

**MEMORANDUM BY
AMNESTY INTERNATIONAL
ZIMBABWE**

SUBMISSION FOR
CONSIDERATION BY THE
CONSTITUTIONAL
PARLIAMENTARY COMMITTEE
ON THE DEATH PENALTY
PROVISIONS IN THE
CONSTITUTION

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Amnesty International Publications

First published in 2010] by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

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Index: AFR 46/016/2010
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

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The adoption of a new Constitution provides a unique opportunity for Zimbabwe to show its commitment to the protection of internationally recognized human rights by abolishing the death penalty in law. In line with the commitment expressed in the Global Political Agreement, to act in a manner that demonstrates respect for the democratic values of justice, fairness, openness, tolerance, equality, respect of all persons and human rights,¹ Amnesty International Zimbabwe is urging the Constitutional Parliamentary Committee to demonstrate Zimbabwe's commitment to human rights by expunging the death penalty from Zimbabwe's Constitution.

Zimbabwe has international human rights obligations to respect, protect, promote and fulfil the human rights for everyone within its jurisdiction, without discrimination. These human rights include the right to life, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and the right to a fair trial. Zimbabwe has explicitly accepted obligations in regard to these rights in the international and regional human rights treaties which it has ratified, including the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR). The application of the death penalty in Zimbabwe violates these rights.

The death penalty in the current Constitution of Zimbabwe was inherited from colonial Rhodesia. While the Constitution of Zimbabwe guarantees the right to life, it also allows the state to execute its citizens 'in execution of the sentence of a court in respect of a criminal offence of which he has been convicted'. The death penalty is currently legislated for in the Criminal Law (Codification and Reform) Act [Chapter 9:23], the Criminal Procedure and Evidence Act [Chapter 9:07] and the Defence Act [Chapter 11:02].

Current statistics show that no known execution has taken place since 2005. However, death sentences continue to be imposed. According to the Zimbabwe Ministry of Justice and Legal Affairs, 52 prisoners, one of them a woman, were awaiting execution in 2009.

Zimbabwe has already considerably restricted the scope of the death penalty: while at independence there were nine crimes which were punishable by death under Zimbabwean law; offenders can currently be sentenced to death for three offences, namely treason;² where the act of insurgency, banditry, sabotage or terrorism results in the death of a person;³ for murder⁴ and for attempted murder or incitement or conspiracy to commit murder.⁵ Apart from treason and murder, mutiny is the only other crime punishable by death.⁶ The method of execution is by hanging or by firing squad.

The reduction in the number of offences punishable by death combined with the five year hiatus in executions suggests that Zimbabwe is already heading towards joining a progressive trend in Africa where more countries are abolishing this inhuman and degrading punishment in the defence of human rights. Amnesty International Zimbabwe is urging the Constitutional Parliamentary Committee to demonstrate Zimbabwe's renewed commitment to human rights as outlined in the Global Political Agreement by taking the final step and expunging the death penalty from the Constitution.

THE INTERNATIONAL TREND TOWARDS ABOLITION OF THE DEATH PENALTY

Sixty years after the adoption of the Universal Declaration of Human Rights, the trend towards worldwide abolition of the death penalty is unmistakable. When the Declaration was adopted in 1948, eight countries had abolished the death penalty for all crimes; today, more than two-thirds of the countries in the world have abolished the death penalty in law or in practice and the numbers continue to grow. The continent of Africa is largely free of executions, with only four of the 53 African Union member states known to have carried out executions in 2009: Botswana, Egypt, Libya and Sudan. Two African countries, Burundi and Togo, abolished the death penalty for all crimes in 2009.

Since 1945, the United Nations has adopted numerous human rights treaties recognizing the obligation that a range of domestic criminal justice matters including the death penalty must meet international human rights standards; numerous articles of the ICCPR, as well as other international human rights deal with criminal justice matters. In ratifying these treaties, states have accepted the human rights obligations set out in them. These obligations include the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Through the years, several UN and regional bodies have discussed and adopted instruments to support the call for the worldwide abolition of the death penalty. In resolution 2857 (XXVI) of 20 December 1971 the UN General Assembly affirmed the desirability of abolishing the death penalty in all countries. The desirability of abolishing the death penalty was reiterated in General Assembly resolution 32/61 of 8 December 1977 and - most recently - by the UN Commission on Human Rights in resolution 1998/8 of 3 April 1998.

In December 2007 and 2008 the United Nations General Assembly (UNGA) adopted resolutions 62/149 and 63/168, calling for a moratorium on the use of the death penalty "with a view to abolishing the death penalty." The resolution is the latest representation of the view of the international community that executions have no place in the 21st century. Since then, other regional bodies or civil society coalitions adopted resolutions and declarations advocating for a moratorium on executions as a step towards global abolition of the death penalty.

In November 2008, the African Commission on Human and Peoples' Rights at its 44th Ordinary Session in Abuja, Nigeria, adopted a resolution calling on state parties to the African Charter on Human and Peoples' Rights to observe a moratorium on the death penalty.

In its General Comment on Article 6 of the ICCPR the UN Human Rights Committee, established to monitor the implementation of the covenant by state parties, stated that Article 6 "refers generally to abolition [of the death penalty] in terms which strongly suggest ... that abolition is desirable. The Committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life... "

In resolution 1997/12 of 3 April 1997, the UN Commission on Human Rights expressed its conviction "that abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights". This statement was reiterated by the Commission on Human Rights in resolution 1998/8 of 3 April 1998.

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that he "strongly supports the conclusions of the Human Rights Committee and emphasizes that the abolition of capital punishment is most desirable in order fully to respect the right to life" (UN document No. E/CN.4/1997/60, paragraph 79). He has urged governments of countries where the death penalty is still enforced "to deploy every effort that could lead to its abolition" (UN document No. A/51/457, para. 145).

The Second Optional Protocol to the ICCPR, adopted by the UN General Assembly in 1989, aiming at the abolition of the death penalty, states in its preamble that "abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights" and that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life. The Protocol provides for the total abolition of the death penalty but allows states parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol.

The UN General Assembly has strongly appealed to all states that have not yet done so to become parties to the International Covenant on Civil and Political Rights and "to consider as a matter of priority acceding to the Optional Protocols to the International Covenant on Civil and Political Rights". (Resolution 58/165 of 22 December 2003)

Under the Rome Statute of the International Criminal Court, the death penalty is excluded from the punishments which that Court is authorized to impose, even though the Court has jurisdiction over extremely grave crimes: crimes against humanity, genocide and war crimes. Similarly, in establishing the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda in 1993 and 1994 respectively, the UN Security Council excluded the death penalty for these crimes. (13) The death penalty was also excluded for such crimes by the Special Court of Sierra Leone, the Special Panels in Dili, East Timor and the legislation establishing the Extraordinary Chambers for Cambodia.

International trends clearly indicate that the appetite for worldwide abolition of the death penalty is rapidly growing. Zimbabwe remains in a minority of less than one third of countries that retain the death sentence in law or in practice. Similarly at regional level, executions are increasingly unpopular, with less than 8% of African countries carrying out executions in 2009. Zimbabwe's own statistics support this trend with five years since the last execution.

THE DEATH PENALTY VIOLATES THE RIGHT TO LIFE AND THE PROHIBITION ON TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The death penalty is a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment, rights which are recognized in the Universal Declaration of Human Rights⁷ and other international human rights instruments⁸ to which Zimbabwe is a state party.

The UN Committee against Torture has referred to the uncertainty of many people under sentence of death in a country where the death penalty is in the process of being abolished as "amounting to cruel and inhuman treatment in breach of article 16 of the UN Convention

[against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]". (UN document A/56/44, 17 November 2000, para. 39(g)).⁹

Many countries internationally have prohibited the death penalty in their constitutions on human rights grounds.¹⁰ National courts have recognized that the death penalty violates the prohibition against torture, cruel, inhuman or degrading treatment or punishment. In 1995, the South African Constitutional Court declared the death penalty to be incompatible with the prohibition of "cruel, inhuman or degrading treatment or punishment" under the country's interim Constitution (*Makwanyane and Mcebunu v. The State* (CCT/3/94) [1995] ZACC 3) paragraphs 95, 146). Eight of the 11 judges also found that the death penalty violates the right to life. The judgment had the effect of abolishing the death penalty for murder.

DEATH PENALTY IS NOT A DETERRENT TO VIOLENT CRIMES

Amnesty International Zimbabwe believes that the consideration of the death penalty as a crime prevention method does not offer a solution to the problem of crime. Scientific studies have consistently shown that the death penalty is not, in fact, a better deterrent to crime as compared to other punishments, as demonstrated by the consistently high crime rates in many of the states of the USA that retain capital punishment.

The most recent survey of research findings on the relation between the death penalty and homicide rates, conducted by the United Nations in 1988 and updated in 2002, concluded: "...it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment"¹¹

Reviewing the evidence on the relation between changes in the use of the death penalty and crime rates, the study conducted by the United Nations stated: "*The fact that all the evidence continues to point in the same direction is persuasive a priori evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty*".¹²

In fact, in countries where the death penalty has been abolished, crime rates have often fallen. Studies in the USA and Canada show that the average murder rate in the USA for states that used the death penalty was higher than for states that did not use it. Twenty-seven years after Canada abolished the death penalty, the murder rate had fallen back by 44 percent.

In a claim supported by various research studies, the Constitutional Court of South Africa asserts that the best deterrent to violent crime lies in guaranteeing a high chance of capture and conviction of criminals:

"We would be deluding ourselves if we were to believe that the execution of...a comparatively few people each year...will provide the solution to the unacceptably high rate of crime...The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is lacking in our criminal justice system".¹³

Political leaders in Zimbabwe need to present effective means of managing crime that do not endorse or contribute to further violence, continue the cycle of violence, or create more

misery through violence. Crime may be reduced through having better trained and equipped police officers, eradicating poverty and improving education amongst other things.

CONCLUSION

Africa has made steady process towards becoming a continent free from executions. Fourteen African states have abolished the death penalty for all crimes, 23 are considered abolitionist in practice¹⁴ and 16 nations retain the death penalty. Of the 14 member states of SADC, six are abolitionist for all crimes, four are abolitionist in practice and four retain the death penalty. Only Botswana has carried out executions in recent years.

Amnesty International Zimbabwe believes that the adoption of a new Constitution provides Zimbabwe with an opportunity to significantly improve its own human rights record, to mark itself out as a progressive force within the region and to align itself with the global trend towards abolishing the death penalty. Abolition of the death penalty in the new supreme law would demonstrate a genuine commitment to protecting the population from an egregious violation of fundamental human rights. Amnesty International Zimbabwe is urging the Constitutional Parliamentary Committee to recognise the death penalty as inhuman and degrading punishment and a violation of the right to life by taking this unique opportunity to remove it from the Constitution in the defense of human rights.

APPENDIX 1: EXAMPLES OF CONSTITUTIONAL PROVISIONS PROHIBITING THE DEATH PENALTY IN OTHER AFRICAN COUNTRIES

Cape Verde: Constitution of the Republic of Cape Verde (promulgated in 1981)

Article 26 (2) states: "...in no case will there be the death penalty." Article 26, "The Right to Life and to Physical and Mental Integrity", is included under Title II, "Rights, Liberties and Guarantees".

Mozambique: Constitution of the Republic of Mozambique (1990)

Article 70 states: "1. All citizens shall have the right to life. All shall have the right to physical integrity and may not be subjected to torture or to cruel or inhuman treatment. 2. In the Republic of Mozambique there shall be no death penalty." Article 70 is included under Part II, "Fundamental Rights, Duties and Freedoms".

Namibia: Constitution of the Republic of Namibia (1990)

Article 6, "Protection of Life", states: "The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia." Article 6 is included under Chapter 3, "Fundamental Human Rights and Freedoms".

Sao Tomé and Príncipe: Constitution of the Republic of Sao Tomé and Príncipe (1990)

Article 21, "Right to Life", states: "1. Human life is inviolable. 2. In no case will there be the death penalty." Article 21 is included under Title II, "Personal Rights".

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- 1 Preamble to the Global Political Agreement, September 2008
 - 2 Article 20(1b) of the Criminal Law (Codification and Reform) Action [Chapter 9:23]
 - 3 Article 23(1v)(A) of the Criminal Law (Codification and Reform) Action [Chapter 9:23]
 - 4 Section 337 of the Criminal Procedure and Evidence Act [Chapter 9:07] and Article 47(2) of the Criminal Law (Codification and Reform) Action [Chapter 9:23]
 - 5 Section 337 of the Criminal Procedure and Evidence Act [Chapter 9:07] and Article 47(3) of the Criminal Law (Codification and Reform) Action [Chapter 9:23]
 - 6 Section 75(2) (b) of the Defence Act [Chapter 11:02].
 - 7 The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in December 1948, recognizes each person's right to life (Article 3). It categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Article 5).
 - 8 Article 6 of the International Covenant on Civil and Political Rights; Article 4 and 5 of the African Charter on Human and People's Rights
 - 9 Annual report of The United Nations Committee Against Torture, 12/10/2001, Available at: <http://www2.ohchr.org/english/bodies/cat/reports.htm>
 - ¹⁰ Amnesty International, International standards and the death penalty, 2006. Available at: <http://www.amnesty.org/en/library/info/ACT50/001/2006>

11 Roger Hood, *the Death Penalty: A worldwide Perspective*, Oxford, Clarendon Press, Third edition, 2002.

12 Ibidem.

13 Statement made by the Constitutional Court of South Africa, when abolishing the death penalty as unconstitutional in 1995.

14 Countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice in that they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions. The list also includes countries which have made a public commitment not to use the death penalty.

