findings are as follows: most of them are very poor, living on under 200 dollars a year. 86% of them could not afford to hire private lawyers to put up an effective defence against the serious charges they face. He observed that nearly 90% of them are supposed to have committed the offences they were charged with in back woods and rural areas.

In addition to their poverty and economic limitations is the further disadvantage of the poor education of most of these convicts. Mr. Sengendo observed that 87% of them have no knowledge or a very poor command of the English language, which is the language of the courts. 27% of them have never been to school, 53% of them have experienced only a little primary school education, 13% have attained secondary school education and only 1% have reached university level or tertiary level education. As a result, many of them could not even understand the trial process, and were not able to defend themselves effectively.

As emphasized by Mr. Sengendo, many of the death row inmates did not benefit from a fair trial largely because of these extrinsic factors that are outside the Court system itself (poverty, poor education, remote location). Poverty makes it impossible for them to hire a private lawyer, and therefore to

49. Source: High Court of Uganda Library, 2004. Charges between 1999 and 2003.

50. "Seven to hang for murder, robbery", New Vision newspaper, 23 March 2005.

51. Jinja Remand Prison, visited on March the 21st, 2005, and Kirinya Prison, Jinja, visited on March the 22nd, 2005.

52 The implications of capital punishment for prison system in Uganda, Master's thesis, Moses Kakungulu Wagabaza. Fifty prisoners were awaiting execution at that time, they were 417 when Advocate Sengendo interviewed the petitioners six years later! They are now over 500 eighteen months later.

53. He has visited the condemned sections of Luzira prisons on average once a week since 1991. He spent a lot of time with the death row inmates and wrote a book entitled *May the State kill? A challenge to the death penalty*, published in 2000, and revised in 2002. He has conducted much research into the Death penalty and many of the death row inmates met by the FIDH mentioned that they had received advice, support, clothing... from him.

54. Affidavit sworn at Kampala, 26 august 2003.

Uganda: Challenging the Death Penalty

be adequately represented at the trial. Their poor education does not allow them to understand what is at stake during the trial and what are the risks they face; they are consequently not able to defend themselves effectively. Living away from the place where the Court will hear their case, they are unable to get witnesses to testify for them.⁵⁵

Ignoring these factors in the decision-making process constitutes a serious threat to the due process of law. It is the responsibility of the State to provide an adequate legal system to its citizens, to ensure an effective legal aid system for the accused, in particular for those facing the most serious charges,⁵⁶ and to guarantee a fair hearing for every person accused of a criminal offence.⁵⁷

Mr. Sengendo confessed that he knows from his extensive experience both as a prosecutor and a defence lawyer that many educated, rich and resourceful people do not get convicted because they are capable of understanding effectively the case against them and of hiring lawyers and investigators to mount an effective defence for the charges against them. He was not surprised that the overwhelming majority of convicts were the poor and unprivileged members of the Ugandan society, who could not defend themselves against the very serious charges they faced.

Furthermore, he estimates that it is highly likely that many of them could have been convicted by mistake and are likely to be executed in error, resulting in a grave miscarriage of justice, for which the government of Uganda is not answerable.

c. Low-ranking Soldiers

Moses Kakungulu Wagabaza, Assistant Commissioner of Prisons, discovered that 22% of condemned persons were soldiers, mostly of the lowest rank.⁵⁸ The FIDH believes that the large number of low rank soldiers among the condemned and the executed shows a “scapegoat policy”, to give the

impression to the international community that the army deals swiftly and effectively with those who have committed crimes.

The latest executions carried in Uganda in 2002 and 2003 involved this kind of offender. In 2002, two UPDF soldiers, Corporal James Omedio and Private Abdullah Muhammad, attached to the “B” company of the UPDF’s 67th Battalion were executed by firing squad. They were reportedly charged with the murder of Rev. Fr. Declan O’Toole, his driver, Patrick Longoli, and his cook, Fidel Longole when they were held up at a roadblock three kilometres from the UPDF’s barracks at Kalosarich (Karamoja, eastern Uganda) on 21 March 2002.⁵⁹ It was reported that the court martial proceedings lasted for two hours and thirty six minutes.

This only compounds the fact that there could not have been a thorough investigation to determine the guilt or otherwise of these two men.⁶⁰ Brendan Jordan, a missionary of the Mill Hill Missionaries, with which O’Toole had been working stated that the execution was ‘revenge’ which was not what the deceased priest would have wanted. Father Joe Jones, a bursar with the same mission in Dublin said, “...definitely there was undue haste. It all seems too opportunistic and we have to ask if these two men were scapegoats.”⁶¹

When the FIDH delegates met Hon. Ruhakana Rugunda, Minister of internal affairs, he explained his position on the subject, and clearly stated that no mercy would be shown towards any military personnel involved with human rights violations committed against the civilian population. He recalled the numerous attacks suffered by the civilian population in the country, and expressed his determination to fight this scourge.

The FIDH considers that these selected executions have not led to any improvement in the region. What the population needs is an efficient and independent criminal system to ensure that perpetrators are arrested and sentenced thus fully respecting the right to a fair trial.

55. Although this right is guaranteed by the ICCPR, art 14.3.e

56. ICCPR, Article 14.3. d

57. ICCPR, Article 14.1 and 3; Death penalty safeguards, article 5, section (v); Minimum standard paper, EU Policy on the Death penalty,

58. The implications of capital punishment for prison system in Uganda, PhD thesis, Moses Kakungulu Wagabaza, 1997.

59. After the presidential elections of 1996, the National Resistance Army (NRA) was renamed the Uganda People’s Defense Force (UPDF).

60. Mr. Martin O’Fainin, the Irish envoy to Uganda, stated that it would have been better to have full investigations, and stated that Ireland is opposed to the death penalty as a matter of policy. Emmanuel Cardinal Wamala, the Archbishop of Kampala, also condemned the execution. See New Vision newspaper, 27 March, 2002.

61. “Missionaries protest swift execution”, New Vision newspaper, 27 April 2002. However, in reaction to this, UPDF spokesman Major Shaban Bantariza said, “...if we had spent two years, they would have said we are hiding something. Let them not tie our hands. The Field Court Martial is a fast process.”

d. Political Opponents

Although the situation of condemned prisoners is not clear due to the lack of public information, the number of people executed is much lower than the number of people condemned to death. One wonders what is the decision-making process leading to the choice of the persons to execute...

It seems that influential politicians exploit the corrupt system to accuse political opponents falsely of capital offences in order to keep them out of circulation.⁶²

FIDH and FHRI has observed a number of former political opponents, former political leaders from Obote's government, members of armed groups fighting against the Government, or military personnel among the prisoners executed, raising suspicion as to the selection of the people executed. The opacity of the procedure followed by the Advisory Committee on mercy requests reinforces the ambiguity of the whole process.

In March 1989, hangings were resumed and three inmates were executed on the 15 March. Among them was Kassim Obura, a member of the public safety unit, a government security unit responsible for gross human rights violations under the government of Idi Amin. He had been convicted of murdering a prisoner in November 1973.

In 1991, among the nine convicts executed were three UNLA soldiers. The UNLA group was opposed to Museveni's movement and fought against the governmental troops. They had been convicted in July 1984 of robbing and murdering a man.

In 1999, Mr Sebirumbi was executed. He had been a staunch UPC stalwart accused of murder in the Luwero Triangle. The decision to execute him was largely seen as politically motivated. The argument has further been made that the hanging of Mr Sebirumbi was to appease the people of the Luwero Triangle, the epicentre of the liberation war (1981-85).

Mr Chris Rwakasisi who headed the dreaded NASA and who probably committed even worse crimes comes from the western part of the country, as do the majority of the senior members of the regime, including the President. He has never been executed.

It is our assertion that on several occasions, the Ugandan government has attempted to legitimize the elimination or the repression of political opposition by using judicial procedures, many of which fail to meet the internationally accepted standards of a fair trial. The FIDH does not pretend that those people had not committed crimes, but that the selection of the people who were prosecuted and executed was biased.

Our assertion is reinforced by the research of Moses Kakungulu Wagabaza, Assistant commissioner of Prisons, in which he established that 53% of the penitentiary personnel was convinced that the selection of the people executed was unfair and discriminatory, based on religious, tribal or political agendas.⁶³

The argument against the death penalty is further strengthened when it is realised that politicians use it to eliminate their opponents.

4. The Trial Stage

The trial for a capital offence is the most serious criminal prosecution. The accused person is consequently entitled to the best defence that is available to him/her and at the same time is entitled to be given every opportunity to defend him/herself effectively against the serious charges he/she faces. Furthermore, the highest legal standard is expected from both the prosecution and the defence.

Samuel Serwany Sengedo, a lawyer and partner in the firm of Katende Ssempebwa & Co, who incidentally was once a State prosecutor in the office of the Director of Public Prosecution (D.P.P.), Uganda and who was also privileged to have interviewed the 417 petitioners in respect of the Petition Challenging the Constitutionality of the Death Penalty in Uganda, said that there was every likelihood that many of the petitioners in the petition had not received a fair trial or had been denied a fair hearing and consequently did not receive just sentences owing largely to factors extrinsic to the court system and that were not the fault of the petitioners. This view is reinforced by the fact that almost 90% of the petitioners were convicted of capital offences and sentenced to death after 1990 by which time the most important safeguards for ensuring a fair trial to a person charged with a capital offence were repealed from Uganda's statute books.

62. Interview granted to FIDH on March 23, 2005 by Etima.

63. The implications of capital punishment for prison system in Uganda, PhD thesis, Moses Kakungulu Wagabaza, 1997.

Uganda: Challenging the Death Penalty

These safeguards were previously contained in Part XV of the Magistrates Courts Act, 1990, Laws of Uganda. It provides for preliminary proceedings and for stringent safeguards and procedures to be followed before the trial of an accused person for a capital offence. The safeguards included the following mandatory processes:

- (a) The accused person must be provided with a summary of evidence in the case against him.
- (b) This summary of evidence must contain the substance and details of the case he is facing and the evidence that each witness from the prosecution is expected to give against the accused.
- (c) All exhibits to be relied upon at the trial should be referenced, produced and marked as exhibits, and shown to the accused person together with the summary of evidence.
- (d) The accused person is entitled to a complete copy of the preliminary proceedings at the state's expense.
- (e) The accused is entitled to reasonable notice of any additional witnesses to be called by the state against the accused person, and
- (f) The state is required to medically examine persons accused to determine their age, physical health and mental state.

These safeguards existed for capital offences in recognition of the gravity of the charges and were supposed to ensure that at all times the accused person was fully aware of not just the charge against him/her, but the details of the case he/she would face, the evidence he/she would have to contradict and the persons who would appear to give evidence. These safeguards protected the accused person and ensured that he/she had ample notice of what was needed to effectively defend him/herself in the fight for life. This information also enabled the accused person to brief his/her defence lawyers properly.

As the safeguards were removed from the Statute books in 1990, persons tried from 1990 have not had the benefit of those safeguards. This has inevitably led to a dramatic increase in the number of convictions. The foregoing could

probably account for why many of the petitioners in the Petition Challenging the Constitutionality of the Death Penalty in Uganda (see below) said that they had not benefitted from a fair trial. Many of them repeatedly complained that they did not understand the charges against them, the case they were going to face, the evidence that was going to be adduced against them and that they were unable to conduct an effective defence.⁶⁴ The majority of the accused persons did not even understand the language of the proceedings of the court, which was English, for the simple reason that they had never been to school. Sengendo puts it thus in his own words:

*I have discovered from these interviews that most of them were very simple, poor and unsophisticated people who did not even understand the trial process to be able to defend themselves effectively. As the information contained in their statements which are attached shows; 87% of them have no knowledge of or have a very poor command of the English language, which is the language of their trials. 27% of them have never been to any school, 53% of them have experienced only some portion of primary level education, 13% have attained secondary school education and only 1% have reached university level or tertiary level education.*⁶⁵

Given the above, he concluded that there was a high likelihood of several cases of miscarriage of justice, which further strengthened the campaign for the abolition of the death penalty.

Quite apart from the affidavit of Sengendo that revealed a lot about the inefficiency in the criminal justice system and its impact on the right to a fair trial, affidavits of some of the death row inmates and those interviewed by FIDH confirm violations of Article 14 of ICCPR.

The FIDH interviewed some condemned prisoners in Jinja and the stories were virtually the same.⁶⁶ Paddy Nashaba, a male Ugandan of the Munyankote ethnic group born on 26 November 1969, was arrested on 17 January 1991 for the crime of aggravated robbery. The High Court judgment sentencing him to death was delivered on 8th November, 1996; this sentence was upheld by the Court of Appeal on August 13, 2000 whilst the Supreme Court upheld the sentence on 14 November, 2002. He applied for the prerogative of mercy on March 25, 2003. He said he was assigned a lawyer by the state and that he met him in court for

64. See paragraph 13 of the affidavit of Samuel Serwanga Sengendo.

65. *Ibid.*, paragraph 14.

66. The following persons were interviewed: Paddy Nashaba, Moses Kizza, Muzameru Balitebya, Yusuf Wamuluwa, George Mukasa. They were all condemned prisoners in Jinja main prison.

Uganda: Challenging the Death Penalty

the first time and not in prison. In fact, he said he had to give money to the lawyer who was assigned to him in the Court of Appeal to facilitate the case. He also said that Father Agostoni paid the lawyer on his behalf so that he could appeal to the Supreme Court.

Moses Kizza, a Ugandan male who was arrested for murder in November 1995 and sentenced to death by the High Court on June 25, 1999, was represented by State counsel in the High Court. His State counsel never visited him in prison for a pre-trial consultation so he too met him for the first time in court during the trial. Unfortunately, this same lawyer was also a prosecutor in the magistrate court.

The case of John Bosco Kapere, as regards legal representation, was similar to that of other inmates FIDH interviewed in Jinja Prison. He too met the lawyer assigned to him by the State in court for the first time in 2001. John Bosco Kapere is also a male Ugandan, born in 1966 of the Mugueri tribe. He was arrested in 1997 for aggravated robbery, but was released on bail after 365 days. He was re-arrested in September 1999 for murder in respect of which judgment was delivered in July 2001; the Court of Appeal upheld the judgment in November 2001 whilst the Supreme Court further upheld the High Court judgment in 2003. A petition for mercy was submitted to the Prison which should have been sent to the appropriate authority.

Muzameru Balitebya Charles was born on 18 October 1964. He is male Ugandan and of the Mutooro ethnic origin. He was arrested on September 27, 1992 for the crime of aggravated robbery. He was unable to give the precise date on which he was sentenced to death by the High Court. He did, however, mention that the Supreme Court upheld the death sentence on June 12, 1999 and that he applied for the prerogative of mercy in 2000. Like others before him he too had met the lawyer the State assigned to him for the first time on the day of trial.

George Mukasa born on 11 November, 1971 and of the ethnic group of Musoga, had the services of a lawyer of his own choice⁶⁷ only in the appeal court, whereas State counsel represented him in the High Court. He claimed the lawyer had no knowledge of the case.

Isaac Migadde says that he met the State appointed lawyer for the first time a day before his trial and that the lawyer appeared to be drunk throughout the trial.

Moses Kizza's case is particularly sad. Born in 1968 and of Muganda ethnic origin, Moses has never appealed his case whilst others appeal against their conviction and also file petitions. The reason is that when he wrote to the Registrar asking for his case to be filed for appeal, the registrar told him that his case file was missing; he then wrote to the judge and the judge told him that he had been released. In 2003, he wrote to the Principal Judge and Commissioner of Prisons, but nothing has been done about his case. It is interesting to note that he did not have an interpreter in court.

Yusuf Wamaluwa, male of the Mugishu ethnic group, born on 15 August 1946, was sentenced to death on 11 January 1995 for the crime of murder he committed on 25 March, 1992. His sentence was upheld by the Supreme Court on October 26, 1996 and he petitioned for the prerogative of mercy on 12 December 1996. He said that although he had the money to engage a private lawyer he was denied access to counsel of his own choice, so he had to settle for a lawyer appointed by the State whom he met in court during the hearing.

The ineffective legal representation by lawyers appointed by the State to represent condemned prisoners during trials at the High Court has often resulted in unjust convictions as State counsels do not conduct the defence as well as they should.

The case of Susan Kigula, a 26 year old female Ugandan condemned prisoner at Luzira Women Prison, Kampala is revealing. She said that she believed that the court relied on the evidence of her five year old step son, who was three years old at the time of the commission of the alleged murder for which she was tried and consequently sentenced to death. According to Kigula, none of the witnesses at the trial testified to having seen her commit the offence of murder⁶⁸ except for her step son. Despite the fact that the evidence was that of an infant under seven years old, the court did not examine thoroughly whether the five year old boy was competent to testify to the matters that he alleged occurred when he was three years old.

Tom Balimbya⁶⁹, a former death row inmate said one witness (an investigator) testified to the court martial that he, Balimbya, had confessed to the crime of robbery despite the fact that he had not made such a confession. To make matters worse, the confession was never produced in court when it was required since the court knew he had not made

67. The name of the lawyer was Edward Mugulumira.

68. Killing of her husband

69. An Army Lieutenant at the time of his arrest on 14th day of May 1993.

such confession. Despite the fact that he had 28 (twenty eight) witnesses from his platoon, he was not allowed to call them in defence. Some of them were taken into custody and were unable to testify on his behalf. He was also not allowed to answer questions put to him and he was not allowed to give his own side of the story. Yet he was convicted and sentenced to death by hanging in June 1995 although court martial sentences are death by firing squad. The conviction came two years after his arrest. He was advised that he could appeal within 14 days, yet there was no court of appeal for those who had been tried by the General Court Martial. Although the Court Martial Appeal Court had been created by law in 1994, it had never actually been set up. This led him and other condemned prisoners in a similar position to lobby Parliament, the Human Rights commission and the Sectorial Committee of Defence and Internal Affairs to pass a law setting up the Court Martial Appeal Court. The court was established in 1998 under the Chairmanship of a former court registrar, Mr. Jack Turyamubona.

He procured the services of a private lawyer, Remmy Kasule, with the help of Father Tarcisio Agostoni to appeal. But the appeal suffered a two year delay because he had to lobby Parliament to appoint a new judge to replace one of the judges who turned out to have been the prosecutor in the lower court.

Errors do occur in the criminal justice system. The case of Edward Mary Mpagi is an eloquent testimony of this fact. Edward was charged for murder and sentenced to death. The investigations by some NGOs later revealed that the man he had allegedly murdered was still alive. He was subsequently released. It was fortunate that he had not been executed before the truth was discovered.

The case of Tom Balimbya is another particularly sad case; his wife remarried after she understood that he was going to be executed. His wife even told his daughter who was born when he was in prison, that he was dead. Fortunately for him, he was released after winning his appeal. But only after spending nine (9) years in prison including seven (7) years on death row for an offence he did not commit.

New evidence to confirm the innocence of an accused person may emerge after all appeals are exhausted and the execution of the condemned prisoner. Where new evidence emerges after exhaustion of appeals, under the current legal system errors cannot be corrected.

5. Available Remedies

a. The Appeal

The condemned can appeal against the High Court decision. The persons sentenced to death met by the FIDH mission said that delays before hearings were extremely variable - from several months to two years.

Appeals, however, rarely result in an overturn of the High Court's decision. Once he/she has been sentenced by the High Court, the accused is afforded very few opportunities to present new evidences establishing his/her innocence in the Appeal Court (see above).

If the Appeal Court upholds the verdict of the High Court, the condemned can appeal to the Supreme Court. The decision of the Supreme Court is final.

Where a defence lawyer has been appointed by the state, it is unlikely that the same lawyer will appear in the appeal as appeared for the accused in the court of first instance. This makes the appeal more complicated as the new lawyer will have to study the facts of the case afresh. Inevitably, this has a negative impact on the final outcome of the case. State appointed lawyers do not give such criminal appeals the attention they deserve and, like their colleagues in first instance, lack experience. Appeals are beset by the same kind of problems that arise at the trial stage, which accounts for why most condemned prisoners have lost criminal appeals.

b. Mercy

i. An Opaque Procedure for Civilians

The final remedy available to prisoners sentenced to death is clemency. It is only after the rejection of the application for mercy that the prisoner can be executed. Article 121 of the Constitution of the Republic of Uganda provides for the Prerogative of Mercy.

Under Article 121(5), "where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges or person presiding over the court or tribunal, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the Advisory Committee on the Prerogative of Mercy."

The President acts through the Advisory Committee. Pursuant to Article 121(1) of the Constitution, the Committee consists of the Attorney General and six prominent citizens of Uganda appointed by the President who should not be members of Parliament, members of the Uganda Law Society or of the District Council. The actual composition of the Committee is unknown, and their deliberations are confidential, thus preventing any information to be given on the motives of this institution or the profile of its members.

Transparency is a key element in ensuring a fair review of each case, and should be duly guaranteed. The FIDH believes that it is this opacity of the mercy procedure that makes the use of the death sentence for political purposes, possible.

In its ruling of 10 June 2005 (see below) the Constitutional Court of Uganda said that “it is important that the procedure for seeking pardon or commutation of the sentence should guarantee transparency and safeguard against delay.”

ii. No Mercy for the Military

The Constitution precludes the Committee from considering cases decided by a Field Martial Court.⁷⁰ This is a serious concern since military justice in Uganda is the source of much abuse. The UN Human Rights Committee denounced this fact in its concluding observations in 2004.⁷¹ In addition, in practice the appeal from such decisions is not always possible and condemned prisoners are sometimes executed the same day.

6. Conditions of Detention

a. The Uganda Prisons Act

The Uganda Prisons Act of 1958 cap 304 Laws of Uganda 2000 is an Act that consolidates the law relating to Prisons and provides for the organisation, powers and duties of prison officers, and for matters incidental thereto.

The Uganda Prisons Act provides for the establishment of a Ugandan Prison Service with the following objectives: (a) The reformation and rehabilitation of offenders and (b) the safe

and secure custody of inmates. The Act is divided into 10 parts. Part 1 is titled Preliminary. Section 1(1) states that the act shall apply to all persons administered by the Government, all prisoners lawfully held in these prisons and to all members of the Ugandan Prisons Service. The provisions of the Prisons Act or any statutory instrument made under the Act apply to any prison or lock up governed by the administration of a district or by the Police or to any prisoner or class of prisoner detained in any such prison or lock up or to any person employed in the control or administration of any such prison.⁷²

Section 3 establishes a Ugandan Prisons Service. The administration of the Service and the control and supervision of all prisoners shall be vested in the Commissioner subject to the directions of the Minister.⁷³ The Commissioner may, subject to this Act, from time to time make Standing Orders and give administrative directions for the observance by all prisons officers carrying out their duties under the provisions of this Act.⁷⁴ The Deputy Commissioner or the Assistant Commissioner may do, order or perform any act or thing that the Commissioner may do, or order or perform.⁷⁵

The Ugandan Prisons Service Policy Document 2000 and Beyond sets out the mission statement of Prisons Service of Uganda, as part of an integrated justice system, within the Justice/Law and other sectors; that mission is to contribute to the protection of all members of society by providing reasonably safe, secure and humane custody of offenders in accordance with the Ugandan Prison Service strategic plan and universally accepted standard while encouraging and assisting them in their rehabilitation, reformation and social reintegration as law abiding citizens. This mission statement articulates the specific task of the Uganda Prisons Service. It also provides for the humane treatment of offenders. This is in accord with Article 10(3) of the International Covenant on Civil and Political Rights (ICCPR) which states that ‘The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation...’ The mission statement is quite commendable given Uganda’s historical and political background and it should ordinarily provide the roadmap towards the humane and just treatment of offenders. Discovering the extent of the Ugandan government’s commitment to implement the mission statement formed part of the FIDH investigation in Uganda.

70. See article 121 (6) of the Constitution.

71. Concluding Observations of the UN Human Rights Committee, Uganda, CCPR/CO/80/UGA, 4 May 2004.

72. S.1 (3) Prisons Act.

73. S.4 *supra*.

74. S.4 (2).

75. S.5, *ibid*.

Uganda: Challenging the Death Penalty

The FIDH visited Jinja Remand Prison and Jinja Main Prison; it is, therefore, appropriate to examine the extent to which the Ugandan Prison Service complies with international standards with regard to the treatment of prisoners before their execution.

Due to time constraints, the FIDH delegation did not visit Luzira Upper Prison where inmates are executed, but it was able to visit and interview condemned inmates who were kept in the condemned section of Jinja Main Prison.

The FIDH discovered that the treatment of offenders was largely determined by availability of funds. There was a general complaint on the part of prison officials that the prison was grossly under funded. They said that the budget for the prison was the same as it was in the 1990s though the number of inmates has increased. In the absence of funds there was little or nothing the prison officials could do to improve living standards of the inmates in terms of quality and quantity of food, providing basic needs for their hygiene, bedding and clothing or improving their living conditions; in addition prison officials are not in a position to improve the space available in the absence of a genuine commitment on the part of government to expand existing facilities.

However, some of the punishment and disciplinary measures that prison officials carry out in terms of the Uganda Prison Act offend the international standards relating to the treatment of detainees.⁷⁶

b. General Remarks

Remand prisoners in Jinja Remand Prison⁷⁷ are kept there pending trial. The prison officer to whom the FIDH spoke could say what the actual capacity of the prison was;⁷⁸ he did, however, say that there were 634 inmates, 4 of them under 18 year old - between ages 16 and 17. The adults range from 18 and 82 year old. The 82 year old inmate was accused of raping a young girl below the age of 18. Juveniles are separated from adults, in the sense that they are not kept in the same cell as adults. There is also a women's prison in Jinja, separate from the men's section.

Most of the detainees in Jinja Remand Prison are charged with defilement, an offence which carries the death sentence.⁷⁹ However, some of them are also charged with murder, assault, theft and robbery. The sentence of death was imposed for the offence of defilement to discourage men from committing the offence. Persons interviewed in Kampala said that many men commit the offence of defilement because of the belief that sexual intercourse with young girls would cure them of HIV/AIDS.

There are about 60 - 70 inmates in each dormitory/cell. The inmates wear singlets because uniforms are not supplied. The recreational facilities include football, drama, drums, guitars, etc. In Jinja Main Prison, the prison officer said that the prison capacity is 500 - 600 and that there were 350 inmates in prison of which 147 are condemned criminals, 145 were ordinary convicts; 17 were committals whilst 7 were non committals. The staff number 84, 80 of whom are uniformed staff.

c. Health Care

The Officer in charge of Jinja Prison informed FIDH that there is a clinic manned by a medical assistant. The medical assistants are actually registered nurses and as such they are paramedics. The doctors come twice a month. There is a pharmacy that, according to the prison official, has a supply of drugs, but on inspection the FIDH discovered that the drug supply was insufficient. The drugs were kept on a shelf covered by a cloth.

At Jinja Main Prison, the FIDH was informed that a medical assistant was head of the medical team supported by a qualified registered nurse and a registered midwife. Again, the FIDH was told that the pharmacy was reasonably equipped and that drugs were supplied from Murchison Bay Hospital in Kampala which is a departmental referral hospital. Drugs were also supplied by charities.

It is doubtful if the arrangement of having a registered nurse in charge of prison clinics satisfies Principle 9 of the UN Basic Principles for the Treatment of Prisoners which states that 'Prisoners shall have access to the health services available

76. See notably United Nations Standard Minimum Rules for the Treatment of Prisoners (UNSMR); Article 7 of ICCPR which provides that 'No one shall be subjected to cruel, inhuman or degrading treatment or punishment'; Article 10(1) of ICCPR which states that 'All persons deprived of their liberty shall be treated with humanity and with respect for the dignity of the human person'; Principle 6 of Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment which states that 'No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstances whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.'

77. Principal Officer II Amisi, A.Z.B.

78. Preferred to be anonymous in order to protect his job.

79. 71% of persons held in custody are capital offenders and of this 71%, 46% are charged with defilement, 1% with murder, 16% with robbery and 5% with rape.

in the country without discrimination on the grounds of their legal situation'. As it stands, the policy of allowing paramedics to attend to inmates on a daily basis whilst a medical doctor comes only twice a month is quite unsatisfactory and needs to be addressed seriously as even a condemned criminal deserves good health care before he faces execution let alone an accused person whom the law presumes innocent until proved guilty. This view is reinforced by Principle 24 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. Principle 24 states 'A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.' Proper medical examination necessarily involves examination by a medical officer with the proper medical training.

The inadequacy of the medical personnel and facilities is further exacerbated by the non-observance of Principle 21(1) and 22 of the United Nations Standard Minimum Rules for the Treatment of Prisoners. Rule 21(1) states 'At every institution there shall be available the services of at least one qualified medical officer who should have some knowledge of psychiatry. The medical services should be organised in close relationship to the general health administration of the community or nation. This shall include a psychiatric service for the diagnosis and, in proper cases, the treatment of states of mental abnormality'.

Rule 22(2) UNSMR states 'Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners and there shall be a staff of suitably trained officers'. The UN SMR provides that a medical officer shall take care of the physical and mental health of the prisoners and should see all sick prisoners and all who complain of illness, and any prisoner to whom his attention is specially directed.

Section 28 of the Uganda Prisons Act⁸⁰ also provides for medical officers. Section 28(1) states 'There shall be a medical officer stationed for every prison' while section 28(2)

states that 'the medical officer shall be responsible for the health of all prisoners in a prison and shall cause all prisoners to be medically examined at such times as shall be prescribed'. In addition, according to the Ugandan legislation, a doctor is able to decide whether it is medically advisable for a sick prisoner to be taken to a hospital⁸¹ although in cases of emergency a sick prisoner may have to be removed without the advice of a medical officer.⁸²

At the Jinja prison, there are no hospital facilities. However, as earlier mentioned, there is a clinic that lacks adequate pharmaceutical supplies and is, therefore, incapable of dealing with serious ailments. Needless to say, the services of a qualified dental officer are not available to every prisoner as provided for under Principle 22(3).

There is no qualified doctor on a permanent basis in the prison. This obviously means that psychiatric services for the diagnosis and treatment of cases of mental abnormality cannot be adequately provided. Also the absence of a qualified doctor in the prisons makes it practically impossible for every prisoner to be seen and examined as soon as possible after admission and also for checking any cases of physical or mental illness and for ensuring that all necessary measures, e.g. the segregation of prisoners suspected of infectious or contagious conditions/diseases, are taken. A qualified doctor would also take into account physical or mental deficiencies which might hamper rehabilitation and determine of the physical capacity of every prisoner for work. The absence of qualified medical officer is worrying since it defeats the very essence of health care.

Although at Jinja, the FIDH noted that inmates with tuberculosis are isolated, it is, however, of the view that, considering the seriousness of tuberculosis, such prisoners ought to have been referred to specialist hospitals for proper treatment since the facilities in the prison are not adequate even for minor ailments such as fever.

What is perhaps most alarming is the fact that sometimes when prisoners on death row become ill, the hospital staff are reluctant to give them proper medicines and medical attention. The medical staff sometimes tell the condemned inmates that since they are going to be hanged anyway they do not need to waste scarce drugs on them.⁸³ Edward Mary Mpagi, condemned to death on 29th April 1982 and awaiting execution in Upper Luzira prison but granted presidential

80. Cap 304 Laws of Uganda, 1995.

81. See section 40 of cap 304 Laws of Uganda, 1995.

82. Section 40 (2) cap 304 Laws of Uganda, 1995.

83. See paragraph o of Ben Ogwang's affidavit.

pardon on July 12, 2000, said that his cousin, Mr. Fred Masembe, who was arrested with him, tried and sentenced to death, died on 28 August 1985 in the condemned section of the prison. He had been suffering from asthma, stomach pains, depression, physical and mental anguish. He said that the late Fred Masembe was denied medical attention by the prisons authorities, who stated that since he was a condemned prisoner who was due to be executed anyway, they could not waste time or money transporting him to Mulago Hospital for treatment.⁸⁴ Edward Mary Mpagi added that consequently priority in medication was given to prisoners who are not on the death row, leading to incidents where unsterilised needles are used on death row prisoners, which has facilitated the spread of HIV/AIDS and other diseases. It is also appropriate to note that when death row inmates are ill, the authorities delay administering any medication or treatment in case the inmate is feigning illness or trying to organise an escape. Quite a number of inmates have died in the condemned section as a result of disease or the delays in treatment. Inmates say they suffer from hypertension, back and chest pain, stomach-ache and ulcers.⁸⁵ Many inmates have died from malaria because they were not given adequate and proper medical attention.⁸⁶

The FIDH was informed that about 6-8 inmates have admitted they have HIV/AIDS. However, only one victim is receiving the anti retroviral drugs from Jinja Main hospital in conjunction with the AIDS Support Organisation (TASO).⁸⁷ The FIDH believes that funds should be provided for the treatment of HIV/AIDS patients irrespective of their legal status.

George Mukasa,⁸⁸ one of the condemned inmates interviewed by the FIDH, said that prisoners do not get enough dosages of required drugs for their ailments. He said he suffered from a hernia and chest pain and he has never been taken to the hospital in town for treatment and no doctor has come to see him. The FIDH notes that this ailment is certainly one that requires the attention of a qualified medical doctor and not a paramedic.

d. Accommodation and Sanitation

Rule 10 of the United Nations Standard Minimum Rules for the Treatment of Prisoners states that 'all accommodation provided

for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and in particular to the cubic content of air, minimum floor space, lighting, heating and ventilation.' This principle is rarely adhered to. There is very limited space/area for movement both within and outside the cell. In Jinja Main Prison, death row inmates, who ordinarily would be in Luzira prison, are kept in cells that can contain up to 30 prisoners each and usually hold between 25 and 30. The FIDH visited three cells for condemned prisoners in Jinja Main Prison that contained 30, 29 and 27 inmates respectively whilst the cell for ordinary convicts had only 19 inmates. These cells are clearly overcrowded with scarcely enough room for the inmates to move around. This makes it easy for contagious diseases such as tuberculosis, common coughs, colds and other infections in the prison to become chronic epidemics. The same is true of the Luzira prison (see below).

When the FIDH delegation visited Jinja Remand Prison it found that each dormitory had over 100 inmates, the lighting was poor and the mattresses, mats and other makeshift sleeping materials provided by the prisoners were in the direct path of the sun's rays. The floor space was also cramped and the prison congested. Although the windows were large, there were no mosquito nets or shutters. The inmates were thus exposed to the vagaries of the weather and to mosquito bites. The prisons are constructed in such a way that makes ventilation difficult. Although fresh air can enter, too much sunshine penetrates the dormitories providing harsh conditions for the prisoners. This is contrary to Principle 11(a) which states "In all places where prisoners are required to live or work, the windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation." One fluorescent bulb is provided in each dormitory. This is grossly inadequate and can cause injury or damage to prisoners' eyesight if they wish to read. This is contrary to Principle 11(b) which states 'Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.' According to Ben Ogwang⁸⁹, in Kirinya prison, the lights in the cells are left on all night, making it difficult for inmates to sleep properly, thus leaving them in a permanent state of tiredness and lethargy

84. See paragraph n of the affidavit of Edward Mary Mpagi of the 29th August 2003 in support of the Petition Challenging the Death Penalty in Uganda.

85. This is particularly so with Jalil Wamutibana, Emmanuel Lokwago and Samuel Birenye interviewed by FIDH at Jinja Remand Prison on March 21, 2005.

86. Death row inmates very often suffer from malaria, from which they die.

87. TASO stands for The Aids Support Organisation. It was the first NGO to support victims of HIV/AIDS in Uganda.

88. Resides in Jinja Main Prison.

89. The longest servicing death row inmate in Luzira Upper Prison since 1983 and relocated to Kirinya prison in Jinja in April 2003.

Uganda: Challenging the Death Penalty

leading to lack of concentration, insomnia and this virtually makes them walking zombies.⁹⁰

Susan Kigula the first Applicant in the Petition Challenging the Constitutionality of the Death Penalty said in her affidavit that the cell where she and her condemned inmates were incarcerated in the women's prison in Luzira was bereft of any human dignity. She said none of the cells had any window and each held three persons instead of just one as was originally intended. Andrew Walusimbi said that the prison cells in the condemned section in Luzira that were meant to accommodate one person now accommodate four to six inmates.⁹¹ Susan further noted that the lights in the cells are not switched off at night.

Rule 12 of the UN SMR provides that 'The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.' The sanitary installations in Jinja Main Prison and Jinja Remand Prison are relatively modern to the extent that they are connected to a water supply and toilets and bathrooms located within the dormitories and also kept clean and tidy. The showers are within the dormitories so that the inmates can shower as many times as they choose, and the water supply for the toilets and the bathrooms is fully functional. The same however cannot be said of Luzira prison. The sanitary installations in both Jinja Remand and Main prisons are far from adequate because the facilities there are not adequate for prisoners' needs particularly in the early morning hours when there is greater demand. The sanitary facilities in the cells in Luzira are not modern like those of Jinja. The cells for instance, have no toilets leaving inmates to urinate and defecate in open chamber pots in the presence of other inmates, which is most humiliating for them. At times the pots accidentally spill or fill up. Frequent urination or defecation leads to resentment from other inmates. Susan Kigula stated that their cells had no toilet facilities and at night inmates had to rely on buckets/chamber-pots.⁹² The situation is same in the condemned section for men in Luzira prison. Andrew Walusimbi said that they use buckets as their toilets and that they are sometimes forced to relieve themselves while their cellmates are eating. Toilet paper and other toilet-ries are not provided despite the fact that such articles are necessary for health and cleanliness.

Rule 15 UNSMR provides 'Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness. Provisions of such toilet articles as are necessary for health and cleanliness.' All the inmates on the death row whom the FIDH delegation interviewed in Jinja Main Prison stated that the prison authorities do not provide them with toilet-ries and inmates have to provide toilet-ries for themselves. Susan Kigula said women were denied the necessary sanitary items for their particular needs.

Principle 17 deals with clothing and bedding. It states that 'Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health.' Unfortunately, the lack of funds has made it difficult for prisons to provide such clothing and bedding which is why, in Jinja Remand Prison, inmates are provided only with singlets. Voluntary agencies such as the church have been providing clothing for inmates. Inmates who do not benefit from such philanthropic gestures are forced to provide their own bedding and mattresses, whilst those who cannot afford it, sleep on rough blankets or cardboard. Some inmates cover themselves with the rags they get from inmates who have been released or inmates who have been hanged and who left such items for them.

According to Ben Ogwang, he and his fellow death row inmates do not have night clothes and since they have only one frequently threadbare and tattered uniform, most of them are forced to sleep naked on the floor. This further increases the degradation and humiliation they suffer. According to Edward Mary Mpagi the Prison authorities used to provide 1 (one) uniform in either white or yellow, but when he was incarcerated the prisons department did not have adequate funds to provide any uniforms, so he had to buy his. But he did not have a bed, mattress or sheets. It was only in 1996 that they acquired mattresses, whereas when he was incarcerated in 1982, prisoners only had 2 (two) blankets on which to sleep. Prisoners sleep naked as they are not allowed to own clothes other than prison issue clothing. It was only in 1996 that inmates were allowed to wear their own underpants.

The FIDH recalls that in the case of *Vikam Deo Singh Tomar v. State of Bihar*,⁹³ the Indian court utilized Article 21 (life and liberty provision clause) to make an order to rescue women

90. See paragraph k of the affidavit dated 29 August 2003, sworn to by Ben Ogwang in *Susan Kigula & 3 Ors v. Attorney-General* in Petition Challenging the Constitutionality of the Death Penalty.

91. See paragraph 8 of his affidavit.

92. See paragraph 10(c) of Susan's affidavit.

93. 1988 Supp. 734.

inmates who were living in inhuman conditions. The Supreme Court ordered the state government to provide without delay, suitable alternative accommodation to house the inmates and in the meantime to

‘put the existing building in which the inmates are presently housed into proper order immediately, and for that purpose to renovate the building and provide sufficient amenities by way of living rooms, bathrooms and toilets within the building. Also an adequate range of furniture including cots must be provided at once, and an adequate number of blankets and sheets, besides clothing must be supplied to the inmates.’

Depriving inmates of blankets and clothing, including mattresses and not providing them with adequate shelter, including bathrooms and toilets, clearly violates international and regional standards relating to the treatment of prisoners.

e. Adequate Food

Principle 20(1) states that “Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength of wholesome quality and well prepared and served.” The FIDH was informed by the prison officials in Jinja Main Prison that prisoners eat three times a day; breakfast is served between 7:00 am and 8:00 am; lunch is served between 11:00 am and 1:00 pm whilst dinner is served between 4:00 pm and 5:00 pm. FIDH’s visit to Jinja Main Prison and Jinja Remand Home shows that though the food quantity may be adequate, the same cannot be said of the nutritional value of the food which was far from adequate for health. For instance the soup used in serving the corn meal (posho) did not contain any meat or fish protein.

Some of the condemned prisoners interviewed by the FIDH noted that condemned inmates suffering from HIV/AIDS and/or peptic ulcers are denied a special diet. Muzameru Balitebya, a condemned prisoner, said that the former officer in charge of the Jinja prison allowed these categories of condemned inmates to have special diets but that the new officer in charge did not allow them. However, when the FIDH visited Jinja Main Prison the team observed that the prison had what looked like special diet for sick inmates but the quality of food to say the least was very poor.

The affidavit of Edward Mary Mpagi who stayed in Luzira Upper prison had this to say:

‘The quality of food was atrocious, and the quantity was very little. The food was posho and beans and was provided once a day. Moreover, the food was not brought at the same time. For example, we could get posho at 8:00 am, the bean soup at 12:00 noon and the beans at 2:00 pm. We are expected to ration this food for the whole day. In many cases, a change of diet meant going without food.’⁹⁴

Susan Kigula⁹⁵ also mentioned that the quality of food was atrocious and also added that the quantity is never enough. She confirmed Mr. Mpagi’s description of the food.

When the FIDH visited the prison, the delegation noticed that some inmates only had posho without the bean soup because the soup had not yet been served. The FIDH was able to assess the quality of food and the way it was served. Prisoners were served from containers that were fitting only for animals. The food lacked nutrients especially animal protein and oil. In Jinja main prison in the condemned prisoners’ cells, the FIDH mission saw that just a quarter of a chicken was provided for over one hundred inmates. The posho was spread on a plain slab and cut into portions for the inmates. According to Moses Kizza, a death row prisoner interviewed by the FIDH, the food is poorly prepared and it has sand in it. Sand in the food is inevitable due to the condition of the slab that the posho is placed before it is cut into portions for the inmates.

In conclusion, the prison food was not adequate in terms of quality in the prisons visited by the FIDH.

f. Visits

Inmates are allowed to have visitors three times a week on Mondays, Wednesdays and Fridays between 10:00 am and 4:00 pm.

Death row inmates are not allowed any physical contact with their visitors and communications with visitors for those on death row is through a screen of bars and a wire mesh. The vast majority of death row inmates in Luzira upper prison do not receive visitors because most of them are peasants from the country and their relatives are unable to afford the fares to come and visit them in prison. The few whose relatives are able to visit are subjected to rigorous body searches. Women visitors are particularly degraded; they are body-searched by female prison warders without any privacy. The prison officers search the women intimately with gloved fingers in

94. Para. 5 (i) of affidavit sworn on the 29th day of August 2003 Challenging the Constitutionality of the Death penalty in Uganda.

95. She was convicted of murder on the 10th September, 2002, and is in the care of the Women’s Prison, Luzira.

full view of other female visitors. Then, the same prison officer would search another woman visitor without washing or changing gloves. This has actively discouraged women from visiting condemned inmates.⁹⁶ This treatment in particular amounts to cruel inhuman and degrading treatment and exposes these female visitors to venereal diseases, and ultimately discourages female visitors from visiting condemned prisoners.

g. Education, Training and Other Activities

Education is provided in Luzira maximum prison and not in Jinja. Prison work is encouraged in Jinja as well, but training is limited due to lack of funds. Lack of funds for the requisite education or training is contrary to Principle 28 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The Principle states that 'A detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.' The lack of education is also in contradiction with Principle 6 of the UN Basic Principles for the Treatment of Prisoners which states that 'All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.' The FIDH feels strongly that education should be a priority even for prisoners who have committed serious offences in order to prepare them for eventual release since this forms part of the prison's objectives.

Inmates exercise for an hour in the morning and one hour in the evening. According to Moses Kizza, one of the death row inmates, the hours allocated for exercise each day are insufficient. He, therefore, advocated that they should be allowed to exercise the whole day. Though this might not be feasible, the period allocated for exercise could be increased.

It is clear that from the date of incarceration to the day of execution, the inmates experience untold misery with substandard accommodation, substandard food, poor clothing and bedding, an unhygienic environment and a poor system of health care.

h. Discipline and Punishment

Under Rule 27 of the UNSMR, 'Discipline and Order shall be maintained with fairness, but with no more restriction than is necessary for safe custody and well ordered community life.' No prisoner shall be employed in the service of the institution, in any disciplinary capacity⁹⁷ and as such conduct constituting a disciplinary offence, shall always be determined by the law or by the regulation of the competent administrative authority.⁹⁸ The types and duration of punishment which may be inflicted, and the authority competent to impose such punishment shall be determined by the law or by the regulation of the competent administrative authority.⁹⁹ No prisoner shall consequently be punished except in accordance with the terms of such law or regulation, and never twice for the same offence.¹⁰⁰

The SMR also include safeguards for the principle of fair hearing, consequently no prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defence. The competent authority shall conduct a thorough examination of the case.¹⁰¹

Section 55 of cap 304 Laws of Uganda, 1995, makes provision for a fair hearing. It states 'No prisoner shall be punished for a prison offence until he or she has had an opportunity of hearing the charge against him or her and making his or her defence.' Section 53(5) of cap 304 Laws of Uganda, 1995, permits the Commissioner 'to award a prisoner amongst others corporal punishment not exceeding such amount as may be prescribed.' In Jinja prison for instance the disciplinary measures include putting offenders in solitary confinement for a maximum of 7 days. The Prison authority seems to rely on the provisions of section 52(1)(a) of cap 304 which states that

'An officer in charge, if he or she is a senior prison officer or any police officer designated as officer in charge, may punish any prisoner found after the inquiry by him or her to be guilty of a minor prison offence by awarding him or her one or more of the following punishments: (...) confinement in a separate cell on the prescribed punishment diet for a term not exceeding such period as may be prescribed.'

97. Rule 28 UNSMR.

98. Rule 29 UNSMR.

99. R. 29.

100. R. 30.

101. R. 30 (2).

The Prison Authority takes the issue of discipline and punishments very seriously. In the prisons visited by FIDH, there was no report of denial of fair hearing. However, the FIDH found out that punishment by confinement in a dark cell is used as punishment for disciplinary offences. At the time of the FIDH visit, one condemned prisoner was in isolation because he had been violent with a member of prison staff. In Jinja prison, the dark cells had no windows so there was no fresh air. The ventilation was poor and actually prevented fresh air and natural light penetrating the cell. This has health implications for inmates placed in such cells, including damage to their eyesight.

This contravenes R.31 of the UN SMR which states that 'punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.'

Isolation cells are still used in central government prisons as a disciplinary measure. The punishment is referred to as PD and CC (Penal Diet and Cellular Confinement). As well as isolation, the disciplined prisoner is also given a half portion of the food he is entitled to. Solitary confinement lasts between 1 and 14 days.

According to the UN Basic Principles for the Treatment of Prisoners, "Efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction of its use, should be undertaken and encouraged." In addition, the UN Human Rights Committee has noted that "prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7 [prohibiting torture and cruel or inhuman treatment or punishment]."

The FIDH and FHRI consider that the use of solitary confinement as a disciplinary measure should be abolished or, at least, restricted.

Although the SMR prohibits the use of reduction of diet as punishment "unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it"¹⁰², prison officials use reduction of diet as punishment for prisoners who use physical force against fellow prisoners.

What makes this form of punishment most worrying is the fact that prisoners subjected to it are deprived of medical fitness principally because the prisons do not have the services of a

qualified doctor but only those of a paramedic and also because the nearest hospital is not easily accessible due to lack of transport which is attributable to poor funding.

Other forms of discipline include denial of remissions and denial of visitors.

7. The Method of Execution

Hanging is the legal mode of execution under Section 99(1) of the Trial of Indictments Act (Cap 23 Laws of Uganda).

As there are two parallel systems of criminal justice in Uganda, there are also two methods of execution. Military execution is by firing squad. These executions usually happen in public, in remote districts away from the more sedate urban centres. The latest executions happened in 2002 and 2003: Corporal James Omedio and Private Abdullah Mohammed, both attached to the "B" company of the UPDF's 67th battalion were executed on 25 March, 2002 by firing squad near Kotido town in the presence of 1,000 people, some of whom were children. They had been convicted of murdering Rev. Declan O'Toole, an Irish priest, on the 21th of March, 2002. The soldiers were tied to trees and shot. Mohammed was shot again at close range after a medical officer established that his heart was still beating (New Vision, 27 March 2002). In 2003, three more executions were carried out: Private Richard Wigiri was executed by firing squad on 3 March 2003 in Kitgum Matidi Township, near Kitgum in northern Uganda, after a military court found him guilty of the murder of Monica Achiro, a civilian, in December 2002. Privates Kambacho Ssenyonjo and Alfred Okech were executed by firing squad later the same day after a military Court near Kitgum found them guilty of killing Charles Labeja, Patrick Olum and Peter Ayela on January 4, 2003. Reports suggest at least 200 members of the public witnessed the executions.¹⁰³

The FIDH recalls in that regard that since 2003, the UN Commission on Human Rights resolutions systematically call upon states that still maintain the death penalty to ensure that "where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering and shall not be carried out in public." (emphasis added)

102. R. 32 (1): Punishment by solitary confinement or reduction of diet should never be inflicted unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.

103. Uganda: Soldiers executed after unfair trial, Amnesty international press release, 6 March 2003, AFR 59/004/2003.

Uganda: Challenging the Death Penalty

The FIDH is of the opinion that the imposition of the death penalty is inherently cruel and therefore does not advocate a particular method which would be less painful or degrading.¹⁰⁴ However, the FIDH wishes to stress the particular cruelty and brutality of the method of execution used in Uganda.

Section 99 of the Trial on Indictments Act provides that the “sentence of death shall be carried out by hanging.” The mission has found a large amount of documents and statements describing the horror suffered by many convicts executed in Uganda. The FIDH thinks that although crude and revolting, these documents should be made public in order to inform about the reality of these executions.

The norm prohibiting torture and inhuman treatment also applies to the method of execution. In General Comment 20, the UN Human Rights Committee noted: “when the death penalty is applied by a State party for the most serious crimes, it must not only be limited in accordance with Article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering.” A similar provision is included in the United Nations Safeguards Protecting the Rights of those facing Death penalty. Its paragraph 9 provides “where capital punishment occurs, it shall be carried out as to inflict the minimum possible suffering.”

The whole process is a source of unnecessary suffering. The procedure leading to the hanging is cruel and traumatic. The execution itself causes great physical pain, adding an excruciating corporal punishment before the death finally occurs.

The main source of information for the section below are affidavits sworn by the petitioners themselves and submitted as evidence by the Defence team in support of their Petition in the case before the Constitutional Court (June 2005). They constitute a remarkable testimony of the living conditions of the death row inmates.

a. The Procedure Applied once the Execution Is Decided

Anthony Okwonga, former Officer in charge at Luzira Prison, gave to the Constitutional Court a thorough account of the procedure leading up to the execution. Everything starts with

the signature of a death warrant by the President of Uganda. The execution is then supposed to be carried out within a week. The warrant is handed to the Commissioner of Prisons, who then passes it to the Officer in charge of the prison, who, in turn, liaises with the Officer in charge of the condemned section. Once he has received the warrant, the process begins. This officer is responsible for the repair of the execution machine, cleaning the gallows, the restriction of the prisoners’ movements, making the coffins in the prison carpentry workshop and drawing up lists of cells where the prisoners are resident.

The warders selected to take part in the execution as well as the executioners are normally brought from outside the condemned section. They are paid a special allowance to participate in the executions.

When the initial preparations are complete, the condemned prisoners selected for execution are taken from their cells. No notice is given to the prisoners in the condemned section, accentuating the fear and shock suffered by the whole section when names are called. Petitioner Ben Ogwang recalled that day when “while I and my fellow death row inmates are exercising outside, the guards suddenly call for lock-up before the usual time. After I and my fellow death row inmates have been locked up in our cells, the guards come and call out names at random. This is an extremely terrifying event, and a person needs to live it to believe it. At this time, we are all very scared and are praying hard that they do not call our names. If a guard comes and stops outside a condemned prisoner’s cell door, the said prisoner usually immediately feels his bowels opening up and ends up soiling himself. The experience is like going through death yourself. I have endured this excruciating experience very many times and I still have recurring nightmares about it.”¹⁰⁵

This situation creates a constant fear within the condemned section, as outlined by prisoner Edward Mary Mpagi: “each time we were taken by complete surprise. All we noticed were incidents like changing of the prison warders, the restriction of our movements, the making of lists of the prisoners who were residents in every room, the unexpected roll calls, the repair of the execution machine and the orders to us to enter our cells. We lived in a complete fear of any unusual activity,

104. Such a position would be vain and dangerous. As emphasized by one of the member of the UN Human Rights Committee, if the Committee deemed unacceptable an execution lasting more than ten minutes, “should it be concluded, conversely, that the committee would find no violation of article 7 if the agony lasted nine minutes?” Another member added that “every known method of judicial execution in use today, including execution by lethal injection, has come under criticism for causing prolonged pain or the necessity to have the process repeated. We do not believe that the Committee should look into such details in respect of execution such as whether acute pain of limited duration or less pain of longer duration is preferable and could be a criterion for a finding of violation of the Covenant.”

105. Ben Ogwang, affidavit sworn at Kirinya Prison, Jinja, 29 August 2003.

and the slightest deviation from our normal routines increased our disquiet, sense of foreboding, restlessness and unease.”¹⁰⁶

Prisoner Mugerwa Nyansio confessed that “every time the guards call for lock-up, I feel as though they are coming to execute me. I live in constant fear and agony. Although the executions happened some time ago, in my mind, all the above executions are as though they happened just yesterday.”¹⁰⁷ Prisoner Edward Mpagi described with a great sense of lucidity the situation: “when the warders finally finished their selections, the rest of us normally sighed with relief, knowing that we would live to die another day.”

The prison warders go from cell to cell, calling out names of prisoners and forcefully ordering them out of the cells. They are hand-cuffed and leg-irons are put on their legs. They say their last goodbyes to their fellow condemned prisoners, some are taken kicking and screaming. Many of them soil themselves in the process.

The prisoners are taken to the office of the officer in charge. He announces to each individual prisoner the crime he was convicted of, as well as the date and time of his execution, which is normally 3 days thereafter. At that stage, most of the prisoners collapse, soil themselves, cry and wail and start praying to the Lord. The prisoners are then taken to the death chambers and are locked up in individual cells.

The prisoners’ heights and weights are recorded. This recording is part of a formula to measure how far the prisoners would drop when the lever of the execution table is released. After this recording, the prisoners are given the three day period before the executions. It enables the prison authorities to get in touch with the prisoners’ relatives and the prisoners to make their wills.

In the meantime, preparations for the execution continue. Coffins are made in the prison, increasing the terror suffered by the other prisoners. Prisoners who are not in the condemned section are deployed to make hoods and clothing that the soon to be executed prisoners are to wear. This is done in the tailoring section of the prison and this process ensures that all the inmates of the prison know that an execution is imminent. The number of hoods and clothes made also informs the other prisoners of the number of prisoners due to be executed.

During the three days, the lights in the cells are left on day and night and the prisoners are under 24 hour surveillance. The prison warders ensure that there are no instruments that the prisoners might use to commit suicide during those three days. Prisoner Mugerwa Nyansio described what he saw in the death chambers when he was sent during the executions of 1996 to bring blankets to the gallows: “they were confined one prisoner to a cell in the cells numbered 1, 3 and 7 respectively. They all had expressionless faces. Their skins had turned pale, tending towards white, as though someone had smeared them with white flour. Their skin was ashen and appeared to be bloodless and colourless. Their complexions were pallid, sallow and ashy. In a very short time they had started looking like ghosts. They were awaiting their death in the most frightening and intimidating atmosphere one can imagine.”¹⁰⁸ He added that he has never been able to take their last images out of his mind, confessing to having nightmares every night and hallucinations about these men.

During these three days, a prison warden reminds each prisoner hourly of the crime he was convicted of, the sentence imposed upon him and the number of hours remaining until the sentence is carried out. They usually write notes to their fellow prisoners who are not among those to be executed. Those notes serve as their last wills and testaments. The prisoners are normally very poor, and all they have are items like flasks, bedroom slippers, soap and their threadbare clothes. These are usually willed to their death row colleagues.

During this period, the prisoners usually keep singing hymns to comfort themselves. The words of the hymns are normally changed by the prisoners awaiting execution, to describe to the rest of the condemned prisoners what fate awaits them.

Although the prisoners are given a last chance to be visited by their friends and relatives, hardly any prisoner receive family visit. Most of them are poor peasants whose families are too destitute to afford the fare to the prison, or the prisoners have spent such long periods in prison that their families have forgotten or abandoned them.

On the day of the execution, in the middle of the night, the prisoners are herded to the Pinion room and the officer in charge reads the execution order for their respective executions. They are then taken to the dressing room and dressed in an unusual overall-like outfit and are covered from

106. Edward Mary Mpagi, affidavit sworn in Kampala, 29 August 2003.

107. Mugerwa Nyansio, affidavit sworn at Luzira Prison, 29 August 2003.

108. *Ibid.*

Uganda: Challenging the Death Penalty

head to toe without any openings for the hands or feet. They are also hand and leg cuffed to avoid incidences of violence. Black hoods are passed over the prisoners' heads. Weights are placed in the overalls of the smaller and lighter prisoners to make them heavier.

The execution chamber at Luzira, the only place in Uganda where executions have taken place until now, is capable of hanging three prisoners at a time. The prisoners can be led singly or in threes, supported by warders.

From the time the prisoners are led to the dressing room and hence to the gallows themselves, their colleagues in the death chamber are, through hymns, recounting the proceedings to the rest of the prisoners in the condemned section below. Graphic details are given out through these songs, telling the others who is being taken for dressing, or for execution and what is being done to him at every moment.

At the execution chambers, the prisoners' legs are tied-up and the noose pushed over their heads to their necks. At the back of the prisoners heads the noose is tightened, cutting off their breathing. The metal loop is normally on the right hand side of the prisoners necks so that when they drop the loop would be directly under their cheeks and it would break the cervical bone, killing them instantly.

The prisoners are then put atop a table, three at a time. The table is designed to open at the bottom when a certain gear-like lever is pressed. The aim is to place the noose around the prisoner's head, press the lever so that the table opens and let the prisoner hang from the neck until he is dead. When all is set, the executioner releases the lever and the table opens. Each side gets stuck against the rubber under the table leaving an open space and the three prisoners drop down. There is an extremely loud thud when the two sides of the table get stuck against the rubber and even a bigger one when the prisoners hit a table in the basement room directly below the gallows.

After the bodies drop, the officer in charge and the priest go downstairs and enter the basement where the bodies are hanging to ensure the prisoners have been executed. The prison doctor is normally already in the basement, and examines the corpses to confirm that the prisoners are dead before they are placed in poorly made plasterboard coffins

ready for burial in shallow unmarked mass graves. This process is repeated until all the prisoners due to be executed that day are executed.¹⁰⁹

The prisoners' families have no access to the corpses. They are not even told where the grave is situated. The corpses are deposited into the mass graves and sprayed with acid to accelerate decomposition.

b. Hanging, a Painful Method Leading to Many Botched Executions

Justice Mwalusanya of the High Court of Tanzania stated in the *Mbushuu*¹¹⁰ case that the process of execution by hanging is particularly gruesome, generally sordid, debasing and brutalising, and ruled that it offends Article 13(6)(e) of the Constitution of the United Republic of Tanzania.¹¹¹

The petitioners in the Constitutional case which gave rise to the June 2005 ruling (see below) have submitted to the Court that the death penalty is an inherently cruel treatment, but they added that the method of execution used in Uganda, hanging, is an aggravating factor. Cruel has been defined by the Supreme Court of Uganda as "causing pain or suffering, especially deliberately."¹¹² The statements obtained on the last executions of civilians carried out in Uganda in 1999 clearly demonstrate the cruelty of the execution by hanging.

Death by hanging in itself is a painful method. Dr. Harold Hillman, Doctor of Medicine, who presented affidavits to a number of courts in the United States of America about the death penalty, explained the circumstances leading to the death of the convict: the obstruction of the windpipe (trachea) raises the carbon dioxide concentration in the blood which makes the person want to inspire (air hunger), but he/she cannot do so, due to the obstruction of the windpipe itself. This causes great distress, as occurs during strangling. However, the person cannot cry out, which is the normal reaction to distress and pain, because his vocal cords are obstructed and compressed. Nor can he react normally to distress and pain by moving his limbs violently, as they are tied. The skin beneath the rope in the neck is stretched by the fall, and this will be painful. The fall of oxygen in the blood stimulates the autonomic nervous system, which often make the prisoner involuntarily sweat, drool, micturate or defecate.

109. Prisoner Mugerwa Nyanso recalled the executions of 1999, when 28 death row inmates were executed: "The 1999 execution went on for so long, and so many people were killed. At every moment I was thinking about three of my roommates and their last deeds on earth."

110. *Mbushuu Dominic Mnyaroje and another v. The Republic*, Criminal Appeal No. 142 of 1994.

111. "No person shall be subjected to torture or inhuman or degrading punishment or treatment."

112. Oder JSC in Abuki, Case No. 5 Vol. 1, page 88 para. b.

Uganda: Challenging the Death Penalty

These events could take minutes.”¹¹³

He also explained that although it is widely believed that hanging causes instant death by fracture of the neck and damage to the spinal cord, such fracture was found in only 19% of persons examined at autopsy by James and Nasmyth-Jones in 1992. All the rest of those hanged had suffered the slow asphyxiation and the physiological effects described above.

Furthermore, the belief that fracture/dislocation of the neck causes instant death is not true. The only experimental study in modern times of that process of dying was carried out in rats by Feldman and Hillman in 1969.¹¹⁴ As soon as the rats' neck is broken, it begins to die immediately, but takes about 7 minutes for its heart to stop. A human being would take much longer. The reason for the continued sensations from the face, head and neck above the site where the rope has fractured the neck, is that at the moment of fracture, there is still a significant concentration of oxygen in the blood for sensory receptors of pain, pressure and sensation to function. Eventually, the concentration of oxygen in the blood and the blood pressure falls, so that the person faints and the sensation fails. However, loss of sensation is not instantaneous.

The belief that death is instantaneous probably arises from the fact that the person neither cries out, nor moves violently, but as explained earlier, they simply cannot. There is no physiological evidence that they lose sensation immediately. After their researches, Doctors James and Nasmyth-Jones concluded that the description of death from judicial hanging as “almost instantaneous” is not justifiable, and in their last paragraph, they add that “hanging as a suitable means [of enforcing the death penalty] must be seriously questioned.”¹¹⁵

Ugandan records of executions by hanging are frightening. Several death row inmates gave atrocious details about botched executions at Luzira prison. Mr. Godfrey Mugaanyi,

now free and one of the founders of Friends of Hope for Condemned Prisoners,¹¹⁶ gave a terrible account of the executions performed in 1991 and 1999: “in 1991, a condemned prisoner, the late Ben Kitanyawa, resisted being taken to the gallows for execution. He fought off the prison warders who had been sent to take him to his execution. It took over ten warders to subdue him. He further resisted being taken up to the gallows and he was stabbed to death by the prison warders and executioners using hammers, crowbars and axes. He did not even reach the gallows.”

“The same year, the late Kelly Omuge’s coffin fell on the road to burial. The fall caused the coffin to break and the corpse fell out. A few warders saw the corpse and it was littered with holes and punctures, indicating that he had not merely been hanged, but that he had also been stabbed and hit on the head with a hammer.”

“In 1999, the late James Kiyingi was hanged. He was the very last person executed that year. However, because of his weight, he did not die and merely fell down on the table in the basement. This prompted the prison warders and the executioners to bundle him up and take him back to the gallows and hang him again. Once again, the same thing happened. This time the prison warders stabbed him and hit him on the head with a hammer until he died.”

“In 1999, it took Haji Musa Sebirumbi over one hour to die, and he supposedly died in excruciating pain. His execution was video-taped.”¹¹⁷

These events are not extraordinary exceptions. As explained by Anthony Okwonga,¹¹⁸ “in case the prisoners are not certifiably dead, they are then killed by hitting them at the back of the head with a hammer or a crow-bar.” Prisoner Ben Ogwang confirmed this information, as he saw the clubs and hammers that are supposed to be used to kill off prisoners

113. Dr. Harold Hillman, affidavit sworn 5 April 2004 in Guilford, United Kingdom.

114. A clinical description of death in rats and the effect of various conditions on the time until cessation of ventricular contraction following section between the brain and spinal cord. *Br J Exp Pathol.* 1969 Apr. 50(2); Cardiac arrest following neck dislocation in rats, *J Physiol*, 1969, Jan. 200(1).

115. The authors were able to examine the cervical vertebrae of 34 victims of hanging after the skeletons of the victims had been exhumed at three former prisons. They gave details of the neck injuries, and were able to show that the incidences of fracture were inconsistent with length of drop, the age of the victim or which hangman carried out the execution. This seems to contradict the often stated view that the efficiency of hanging as a cause of immediate death depends upon the skill of the executioner.

116. Upon his release, Tom Balimbya together with a group of former death row inmates formed a non governmental organisation (NGO) called Friends of Hope for condemned Prisoners. This NGO gives talk shows and provides a model for other former death row prisoners to aspire for. The goal of the NGO is to abolish the death penalty which it does by creating public awareness that death row inmates are human beings who still deserve humane treatment and not execution. Also he with a group of former death row inmates formed a company called Old Scars Can Arouse Remorse (“Oscar New Way Enterprises”). The aims are to help rehabilitate and provide employment to former inmates of death row, as well as former long-term prisoners. They have currently set up a welding workshop in Wandegaya and they are in the process of setting up a car-washing bay.

117. Godfrey Mugaanyi, Affidavit sworn 28 August 2003, Kampala.

118. Former Officer in Charge at Luzira Prison, who explained the whole process of executions in front of the Constitutional Court in support of the Petition.

who do not die when he was sweeping the area around the executions chambers.

These stories about horrific executions abound in the prisons, and every prisoner on death row hears about it very quickly. As explained by Prisoner Ben Ogwang, because many of the guards are their friends, some of them come to discuss the gruesome details of the executions that occur with the prisoners. These guards often have no one else to talk about the horrors that they are forced to endure, yet they need to talk to someone to get their burden off their chests. As a result, stories abound of people who fail to die when they are first hanged and guards forced to brutally kill them off with clubs and axes.

Other stories are that when the hangman makes miscalculations about the weight some prisoners are decapitated outright. Prisoner Ben Ogwang affirmed that there is the smell of death and blood all over the condemned section during an execution.

Anthony Okwonga stated that he saw on several occasions the heads of prisoners being snapped off during executions. It occurred mainly in the case of old inmates aged above sixty. "When the heads are snapped off, blood spills all over the place and even onto the prison warders assisting with the execution."¹¹⁹

These stories should lead the authorities of Uganda, and all the countries concerned,¹²⁰ to discard this method clearly violating their international obligations to prohibit torture and inhuman treatments.

Unfortunately, in its June 2005 ruling, the Constitutional Court of Uganda, taking into account the fact that passing the sentence of death is permitted under the Constitution of Uganda, stated that it follows that the implementing or carrying out of the death penalty by hanging cannot be cruel, inhuman or degrading.

The FIDH deeply regrets that decision, since all the descriptions of the executions above mentioned clearly indicate the contrary.

c. The Impact on the Prison Staff and the Other Detainees

The way execution is carried out in Ugandan prisons has a devastating impact on both the prison personnel and the other death row inmates.

First of all, the other detainees who have witnessed an execution are all recalling an unforgettable traumatism. They all explained the incredible fear they felt when they heard the guards calling names and stopping in front of their cells, often taking one of their fellow inmate to the execution chamber. Prisoner Ben Ogwang explained clearly what this situation means for them: while we go through the pain and suffering of our colleagues, we are also contemplating our own death.

Prisoner Mugerwa Nyansio recalled the day when the prison warders stopped in front of his cell and called out three of his roommates one at a time, and took them all. "They were dragged crying, screaming, screeching, shrieking and squawking. This was by far the most difficult time in my entire life. I watched as three fellow inmates with whom I shared my days and nights were literally taken away to be executed and I was left alone in the cell to grapple with my troubles, nightmares and hallucinations."¹²¹

Prisoner Andrew Walusimbi had the same experience in 1999 when his roommate was taken to the execution chamber. He explains that his roommate sent him a letter from the death chamber, and "whenever I remember that letter, I lose my concentration, I shiver with fear. I could not sleep for months after that execution."¹²²

Everything seems to be organised to spread fear and terror in the section of the condemned. One has to realize that in Luzira prison, the gallows are located above the section of the condemned, allowing the death row inmates to hear the singing from the execution chambers, and the dreadful sound of the executions.

Prisoner Ben Ogwang described it in his statement: "after a few moments, we hear a loud sound like a sudden explosion, as the trap doors of the gallows spring open and the person

119. Anthony Okwonga, affidavit sworn the 29th of August 2003, Luzira Prison.

120. Uganda does not have the monopoly of these frightening accounts. They do occur wherever the death penalty is carried out by hanging. Dr. Hunt, Doctor of Medicine and practitioner of Forensic pathology in the United Kingdom for forty-five years recalled a case in the 1950's when an English doctor told him in great confidence that he had once attended to perform an autopsy on an executed criminal in London, which took place at least an hour after hanging. He had found the victim deeply unconscious but still breathing. He told Dr. Hunt that he then clamped the victim's trachea with a pair of bowel clamps and he returned after a short time to find that there were no longer signs of life. He ensured that the prison Governor was informed of the matter but that it was never mentioned thereafter; see Dr. Albert C. Hunt, affidavit sworn 5 April 2004, St-Andrews, United Kingdom.

121. Prisoner Mugerwa Nyansio, affidavit sworn 29 August 2003, Luzira Upper Prison, Kampala.

122. Prisoner Andrew Walusimbi, affidavit sworn 29 August 2003, Luzira Upper Prison, Kampala.

drops to his death. We then hear the body fall with a loud bang onto the death table. This is a moment of excruciating pain for all of us.” This cycle is repeated until the last person has been executed. In the last execution in 1999, this process was repeated for twenty-eight times, since 28 prisoners have been executed the same day.

The prison officers also find this event deeply shocking. Mr. Moses Kakungulu Wagabaza, who conducted research into the Prison Department explained that “the prison warders after an execution develop psychological problems like stress and nightmares. Some of them either quit the prison service or go mad after participating in executions.”

Dr. Margaret Mungherera, a forensic psychiatrist who has examined and treated many people who have participated in the execution of death row prisoners, has diagnosed them as persons suffering from post-traumatic disorders caused by the guilt, culpability, remorse, self-reproach and self-condemnation they feel in participating in the taking of human lives.¹²³

Mr. David Nsalata, Officer in charge of Luzira Upper Prison between 1990 and 2000, was present during the executions of 1991, 1993, 1996 and 1999. He explained that he “never recovered from the trauma and experience of witnessing executions at Luzira. I have tried to block the memories of those executions from my mind. Having to participate in the actual process of executing another human being is the most difficult and traumatising aspect of the duties imposed on prison officials and it is not an activity anyone would want to be part of.”¹²⁴

Mr. Joseph Etima, the Prison Commissioner, declared to the FIDH mission that “whenever executions are carried out, they have had the effect of making me feel dehumanised with the guilty feeling of one who has killed. It is particularly unnerving in my position having regard to the fact that through the chain of command, I command officers to carry out executions yet my conscience tells me that killing is wrong.” He explained that in his capacity as Commissioner, he attended one execution, and found it to be a very cruel and inhuman punishment. After witnessing that execution, he did not eat for two days, and could not sleep properly for a long time because of nightmares, which keep recurring even to this day. The images of this execution still haunt him today, and he is convinced that they will never leave him in peace.

Not only is their participation in the execution traumatising for them, it also has a deep impact on their work and duties, and jeopardises their efforts to accomplish their other tasks. Moses Kakungulu Wagabaza explains that “after an execution, the other condemned prisoners lose faith in the prison service. They begin to look at prison officers as killers who they deem unfit to impose any discipline and reform in them. The prison service therefore experiences a set-back in its image and programmes for the prisoners after executions.”¹²⁵

Joseph Etima, the Prison Commissioner, explained that after executions, it takes the prison staff several months to stabilise the inmates, and years to regain their trust. Witnessing or participating in the execution of inmates is an unbearable burden for prison staff because a close personal bond is often established between the inmates and the prison staff.

8. Challenging the Death Penalty: The Road to Abolition?

Article 22(1) of the Ugandan Constitution, which protects the right to life, provides that no person shall be deprived of life intentionally, except in execution of a sentence passed by a Court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

In 2001, a Constitutional Review Commission was appointed by President Yoweri Museveni to review the Constitution. The Commission’s brief was to gather opinions on the constitution from individuals, non-governmental groups and state institutions. Debates on the use of the death penalty featured prominently during the constitutional review. A group of prisoners asked to see the Commission’s members, and they submitted their arguments to the Commission. The final report of the Commission was handed to the Ministry for Justice and Constitutional Affairs in December 2004. Unfortunately, the Constitutional review Commission adopted a position favourable to the retention of the death penalty.

Realising that their submission to the Constitutional Review Commission would fail, the group of prisoners decided to work on a petition challenging the constitutionality of the sentence. Helped by Father Tharcisio Agostoni and the Foundation for Human Rights Initiative (FHRI), the FIDH affiliate in Uganda,

123. Dr. Margaret Mungherera, affidavit sworn at Kampala, 26 August 2003, para. 10.

124. David Nsalasatta, affidavit sworn at Kampala, 26 August 2003.

125. Moses Kakungulu Wagabaza, affidavit sworn at Kampala, 28 August 2003.

Uganda: Challenging the Death Penalty

they convinced the other detainees on death row in Uganda and they all joined together and filed a petition in the Constitutional Court of Uganda in September 2003.¹²⁶

Several African countries had already experienced a similar legal challenge. In Zimbabwe the Supreme Court held, in 1993, that it would be unconstitutional to execute four prisoners under sentence of death because of the intense and prolonged suffering they had undergone on death row.¹²⁷

In Tanzania, a High Court ruled that hanging, as a form of punishment, was cruel, degrading and inhuman, and therefore unconstitutional.¹²⁸

In Nigeria, the Court of Appeal decided in 1996 that condemned prisoners could ask a High Court to determine whether they should be re-sentenced in view of their prolonged stay on death-row.¹²⁹ In Botswana, an attempt was also made to declare capital punishment unconstitutional in 1995, but the Court of Appeal held that it was not unconstitutional.¹³⁰

In a landmark decision in 1995, the South African Constitutional Court held that: “the proclamation of the right [to life] and the respect for it demanded from the State must surely entitle one, at the very least, not to be put to death by the State deliberately, systematically and as an act of policy that denies in principle the value of the victim’s life.”¹³¹

There is however a major difference in the Ugandan case, in that it involves the whole prison population. This case is historical, and is a first step on the path to the abolition, whatever some of the members of the Judiciary might think or declare, as Judge G.W. Kanyeihamba, Professor of Law and Justice of the Supreme Court, who wrote that “the abolitionists tend to be small groups of elite minorities with the loudest voices in society.”¹³²

The petition before the Constitutional court invoked several arguments:

1. The death sentence is inconsistent with the prohibition of cruel, inhuman or degrading treatment (arts. 24 and 44 of the Constitution).

On 10 June 2005, the Constitutional Court of Uganda decided that “Art. 22(1) of the Constitution recognises death penalty as an exception to the enjoyment of the right to life... [and] that the right to life is not included in article 44 [of the Constitution] on the list of the non derogable rights... Imposition of death penalty therefore, constitutes no cruel, inhuman or degrading punishment.”

It should be noted that no derogations are ever allowed to the prohibition of slavery, torture and cruel, inhuman or degrading treatment. However, paradoxically, the Constitutional Court decided that it can be derogated to the right to life.

2. Mandatory death sentences are inconsistent with the right to appeal against sentence only (and not conviction).

According to the Constitutional Court, the right of the convict to be heard in mitigation before sentence is an element of a fair trial. The same is true of the right of the court to make inquiries to inform itself before passing the sentence, to determine the appropriateness of the sentence passed. Under Uganda legislation, that right of the court is not possible in case of a person convicted under a mandatory sentence of death (section 98 of the Trial of Indictments Act).

Justice Okello concludes “I can think of no possible rationale at all for that distinction yet, a person facing death sentence should be the most deserving to be heard in mitigation... That provision which denies the court opportunity to inform itself of any mitigating factors regarding sentence of death, deprives

126. *Susan Kigula, Fred Tindigwihura, Ben Ogwang and 414 others v. Attorney General*, Constitutional Petition No. 6 of 2003.

127. *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney-General, Zimbabwe and Others*, 1993 (4) SA 239 (ZSC). However, the government reacted to this decision by amending the Constitution to foreclose such grounds for reviewing death sentences.

128. *Mbushuu Dominic Mnyaroje and another v. The Republic*, Criminal Appeal No. 142 of 1994. On appeal, the Tanzanian Court of Appeal agreed that it was cruel and degrading, but ruled that it was not unconstitutional.

129. *Peter Nemi v. The Attorney General of Lagos and anor.* Appeal No. CA/L/221/95.

130. *Patrick Ntesang v. The State*, Court of Appeal, Criminal Appeal No. 57 of 1994.

131. Justice Didcott, in *The State v. T. Makwanyane and M. Mchunu*, Case No. CCT/3/94, paragraph 176, referred to below as the South African Constitutional Court judgment.

132. “Reflections of a judge on the death penalty in Uganda,” *The Ugandan living law Journal*, Volume 2, Number one, June 2004 (published by the Uganda Law Reform Commission).

Uganda: Challenging the Death Penalty

the court the chance to exercise its discretion to determine the appropriateness of the sentence. It compels the court to impose the sentence of death merely because the law directs it to do so. This is an intrusion by the legislature into the realm of the Judiciary. There is clearly a violation of the principle of separation of power.”

In addition, Section 132 of the Trial of Indictments denies a person who is convicted and sentenced under a provision where capital punishment is mandatory by law to appeal against the sentence only (and not against the conviction).

As a result, the Constitutional court decided that “the various provisions of the laws of Uganda which prescribe mandatory death sentence are unconstitutional.”

3. The long delay between the pronouncement of the death sentence and the carrying out of the sentence allows for a death row syndrome, which constitutes a cruel, inhuman and degrading treatment prohibited by arts. 24 and 44 of the Constitution.

According to the Constitutional court, condemned prisoners do not lose their constitutional rights, except those rights that have inevitably been removed from them by law, either expressly or by necessary implication. Condemned prisoners are still entitled to protection against cruel, inhuman or degrading treatment while they are in confinement before execution.

The Court added that the conditions of detention in the condemned section of Luzira Prison coupled with the treatment meted out to the condemned prisoners during their confinement are not acceptable by Ugandan or international standards. The Court concludes that “Inordinate delays in such conditions indeed constitute cruel, inhuman or degrading treatment.” The Court added that “it is important that the procedure for seeking pardon or commutation of the sentence should guarantee transparency and safeguard against delay... A delay beyond three years after a condemned prisoner’s sentence has been confirmed by the highest appellate court would tend towards unreasonable delay.”

4. Hanging as the mode of carrying out death sentence is cruel, inhuman and degrading.

Justice Okello decided that since the death penalty is recognised under art. 22 of the Constitution as an exception to the right to life, execution by hanging may be cruel but the provisions of the Constitution prohibiting cruel treatment or punishment “were not intended to apply to death sentences permitted in art. 22(1). Therefore, implementing or carrying out death penalty by hanging cannot be held to be cruel, inhuman and degrading.”

One can conclude that, although the Court upheld the death penalty, the position expressed by the panel was more encouraging, which will change dramatically the situation of the petitioners and more generally of the detainees awaiting trial. The provisions that mandate the death penalty as punishment for certain crimes are held unconstitutional, and these laws must be amended. Petitioners who have not yet exhausted their right of appeal are entitled to appeal against the sentence and to raise any mitigating factor. Those not yet sentenced are entitled to raise any point of mitigation now, and this should reduce the number of death sentences in the future.

Contacted immediately after the delivery of the judgement, John W. Katende, lawyer for the petitioners, expressed his satisfaction, and declared that the judgement represents a major victory, insisting on the fact that mandatory death sentences were declared unconstitutional, while 415 out of 417 were sentenced as a result of mandatory death sentences. In addition, a death sentence, irrespective of whether it was a result of a mandatory death penalty provision or not, becomes unconstitutional if not carried out three years after confirmation of the sentence by the Supreme Court.

The FIDH hopes that the decision of the Constitutional Court will reduce the number of persons sentenced to death. This new opportunity given to the accused to raise mitigated facts, and to the judge to review carefully the situation of each crime and each perpetrator, should limit greatly the number of death row inmates in the coming months and years.

IV. Conclusion and Recommendations

The FIDH identified a number of elements inconsistent with the international human rights obligations of Uganda in the context of the administration of the death penalty.

The Ugandan legislation foresees the death sentence for a number of crimes that cannot be considered as the most serious crimes, namely having lethal consequences. This is notably the case of the crimes of treason or kidnapping with intent to murder. It is also the case of a number of military offences such as cowardice in action, failure to protect war materials or spreading harmful propaganda.

In addition, new crimes entailing the death penalty have been established after ratification of the ICCPR by Uganda. This is notably the case with the crime of terrorism. A Bill concerning aggravated robbery currently under discussion in Parliament also carries the death sentence. This is a violation of Uganda's obligation under the Covenant to progressively restrict the number of offences for which the death penalty could be imposed, and to tend towards the abolition of the death penalty.

It is furthermore in contradiction with the fact that Uganda ratified the Statute of the ICC, which excludes recourse to the death penalty, in particular for the most serious international crimes.

Ugandan legislation establishes mandatory death sentences for a number of crimes, which is contrary to international standards and to the principle of separation of powers since it suppresses the possibility for the judiciary to assess the merits of the case and to take into account mitigating circumstances. This has been condemned by the Constitutional Court of Uganda in an important ruling of 10 June 2005. Such legislation should now be amended as a matter of urgency.

Last but not least, the restriction on the imposition of the death penalty on persons with a mental deficiency is not broad enough to be in line with international standards in that regard.

The FIDH was able to confirm that most of the detainees sentenced to death are uneducated and poor, which makes them much more vulnerable to miscarriages of justice since they are not able to defend themselves, nor to afford the services of a lawyer. As a result, when arrested, their condemnation is almost inevitable; since a number of crimes entail mandatory death sentences, those suspected of having committed one of those crimes will almost automatically be condemned to death.

A number of death row prisoners are low-ranking soldiers. The authorities justify their arrest and condemnation by their willingness to address human rights violations committed by the army. The FIDH fears that low-ranking soldiers are scapegoats and hide the lack of political will to prosecute the high level military responsible for human rights violations against the civilian population.

It also seems that the death penalty has been used selectively, a number of political opponents being on the death row, as well as among those executed.

The conditions of detention are largely below international human rights standards. Only a registered nurse or paramedic is based on a permanent basis in the prison, while there should be a doctor. Pharmaceuticals are insufficient, diet is of very poor quality and is not adequate for sick people. Accommodation and sanitation are extremely poor, in particular in Luzira prison. Solitary confinement is still used as a disciplinary measure for up to 14 consecutive days.

In view of the accounts and testimonies of detainees or former detainees from the condemned section of the Luzira prison, the FIDH considers that execution by hanging in Uganda clearly amounts to an inhuman treatment, if not to torture.

The FIDH consequently issues the following recommendations:

To the Ugandan authorities:

Specific recommendations on the death penalty

- Adopt a moratorium on the death penalty as a first step towards its abolition
- Suppress mandatory death sentences, as imposed by international human rights law and by the ruling of the Constitutional Court of 10 June 2005
- As a first step, restrict the number of offences carrying the death sentence to the most serious crimes only, in conformity with international human rights law
- Refrain from adopting new crimes entailing the capital punishment
- Clearly exclude the imposition of the death penalty from persons with any mental or intellectual deficiency

Uganda: Challenging the Death Penalty

- Ensure transparency in the composition and the proceedings of the advisory committee in charge of the prerogative of mercy, as requested by the Constitutional Court of Uganda in its 10 June 2005 ruling
 - Ensure that appeal against death sentences pronounced by military courts be mandatory, and that request for mercy be possible
 - Make public statistics on the number of death sentences pronounced and executed, every year, differentiated by age, gender, charges, etc. and allow for an informed public debate on the issue
 - Conduct sensitization campaigns to make the Ugandan population aware of the necessity to abolish the death penalty
 - Ratify Protocol II to the ICCPR abolishing the death penalty
 - Support the resolution adopted every year by the UN Commission on Human Rights regarding the abolition of the death penalty
 - Support a possible initiative of the African Commission for the adoption of a Protocol to the African Charter abolishing the death penalty
- automatically free on bail the person detained if the investigation is not achieved in that timeframe
- Spell out in the legislation the period for committal of capital offenders to the High Court after the investigation in order to avoid long detention pending the hearing
 - Ensure that persons condemned by military courts benefit effectively from the right to appeal, and this appeal should be automatic in case of death sentence; ensure more generally that military courts abide by the fair trial guarantees (independence, impartiality, competence, etc.)
 - Strengthen the Judicial Integrity Committee to suppress corruption in the justice system
 - Increase the budgetary allocation for the prison system in order to improve existing infrastructure, provide necessary bedding and clothing as well as adequate food and healthcare, in conformity with relevant international standards
 - Put an end to the use of long solitary confinement as a disciplinary measure against prisoners
 - Adopt an implementing legislation of the Rome Statute fully conform with the spirit and the letter of the ICC Statute

General recommendations on the administration of criminal justice

- Subject offenders to psychiatric examination to determine their mental state at the time the offence was committed
- Fund the legal aid scheme¹³³ to make it people centered and rights based, make sure that senior lawyers participate in the scheme and increase their emoluments in that framework; and establish an effective supervisory mechanism involving the Bar Association to ensure that lawyers from the legal aid scheme discharge their functions effectively
- fund through a witness fund attendance of witnesses for accused persons who cannot afford to procure the attendance of their witnesses
- reduce the current legal time limit of 360 days in order to carry out the investigation phase in the criminal procedure, and

To civil society organisations:

- Continue their advocacy work in favour of the abolition of the death penalty
- Continue their public awareness programmes on the death penalty

To the international community, including the European Union:

- systematically address the issue of the death penalty in all meetings with the Ugandan authorities
- support civil society initiatives in favour of the abolition of the death penalty in Uganda

133. The current Legal Aid Basket is funded by various donors, including the Danish Agency for International Development (DANIDA).

Appendix: Persons Met by the Mission

- Mr. Benjamin J. Odoki, Chief justice of Uganda
- Hon. Ruhakana Rugunda, Minister of Internal Affairs
- Hon. Edward Sekandi, Speaker of Parliament
- Mrs. Margaret Sekaggya, Chairperson, Uganda Human Rights Commission
- Prof. Joseph M.N. Kakooza, Chairman, Uganda Law Reform Commission
- Racheal A. Odoi Musoke, Principal legal officer, Uganda Law Reform Commission
- Mr. Joseph A.A. Etima, Commissioner General of Prisons
- Dr. Johnson O.R. Byabashaija, Deputy Commissioner general of Prisons
- Mr. David Nsalasatta, Senior assistant Commissioner of Prisons, Administration
- Officer in charge, Jinja Remand Prison
- Officer in charge, Jinja Prison
- Mr. Jean-Bernard Thiant, French Ambassador
- H.E. Sigurd Illing, Head of Delegation, European Union

Civil society:

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- Mr. Richard Haavisto, Researcher Central Africa, Amnesty International

Prisoners at Jinja Remand prison:

- Jalil
- Samuel
- Emmanuel Lokwago
- Edward Senata
- Zubairi Mdiba
- Suspita Tallo
- Richard Mwiroti

Prisoners at Kirinya Jinja Prison:

- Muzaniru Balitebya Charles
- Paddy Nashaba
- Moses Kizza
- George Mukasa
- John Bosco Kapere
- Wanamwa Yusuf



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- b) Prevent violations, and support civil society
- c) Observe and alert
- d) Inform, denounce, and protect

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The **Foundation for Human Rights Initiative (FHRI)** is an independent, non-governmental organization established in December 1991 to enhance the knowledge, respect and observance of human rights, and to encourage exchange of information and experiences through training, education, research, advocacy, lobbying and networking.

It seeks to remove impediments to democratic development and meaningful enjoyment of the fundamental freedoms enshrined in the 1995 Constitution and other internationally recognized human rights instruments.

The organisation addresses the entire range of human rights: civil and political as well as economic, social and cultural as defined in international human rights covenants.

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