

# AMNESTY INTERNATIONAL MEMORANDUM

AFR 28/003/2010

25 June 2010

## GHANA: SUBMISSION FOR CONSIDERATION BY THE CONSTITUTION REVIEW COMMISSION ON THE REVIEW OF THE DEATH PENALTY PROVISIONS IN THE 1992 FOURTH REPUBLICAN CONSTITUTION OF GHANA AND THE POSSIBLE ABOLITION OF THE DEATH SENTENCE

**As Ghana approaches two full decades of uninterrupted constitutional rule, Amnesty International is urging the Constitution Review Commission to reinforce Ghana's commitment to human rights by expunging the death penalty from Ghana's constitution.**

Ghana has international human rights obligations to respect, protect 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. Ghana 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. In Amnesty International's view, the death penalty violates these rights. Amnesty International opposes the death penalty in all cases without exception regardless of the nature of the crime, the characteristics of the offender, or the method used by the state to kill the prisoner.

The death penalty has been on Ghana's statute books since English common law was implemented in 1874. While the 1992 Ghanaian Constitution guarantees the right to life, it also allows the state to execute its citizens in "execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted." Article 3 (3) provides for mandatory death sentence for persons convicted of high treason. While no death row prisoner has been executed since 1993, death sentences continue to be imposed. According to the Ghana Prisons Service, 99 prisoners, two of them women, were awaiting execution in 2009.

The review of the 1992 Constitution of the Republic of Ghana, which is currently underway, provides a unique opportunity for Ghana to truly and fully commit to the protection of internationally recognized human rights by amending the sections of the constitution relating to the death penalty and by abolishing the death penalty.

Amnesty International urges the Constitution Review Commission to

- Amend articles 3 (3) and 13 (1) of the 1992 Fourth Republican Constitution of Ghana to remove the mandatory death sentence for persons convicted of high treason (3(3)) and to prohibit the execution of citizens by the state (13(1)).
- Entrench in the new Constitution the abolition of the death penalty.
- Amend article 13 (2) of the Constitution to restrict the circumstances under which lethal force can be used.

## THE RIGHT TO LIFE AND THE PROHIBITION ON TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

The death penalty is the ultimate denial of human rights. It is the premeditated and cold-blooded killing of a human being by the state. This cruel, inhuman and degrading punishment is done in the name of justice. It violates the right to life as proclaimed in the Universal Declaration of Human Rights.

Article 13 of the 1992 Ghanaian Constitution guarantees the right to life, however, the same article allows for the death penalty:

*13.(1) No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted*

Article 3 (3) provides for mandatory death sentence for persons convicted of high treason:

*3. (3) Any person who (a) by himself or in concert with others by any violent or other unlawful means, suspends or overthrows or abrogates this Constitution or any part of it, or attempts to do any such act; or (b) aids and abets in any manner any person referred to in paragraph (a) of this clause; commits the offence of high treason and shall, upon conviction, be sentenced to suffer death.*

An execution is an extreme physical and mental assault on a person already rendered helpless by government authorities. The cruelty of the death penalty is manifest not only in the execution but in the time spent under sentence of death, during which the prisoner is constantly contemplating his or her own death at the hands of the state. Threatening to kill a prisoner can be one of the most fearsome forms of torture. This cruelty cannot be justified, no matter how cruel the crime of which the prisoner has been convicted.

The manner in which a death sentence is imposed or executed and the conditions of detention on death row breach the prohibition on torture and inhuman or degrading treatment or punishment.

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).

Article 6 of the International Covenant on Civil and Political Rights, to which Ghana is a State Party, recognizes the right to life and sets out restrictions to the use of the death penalty for countries that still retain this punishment in their legislation. Paragraph 6 of the same Article states that "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

The African Charter on Human and Peoples' Rights, to which Ghana is a State Party, recognizes in Article 4 the inviolability of human beings and their right to life and to the integrity of the person. Article 5 prohibits all forms of exploitation or degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.

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))

## THE 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 thereby recognizing the obligation that a range of domestic criminal justice matters 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.

Through the years, several UN and regional bodies discussed and adopted instruments to support the call for the worldwide abolition of the death penalty.

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." 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 People's Rights at its 44<sup>th</sup> 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 resolution 2857 (XXVI) of 20 December 1971, cited above, 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 its general comment on Article 6 of the International Covenant on Civil and Political Rights, cited above, the UN Human Rights Committee 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 UN Human Rights Committee (CCPR/CO/79/GNQ, 30 July 2004, para. 4) has expressed concern over the retention of the death penalty in states parties to the International Covenant on Civil and Political Rights and has encouraged states parties to abolish it in law.

The UN Committee against Torture has welcomed the abolition of the death penalty and moves towards abolition in several countries. (CAT/C/CR/29/5, 23 December 2002, para. 4(b); A/56/44, 17 November 2000, para. 35(b).)

The Second Optional Protocol to the International Covenant on Civil and Political Rights, 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)

The UN Human Rights Committee has called on states parties to the International Covenant on Civil and Political Rights to "consider... acceding to the Second Optional Protocol to the Covenant", including states that have not yet abolished the death penalty. (15) The Committee has commended countries for having acceded to the Second Optional Protocol. (CCPR/CO/81/SEMO, 12 August 2004, para. 6)

In resolution 2005/59, adopted on 20 April 2005, the UN Commission on Human Rights stated that "the abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights" and that "the abolition of the death penalty is essential for the protection of [the right to life]".

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.

## **NATIONAL COURT DECISIONS**

On 6 June 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.

## **THE USE OF LETHAL FORCE**

Article 13 of Ghana's Constitution, which guarantees the right to life also provides for much wider grounds for the use of lethal force than is permissible under international standards. Article 13 (2) of the Ghanaian Constitution states:

*13. (2) A person shall not be held to have deprived another person of his life in contravention of clause (1) of this article if that other person dies as the result of a lawful act of war or if that other person dies as the result of the use of force to such an extent as is reasonably justifiable in the particular circumstances.-*

*(a) for the defence of any person from violence or for the defence of property; or*

*(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or*

*(c) for the purposes of suppressing a riot, insurrection or mutiny; or*

*(d) in order to prevent the commission of a crime by that person.*

While the use of force and firearms may sometimes be permissible when making an arrest or preventing a person from escaping, the provisions of Article 13 of Ghana's Constitution are impermissibly broad and do not require the existence of an imminent or grave threat of death or serious injury and have a more lenient standard of necessity than that which is required by international standards.

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials make clear that lethal force should not be used unless certain additional requirements are met, including as a preliminary matter that there exists a grave or imminent threat of death or serious injury. Basic Standard 5 of the

UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states that lethal force should not be used except when strictly unavoidable in order to protect your life or the lives of others.

Principle 9 of the UN Basic Principles on the Use of Force and Firearms states: "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."

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

### **Africa**

**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".

### **Americas and Caribbean**

**Colombia:** Constitution of Colombia (1991)

Article 11 states: "The right to life is inviolable. There will be no death penalty." Article 11 is included under Title II, "Rights, Guarantees and Duties".

**Dominican Republic:** Constitution of the Dominican Republic (promulgated in 1966)

Article 8 (1) refers to "the inviolability of life" and states: "Therefore, neither the death penalty, torture, nor any other punishment or oppressive procedure or penalty that implies loss or diminution of the physical integrity or health of the individual may be established." Article 8 is included under Title II, Section I, "Individual and Social Rights".

**Ecuador:** Constitution of the Republic of Ecuador (1979)

Article 19 (1) refers to "The inviolability of life and personal integrity" and states in part: "There is no 2 death penalty." Article 19 is included under Title II, "Rights, Duties and Guarantees".

**Haiti:** Constitution of the Republic of Haiti (1987)

Article 19 states: "The death penalty is abolished in all cases." Article 19 is included under Title III, "Basic Rights and Duties of the Citizen".

**Honduras:** Constitution of the Republic of Honduras (1982, in force since 1985)

Article 66 states: "The death penalty is abolished." Article 66 is included under Title III, "Declarations, Rights, and Guarantees".

**Nicaragua:** Constitution of Nicaragua (1987)

Article 23 states: "The right to life is inviolable and inherent to the human person. In Nicaragua there is no death penalty." Article 23 is included under Title IV, "Rights, Duties and Guarantees of the Nicaraguan People".

**Panama:** Constitution of the Republic of Panama (1972)

Article 30 states: "There is no death penalty..." Article 30 is included under Title III, "Individual and Social Rights and Duties".

**Uruguay:** Constitution of the Oriental Republic of Uruguay (1970)

Article 26 states in part: "The death penalty will not be applied to anyone." Article 26 is included under Section II, "Rights, Duties and Guarantees".

**Venezuela:** Constitution of the Republic of Venezuela (1961)

Article 58 states: "The right to life is inviolable. No law can establish the death penalty, nor any authority apply it." Article 58 is included under Title III, "Duties, Rights and Guarantees".

## Asia

**Marshall Islands:** Constitution of the Republic of the Marshall Islands (came into effect on 1 May 1979):

"No crime under the law of the Marshall Islands may be punished with death." (Article III)

**Micronesia (Federated States of):** Constitution of the Federated States of Micronesia (came into effect on 10 May 1979):

"Capital punishment is prohibited." (Article IV, Section 9)

## Europe

**Austria:** Federal Constitutional Law of the Republic of Austria, as revised in 1929

Article 85 states: "The death penalty is abolished."

**Germany:** Basic Law of the Federal Republic of Germany (of 23 May 1949)

Article 102 states: "The death penalty is abolished."

**Iceland:** Constitution of the Republic of Iceland (1944)

Article 69, as amended in 1995, reads in part: "Capital punishment may never be stipulated by law."  
Article 69 is included in the section of the Constitution which deals with human rights.

**Italy:** Constitution of the Republic of Italy of 27 December 1947

Article 27 states in part: "The death penalty is not admitted except in cases specified by military laws in time of war." Article 27 is included under Title I, Part One, "Rights and Duties of Private Citizens".

**Monaco:** Constitution of the Principality of Monaco of 17 December 1962

Article 20 states in part: "The death penalty is abolished." Article 20 is included under Title III, "Liberties and Fundamental Rights".

**Netherlands:** Constitution of the Kingdom of the Netherlands (1983)

Article 114 states: "The death penalty may not be imposed."

**Portugal:** Constitution of the Portuguese Republic (1976)

Article 24, "Right to Life", states: "1. Human life is inviolable. 2. In no case will there be the death penalty." Article 24 is included under Part I, "Fundamental Rights and Duties".

**Spain:** Spanish Constitution (1978)

Article 15 states: "All have the right to life and physical and moral integrity and in no case may they be subjected to torture or inhuman or degrading punishment or treatment. The death penalty is abolished except in those cases which may be established by military penal law in times of war."

**Sweden:** Instrument of Government of the Swedish Constitution (came into effect on 1 January 1975).

Chapter 2, Article 4 states: "Capital punishment may not occur." Chapter 2 is entitled "Fundamental Freedoms and Rights".