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ZIMBABWE

Constitutional reform - an opportunity to strengthen human rights protection

"The drafting of a new constitution for Zimbabwe is a unique opportunity to establish human rights at the heart of its political life."

Introduction

1. Amnesty International's role

Amnesty International regularly submits recommendations to governments involved in preparing constitutional and other legal reforms in order to ensure that provision is made for the safeguarding of human rights, in particular those that fall within Amnesty International's mandate. In the past Amnesty International has submitted recommendations to the relevant authorities in countries where major constitutional or legislative revisions are being undertaken. We have sometimes acted at the request of the authorities concerned and at other times on our own initiative. For example, in recent years we have submitted recommendations to the appropriate authorities in Albania, Angola, Benin, Burkina Faso, Colombia, Guinea-Bissau, Hong Kong, Jordan, Laos, Malawi, Namibia, Nepal, Pakistan, Peru, South Africa, the USSR, Venezuela and Vietnam.

Amnesty International bases its work on the principal foundations of international human rights law - the Universal Declaration of Human Rights (1948) and other international standards which have been developed from the provisions contained in the Universal Declaration.

Amnesty International's recommendations to constitutional or legislative drafting bodies reflect the organization's objectives: working for the release of prisoners of conscience, that is, anyone who has been imprisoned, detained, or otherwise physically restricted on account of his or her political, religious or other conscientiously-held beliefs, ethnic origin, sex, colour or language, provided he or she has not used or advocated violence. Amnesty International also works for fair and prompt trials for all political prisoners, including those who may have used or advocated violence. It campaigns against the use of torture or other cruel, inhuman or degrading treatment or punishment in all cases, and is unconditionally opposed to the use of the death penalty. Amnesty International condemns deliberate and arbitrary killings and "disappearances" by anyone, including armed political groups.

Amnesty International's recommendations and comments are limited to the areas of human rights, as defined by the organization's own mandate and international human rights law, as explained above.

2. The background for Zimbabwe's decision to draft a new constitution

Zimbabwe's present constitution is a much amended version of a constitution developed in the Lancaster House negotiations that took place in London in 1979 and was adopted in Zimbabwe in 1980. There has for a long time been a discussion in the country to make a "home grown" constitution.

Many of Zimbabwe's non-governmental organizations (NGOs) at the end of 1998 formed the National Constitutional Assembly (NCA). The NCA lobbied in favour of a major exercise in which there would be education of and then a consultation with the whole people of Zimbabwe, not only an act of parliament. Their lobbying was a major factor in President Robert Mugabe's decision to appoint a Constitutional Commission. This Commission, more than 400-person strong, was appointed on 21 May 1999, with a mandate to deliver a draft new constitution to the President. The Constitutional Commission presented its draft to President Mugabe on 29 November 1999. During the drafting process the Commission held more than 5,000 meetings all over Zimbabwe in August and September, in order to hear the views of all Zimbabweans.

The NCA had ambivalent views on the composition of the Commission and parts of its mandate, including regarding what would happen to the draft once it was given to the President. Most of the NCA members, including many of the main constitutional and human rights lawyers in Zimbabwe, and most of the political opposition did not take up the government's invitations to sit on the Commission.

There was conflict also within the Constitutional Commission. When it adopted its draft in November and handed it to the President, more than 20 of the commissioners left the Commission because they felt the draft did not reflect the conclusions of the meetings with the Zimbabwean people. Their criticism focussed mainly on the sections of the draft relating to presidential powers and other areas that fall outside the Amnesty International mandate.

The aim of this report is to contribute to ensuring that the draft constitution complies with Zimbabwe's obligations under international law in those areas which are of concern to Amnesty International. Therefore, in assessing the draft constitution, Amnesty International has compared the text with the relevant provisions of international and regional human rights treaties to which Zimbabwe is a state party, drawing attention to sections of the text which appear inconsistent with these provisions.

The drafting of the new constitution providing for, among other things, a bill of rights, an institutional framework and guidelines for future governments' decisions, is a unique opportunity to establish human rights at the heart of Zimbabwe's political life. The constitution is a central part of the legal framework to ensure that people enjoy human rights, that human rights violations are prevented or when they have taken place that the perpetrators are brought to justice and punished and victims receive redress and compensation.

Amnesty International does recognize that no law in itself is sufficient to prevent violations of human rights. However, if individuals are aware of their constitutional rights they are more likely to be able to claim and enjoy them. Constitutions are usually the most comprehensive and accessible means by which ordinary individuals can understand:

- what their rights and freedoms are;
- which legal guarantees they have to prevent human rights violations;
- how these rights and freedoms may be limited in order to protect the rights and freedoms of other individuals or groups;
- how and where individuals can seek justice if other individuals or public officials violate their rights and freedoms.

The exercise of public consultation and education that both the NCA and the government-appointed Constitutional Commission have undertaken has been an exercise which, if continued, may help create a more open society, where many of the freedoms referred to below can be practised in a way not previously seen in Zimbabwe. Amnesty International urges the government of Zimbabwe to continue with the public process of discussion about human rights and constitutional reform, to develop an atmosphere of accessibility and accountability to its people, and foster an environment of freedom of speech, association and opinion.

Section 1. Obligations under international law

Considering that the new constitution will be the “supreme law of Zimbabwe” (see Chapter I, Article 7 of the draft constitution), and therefore prevailing over national laws conflicting with it, the Constitutional Commission has a great opportunity to set the legal framework of Zimbabwe in a way which is consistent with international human rights.

A general principle of international law is that a state has to fulfill its international obligations (under a treaty or customary international law) in good faith. A state cannot invoke its domestic laws or constitution to prevent the application of international law. On this matter, it is a general principle of international law that a country may not use domestic law or decisions of national authorities, including the judiciary, in order to evade its commitments under international law.

In this regard it is encouraging that the draft constitution contains general clauses, such as “the foreign policy of Zimbabwe must be based on principles of respect for international law and treaty obligations” (Article 20 b) and “When interpreting this Chapter, a court, tribunal or forum must consider international law, treaties and conventions” (Chapter III Article 35 c). These clauses are not in the constitution currently in force.

However, in defining when provisions of an international convention apply within Zimbabwe, the draft proposal of the Commission and the present constitution have a similar article: “An international treaty which has been concluded or executed by the President or

under the President's authority does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament." (Draft constitution Article 258 part 3 b; similarly in Zimbabwe Constitution's Article 111 B b).

As of January 2000 Zimbabwe has ratified or acceded to the following international human rights conventions:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention)
- Convention on the Rights of the Child (CRC)
- Convention on the Prevention and Punishment of the Crime of Genocide
- International Convention on the Suppression and Punishment of the Crime of Apartheid
- the Geneva Conventions and their two additional Protocols

At regional level, Zimbabwe has ratified :

- The African Charter on Human and Peoples' Rights (African Charter)
- The African Charter on the Rights and Welfare of the Child (ACRWC)

These instruments provide a comprehensive set of rights which are universal and indivisible. It is an international obligation to states parties of these treaties to ensure that these rights are implemented at national level and that individuals within their jurisdiction enjoy these rights without discrimination and undue restrictions.

Zimbabwe is also obliged to adopt legislative measures to give effect to these rights as stated in the ICCPR Article 2, paragraph 2:

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

The United Nations (UN) Human Rights Committee, when making its concluding observations on Zimbabwe's initial report on its compliance with the provisions of the ICCPR, recommended that Zimbabwe

“undertake a comprehensive review of its domestic legislation, including the constitution, with a view to ensuring its full compatibility with the principles and provisions of the Covenant. The State party is urged to ensure that the Covenant rights are not restricted or overridden by incompatible legislation and that individuals are able to challenge in the courts the application of laws which affect their rights under the Covenant. The Committee recommends the establishment of institutional mechanisms to ensure the integration of Covenant rights in law and practice.” (CCPR/C/79/Add.89).

Similar provisions to Article 2 of the ICCPR can be found in the CERD (Article 2(c)), Women's Convention (Article 2(a) and (b)) and CRC (Article 4).

At the regional level, the African Charter states:

The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them (Article 1).

In light of the above clear obligations the draft constitution should provide that in any case of conflict between national law and international treaty obligations, those treaty obligations prevail. Amnesty International recommends that the new constitution contains, in its operative part, an article providing that international human rights treaties to which Zimbabwe is, or becomes, a party should be fully incorporated into national law or that provisions of international human rights treaties and international customary law on human rights are directly applicable and directly enforceable in a court of law.

Section 2. The right to life and abolition of the death penalty.

Zimbabwe has in both its present constitution and in the draft constitution drawn up by the Constitutional Commission a provision protecting the right to life. However, both allow the state to take human lives.

The right to life, guaranteed by Article 3 of the Universal Declaration of Human Rights and Article 6 of the ICCPR, is the most fundamental of all human rights. Amnesty International considers the death penalty to be incompatible with full respect for the right to life, as well as the right not to be subjected to cruel, inhuman or degrading punishment. In the organization's view it is inherently unjust and arbitrary, however heinous the crime for which it is provided and however scrupulous the procedures by which it is enforced. The risk of

error is inescapable, yet the penalty is irrevocable. The overwhelming conclusion from studies on the topic is that there is no reliable evidence that the death penalty achieves a purpose of avoiding other serious harm, for example, by deterring the crimes for which it is available. There is some evidence, albeit inconclusive, that it can actually contribute to such crimes. It may certainly distract societies from seeking more effective means to combat serious crime.

Amnesty International welcomes the strengthening of the right of life in the draft proposal, where the proposed text is more in line with the obligations Zimbabwe has under the ICCPR's Article 6. We also welcome the fact that the death penalty in the draft is no longer compulsory for any crime.

However, Amnesty International believes that one of the most important steps a country can take to secure human rights for everyone under its jurisdiction is to abolish the death penalty by removing the penalty from its laws. Zimbabwe has a great opportunity in this process of reforming the constitution to prohibit the death penalty explicitly in the constitution.

In doing so, Zimbabwe will follow the increasing trend within the international community towards abolition of the death penalty. In Africa alone, the following countries have abolished the death penalty for all crimes: Angola, Cape Verde, Guinea-Bissau, Mauritius, Mozambique, Namibia, Sao Tom and Principe, Seychelles and South Africa. Another important manifestation of this trend is the adoption on 15 December 1989 by the UN General Assembly of the Second Optional Protocol to the ICCPR prohibiting executions and requiring the abolition of the death penalty in peacetime. Since 1997, the UN Commission on Human Rights has called upon all states that have not yet abolished the death penalty to establish a moratorium on executions with a view to completely abolishing the death penalty. Furthermore, in establishing the International Criminal Tribunals for the former Yugoslavia and for Rwanda, the UN Security Council excluded the death penalty from the punishments which these courts are authorized to impose. Similarly, the Rome Statute of the International Criminal Court does not permit the court to impose the death penalty.

Amnesty International recommends that Zimbabwe abolishes the death penalty.

Section 3. The right not to be subjected to torture and cruel, inhuman or degrading treatment or punishment: The necessity for Zimbabwe to ratify the UN Convention against Torture

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” (Universal Declaration of Human Rights, Article 5; also Article 7 of the ICCPR)

This right of freedom from torture and other cruel, inhuman or degrading treatments and punishments is absolute and non-derogable. It applies to all people. It may never be suspended even during times of war, internal political instability, or states of emergency (ICCPR Article 4). The United Nations has elaborated on issues of torture and ill-treatment in a specific convention, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into effect in 1987. Zimbabwe has not ratified this convention.

Although the principles of human dignity, right to physical integrity and prohibition of torture are acknowledged by the constitutions of most countries in the world, the use of torture is widespread. Amnesty International continues to receive reports of the use of torture by the police and army in Zimbabwe. While legislation alone cannot prevent torture it is, nevertheless, essential that the law, including the constitution as the most fundamental law, should contain the strongest possible safeguards against this crime.

We therefore welcome the proposal for a clear provision in Article 41(1) of the draft constitution prohibiting torture and other cruel, inhuman or degrading treatment or punishment. Amnesty International also welcomes in Article 41(2) the clarification that gender-based violence is a form of torture.

However, there is a possibility that the protection afforded by the above provisions may be undermined by weaknesses elsewhere in the draft constitution, namely that the draft fails to expressly exclude evidence elicited as a result of torture or other compulsion in trial (see Section 4 below). Furthermore, Amnesty International believes that the Second Schedule which deals with states of emergency is inconsistent with Zimbabwe’s obligation under international law, as it does not include freedom from torture among the rights which cannot be suspended (see Section 6 “State of emergency powers too extensive”).

Amnesty International is also concerned that the proposed Article 41(3) excludes from the definition of what constitutes cruel, inhuman or degrading treatment "moderate corporal punishment" imposed on children. Please see Section 8, "Secure children’s rights in the constitution" where we comment separately on this concern.

While Amnesty International recognises the strengthening of protections afforded in the draft constitution compared to the present constitution, further steps are needed as indicated to bring paragraph 41 fully into line with Zimbabwe's obligations. Finally we urge Zimbabwe to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Section 4. Right to personal liberty/fair trial

In the draft constitution, provisions affecting the right to a fair trial can be found in Chapter III on individual human rights and freedoms. In particular Article 37 'right to life', Article 38 'right to personal liberty', Article 41 'freedom from torture and inhuman or degrading treatment' and Article 50 'protection of law: fairness in criminal cases'.

While Amnesty International welcomes the improvements contained in the draft constitution with regards to fair trial provisions, there are still some aspects in which the draft constitution does not reflect Zimbabwe's obligations under international law.

Amnesty International's major concerns on the issue of fair trial refer to:

1. Right to choose a lawyer and have a lawyer assigned free of charge

The ICCPR provides that everyone shall be entitled "*to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it*" (Article 14(3)(d)). This guarantee of the right to legal counsel is fundamental to a fair trial. The present draft constitution affords the right to a free counsel only "*if the accused person is liable to be sentenced to death or to life imprisonment*" (Article 50(2)(f)).

Amnesty International believes that this provision excessively narrows the right to have a lawyer assigned free of charge. Given the extent of poverty in Zimbabwe, this provision will have the effect of depriving the majority of individuals suspected of criminal offences of the right to a lawyer. While acknowledging the economic difficulties which the government also faces, Amnesty International recommends that the right to have a lawyer assigned free of charge is not limited to those accused of a crime which carries a sentence of death or life imprisonment.

2. Presumption of innocence - burden of proof

The ICCPR ((Article 14(2)) states "*Everyone charged with a criminal offence shall have the right to be presumed innocent, until proven guilty according to the law*". The presumption of innocence has a number of consequences in criminal proceedings. One of these is to place the burden of proof upon the prosecution, i.e. the prosecution has to prove an accused person's guilt.

The UN Human Rights Committee in its General Comment No 13 interpreted Article 14(2) in the following terms:

“by reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt. Further, the presumption of innocence implies a right to be treated in accordance with this principle. It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial”.

At regional level, the African Charter provides that every individual shall have *“the right to be presumed innocent until proved guilty by a competent court or tribunal”* (Article 7(1)(b)).

The proposed draft constitution in Article 50(8) provides that: “a law may impose on a person charged with an offence the burden of proving particular facts”. Amnesty International believes that this wording may allow Zimbabwe to shift the burden of proof to the accused, therefore violating his/her right to be presumed innocent, and recommends that Article 50(8) of the draft constitution is deleted to ensure an accused is presumed innocent until proved guilty.

3. Right to silence

Persons charged with a criminal offence may not be compelled to testify against themselves or to confess guilt (ICCPR Article 14(3)(g)). The right of an accused to remain silent during police interrogation (pre-trial stage) and at trial is implicit in the right to be presumed innocent and the right not to be compelled to testify or confess guilt.

Article 50 (9) of the draft constitution states:

A law may allow a court to draw whatever inferences are proper from an accused person’s refusal to answer a question, and to treat the refusal, on the basis of those inferences, as evidence corroborating any other evidence given against the accused person.

Amnesty International believes that such provision is in violation of the right to silence and the right not to be compelled to testify or confess guilt, and recommends that Article 50(9) of the draft constitution is deleted to ensure the accused’s right to silence.

4. Exclusion of evidence elicited as a result of torture or other compulsion

The draft constitution provides in Article 50 (4) that:

“in any criminal trial, evidence that has been obtained in a manner that violates any provision of this Chapter must be excluded if the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice or the public interest”.

Amnesty International notes that this provision, when read together with Article 41(1), appears to exclude any evidence elicited as a result of torture, cruel, inhuman or degrading treatment or duress.

Amnesty International believes that whenever there is an allegation that a statement was elicited as a result of torture, cruel, inhuman or degrading treatment or duress, a separate hearing should be held before such evidence is admitted at the trial. At such hearing, evidence should be taken on whether the statement in question was made voluntarily. If it is determined that the statement was not made voluntarily, then it must be excluded from evidence in all proceedings except proceedings brought against those accused of coercing the statement.

Amnesty International suggests that, to avoid ambiguity, the text of this provision should indicate that any evidence elicited as a result of torture, cruel, inhuman or degrading treatment, or duress must be excluded in any criminal trial.

5. Compensation for illegal arrest or detention

ICCPR Article 9(5) states: *Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.* Article 50 (7) of the draft Constitution imposes certain conditions on such right of compensation which limit the right. Firstly, it provides for compensation only *“from the person responsible for the arrest or detention”*, therefore ruling out the responsibility of the state for the unlawful act. Secondly, it excludes liability of *“a judicial officer acting in a judicial capacity reasonably and in good faith”* and *“any other public officer acting reasonably and in good faith and without culpable ignorance or negligence”*. The effect of these conditions is to shift the burden of proof to the victim of the unlawful arrest or detention.

Amnesty International recommends that the draft constitution is made compatible with Article 9(5) of the ICCPR to ensure that victims of unlawful arrests and detentions are afforded effective redress.

6. Right to appeal

Under ICCPR Article 14(5) everyone convicted of a criminal offence has the right to have the conviction and sentence reviewed by a higher tribunal. Under international law, the right to appeal is applicable to everyone convicted of any criminal offence, regardless of the seriousness of the offence. However, the draft constitution subjects such a right to “reasonable restrictions that may be prescribed by law” (Article 50(7)).

Amnesty International recommends amendments to the draft constitution to guarantee the right to appeal unconditionally.

Section 5. Reparation for human rights violations

Under international law, governments are obliged to grant reparations to victims of human rights violations or to their families. This general principle is present in various international human rights treaties and standards. According to Article 14(6) of the ICCPR, victims of miscarriage of justice have the right to compensation from the state. Article 19 of the UN Declaration on the Protection of All Persons from Enforced Disappearance provides:

“The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependents shall also be entitled to compensation.”

The UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions states:

“The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time” (Principle 20).

The draft constitution does not contain any provision referring to the duty of the state to provide such reparation to victims or their families for violations of human rights. Accordingly, Amnesty International recommends that a provision stating the duty of the state to provide reparation for violations of human rights is included before the draft is put to a referendum.

Section 6. State of emergency powers too extensive

Article 63 of the draft constitution provides for limitations of the human rights and freedoms described in Chapter III Part II, in case of public emergency. The power to proclaim the state of emergency lies with the President of Zimbabwe, who may decide, in consultation with the Prime Minister, to declare a state of public emergency. Such declaration ceases to have effect if it is not approved within 7 days from its publication in the Gazette (14 if the Parliament is dissolved) by at least two-thirds of all the Members of Parliament (see Article 102 of the draft constitution).

In the draft the rights and freedoms can be limited by a written law and only to the extent permitted by the Second Schedule. The Second Schedule provides that any limitation must be no greater than is strictly required by the emergency and it must be consistent with Zimbabwe's obligations under international law.

While the African Charter on Human and Peoples' Rights is silent on the question of the limitation of rights during states of emergency, several international human rights treaties allow the state to derogate from (suspend or restrict) certain human rights guarantees in narrowly defined circumstances and only to the extent strictly required by the situation. For instance, Article 4 paragraph 1 of the ICCPR states:

“ In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. ”

The UN Special Rapporteur on the Question of Human Rights and States of Emergency has pointed out that, under international human rights law, states must respect certain principles relating to states of emergency:

- the principle of legality, whereby there should be regulations and mechanisms of control governing such situations;
- the principle of proclamation, whereby a state of emergency must be publicly announced and the authorities must inform the population about the types of measures to be taken, together with their scope, duration and in what parts of the territory they apply;
- the principle of establishing a time limit, whereby the state of emergency must be limited in time and should only remain in force as long as the reasons which led to its declaration continue to exist;
- the principle of need and proportionality, whereby a state of emergency can only be declared when ordinary means of dealing with the situation are insufficient and any

measures adopted during this period must be proportional to the seriousness of the situation;

- the principle of non-discrimination;
- and the principle of non-derogation of human rights, whereby certain human rights cannot be suspended or restricted, even in time of war or emergency (UN Doc. E/CN.4/Sub.2/1997/19).

Amnesty International notes that Articles 63 and 102 of the draft constitution and the Second Schedule do not sufficiently include the principle of legality, in the sense that they fail to clearly indicate the grounds for declaring the state of emergency and the principle of establishing a time limit for the state of emergency.

Amnesty International recommends that the Zimbabwe constitution must have an indication of the criteria for declaring a state of emergency, as well as of the provisional character of any state of emergency.

The second paragraph of Article 4 of the ICCPR lists which rights cannot be derogated from or suspended in any circumstances. Article 7 of the UN Declaration on the Protection of All Persons from Enforced Disappearance provides: “*No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances*”. Furthermore, the Commission on Human Rights in its resolution 1992/35 recommended all states to maintain the right of habeas corpus and similar remedies “*at all times and under all circumstances, including during states of emergency*”.

The Second Schedule of the draft constitution lists those rights that cannot be restricted during the state of emergency:

- (a) *the right to life set out in section thirty-seven;*
- (b) *the rights, set out in section thirty-eight—*
 - (i) *to be treated with humanity and respect for inherent human dignity;*
 - (ii) *to challenge the lawfulness of arrest or detention;*
- (c) *the right not to be subjected to medical or scientific experiments, set out in section thirty-nine;*
- (d) *the right not to be held in slavery or servitude, set out in section forty;*
- (e) *the right to human dignity and reputation set out in section forty-two;*
- (f) *the right, set out in section forty-three, not to be treated in an unfairly discriminatory manner on the ground of race, colour, tribe, place of birth, ethnic or social origin, language, class, culture, sex, gender, marital status, disability or natural difference or condition,*

(g) *the right to a fair trial, set out in section fifty.*

Amnesty International welcomes the improvements of this draft Second Schedule compared to the one currently in force. In particular it favourably notes that the right to fair trial is explicitly included among the rights which cannot be derogated in states of emergency.

However, comparing the Second Schedule of the draft constitution with the above mentioned international provisions, Amnesty International notes that the Schedule does not include among the rights which cannot be derogated:

- the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment as provided in Article 41 of the draft constitution;
- the right of freedom of conscience as provided in Article 44 of the draft constitution;
- the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation as provided in Article 38(2) of the draft constitution;
- the right to recognition everywhere as a person before the law (as provided in Article 16 of the ICCPR);
- the right not to be subjected to enforced disappearance;
- the right to habeas corpus.

Amnesty International recommends the inclusion of proposed Articles 38 (2), 41 and 44 on the list of rights which cannot be suspended in time of emergency, as well as including the right to recognition everywhere as a person before the law (as provided in Article 16 of the ICCPR), the right not to be subjected to enforced disappearance and the right to habeas corpus, in accordance with Zimbabwe's obligations under international law.

Section 7. Women's rights - major improvements

Freedom from discrimination and the necessity for equality between men and women are clearly stated in the Universal Declaration of Human Rights, the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Women's Convention, the Convention on the Rights of the Child, and the African Charter on Human and Peoples' Rights.

The government of Zimbabwe is in particular, by acceding to the Women's Convention, bound to guarantee equality between men and women. Like all countries which have acceded to the Convention, Zimbabwe is being scrutinized by the UN Committee on the Elimination of Discrimination against Women (CEDAW). CEDAW gave their first concluding observations on Zimbabwe's compliance with its obligations in May 1998. They stated that "negative attitudes towards women and discriminatory customary laws and practises continue to contribute to the slow pace in advancing the status of women" in Zimbabwe (paragraph 121 of CEDAW Report A/53/38). The report lists as a principal area of concern "that discriminatory traditional practices, such as lobola, polygamy and female

genital mutilation, are still accepted". CEDAW expresses concern that constitutional provisions are not sufficient and that tradition and customary law ensures continued discrimination (Paragraph 141 of CEDAW Report A/53/38).

Amnesty International recognises major improvements for the rights of women in the proposals made in the draft new constitution, compared with the existing constitution of Zimbabwe. We would like to highlight the following in particular:

The draft includes a new chapter called "Fundamental Principles and National Objectives" (Chapter II). This chapter includes an article on equality that also specifies women's equal rights to land and resources (Article 21). In this chapter there are also provisions for family care and maternity leave "to enable women to enjoy a real opportunity to work" (Article 25) and measures for the prevention of domestic violence (Article 26). Both proposed Articles 25 and 26 represent significant developments for the rights of women.

Amnesty International welcomes in particular the proposed commitment to prevent 'domestic violence'. We expect that this provision together with Article 41 on prohibition of torture, which explicitly includes gender-based violence as a form of torture (see Section 3 above), will bind the government of Zimbabwe to adopting all necessary preventive and protective measures to ensure women's rights. These should include:

- enacting legislation which makes domestic violence in all its manifestations a criminal offence;
- providing women victims of violence with access to the mechanisms of justice and to just and effective remedies for the harm they have suffered;
- undertaking wide-ranging public awareness programs through the media, the education system and public announcements to inform both men and women of women's equal rights;
- providing gender-sensitization training to law enforcement and judicial personnel;
- expanding victim support services provided by the state or non-governmental organizations.

The proposed bill of rights (Chapter III) contains a much stronger anti-discrimination clause than in the present constitution, although the latter includes gender in its Protection from Discrimination clause (Article 23). However Article 23(5) allows for a major exception:

Article 23 (5) Nothing contained in or done under the authority of any law that discriminates between persons on the ground of their gender shall be held to be in contravention of subsection (1)(a) or (b) to the extent that the law in question—

- (a) gives effect to section 7(2) or any other provision of this constitution; or*
- (b) takes due account of physiological differences between persons of different*

*gender; or
(c) makes provision in the interests of defence, public safety or public morality;
except in so far as that law or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*

In contrast the commission's proposal gives strong protection against gender based discrimination and does not contain such an exception. In addition these draft provisions are strengthened by the fact that the application of the proposed Bill of Rights not only applies to the relationship between the state and the individual, but explicitly also to all state organs and between individuals (Article 34).

Amnesty International would also like to welcome the changes in the proposed chapter on citizenship. In the present constitution citizenship follows paternal patterns. Article 5 refers to "his father or, in the case of a child born out of wedlock his mother" as the source of citizenship. Article 7 gives a woman possibilities to obtain Zimbabwean citizenship through marriage to a male Zimbabwean citizen. No such possibility exists for men. Article 7 also defines the term "responsible parent" as the father, unless he is dead or the child is illegitimate.

In the proposed new constitution all the paragraphs under citizenship are gender neutral, and there is no mention of children born out of wedlock.

If the proposed Articles 21, 25, 26, 34, 41 and 43 are adopted, the Government and Parliament must give effect to them by changing all other legislation, including local customary law, when this is incompatible with international law. Amnesty International expects that, once the new constitution is adopted, not only will laws which discriminate between men and women be null and void (in accordance with Article 7 of the draft constitution), but also new protective legislation will be adopted to ensure the effective protection of women's rights and an end to discrimination.

Section 8. Secure children's rights in the constitution

1. Abolish corporal punishment

Amnesty International recognizes the improvements for the rights of children that the draft proposal from the Constitutional Commission represents compared to the present constitution, especially the fact that age is included in the proposed Article 43 on freedom from discrimination. There are however two areas in which the rights of children according to Zimbabwe's international obligations are not reflected.

Firstly corporal punishment of children is “not regarded as cruel, inhuman or degrading” under proposed Article 41 (“Freedom from torture and inhuman or degrading treatment”). Article 41(3), which lists punishments not regarded as cruel, inhuman or degrading, includes corporal punishment imposed on children by parents or other guardians (Article 41 (3)(b)) and by the state in execution of a judgement or order of a court (Article 41(3)(c)). In this respect it is similar to Article 15 in the present constitution. The text of proposed Article 41(3)(c) also conflicts with proposed Article 43 (Freedom from Discrimination), since the reference to corporal punishment is made only to male children.

Amnesty International is concerned that the proposed Article 41(3) contravenes Zimbabwe’s obligations as a party to the ICCPR and the CRC. The international standards on corporal punishment for children are clear:

The UN Human Rights Committee in its general comment 20 on Article 7 of the ICCPR, stated that

"the prohibition [of torture or cruel, inhuman or degrading treatment or punishment] must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure."

Similarly, the UN Commission on Human Rights in resolution 1997/38, adopted on 11 April 1997, stated that "corporal punishment can amount to cruel, inhuman or degrading punishment or even to torture". The statement was repeated in the Commission on Human Rights resolution 1998/38 of 17 April 1998. In resolution 1999/32, adopted on 26 April 1999, the Commission on Human Rights stated that "corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture".

The UN Committee on the Rights of the Child in June 1996 in its concluding observations on Zimbabwe’s report on its compliance with its obligations under the CRC raised corporal punishment as a principal subject of concern: “the Committee expresses its concern at the acceptance in the legislation of the use of corporal punishment in school, as well as within the family. It stresses the incompatibility of corporal punishment, as well as any other form of violence, injury, neglect, abuse or degrading treatment, with the provisions of the Convention, in particular articles 19, 28 paragraph 2 and 37.” (paragraph 18, CRC/C/15Add.55). Furthermore in paragraph 21 they raised concern that the juvenile justice system includes “the recourse to whipping as a disciplinary measure for boys.” They recommended that the government “forbid the use of any form of corporal punishment within the family and in school” (paragraph 31) and incorporate a clear prohibition of whipping as a disciplinary measure in the juvenile justice system (paragraph 33).

Finally the African Charter on the Rights and Welfare of the Child, to which Zimbabwe is also a party, states in Article 16(1) that:

State parties to the present Charter shall take specific legislative, administrative, social and educational measures to protect the child from all form of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment including sexual abuse, while in the care of a parent, legal guardian or school authority or any other person who has the care of the child.

Amnesty International recommends that the possibility of corporal punishment of children is removed by deleting subsections (b) and (c) of Article 41(3), consistent with Zimbabwe's obligations under the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. This amendment would also bring the provisions relating to children and corporal punishment into line with current practice regarding corporal punishment for adults, which ended following a Supreme Court ruling.¹

2. Protect children against recruitment to armed forces

From the spirit of the draft constitution one could read that children should not be recruited to the armed forces, but neither in the chapter on armed forces nor in Article 54 "Rights of children, their parents and guardians" are there any standards relating to recruitment to the armed forces.

The African Charter on the Rights and Welfare of the Child (Article 21 part 2) states very clearly that:

State parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain, in particular, from recruiting any child.

Under Article 2 of this Charter a child is defined as anyone under the age of 18.

Amnesty International recommends that a paragraph should be added to Article 54, protecting children (under the age of 18) from being recruited into the army.

Section 9. Include sexual orientation in the freedom from discrimination clause

¹*Ncube and Other v The State*, Supreme Court of Zimbabwe, (1988) LRC (Const), 14 December 1987.

One of the main purposes of rights enshrined in a constitution can be seen as "*to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect ... the weakest amongst us, that all of us can be secure that our own rights will be protected.*"²

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The UN Human Rights Committee in its concluding observations in August 1998 on Zimbabwe's adherence to the ICCPR "notes with concern that homosexuals are subjected to discrimination" and "recommends that (relevant) legislation be brought into conformity with the Covenant" (CCPR/C/79/Add.89 paragraph 24).

Amnesty International recommends the inclusion in Article 43 of "sexual orientation" as a ground for people not to be treated in an unfair or discriminatory manner.

Section 10. Amnesty International's conclusions and recommendations

In this document Amnesty International has analysed some of the human rights aspects of the current draft constitution as presented by the Constitutional Commission on 29 November 1999 to President Robert Mugabe. Our conclusion is that even if the draft from the Commission represents major improvements compared with the present constitution in the human rights area, there are still incompatibilities between the obligations that Zimbabwe has under international law and the draft. It is these areas which this document has analysed. There are other areas in the Commission's draft which have raised major discussions in Zimbabwe, but as already noted many of these are outside the organization's mandate and we have therefore refrained from commenting on them.

In conclusion Amnesty International recommends that the following points be considered for inclusion in the draft before it is put to the people for a vote:

- that the new constitution contains, in its operative part, an article providing that international human rights treaties to which Zimbabwe is, or becomes, a party should

² A Chaskalson, President, Constitutional Court of South Africa: Judgment in Case No. CCT/3/94 concerning the death penalty, at para 88; delivered on 6 June 1995

be fully incorporated into national law or that provisions of international human rights treaties and international customary law on human rights are directly applicable and directly enforceable in a court of law

- that Zimbabwe abolishes the death penalty
- that the right to have a lawyer assigned free of charge is not limited to those accused of a crime which carries a sentence of death or life imprisonment
- that Article 50(8) of the draft constitution is deleted to ensure an accused is presumed innocent until proved guilty
- that Article 50(9) of the draft constitution is deleted to ensure the accused's right to silence
- that, to avoid ambiguity, the text of Article 50(4) of the draft constitution should indicate that any evidence elicited as a result of torture, cruel, inhuman or degrading treatment, or duress must be excluded in any criminal trial
- that the draft constitution is made compatible with Article 9(5) of the ICCPR to ensure that victims of unlawful arrests and detentions are afforded effective redress
- that amendments are made to the draft constitution to guarantee the unconditional right to appeal
- that a provision is included stating the duty of the state to provide reparation for violations of human rights
- that the constitution must clarify the grounds which must be fulfilled before a state of emergency can be declared, as well as stating the provisional character of any state of emergency
- that Articles 38 (2), 41 and 44 are included in the list of rights which cannot be suspended during states of emergency, and that the right to recognition everywhere as a person before the law (as provided in Article 16 of the ICCPR), the right not to be subjected to enforced disappearance and the right to habeas corpus *are also included as non-derogable rights*
- that the possibilities of corporal punishment of children is removed by deleting subsections (b) and (c) of Article 41(3)
- that a paragraph is added to Article 54, protecting children (under the age of 18) from being recruited into the army
- that "sexual orientation" is included in Article 43 as a ground for people not to be treated in an unfair or discriminatory manner.

In addition to the above points, Amnesty International urges the Zimbabwean Government to ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Amnesty International will be observing with keen interest the implementation of a final constitution and will continue to measure Zimbabwe's human rights record against its national, regional and international obligations.