

UGANDA

@Recommendations for safeguarding human rights in the new Constitution

INTRODUCTION

The government of President Yoweri Museveni has given the Constituent Assembly, elected on 28 March 1994, the task of promulgating a Constitution to replace the 1967 Constitution. The new Constitution will provide the framework for safeguarding human rights in Uganda in the years ahead and it is important that it should include the strongest possible guarantees for the protection of human rights. The draft Constitution now before delegates to the Assembly was presented on 31 December 1992 to President Museveni by the Ugandan Constitutional Commission, a body established by the government in December 1988. The new Constitution is due to be promulgated by early 1995. Chapter 5 of the draft Constitution, also known as the Bill of Rights, contains provisions for the protection of fundamental human rights and freedoms. However, other chapters also contain provisions with important implications for human rights.

The promulgation of a new Constitution provides a unique opportunity to establish human rights at the heart of Uganda's political future. The human rights provisions of post-independence Ugandan Constitutions in 1966 and 1967 were compromised by wide-ranging rights of derogation in a state of emergency, under which the state was permitted to suspend fundamental human rights, and by the willingness of successive governments simply to override the rule of law. Now is the moment to ensure that the new Constitution fully incorporates human rights safeguards which are equal to or greater than existing minimum international standards. National law and practice will then need to be reviewed and amended where necessary in order that neither conflict with the new constitution and minimum international human rights standards. For example, practical action will need to be taken to create mechanisms and procedures which ensure that the armed forces and the prisons, police and security services fully respect international human rights standards. In addition, significant reforms may be needed in the criminal law, criminal procedure and emergency legislation.

As it stands, the Ugandan draft Constitution fails in important respects to meet international human rights standards. It does so, for example, through its retention of the death penalty; through aspects of its provisions for the suspension of human rights in a state of emergency; and through its failure to specify that the behaviour of law enforcement officials - members of the armed forces and the police, prisons, intelligence and security services - will conform to the highest professional standards, including international standards relevant to their work.

The importance of ensuring that the new Constitution meets the requirements of international standards in the safeguarding of human rights is highlighted by the human rights record in Uganda since the National Resistance Movement (NRM) came to power in January 1986. After an initial reduction in human rights violations, levels rose dramatically as the new government sought to combat armed insurgencies in the north and east. Over the years Amnesty International documented these violations and in September 1992 published a report, *Uganda: The failure to safeguard human rights* (AI Index: AFR 59/05/92).¹ The report highlighted the continuing need to establish proper mechanisms and procedures in order adequately to safeguard human rights. It made practical recommendations which, if implemented, would act to prevent human rights violations taking place. There has been a decline in the scale of armed opposition to the government since 1992, leading to a reduction in military counter-insurgency operations and a consequent decline in human rights violations by government forces. But the failure to introduce adequate mechanisms and procedures for safeguarding human rights and for preventing human rights violations remains a central concern of Amnesty International's work in relation to Uganda.

This document details some of Amnesty International's concerns in relation to the provisions for safeguarding human rights in the draft Constitution and makes recommendations for amendment. Amnesty International hopes that this report will be widely discussed in Uganda and that the recommendations it contains are taken into consideration when the delegates to the Constituent Assembly meet to consider and adopt the final text of the Constitution.

HUMAN RIGHTS IN THE DRAFT CONSTITUTION: SOME OF AMNESTY INTERNATIONAL'S CONCERNS

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 Namibia, Angola, South Africa, Benin, Burkina Faso, Albania, Laos, Nepal, Pakistan, the USSR, Vietnam, Guinea-Bissau and Malawi.

Amnesty International's recommendations to constitutional or legislative drafting bodies reflect the organisation's objectives. Amnesty International works for the release of prisoners of conscience, that is, anyone who has been imprisoned, detained, or otherwise

¹ Earlier Amnesty International reports which dealt with similar concerns include, *Uganda: The human rights record 1986-1989* (AI Index: AFR 59/01/89); *Uganda: Death in the Countryside: killings of civilians in 1990* (AI Index: AFR 59/15/90); *Uganda: Human rights violation by the National Resistance Army* (AI Index: AFR 59/20/91)

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 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 bases its work on the principle 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. These include: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, both of which entered into force in 1976; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (henceforth, Convention against Torture), which entered into force in 1987; and the Organisation of African Unity's African Charter on Human and Peoples' Rights (African Charter), which entered into force in October 1986. Uganda is a party to these international standards, with the exception of the ICCPR.

Some of Amnesty International's concerns about the draft Constitution are outlined below:

1. Suspension of fundamental human rights during a state of emergency

Article 129 (8) of the draft Constitution provides a future parliament with the right, by a law, to "provide for the suspension of any fundamental human right or freedom during the period when a state of emergency is in force".

This article is very sweeping. It leaves the fundamental human rights of Ugandans potentially as vulnerable to the discretion of future governments as they have ever been in the past. Uganda is a party to the African Charter, which does not permit derogation of any of the rights specified in that treaty. Although some derogation from certain provisions guaranteeing civil and political rights is not absolutely prohibited by other international standards in times of public emergency, these standards recognise that there are some rights which are so fundamental that they should **never** be derogated from in any circumstances, including a state of emergency. These non-derogable rights, enumerated in Article 4 (2) of the ICCPR, to which Uganda is not yet a party, include:

- the right to life;
- the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;
- the right to freedom of thought, conscience and religion.

The right not to be subjected to cruel, inhuman or degrading treatment or punishment is contained within Article 54 of the draft Constitution. Uganda is a party to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that exceptional circumstances are never a justification for torture.

Amnesty International recommends that the new Constitution contain a provision which affirms that the right to life, the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment and the right to freedom of thought, conscience and religion may never be derogated from in any circumstances.

2. Suspension of *habeas corpus* during a state of emergency

Article 53 (7) permits the right of *habeas corpus* to be suspended in a state of emergency. *Habeas corpus* is an essential safeguard to protect other rights during a state of emergency. Suspension of *habeas corpus* deprives individuals in detention of the protection afforded by judicial control of their detention when they are most in need of that protection. The UN Special Rapporteur on states of emergency and the Human Rights Committee (set up under the ICCPR to monitor implementation of the Covenant) have both declared that the right to *habeas corpus* should not be suspended in a state of emergency. Article 9 of the UN Declaration on Disappearances states that *habeas corpus* should not be suspended under any circumstances, including a state of emergency.

Amnesty International recommends that the new Constitution should prohibit the suspension of *habeas corpus* during a state of emergency.

3. Administrative detention during a state of emergency

Article 71 provides for administrative detention in the event of a state of emergency.

Even international standards which permit the derogation of certain rights during a state of emergency strictly limit such restrictions. For example, Article 4 of the ICCPR states that certain civil and political rights may not be derogated from except to the extent "strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [states'] other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

The Human Rights Committee has stressed in its General Comment on Article 9 of the ICCPR, which details minimum safeguards for those deprived of their liberty, that administrative detention "... must not be arbitrary and must be based on grounds and procedures established by law, information on the reasons must be given and court control of the detention must be available". Article 129 (1) of Uganda's draft constitution defines a state of emergency. Article 71 provides details of the procedures which will be followed for administrative detention and requires that information be given to a detainee within 24 hours specifying the grounds upon which he or she is restricted or detained. But Article 71 fails to limit the grounds on which authorities may detain people during a state of emergency and therefore falls short of the standards required under Article 4 of the ICCPR, which says that the grounds should be limited.

Not only does the draft Constitution permit suspension of *habeas corpus* during a state of emergency, but it fails to provide any other adequate court control of administrative detention in a state of emergency. Amnesty International is concerned in this regard by the role specified for a Human Rights Commission under Article 73 of the draft Constitution. Article 76 provides for the formation of a Human Rights Commission. This is to be done by making permanent the commission established in 1986 by the NRM government to investigate human rights abuses before it came to power and by giving it powers equivalent to that of an Ombudsman in relation to human rights issues in Uganda since 1986.

However, the commission is also charged under Article 73 of the draft Constitution with reviewing the cases of those whose *habeas corpus* has been suspended in a state of emergency no later than 21 days after their detention or restriction. It can only **recommend** either release or continued detention or restriction for a further three months, after which time the case must again be reviewed by the Commission. Although it has the powers of a court in relation to some of its functions, it does not have such powers in relation to its role in reviewing cases of detention or restriction in a state of emergency². Its decisions will be neither binding on the executive nor directly enforceable. This role can only compromise its independence and credibility as Ombudsman, and it fails to provide the prompt judicial review of detention required by Articles 9 (3) and 9 (4) of the ICCPR.

Amnesty International urges that the new Constitution limit its provision for administrative detention in a state of emergency to the extent specified in Article 4 of the ICCPR. Further, it urges that the new Constitution provide for the prompt and periodic review of cases of administrative detention by a court with powers to bind the executive and enforce its judgements, as set out in Article 9 of the ICCPR.

² Article 78 of the draft constitution establishes those functions of a Human Rights Commission in relation to which it has the powers of a court.

Amnesty International also urges that the new constitution fully incorporate additional safeguards for prisoners, in line with those contained in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the UN General Assembly on 9 December 1988.

4. Retention of the death penalty

Article 52 permits the death penalty to continue to be imposed in Uganda. Article 52 (1) states:

No person shall be deprived of life intentionally except in execution of the sentence of a court of law in a fair trial in respect of a criminal offence under the law of Uganda of which he has been convicted.

Article 52 (2) states:

No law shall be made by the Parliament depriving any person of the right to life intentionally except in very grave circumstances acceptable in a just and democratic society.

In May 1993, Amnesty International published a report on Uganda entitled, *The death penalty: a barrier to improving human rights* (AI Index: AFR 59/03/93). The report documented the regular use of the death penalty in Uganda. The death penalty under the Uganda Penal Code covers the offences of: murder, kidnap with intent to murder, armed robbery, treason, armed smuggling, rape, defilement of girls under the age of 18 and unlawful sexual intercourse with a prisoner. In addition, 18 offences carry the death penalty under the military disciplinary code. Despite reforms in 1992, Amnesty International is concerned that soldiers may still be being tried under procedures which fall short of international standards on the right to a fair trial. In the report, Amnesty International called for the abolition of the death penalty on the grounds that it is a denial of the ultimate human right - the right to life. It is also a denial of the right under Article 54 of the draft Ugandan Constitution not to be subjected to cruel, inhuman or degrading treatment or punishment. Uganda is a party to the Convention against Torture. Amnesty International does not believe that the death penalty is an effective deterrent. Further, it believes that official recourse to the death penalty has been, and remains, a barrier to official action to introduce practical safeguards which would actually deter or prevent human rights violations.

The right to life is guaranteed by Article 3 of the Universal Declaration of Human Rights, which applies to all UN member states, and by Article 6 of the ICCPR, to which Uganda is not yet a party. However, the right to life is also guaranteed by Article 4 of the

African Charter, to which Uganda is a party. The tide of opinion in Africa is moving against the death penalty. Seven African countries have now abolished it for all crimes, one has abolished it for ordinary crimes and eight have abolished it de facto by not executing anybody in the past ten years. Two countries, Guinea-Bissau and the Gambia, abolished the death penalty for all crimes in 1993. It is time that Uganda followed suit.

Amnesty International urges that the new Constitution contain a positive affirmation guaranteeing the right to life and declaring that the death penalty will never be allowed.

If the new Constitution does not abolish the death penalty, then, as a first step toward total abolition and to ensure that it is consistent with international standards, it should contain a provision that nothing in the Constitution shall be invoked to delay or prevent the abolition of the death penalty in future. Amnesty International also recommends that the new Constitution should provide the strictest possible procedural and substantive guarantees including those contained in Article 6 of the ICCPR and other international standards, including the UN Economic and Social Council (ECOSOC) Safeguards guaranteeing Protection of the Rights of those Facing the Death Penalty. These include:

- the death penalty may be imposed only for the most serious crimes (Article 6 (2) of the ICCPR);
serious crimes in this instance should be taken to mean intentional crimes with lethal or other extremely grave consequences (ECOSOC Safeguards);
- its imposition must conform to the other provisions of the ICCPR which include guarantees for a fair trial including a right of appeal to a higher court (Articles 6 (2) and 14 of the ICCPR);
- anyone sentenced to death shall have the right to seek pardon or commutation of the sentence (Article 6 (4) of the ICCPR);
- the death penalty may not be imposed on persons under 18 and may not be carried out on pregnant women (Article 6 (5) of the ICCPR).

5. Human rights standards for law enforcement officials

Article 255 states:

It shall be the duty of the Uganda Armed Forces and any of the armed force established in Uganda, the Ugandan Police Force and any other police force, the Uganda Prisons Service, all intelligence organisations and the National Security Council to observe and respect human rights and freedoms in the performance of their functions.

These bodies have each been implicated by Amnesty International in serious human rights violations in Uganda since 1986, despite regular declarations of commitment on their

part to the observance and respect of human rights. Therefore, Amnesty International urges that the duties of these bodies with respect to human rights need to be made more specific in the Constitution as a step towards enabling them to conform to international standards in practice.

To this end, Amnesty International recommends that the new Constitution provide that these bodies should comply with national law at all times, including court orders. They should also comply with international humanitarian law and human rights and criminal justice standards.

These include:

- The four Geneva Conventions of 12 August 1949 and the Protocols Additional to the Geneva Conventions of 12 August 1949;
- The UN Standard Minimum Rules for the Treatment of Prisoners, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of July 1957 and 2076 (LXII) of May 1977;
- The UN Code of Conduct for Law Enforcement Officials adopted by the UN General Assembly in December 1979 - this code defines basic human rights applicable to law enforcement officials;
- The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by consensus on 7 September 1990 by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by the UN General Assembly in its Resolution 45/121 of 14 December 1990. These principles elaborate further Article 3 of the Code of Conduct for Law Enforcement Officials, by making clear that the intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life;
- The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the UN General Assembly on 9 December 1988;
- The UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted by the UN ECOSOC on 24 May 1989 and endorsed by the UN General Assembly by Resolution 44/162 of 15 December 1989;

- The UN General Assembly Declaration on the Protection of All Persons from Enforced Disappearance (Resolution 47/133 of 18 December 1992).

6. Incorporating international human rights standards into national law

Amnesty International recommends that the new Constitution contain an article providing that international human rights treaties to which Uganda is, or becomes, a party should be fully incorporated into national law and directly enforceable in a court of law. The Constitution should also provide that in case of conflict between national law and international treaty obligations, those treaty obligations prevail.

As it stands, the draft Constitution does neither.

7. Other concerns

This report has discussed in detail only some of Amnesty International's concerns about the draft Constitution currently before delegates to the Constituent Assembly. Other concerns to which Amnesty International wishes to draw attention include:

- Chapter Three (Articles 7-39) of the draft Constitution, 'National objectives and directive principles of state policy', whose aim is to guide all levels of Ugandan state and society in the application, interpretation and implementation of the Constitution or any other law, appears in some of its provisions to restrict certain fundamental human rights or is so vague that it is susceptible to abuse;
- The independence of the Human Rights Commission is not adequately protected in Articles 76-83 and its functions require further clarification in order to satisfy international standards for human rights commissions;
- The independence of the judiciary is not adequately protected in Chapter 10;
- Some of the provisions in Chapter Five contain "clawback clauses" which permit limitation of fundamental human rights in non-emergency situations.

CONCLUSION

Amnesty International appeals to those Ugandans who will agree the final text of the new Constitution to address seriously the concerns raised in this report on behalf of the citizens whom they represent. If this commitment is met, the next challenge for Ugandans will be to undertake a comprehensive review of existing national law and practice in order to ensure that neither conflict with the human rights safeguards in the new constitution. When that too has been completed, Uganda's new era for human rights will truly have dawned.