TOWARDS THE ABOLITION OF THE DEATH PENALTY IN UGANDA: (AN ANALYSIS OF THE IMPLICATIONS OF THE SUSAN KUGULA CASE)

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DECLARATION A

This dissertation is my original work and has not been presented for a degree of any other academic award in any University or institution of learning

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Date...5/11/2011.....

DECLARATION B

"I/We confirm that the work reported in this dissertation was carried out by the candidate under my/our supervision"

Name and Sig of Supervisor	Name and Sig of Supervisor
Date	Date

APPROVAL

This dissertation entitled: TOWARDS THE ABOLITION OF THE DEATH PENALTY IN UGANDA: (AN ANALYSIS OF THE IMPLICATIONS OF THE SUSAN KUGULA CASE) prepared and submitted by **Matovu Namutale M.K.J** in partial for the degree of Master of Laws has been examined and approved by the panel on oral examinations with a grade of **PASSED**

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DEDICATION

I dedicate this work to my family

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First, I thank the Almighty God for enabling me to successfully complete this work.

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However all errors and omissions are entirely mine.

God bless you all.

LIST OF ACRONYMS

ICCP	=	International covenant on Civil and political rights
AG	=	Attorney General
LDC	=	Law Development Centre
XAUR	=	Xintian UiGhur
TAR	=	Tibet Autonomous Region
UDHR	=	Universal Declaration of Human Rights
HRA	=	Human Rights Activities
AAPL	=	American Academy of Psychiatry and the Law
ICESCR	=	International Conventions on the elimination of all forms of racial discrimination
U.S.C.C.B	=	United States Conference of Catholic Bishops
UHRC	=	Uganda Human Rights Commission
UPDF	=	Uganda People's Defence Forces
UPDFA	=	Uganda People's Defense Forces Act Cap 307 of the Laws of Uganda
UPF	=	Uganda Police Force
UDC	=	Unit Disciplinary Committee
UN	=	United Nations
UHFRI	=	Uganda Foundation for Human Rights Initiative
UPC	=	Uganda Peoples Congress
UNLA	=	Uganda National Liberation Army
FIDH	=	International Federation for Human Rights
EIDHR	=	European Initiative for Human Rights
LWOP	=	Life without Parole
DPP	=	Director of Public Prosecutions
CAT	=	United Nations Convention Against Torture
CESCR	=	International Covenant on Economic, Social and Cultural Rights

CPC	=	Criminal Procedure Court
CRC	=	United Nations Convention on the Rights of a Child
ECHR	=	European Convention for the Protection of Human Rights and Fundamental Freedoms
NRA	=	National Resistance Army
PCA	=	Penal Code Act
TID	=	Trial on Indictment Degree

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ABSTRACT

The researcher embarked on the research topic: An analysis of the implications of the SUSAN KIGULA CASE; The study investigates two issues related to Uganda perception about the abolition of the death penalty and also discusses the implications and imports of the Kigula Case- a special type of ruling on the subject in Uganda. In the researcher's report there is an introduction of the death penalty and its background in Uganda. The researcher looks at the background in Uganda and the rest of the world in general, had an opportunity to look at the current literature and the different view points i.e. literature of the death penalty generally and in Uganda in particular, and conducted field study, desk study and the findings have been included and summarized in chapter four- Data analysis, Interpretation and Presentation. conclusions have been drawn and it is hoped hoped that another researcher may start from there for further research. Given the world trend, it will not be long for the death penalty to be abolished entirely from the Ugandan statute books. It is the researcher's view that people live and work in a global village – and Uganda is part of this global village. Uganda cannot afford to work in isolation. The modern evolving standards of decency cannot leave Uganda out. The researcher agrees with the world wide trend and majority views concerning the death penalty that it is no longer viable. The sooner the death penalty is abolished, the better. The researcher concluded by stating that the death penalty has outlived its useful purpose

The researcher found that more than 2/3 of the world have abolished the death penalty – in law and practice. Even the 50 countries that have retained the death penalty, have not used it in 2009. It was only 18 countries that (included China) used it in the same year. The researcher reviewed different literature of different authors with diverse views on the death penalty. Some of those reviewed included; The death penalty debate by Hon. Justice Anthony Bahati, Chairman of the Law Reform of Tanzania, Robin M. Maher, "The death penalty and reform in the USA; The people decide by Leah Ambler, John MCdams views on the deterrents among others. Following the research design, the researcher embarked on the analysis of the Susan Kigula case and its implication on the Ugandan laws. The researcher first looked at the legal provisions governing the death penalty in Uganda – both in civil and military courts, and a list of offences that attract the death penalty. The researcher also looked at the international human rights instruments and how they impart on Ugandan court system. The researcher found that most of the people interviewed were in favour of the death

penalty. This was no surprise in a country where mob justice is very common even for the slightest offence.

The death penalty is constitutional in Uganda but the court's judicial notice on the international trend for abolition and the advice to the law makers to consider the abolition of the death penalty is indeed encouraging. The researcher was able to identify a number of elements inconsistent with the international human rights obligation of Uganda in the context of the administration of the death penalty. Great attention has been focused on the abolition of the death penalty the world over. The abolionists have failed to consider the plight of the victims families. The victims have also human rights which were cut short by deliberate criminal behavior. Many writers and researchers are of the view that the death penalty has no deterrent effect. In the researcher's view this is debatable. The researcher concludes that death penalty in Uganda (in light of what has transpired) will soon be abolished. How soon this will depend on how the government and other stakeholders will act; – namely sensitize the public. But until that is done, the hardened attitude of the populace may take long to soften.

CHAPTER ONE
INTRODUCTION

1.1 Background of the study

In this chapter, the researcher gives an overview of the world over of the death penalty, where it is still carried out (the countries), where it has been suspended and how the Kigula case[1] abolished the mandatory death penalty. The death penalty, the researcher will show, is not only peculiar to Uganda but in many parts of the world.

In Yemen, despite the fact that Yemen law prohibits both the imposition and application of the death penalty for juvenile offenders continue to take place because of disputes over the age of offenders. Walid Haykal, sentenced to death for a crime he committed when he was 16, remains on death row. He has exhausted all appeals and his sentence is awaiting ratification by the president.

Mandatory death sentences

In Uganda, important progress was made in 2009 towards outlawing mandatory death sentence; on 21st January 2009 the supreme court of Ugandan upheld the judgment of the Ugandan Constitutional court, which held that mandatory application of the death penalty is unconstitutional although the death penalty itself remains constitutional. The court also decided that the mandatory imposed death sentences received by the vast majority of more than 400 appellants in this case should be commuted to life imprisonment.

The Inter-American court of Human rights ruled in September 2009 in the case of **DaCosta Codogan V Barbados**[2] that the mandatory death sentences imposed in murder cases in Barbados violated the right to life; According to the court, mandatory imposition of the death penalty also fails to limit the application of the death penalty in the most serious crimes. It was also in violation of articles 4(1) and 4(2) of the American Convention on Human Rights. In their judgment, the court also found that the state had violated Mr. Cadogan's right to a fair trial and stated that "the stature shall ensure that all persons accused of crime whose sanction is the mandatory death penalty will

[1] Constitutional Appeal No. 3 of 2006
[2] See above

duly be informed, at the initiation of the criminal proceedings against them, of their right to obtain the psychiatric evaluation carried out by a state employed psychiatrist....."

In Singapore, a stay of execution was granted in December 2009 to allow for a constitutional appeal challenging the mandatory imposition of a death sentence to be considered by the court of Appeal. On 8th December the court of Appeal ruled that Yong Vui Kong's as his had that the earlier withdrawal was due to his poor mental state after 20 months of isolation.

The death penalty has existed for as long as human beings have been on earth. Sometimes it was arbitrarily imposed and carried out in all sorts of manner as for example burning on the stake, crucifixion, beheading, shooting, etc. During World War II, the crimes committed by the Nazis in Germany whereby millions of people were put to death, clearly shocked the world. This was one of the reasons why the UNIVERSAL DECLARATION OF HUMAN RIGHTS was adopted and proclaimed by the United Nations Assembly on 10th December 1948.
It may be noted that the right to life is provided for separately, and the freedom from torture, cruel, inhuman or degrading punishment is also treated separately.

The next instrument is the ICCPR which was adopted and opened for signature, ratification and accession by the General Assembly on 16th December 1996, came into force on 23rd March, 1976.
Article 6(1) thereof states: - Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

It is also significant to note that having so comprehensively provided for the death penalty in Article 6, the convention proceeds to provide separate sections for torture, cruel, inhuman or degrading treatment or punishment.
Thus Article 7 of ICCPR provides that:

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular no one shall be subjected without his free consent to medical or scientific experimentation."

It is noteworthy that the above provisions of the Covenant are in pari material with articles 22(1) and 24 of the Constitution of Uganda. There is no any conflict between Articles 6 and 7 of this Covenant.

The Assembly proceeded to set out international standards to be achieved by all member states.
Article 3 states: "Everyone has the right to life, liberty and security of person."
Article 5 states: "No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment."

Whether Articles 24 and 44 (a) of the constitution of the Republic of Uganda 1995 as amended which prohibits any forms of torture, cruel, inhuman and degrading treatment or punishment were not meant to apply to article 22 (1) of the constitution? Again whether Articles 20, 21, 22, 24, 28 and 44 (a) of the constitution and other various laws of Uganda which provide for a mandatory death sentence are unconstitutional and therefore inconsistent.

The world witnessed further progress towards ending judicial killings by states in 2009. For the first time since Amnesty International started keeping records, no single execution was carried out in the whole of Europe, while important steps were taken to turn the United Nations General Assembly resolutions calling for a world wide moratorium on executions into reality.
Two more countries, Burundi and Togo, abolished the death penalty in 2009, bringing the number of countries that have removed capital punishment entirely from their laws to 95. The world is in reach of 100 countries declaring their refusal to put people to death including Uganda. (Moratorium)

In the Americas the United States of America was the only nation to carry out executions in 2009.
In sub-Saharan Africa only two countries executed prisoners; Botswana and Sudan.
In Asia, there were no executions in Afghanistan, Indonesia, Mongolia and Pakistan in 2009, the first execution - free year in those countries in recent times.

These successes follow decisions made by the UN General Assembly in 2007 and 2008 to call for a global moratorium on executions as a first step to total abolition.

Amnesty International hopes and believes that the UN General Assembly resolutions, the first of their kind; will continue to be a major influence in persuading countries to abandon their use of capital punishment. A similar resolution will be considered at the Third Committee of the UN General Assembly in late 2010.

But even as the world opinion and practice shift inexorably towards abolition, the extensive and politicized use of death penalty continues in countries including China, Iran and Sudan! In 2009, as in previous years, the majority of the world's executions occurred in two regions: Asia and Middle East and North Africa.

The continuing executions of those under 18 years of age continued in two countries: Iran and Saudi Arabia. These executions were in violation of international law.
While in the Arab World death penalty was open, elsewhere it was hidden complicating a follow-up. Secrecy surrounds the use of the death penalty in countries such as China. Belarus, Iran, Mongolia, North Korea, Vietnam and Botswana. Such secrecy is indefensible. If capital punishment is a legitimate act of government as these nations claim, there is no reason for its use to be hidden from the public and international scrutiny.

Eighteen countries carried out executions in 2009. Amnesty International has documented the executions of 714 people, but this total does not include figures from China, where the majority of the world's executions take place, so the real global total is significantly higher. In 2009, China again refused to divulge exact figures of its use of death penalty, although evidence from previous years and a number of current sources indicates that the figure remains in the thousands.

Methods of execution in 2009 included hanging, beheading, stoning, electrocution and lethal injection.

The figures used are the largest that can safely be drawn from research although it should be emphasized that the true figures are significantly higher. Some states intentionally conceal death

penalty proceedings, others do not keep or make available statistics on the numbers of death sentences (at least more than one) in that country but is was not possible to calculate a figure[3].
A list of abolitionist and retentionist countries as of 31st December 2009 an be found in Annex I, Annex II reports of ratifications of international treaties providing for the abolition of the death penalty as of 31st December 2009[4]. Article 22 of the Constitution of Uganda (1995) Uganda is a party to the CCPR and the first optional protocol but not a party to the 2nd optional protocol abolishing the death penalty.

In Susan Kigula Vs the AG

The respondents/ Cross Appellants, (the respondents) filed their petition in the Constitutional court under Article 237(3) of the Constitution challenging the Constitutionality of the death penalty under the constitution of Uganda. The respondents were convicted of diverse capital offences and had been sentenced to death as provided for under the laws of Uganda. They contended that the imposition of death sentence was inconsistent with Articles 24 and 44 of the Constitution. Further they argued that the various provisions of the laws of Uganda which provide for a mandatory death sentence are unconstitutional because they are inconsistent with Articles 20, 21, 22, 24, 28 and 44(a) of the Constitution. They contended further that the provisions contravene the constitution because they deny a convicted person the right to appeal against death sentence, thereby denying them the right of equality before the law and the right to a fair hearing as provided for in the constitution.

Second, that the long delay between the pronouncement by court of the death sentence and the actual execution, allows for the death row syndrome to set in. as such carrying out of the death sentence after such a long delay constitutes cruel, inhuman and degrading treatment contrary to Articles 24 and 44 (a) of the constitution.

Third, that section 99(1) of the Trial on Indictments Act which provides for hanging as the legal mode of carrying out the death sentence is cruel, inhuman and degrading contrary to Articles 24 and 44 of the constitution.
Accordingly they sought various reliefs, orders and declarations.

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[4] Death sentences and executions 2009, by Amnesty International Report No. 3 of 2010

The Attorney General (the Appellant) opposed the petition in its entirety, contending that the death penalty was provided for in the constitution of Uganda and its imposition, whether as a mandatory sentence or as a maximum sentence was constitutional.

Where a death sentence has been passed lawfully, can there be a supervening event which can render the carrying out of such death sentence on the condemned prisoners to constitute inhuman and degrading treatment contrary to Article 24 of the constitution?

The death penalty in Uganda is flawed as in the USA where it has been reported that since the 1970s more than 120 who were on the death row have been exonerated[5]. For example, the researcher was involved in a case as a defence counsel in 1996. There were four defendants on a capital offence. The trial judge was so biased that he deliberately omitted to record during the trial any matter that was favourable to the defendants and she ended up convicting them and then sentenced them to death!

The constitutional court sat as a panel of 5 justices of Appeal. The petition was brought under article 137 (3) of the constitution of the republic of Uganda challenging the constitutional validity of the death sentence. The 417 petitioners were, at the time of filling the petition, on the death row, having been convicted of various offences under the laws of Uganda and were sentenced to death, the sentences provided for under the laws of Uganda.

The argument of the petitioners was that the imposition of the death sentence on them was unconstitutional because it is inconsistent with articles 24 and 44 of the constitution which prohibit cruel, inhuman or degrading punishment or treatment. Indeed according to the petitioners the various provisions of the laws of Uganda which provide for mandatory death sentence are inconsistent with articles 20, 21, 22, 24, 28 and 44 since the constitution guarantees protection of rights and freedoms such as equal treatment , rights to fair hearing but provisions for mandatory death sentence contravene those provisions.

The petitioners argued also that a long delay between pronouncement of the death sentence and the carrying out of the sentence, allows for a death row syndrome to set in.

[5] Death penalty information centre 2005, the preamble of the constitution of the movement, a culture of life and the death penalty

The petitioners in the third alternative contended that section 99(1) of the Trial on indictments Act (Cap 23laws of Uganda) which provides for hanging as a legal mode of carrying out death sentences was cruel, inhuman and degrading as it contravenes articles 24 and 44 of the constitution.

The petitioners asked for three reliefs;

i) That the death sentences imposed on them be set aside,
ii) That the cases be remitted to the High court which would determine appropriate sentences under article 137 (4) of the constitution
iii) Any other relief the court feels appropriate.

What was of interest to the court and all stakeholders was whether the petitioners were entitled to the remedies they had prayed for.

The Supreme Court held, inter alia, "that all those laws on the statute book which provide for a mandatory death sentence are inconsistent with the constitution and therefore are void to the extent of that inconsistency[6].

The researcher's interest herein is to find any new import (if any) in the Ugandan constitutional law brought about by the Susan Kigula case decision.

The death penalty appears to be often applied unfairly and influenced by where a crime is committed...the quality and costs of the legal defense and other social factors.

The right to life and the prohibition of cruel, inhuman or degrading punishments are set out in the Universal Declaration of Human Rights, the UN international covenant on civil and political rights, The African charter on Human and people's rights, the American convention on the Human Rights, the European convention on Human Rights and other important human rights treaties. These rights are also granted by many National constitutions and other laws.

The sanction of death, when it is not necessary to protect society, violates respect for human life and dignity[7].

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[6] Constitutional appeal No. 3 of 2006

[7] Jeffrey Fagan, " deterrence and death penalty: the critical review of new evidence (testimony to the New York state assembly standing committee on codes, judiciary and corrections, hearings on the future of capital punishment in the state of New York January 21st 2005.

In the Kigula's case makes a new import in the law concerning the death penalty has been introduced. It is now very inconsistent with some section of the law and if it is then how do you use such a law to convict an accused and sentence him to death? With the Kigula case, a new rethinking of the death penalty is needed.

There is a serious re-examination of the death penalty – its fairness and effectiveness, its social and moral dimension, while the above is the true with the right – minded people; the reverse could be true with the populaces who have decided to use mob- justice to kill suspects however minor the offense could seem. Do such people oppose the death penalty what ever the arguments?

Worldwide view to the death penalty

Amnesty International has been campaigning for the total abolition to the death penalty since 1997[8]. The organization believes that the death penalty violates the right to life and is the ultimate cruel, inhuman and degrading punishment[9]. It 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.

Amnesty International believes that the death penalty legitimizes an irreversible act of violence by the state. Research demonstrates that the death penalty is often applied in a discriminatory manner, being used disproportionately against the poor, minorities and members of racial, ethnic and religious communities. The death penalty is often imposed after a grossly unfair trials aand poses the risk of executing the innocent. Death penalty will inevitably claim innocent victims, as has been persistently demonstrated.

While the death penalty runs the risk of irrevocable error, it has been proven to have no special deterrent effect. It denies the possibility of rehabilitation. It promotes simplistic responses to complex human problems, rather than pursuing constructive solutions. It consumes resources that

[8] Death penalty information center 2005, The preamble of the constitution of the movement, a culture of life and the death penalty

[9] Htt://www.amnesty.org/en/death penalty assessed in July 2010

could be better used to work against violent crime and assist those affected by it. It is a symptom of culture of violence, not a solution to it. It is an affront to human dignity[10].

Amnesty international is global movement of 2.8 million supporters, members and activities in more than 150 countries who campaign to end grave abuses of human rights. In 2009 its sections, structures and activists from around the world mobilized simultaneously in global days of action to protest against the application of the death penalty[11].

On 6 May 2009, for instance, Amnesty International members took part in paying tribute to Delara Derabi[12], 22 year old Iranian woman who had been convicted after unfair judicial proceedings during which she consistently protested her innocence, was hanged for murder which took place when she was 17. Her execution was carried out despite a two – month stay ordered by the Head of the Judiciary, and sparked international outrage!

On 19th May 2009 activists from Amnesty International joined the US abolitionist movement on the organization of approximately 155 events calling attention to the injustice of Troy Davis. Troy Davis has been on death row in Georgia for 18years for murder of a police officer he maintains he did not murder. He has faced three execution dates in the past two years as the state of Georgia has continued to seek to kill him despite the fact that most of the witness it relied upon to convict Troy Davis in August 1991 have since recanted their testimony. On 17th August 2009, the US Supreme court issued an order mandating a new evidentiary hearing for Troy Davis. With its ruling, the nation's highest court decided that Davis should have another chance o prove his innocence before the state of Georgia puts him to death.

The abolitionist movement renews its commitment to the abolition of the penalty each year on 10th October, Amnesty International, as a founding member of the world coalition against death penalty, took part of initiative dedicated to the importance of educating and reaching people in all countries of the world, urging them to take a stand against the death penalty.

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[10] See 8 above
[11] See 8 above
[12] See 8 above

Throughout the year, Amnesty International continued campaigning towards ending the application of capital punishment world wide and towards ending the application of capital punishment worldwide and towards ensuring that the internationals standards and laws that limit its use are respected. The campaign will continue until this most cruel, inhumane degrading punishment is done away with[13].

1.2 The Global Picture

More than two thirds of the countries of the world have abolished the death penalty in law or and in practice. While 58 countries retained the death penalty in 2009, most did not use it. Eighteen countries were known to have carried out executions that were likely to have taken place in China, which again refused to divulge figures on its use of the death penalty[14].

In 2009, the following countries executed the number of convicts indicated against them. Bangladesh (3), Botswana (1), China (+), Egypt(at least 5), Iran (at least 388), Iraq (at least 120), Japan (7), Libya (at least 4), Malasysia (+), North Korea (+), Saudi Arabia (at least 69), Singapore (1), Sudan (at least 9), Syria (at east 8), Thailand (2), USA (52), Vietnam (at least 9), Yemen (at least 30)[15].

Methods of executions used is 2009 includes handing (Balnglasdesh, Botswana, Egypt, Iran, Japan, north Korea, Malaysia, Singapore, Sudan, Syria, shooting (China, Liberia, Syria, Vietnam, Yemen), beheading (Saudi Arabia), Stoning (Iran), electrocution (USA) and Lethal injection (China, Thailand and USA)[16].

The Middle East and North Africa region had the highest per capita rate of executions in the world; Iraq reported the highest execution rate, followed by Iran, Saudi Arabia and Yemen.

There were no reported executions in Afghanistan, Bahrain, Belarus, Indonesia, Mongolia, Pakistan, St Kitts and Nevis and United Arab Emirates in 2009, although all of these countries had carried out

[13] Act 50/001/2010 Amnesty international, March 2010
[14] The death sentences and executions by Amnesty international Act 50/001/2010
[15] See above
[16] See 12 above

executions in 2008. On the other hand Thailand carried out its first two executions since 2003 in August 2009[17].

At least 2001 people were sentenced to death in 56 countries in 2009,the true number is much higher: Afghanistan (at least 133), Algeria (at least100), Bahamas (at least 2), Bangladesh(at least 64), Belarus (2), Benin (at least 2), Botswana (2), Burkina Faso (at least 6), Chad (+), China (+), Gambia (at least 1), Ghana (at least 7),Democratic Republic of Congo (+), Egypt (at least 269), Ethiopia (at least 11), Guyana (3), India (at least 50), Indonesia (1), Iran (+), Iraq (at least 366), Jamaica (2), Japan (34), Jordan (at least 12), Kenya (+), Kuwait (at least 3), Liberia (3), Libya (+), Malaysia (at least 68), Mali (at least 10), Myanmar (at least 2), Mauritania (at least 1), Morocco/ Western Sahara (at least 13), Nigeria (at least 58), North Korea (+), Pakistan (256), Palestinian Authority (17), Qatar (at least 3), Saudi Arabia (at least 11), Sierra Leone (at least 7), Singapore (at least 6), Somalia (12, of which in Puntland and six within the jurisdiction of the Transitional Federal Government), South Korea (at least 5), Sri Lanka (108), Sudan (at least 60), Syria (at least 7), Taiwan (7), Tanzania (+), Thailand (+), Trinidad and Tobago(at least 11), Tunisia (at least 2), Uganda (+), United Arab Emirates (at least 3), USA (at least 105), Vietnam (at least 59), Yemen (at least 53), Zimbabwe (at least 7)[18].
Despite the seemingly fewer executions those on the death sentence were many.

Juvenile offenders are on death row in several other countries around the world. In June 2009 the special Rapportuer on the solution of human rights in the Sudan stated in her report to the 11th session of the Human Rights Council that two of the defendants arrested in connection with an attack on Khartoum were under 18 years of age when the attack took place. The report also expressed concerns that other children remain detained with adults, and that four were reported to be 17 years old were on trial for alleged participation in the attack[19].

In its January report to security council, the secretary General of the United States argued: "A child rights Act was passed by the National Assembly to provide a legal framework for the protection of the rights of the children.....in the North, at least eight child suspects who were tried in connection

[17] See above
[18] See 13 above
[19] See above

with Omdurman attack remain on death row, despite government assurances to the special representative for children and Armed conflict that no child would be executed in Sudan." Amnesty International received information that two Juvenile offenders were pardoned in 2009.
Juvenile offenders remained under sentence of death in Nigeria and Uganda at the end of 2009. In October 2009 at least one child soldier was sentenced to death in Myanmar for the murder of another child soldier.

1.2 Statement of the problem

Although the death penalty is sanctioned by the Uganda constitution there are statistics to indicate that convicts facing death row have not been executed or when there are executed if ever at all, it is after along wait. There are several convicts awaiting execution Suzan Kigula's case is ground breaking and zeros on weather death penalty should be abolished.

The survey is aimed at finding out the opinions of various people in Kampala/ Uganda concerning the constitutionality of the death penalty in Uganda. And whether it should be abolished or retained. What was the new import of the S. Kigula case In the Ugandan laws concerning the death penalty? The Kigula case did not abolish the death penalty but mandatory death sentence. Did this case bring any impact in the laws of Uganda? If so what are the implications and imports?
Many different people have written about the death penalty the world over. Many books, journals (and on the internet as well) have been published. Uganda has not been left behind. Professor E.Tibatemwa and Professor Mushanga and many Uganda writers are also on the band wagon. Many of them have written for and against the death penalty. Some writers were of the view that the death penalty could not be challenged in the courts of law as it was legal and constitutional. During the constitutional law making process in Uganda, a great number of Ugandans were in favour of the death penalty.
After some picketing and out of the blue, the inmates on death row in Luzira prison led by Susan Kigula and 416 others petitioned the constitutional court challenging the legality of their death sentences. The case ended up in the supreme court of Uganda. The supreme court pronounced itself on the legality of the death penalty in Uganda. The researcher decided to analyze the implications and imports of the case on the Uganda legal system and also looked at the Uganda's perception on the death penalty.

This decision was an emerging new trend which in the researcher's view begs an analysis of the legality of the punishment vis a vis the perception of the death penalty by Ugandans.
The Assembly set out International Standards to be achieved by all member states e.g the right to life "Everyone has the right to life, liberty and security of person and no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment." Proclaimed the declaration

It may be noted that the right to life is provided for separately, and the freedom from torture, cruel, inhuman or degrading punishment is also treated separately. It cannot be argued therefore that by these provisions, the Universal Declaration of Human Rights has thereby abolished the death penalty in the world. Indeed this could not have been so, for even as the declaration was being proclaimed, death sentences passed by International Tribunals were being carried out against war criminals in Germany and Japan. This is not binding though it has become customary law.

The next instrument is the International Covenant on civil and Political Rights which was adopted and opened for signature, ratification and accession by the General Assembly on 16th December 1996, and came into force on the 23rd March, 1976.
Article 6(1) thereof states: - Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

It is also significant to note that having so comprehensively provided for the death penalty in Article 6, the convention proceeds to provide separate sections for torture, cruel, inhuman or degrading treatment or punishment.

The researcher is interested to find out (or research) what are the new implications / imports the Kigula case brought into the laws of Uganda. How did the decision in this case impact on our current laws concerning the death penalty? What does this decision mean in our current law? An re-examination and analysis of these is indeed needed.

1.3. Significance of the study

The reason for carrying out this research is to enhance and contribute to knowledge and possibly, help the politicians or policy makers in the process of making relevant laws concerning the death

penalty or to retain or not retaining it. The Universal Declaration of Human Rights, 1948 is against the death penalty and the Uganda constitution supports it. Can a common ground be found? Is the death penalty really cruel as is alleged by Human Rights Activists? (URA) Does case law outside Uganda have any relevancy? The Kigula case brought in new imports within our laws and it is obvious that the mandatory death penalty is no longer legal in Uganda. What is the way forward? Do we leave it at that? What should the law makers do in light of this judgment? This and other questions are the major reasons puzzling the researcher and the researcher intends to address them critically.

The researcher's work will be different from other researchers' work in that the researcher hereinto will be looking particularly on the new imports of the Kigula case and what does it (the decision in this case) mean to the Ugandan criminal justice systems and what will be the way forward after the Kigula case. The students of laws human rights and other stakeholders are to benefit.
What did the decision in Susan Kigula mean as regards human rights?

Conclusion

In the next chapter II, the researcher will review some of the relevant literature and will look critically at some of the views expressed by those researchers therein.

CHAPTER TWO
LITERATURE REVIEW

In this chapter, the researcher is going to review the literature pertaining to the death penalty generally. Most of this literature is in the forms of articles written by different scholars, judges and many stakeholders in the legal field and those concerned with the administration of justice both at home and abroad.

2.1 The death penalty debate by Hon Justice Anthony Bahati argues[20];Crimes as well as the mode of punishment correlate the culture and form of civilization from which they emerge[21].
The Hon. Justice extensively quotes from the Holy Bible where capital punishment is mentioned.
For example capital punishment in the Holy Bible is mentioned many times. In the book of Leviticus 24: 17-21, it is said, "He who kills a man shall be put to death." An eye for an eye" principle applies here. Genesis 9:6 states, "Whoever sheds the blood of man, by man shall his blood be shed." Exodus 21-12-14 states: "whoever strikes a man so that he dies shall be put to death. But if he did not lie in wait for him, but God let him fall into his hand, and then I will appoint for you a place to which he may flee. But if a man willfully attacks another to kill him treacherously, you shall take him from my altar that he may die." Numbers 35:30-31 reads: "if anyone kills a person, the murderer shall be put to death on the evidence of witnesses; but no person shall be put to death on the testimony of one witness. Moreover you will accept no ransom for the life of a murderer, who is guilty of murder, but he shall be put to death." Mathew 26:52: "then Jesus said to him, put your sword back into its place; for all who take the sword will perish by the sword. Finally in Revelation 13:10 it is provided, "if anyone is to be taken captive, to captivity he goes; if anyone slays with sword, with the sword must he be slain." The Holy bible does only differentiate between murder and manslaughter but lays out the procedure to establish guilt in murder based on witnesses. Interestingly, support for the death penalty is in law enforcers and opposition rests with the philosophers and clergy.

[20] Justice Bahati, the Chairman of the Law reform commission of Tanzania

[21] The Consultation paper on the mode of the executive power of death penalty sentence and incidental matters: Law commission of India

That Christ had told us to love our neighbours and that murders cannot be condoned. Moreover, Moses ordered "eye for an eye". They go even further and quote St. Paul in Romans 13:1-5 where St. Paul refers to the law enforcement personnel as "ministers of God" who bear not the sword in vain. It is of interest to note that the major support for more use of this form of punishment has always come from lawyers, police, judges, advocates and all those involved with law and order in society. Objection to the use of death penalty has always come from philosophers, humanitarian groups, clergymen, and social scientists especially sociologists, psychologists, psychiatrists, and criminologists. This reasoning is supported by case law from Africa.

The writer extensively considered two cases in his paper, namely *Mbushuu's case from Tanzania*[22] *and Makwanyane's case from the Republic of South Africa*[23] *and concluded rightly that the two cases do not differ much in reasoning*

In the researcher's view, the writer quoted from the Bible as to give the impression that the death penalty should be acceptable as the Holy Bible supports it. This is misleading because, currently the most vocal group opposing the death penalty are followers of the Bible[24].

Admittedly, crimes as well as the mode of punishments correlate to the culture as the writer states but he deliberately ignored the fact that the world has changed a lot in the modern civilized world. This assertion is or was weakened by the case of *Tyer V United Kingdom*[25] where it was held inter-alia, by the European court of Human Rights that human rights concepts have to be interpreted in the light of present day conditions and that whole punishments including the death penalty be cruel but is the degree of cruelty that matters.

2.2 Robin M. Maher in his article: The death penalty and reform in the USA[26].

Not long after the first recorded execution, the first voices of opposition in America were raised in 1700s. But the majority of its USA citizens defended and supported the continued use of death penalty.

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[22] 1994TLR 146

[23] Case no CCT/B/94

[24] Culture of Life and penalty of death, US conference of Catholic Bishops, Washington DC, USCCB, 2005

[25] 2 EHRRI

[26] Robin M Maher is director of American Bar Association, death penalty representation project in Washington D; maherr@staff.gibanet.org

There is evidence that some attitudes are changing about the death penalty. The debate has shifted from whether capital punishment is appropriate in a modern civilized society to questions about the fairness of the trials and the reliability of the results. The USA Supreme Court is sharply divided[27].

The main bone of contention among the stakeholders are the most vulnerable members of society e.g. children and the mentally retarded are among others continually viewed as undeserving of death sentences. The release of more than over one hundred wrongfully convicted persons from death row in recent years has left even the most evident supporters of capital punishment wondering whether those who are executed are the guilty or innocent ones[28].

The writer gives a historical background of the death penalty in the USA and states that the modern death penalty era began in 1976 when the USA Supreme Court approved new state statutes and reinstated use of the death penalty after a four- year hiatus. New measures and safe guards were introduced intended to accomplish the, "twin objectives" of making imposition of the death penalty consistent and principal and as well as humane and sensible to the uniqueness of the individual.

2.3 A new procedure.

Science gave critics of the death penalty renewed impetus after DNA offered the first tangible proof that the death penalty system was seriously flawed. It (DNA) exposed many wrongful convictions. For example (in a July 2001 speech at the meeting of Minesota women lawyers in Minnesapolis USA Supreme Court Justice Sandra Day O'Connor said that in capital cases with defendants too poor to hire their own lawyers the work of government appointed counsel, "has been too often inadequate" perhaps it is time to look at minimum standards for those appointed in death cases and adequate compensation for appointed counsels when they are used[29].

Each death penalty jurisdiction (e.g. Australia, USA, Europe, Asia, e.t.c.) determines which crimes are eligible for the death penalty and the criteria that will be used to qualify that crime for the death

[27] See main report
[28] See main one
[29] Ken Armstrong, Steve Mills, Tribune Staff recorders and AP writer, Brian Bakst, O'Conner questions, fairness of the death penalty, justice: rethinking laws she shaped. Chicago tribune, July 4 2001 at 1

penalty[30]. There is no automatic death sentence for any crime. The crime must have some aggravating features e.g. heinous or atrocious nature or cruelty. The trials of these capital offenses are lengthy and complicated first when the juries in these trials are asked specific questions. For instance questions concerning their views on the death penalty inter alia. Only Jurors who are considered, 'death qualified', and because they support the death penalty are retained. This is unfair, in the researcher's view to the defendant, because normally, he ends up being convicted and sentenced to death. What should be done is to take on those who are eligible for jury service and who had passed judgment basing on the evidence adduced. But to take on someone to sit on the jury after finding out that the juror support the death penalty seems biases and intended to get a biased verdict.

Family members of victims are sometimes permitted to testify about their loss or their preference for a life or death sentence and the jury deliberates and decides the appropriate sentence. In the researcher's opinion, allowing family members of the victim to testify about their loss etc, their evidence (in support for the death penalty) is unfair to the accused. Their preference can be guessed correctly.

Most capital murder convictions have only two possible sentences – death or life imprisonment without parole. A few jurisdictions offer life without parole as a sentence options.

When all appeals are exhausted the defendant may ask for clemency and fresh testimony from the family of the victim etc, as to why the convict should be put to death or sentence commuted to life. This procedure in the researcher's view is a waste of time as not much is likely to change. Instead, it should be done as in Uganda where the file(s) of the defendant, his good acts are compiled for the authority to decide though not much comes out in most cases[31].

Though the writer argues; that deterrence is the main reason for justification of the support of the death penalty, but this is no longer the leading reasons not only in America but the world over. For example AlGore and George Bush both cited deterrence as their primary reason for support of the

[30] In a speech in 2001 US supreme court justice Ruth Bader Ginsburg said, "I have yet to see a death case among the dozens coming to the supreme court on the eve of execution stay applications in which the defendant was represented at the trial. People who are well represented at trial do not get death penalty" Associated Press, Oklahoma Governor commutes death sentence, Texas Bill boosts defense for poor, Chicago tribune April 11, 2001 at 8

[31] Uganda Clemency Act

death penalty during the 2002 campaigns, but the primary reason cited by the Americans was retribution or "an eye for eye". There are some hidden reasons why states (in America) in the researcher's opinion keep and support the death penalty. For example, the fairness and death sentencing Act (also known as the Racial Justice Act) was proposed in the USA congress in 1998. It has been reintroduced several times since then but it has never been passed. It may never find itself on the statute books. Several states bills that acknowledged and attempted to eliminate racial disparities were also introduced but not a single one has ever been passed. This explains why those legislatures which are predominantly are reluctant to correct that racial discrimination within their law[32].

2.4 The people decide: by Leah Ambler[33]

The effect of the introduction of the Quasi – Jury system (Saiban –inSeido) on the death penalty in Japan.

Japan still has a capital punishment for various offenses. Japan passed Lay Assessor Act of May 2009. Under this Act randomly selected members of the Japanese public will preside over, criminal trials alongside professional judges and be responsible for determining both verdicts and sentences.

The authors are the view that this new system in Japan is likely to have a bigger impact on the capital punishment in Japan and that it is likely to reduce capital punishment to the point of effectively abolishing it at trial point stage in the district court. According to the death penalty defacto or dejure, is the most desirable outcome of the introduction of Lay participation in Japan.

The lay assessor Act expressly excludes the abolition of the death penalty as a reason for reform,, each party in the new Saiban-in-seido since then has appeared directly or indirectly to contemplate the prospect of defacto abolition of the death penalty.

May be it may happen, for example, the author gives three types of scenarios for defacto abolition:

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[32] A national study by Professor James Liebman found that the overall rate of prejudicial errors in capital cases was 68% i.e. courts found out that reversible errors in nearly 7 out of 10 capital cases that were fully reviewed during the study period. A broken system: error rates in capital cases: 1970-1995 assesed on http://ww2.law Columbia ed/institutional services/Liebman

[33] Lay Assessors Act (Saiban-in-seido) of Japan, 2009

The first scenario may happen where prosecutors seek the death penalty and it is out voted in accordance with the simple majority formula. The second scenario is when prosecutors seek the death penalty and it is out voted upon applying the complex sentence reduction formula; despite some members of the mixed penal voting for it. Thirdly, the prosecutors may not seek the death penalty in some cases due to the unpredictability of success and instead seek a lesser penalty for which they have greater chances of success.

As in Uganda, the Japanese grounds its national policies in the will of its people. The Lay assessor's Act placed Japan's system of capital punishment squarely within the public domain and provide the Japanese pubic with the tools to initiate a change towards dejure abolition. The Japanese people now can make decisions on capital sentencing which may play an essential role in the abolition at grass-roots level. Any future law that may be made by the Japanese legislature affecting the death penalty will definitely reflect the decisions that the principles (prosecutors, judges, defendants, lawyers) make as participants in the Saiban-in-Seido.

2.5 John Mcdams views on deterrence

John Mcdams, of the Department of political science of the Marquette University on deterrence of the death penalty wrote; "if we execute murders and there is in fact no deterrent effect, we have killed a bunch of murderers. If we fail to execute the murderers, and doing so would in fact have deterred other murderers, we have allowed the killing of a bunch of innocent victims. I would much rather risk the former. This to me is not a tough call".

In his article, he would not hear any talk about abolition of the death penalty. To him those who advocate for abolition ignore the fact that those who are murdered also have loved ones they leave behind and that they never at any point ponder the interests of the victims.

The author does discuss others who are given capital punishments for other crimes other than murder. In short he gives a list of victim families and dejects the attention given to the execution of 1000 murderers especially when the loudest voices think the death of a convicted murderer is a tragedy, yet the deaths and suffering of countless victims is only an easily ignored statistics. In a way, the professor has a point.

2.6 Just violence:

An Aristotelian justification of capital punishment by Sarah Tischler Alkin

California State University at Chicago.

The writer says that the task of moral justification has been left to philosophers who continue to debate the oral permissibility, based on ethical principles of punishment by death.

Both John Stuart Mill's theory of consequentiality approach based on utility and Immanuel Kant's[34] theory of retributism are the most common sources of theoretical justification of capital punishment.

While Aristotle does not explicitly argue for death as just punishment for murder, the principles found in his theory of human action and justice in rectification of the death penalty for crimes of murder in a limited number of cases seen to support so. Aristotle's description of non voluntary actions leaves open the question of whether or not individuals diagnosed with anti-social personality disorder also referred to as sociopaths, action voluntarily if they act in ways that result in harm. The diagnostic criteria include, "failure to confirm to social norms for the respect to lawful behavior, reckless disregard for the safety of self or others. Lack of remorse as indicated by being indifferent to or rationalizing having hurt, mistreated or stolen from another. Since many individuals convicted of murder have also been diagnosed with this disorder, an argument must be made that would definitely include or exclude these individuals from the class of non voluntary action when murder is committed.

While deciding to act is voluntary according to Aristotle, not all voluntary acts involve decision. For example actions done on the spur of the moment are considered voluntary but do not in most cases, one may choose to act viciously but not be considered vicious in character. The act will rather be considered only incidentally vicious

One of the most prevalent aspects of justice is related to abiding by societal laws. Those who commit murder (or other crimes) which attract capital punishment do so voluntarily.

While the intentional killing of a person is wrong in cases where the death is as a result of a vicious act of injustice, Aristotle's theory of human action allows for crucial distinction between the act of murder and the death penalty. An act that is voluntarily unjust is committed for the purpose of obtaining some deserved benefit at the cost of another. This is the end that is chosen.

[34] John Stuart Mill and Immanuel Kant's were both philosophers

Murder differs in kind from acts which aim at restoring justice. In cases of rectificatory justice, the goal is rectification of a wrong and equity of deserved burdens and benefits, while both acts result in the death of a human being, in the case of murder, a life is taken unjustly. In the case of death as a punishment for murder, a life is taken for the sake of restoring justice. This difference in intention allows the two acts to be considered dissimilar, just as the description of involuntary, non voluntary and voluntary actions allow for a distinction between types of acts based on the agent's intent.

2.7. The death penalty

J.J. Maloney[35] argues that;

that it (death penalty) is one of the two most divisive debates in the USA. He also refers to famous cases in the USA. The first modern unpopular execution was that of Nicola Sacco. After the execution of Nicola Sacco, another convict in another murder case confessed that it was in fact him who had murdered the victims for which death Nicola was put to death. This particular case galvanized the public against the death penalty, though temporarily.

Felix Frankfurter wrote an article for the Antlilic monthly that examined the Nicola case and concluded that their convictions were a travesty of justice and named the probable culprits.

Fifty years after Nicola and fellow convicts had been executed Governor Michael Dukakis of Massachusetts signed a proclamation clearing their names. Most of the death penalty cases that have aroused public interest mostly involved white people.

In fact as R. Karl Menninger (a psychiatrist in USA) put it in his book[36], "The crime of punishment" most death penalty convicts had or were often wrongly convicted and that by the time this fact came to light, it was often too late".

The support for the abolition of the death penalty is gaining momentum everyday in the USA. The writer is of the view that one day USA will adapt a new policy that will do away with murderers getting capital punishment. The writer does not show what other punishment should be given to these murderers. He is also silent about the victims' rights and how they can be assisted to appease them or their suffering. Like many who are advocating for the abolition of the death penalty in the USA and the world over, the author's arguments point in that direction though he does not want to

[35] Article o death Penalty in the UK by JJ Maloney

[36] Menninger; The crime of punishment at 49

say so point blank. Professor Makubuya in his article 'The Constitutionality of the death penalty in Uganda, a critical inquiry' argues with regard with regard to the death penalty in Uganda, argues that death penalty offends the concept and law of Uganda on human rights and that it is inconsistent with the contemporary trend of international law. He contends that the death penalty is a violation of the right life and that it amounts to cruel, inhuman and degrading treatment, which is unacceptable under international law and domestic law as well. He rebuts the argument for the death penalty and contents that the death penalty contradicts the inalienable fundamental rights therein.

2.8 Mandatory death sentence in Uganda

Until the Supreme Court pronounced it self on the mandatory death penalty, it was legal and in many cases where it had been prescribed, the trial judge had no sentencing discretion where a defendant had been convicted on the charge. The mandatory death sentence was inconsistent with the constitution and therefore unconstitutional.

The mandatory death sentences were cruel and inhuman because they did not differentiate between offenders – as a result offending article 24 of the Constitution. Murder may be committed under different circumstances.

Sentencing is a matter of law and part of the administration of justice which under article 126 is a preserve of the judiciary.

All those laws as on the statute books of Uganda which provide for a mandatory death sentence can only be regarded as a maximum sentence.

2.9 What is the way forward?

It should be emphasized that the holding of the Supreme Court that the death penalty was not unconstitutional endorses the legality of the death penalty and the spirit of the criminal justice system. Thus, there is no recourse in the courts.

However under international human rights laws, the death penalty is recognized as a degrading treatment. Steps are called upon to abolish it. Uganda being a signatory to the ICCPR, the case can be taken to the human rights committee. As the constitutional court indeed agreed (J.J. Okello) that the death penalty is degrading although not unconstitutional.

2.10 The authors give the following figures namely[37];

a) From 1976 to 2005, 962 men and 10 women were executed.
b) Over 65% of this total were executed in five states; Texas (345), Virginia (94), Oklahoma (77), Missouri (64), Florida (60)
c) Currently 42% of the death row inmates are black, far higher than their percentage of the overall US population (12.9%).
d) Approximately 3.400 men and 54 women await execution (at the time of waiting).

The above is true but unfortunately the authors have not attempted to explain why those figures are like that but the message can be read in those figures.
The writers have indicated that there has been a general decline i.e. executions are down from 1999 (98 executions)to 2004 (59 executions), a drop f 40%, the death rows also shrunk, fewer death sentences and more than 120 convicted persons have been exonerated.

The authors do not say why there has been this general decline but they seem to insinuate that it is due partly to their constant campaign against the death penalty. It is the view of the church that the right and duty of legislative public authority to inflict punishment proportionate to the gravity of the offense. Recourse to the death penalty is not absolutely exchanged, the death penalty is not intrinsically evil, as it the intentional taking of innocent life through abortion[38].
But the church teaches that in contemporary society where the state has other non lethal means to protect its citizens, the state should not use the death penalty.

In my view, the views of the Bishops and their supporters are one sided – namely advocating for the abolition of the death penalty. Though they have brought some few voices from the victims' families in their support, they have not indicated or attempted to show how these members of the victims should be treated. But having been in the field for over thirty years (campaigning against the death penalty) their campaigns have started to bear fruit.

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[37] See as 17 above
[38] According to recent polls, Americans are closely split on the proper sentence for convicted murderers though most respondents support the death penalty, that support dropped to 53% when people were offered alternative sentence of LWOP, with 44% supporting LWOP. Jeffrey M. Jones, support for the death penalty remains high at 74% slight majority prefer death penalty to life imprisonment as punishment for murder, Gallup News Service, May 19 2003

2.11 Organized psychiatry and the death penalty: An introduction to the special section.

Michael A. Norko MD[39]

J. A.M Acad Psychiatry law 33: 178-9, 2004.

The American Academy of Psychiatry and the Law (AAPL) has been formally debating taking an official position on the death penalty since 1998.

The members resolved that (AAPL) calls for a moratorium on capital punishment until the death penalty jurisdictions implement policies and procedures that (i) ensure that death penalty cases are administered fairly and impartially in accordance with basic due process and (ii) prevent the execution of mentally disabled persons and people who are at the age of below 18 at the time of their offenses.

This was good news for those advocating abolition. This is a respectable organization and their views are highly respected. The input of this respectable organization is a big booster to the abolitionists cause because it came at a time when jurisprudence the world over is struggling to struggle with the contours of capital punishment. It was after this resolution that the US Supreme Court ruled in *ARKINS Vs VIRGINIA*[40] that capital punishment of mentally retarded people was unconstitutional.

[39] See from 18

[40] ABA resolution No. 107 approved February 3 1997 available at http://www.abnet.org/moratorium/resolution.html

CHAPTER THREE
METHODOLOGY

3.1 Research Design

The researcher conducted his field work during the first three weeks of July 2010. The researcher was assisted by two research assistants to carry out the field work, distributing the questionnaires and carried out some interviews. The researcher interviewed three high court judges, three magistrates, and about 20 advocates of the High Court of Uganda and 6 secondary school teachers, four prison officers attached to Luzira prison , one journalist from Bukedde Paper and others. The researcher conducted basic research as well as website and research on the internet.

The researcher visited the following libraries; Makerere university library, High court library, Law Development Center library and KIU Law library. In all these the researcher was able to obtain some useful information and tips which are reflected in the researcher's work here into. During the research, a lot of literature on death penalty was perused. This included treaties, conventions, resolutions, declarations, constitutions, case law, journal articles, internet and other relevant materials.

3.2 Research Population

The researcher targeted mainly lawyers/ advocates, prison officers, because the researcher felt that these directly dealt with those who were arrested and convicted of capital offenses and in the researcher's view point were best placed to comment on the researcher's topic of interest. The teachers were also targeted because these were individuals who deal with all sorts of people for many years and their experiences could not be overlooked easily. The researcher felt that these target groups could easily be accessible and could easily be generalized on. The lawyers and the secondary school teachers were mainly graduates whose understanding of the researcher's topic could receive well articulated answers and responses. The prison officers are people who often interact with these convicts on the death row. i.e. after the arrest these were remanded in prison which became their permanent home (if convicted) and perhaps up to their death or release.

3.3 Sample size

The legal fraternity in Uganda can be broken down as follows:

a) Judges of the High court 44
b) Magistrates 120
c) Advocates 800
d) Advocates in actual legal practice 370
e) Advocates or lawyers in other branches say lecturing, civil, service, business etc 150

Overall Total 1560

The percentage interviewed who responded to the questionnaires was 0.5%

3.4 Sampling procedure

The researcher used the purposive sampling because these were the people who were mainly involved (stakeholders) with the convicts on death row at one stage or the other up to the last day whether executed or not. The advocates, besides their knowledge of the law very often interact with these convicts as legal advisers, defence counsels or prosecuting attorneys etc, the judge's interaction can not be overlooked as well, the teachers have interacted with large populations of people e.g. students, parents, fellow teachers, this qualifies them to be knowledgeable and useful to the researcher. Other ordinary people had some input also.

3.5 Data collecting methods.

Research instruments:

a) Questionnaire:

The researcher gave out 50 copies of the questionnaires to the respondents of the same number. The majority would tell the researcher to return the following day and despite the fact that the researcher made return journeys. the questionnaires were still at times not filled. In some incidences the respondents would complete them there and then. Other respondents never bothered to complete them at all.

b) Interview

The researcher interviewed three judges of the high court. The researcher never had any problem with two court judges because he was known to them personally and had been at the Bar together prior to their appointment. This enabled the respondents (judges) to talk freely against the pros and

cons of the death penalty. The third respondent (judge) was not forthcoming and looked and behaved businesslike.

The researcher found these two methods very useful. The questionnaires gave the respondents ample time to reflect on what they wanted to reply to the questions and these were very helpful to the researcher.

As regards the whole interviews the researcher was able to make some observations for example, the researcher noticed that the judges who had served as defence counsels at time they were still at the bar, showed some uneasiness when they convicted a person and sentenced that person to death – otherwise if they had any leeway they would not convict or, as and when they convicted they would give a lesser sentence where the law so permitted. The reverse the researcher observed was true as regards those who had worked for the DPP as prosecution counsels or attorneys. They always wanted to convict at any cost which earned them the nick name of "persecutors". In the researcher's view, these were the best methods because these (respondents) were not strangers to the topic (death penalty). They were stakeholders, they had their own ideas as result of their experience to the topic and at times they looked on helplessly as the law often took its course- a course they had not supported (or would have opposed if they had their own way).

3.6. Qualitative and Quantitative Analysis

The researcher mainly used qualitative form of research though at times the quantitative method was used – both complementing each other / or and supplementing each other or both. The qualitative was directing the quantitative and the qualitative feedback into the quantitative in circular evolving process with each other. Using this method the researcher was able to notice that concepts emerged from the data. See chapter four

The researcher's topic for research requires people's interpretation and perception on the death penalty. This is why when it came to oral interviews the researcher never went with prepared questions. The interviews were carried out in an informal way just like a conversation. Besides their preconceived ideas (for or against the death penalty) many of those interviewed agreed that this was a public policy matter – the abolition of the death penalty would require public policy to change.

Otherwise (rightly) many claimed public policy is still with us. The death penalty is not viable as can be witnessed by the following statistics. (see chapter iv)

3.7 Ethical considerations

The researcher explained to the respondents the purpose of the research and many gave their consents. Some said that they would not want to be named and others did not have any problem being interviewed and named.

3.8. Limitation of the study

The researcher found some respondents had taken sides already. Some claimed that "an eye for an eye' was the best policy. These could not change their positions. Likewise those who saw no benefit in the death penalty maintained their positions. These were some of the limitations the researcher faced. The researcher had problems accessing the law section of Makerere university library. To access the section the researcher needed permission of the officer in charge. This was during the long vacation. On the first visit the officer was not there. On the second and subsequent visits when he was there, there was no power.

The researcher has not made much effort to repeat the arguments both for and against the death penalty, because the researcher feels that enough 'justice' have been accorded to these arguments by most of the literature. Has Uganda complied with the international standards? In his study, the researcher examines the international standards and how Uganda has fared.

CHAPTER FOUR

4.0 The legal provisions governing the death penalty in Uganda

In this chapter the researcher will critically look at the legal provisions governing the death penalty in Uganda-both the civil and military courts/tribunals and the list of offences that attract the death penalty.

The researcher will also examine the death penalty und the international human rights standards. What does the international human rights statutes say about the death penalty? Has Uganda adhered to them? If not, why not? The researcher will also discuss the Susan Kigula case

4.1. Death Pnealty and the Constitution

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

International Human Rights instruments were ratified later, including the international covenants on civil and political rights (ICCR) and on Economic, social and cultural rights (ICESCR) in 1987, the convention against Torture and other cruel, inhuman or degrading treatment or punishment in 1996 and the convention on the rights of the child in 1990. In order to incorporate those instruments into domestic legislation and give them legal force in national courts, many new provisions were added in the constitution of 1995. Under Ugandan law, the various human rights instruments are not directly enforceable by the courts or other administrative authorities. They first have to be incorporated into domestic legislation or administrative arrangements. For a ratified instrument to become national law, a law needs to be adopted by parliament.

4.2. Economic and Social Rights

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

4.3 Ratification of international human rights instruments

Uganda is a state party to seven of the major international Human Rights treaties and the main international humanitarian law instruments, in particular the Geneva Conventions of 12th august 1959 for the protection of victims of war and the Additional protocols thereto, of 1977

On 14 June 2002, Uganda ratified the Rome Statute of the International Criminal Court and later in December 2003, the government of Uganda submitted a referral to the court on the situation in Northern Uganda. In June 2004, the situation in Uganda was assigned to the preliminary chamber II, and the prosecutor announced the launch of an investigation in Uganda in July 2004 (the ICESCR, the ICCPR, the International Convention on the Elimination of all forms of Racial discrimination, the Convention on the Elimination of all forms of Discrimination Against Women, the Convention on the Rights of the Child, the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and the International Convention on the protection of the Rights of all Migrant Workers (and members of their families), as well as the first optional protocol to the ICCPR and the two optional Protocols to the conventions on the rights of the child (on the involvement of children in armed conflicts and on the sale of children, child prostitution and child pornography) the African Charter on Human and Peoples Rights and the protocol to the African Charter on Human and Peoples' rights on the establishment of an African Court on Human and Peoples' rights)

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

In addition, implementation legislation should be adopted as soon as possible, in order to match declarations of support to the ICC with facts. That legislation should be fully in conformity with the spirit and the letter of the ICC statute.

4.4 The Ugandan Human rights Commission

While drafting the 1995 constitution, the constituent Assembly realized that it was necessary to create and empower a permanent body for the promotion and protection of Human Rights

Article 51 of the constitution was therefore written specifically for this purpose. It creates the Uganda Human Rights Commission (UHRC) with quasi-judicial functions[41].

The commission possesses vast powers to protect the respect of human rights; investigate at its own initiative or on complaint made by any person or group of persons against the violations of any human rights, to have access to and monitor detention conditions[42]; to conduct educational and other activities to promote human rights awareness, and to monitor and make recommendations for government compliance with its international obligations[43].

The commission is empowered to subpoena any witness, to request any document, to order the release of any detained person, and recommend payment or compensation or any other legal remedy after it finds the existence of human rights abuse. However, the commission cannot investigate any matters pending before a court of law, matters relating to Uganda's dealing with other countries or international organizations, or matters relating to the prerogative of mercy[44].

The commission's tribunal handles a large number of complaints each year, and often awards generous compensation to the victims. The government departments responsible for those human rights violations include the Uganda People's defense Force (UPDF) and the Uganda Police Force (UPF)[45]

Unfortunately, 90% of the awards granted by the commission's tribunal have not been honoured by the Attorney General[46].

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[41] Uganda Human Rights Commission Act of 1997

[42] Affidavit in Kigula case

[43] The commission handled my complaints interviewing depreviation of liberty, torture, inhuman tendencies

[44] Uganda Human Rights Commission Act, passed by Rights in 1997

[45] Among the 21 cases handled by the tribunal in Kampala 12 involved the police. (See page 6 2004 Among the report of Uganda Human Rights Report

[46] UHRC expressed concern about the frequent lack of implementation by the state party of the common decision concerning both ways of compensation to the victims of human rights violations and the presentation of Human Rights

4.5 Public opinion and the death penalty

The majority of the people met by the researcher were in favour of keeping the death penalty, at least for certain crimes (murder, rape). The media also is generally favourable to the death penalty. The prison officials were the most opposed to capital punishment probably because of the involvement of the prison staff in the executions and the resulting trauma who became the long stay with those condemned persons, they felt for them sympathy.

Prison officials like Vincent Oluka, Principal Officer II working with the Uganda Government Prison Service says that his interaction with condemned prisoners for 14 years and observing their character, behaviour and attitude whilst in prison has led him to form the view that these prison are poor and misguided people who engaged in antisocial behaviour when they were outside. He said that he interacts frequently with them and they have never attacked him[47]

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

A recurrent argument by officials in favour of the death penalty is that it is cheaper to execute death row inmates that to imprison them for long term. However, Joseph A.A. Etima argues to the contrary. According to his research into the prison system in Uganda, the percentage of prisoners on death row is negligible compared to the number of other prisoners and therefore their upkeep is negligible. He supported these findings with the prison statistics that showed that is 2000 out of the general prison population of 15,391 only 225 were on death row, representing only 1.5% of the entire prison population. He also argued that these prisoners can be made to contribute significantly to their upkeep and by far the strongest argument; he argued that the value of human life cannot be quantified in monetary terms[48].

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offenders in the linked number of cases which the commission link recommend such prosecution. Considering observation of the UN Human Rights committee Uganda CCRP/CO/80/UCA, 4th May 2004

[47] See 6 above

[48] Etima (Former commissioner of Prisons Affidavit paragraph II(a) (c) of A.A

Some members of the executive support the death penalty. This is particularly true of hon. Ruhakana Rugunda, the Uganda's former Minister of Internal Affairs, because Uganda has a terrible history of security forces using force freely to maim, and kill. Given this background of gross human rights abuse, he is of the view that the only way to stem the tide is to apply the mosaic law of an eye for an eye or a tooth for a tooth

He also mentioned that it is necessary to access the extent to which local circumstances in Uganda would permit the operation of human rights instruments. In his view, some of the international human rights instruments are not relevant to local circumstances. He did not give any example
It should also be noted that the Uganda Human Rights Commission did not recommend the full abolition of the death penalty, but recommended to the Constitutional Review Commission the amendments of the legislation to remove politically related offences from the list of crimes punishable by death[49].

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

4.6. Military justice

Justice for military personnel is provided for under the Uganda People's Defence Forces Act CAP 307 of the laws of Uganda vol. XII Section 14-44 spells out persons and circumstances subject to military law. Sections 45-71 spell out the miscellaneous offences punishable under military law, while section 72-94 provides for the due process to be followed in the arrest, trial and punishment of military offenders.

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

[49] Uganda Human Rights, 6th Annual Report, 2003 paragraph 10, 13 page 98

The Act under sections 77,78,80,81 and 84 provides for the composition of powers of the following courts respectively; Unit Disciplinary Committee, Field Court Martial, Division Court Martial, General Court Martial and Court Martial Appeal Court.
A unit disciplinary committee (UDC) is based at each army unit. It has powers to try and determine all cases other than those involving murder, manslaughter, robbery, rape, treason, terrorism and disobedience of unlawful orders resulting in loss of life.

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

The Division Court Martial on the other hand is based at the division and has unlimited jurisdiction to try any offence under the Act. It is chaired by an officer not below the rank of a major.

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

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

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

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

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

Moreover, these two soldiers were tied on trees and executed in public and in the presence of children. Public executions constitute a cruel, inhuman and degrading treatment. The UN Commission on Human Rights asks states not to carry out capital punishment in public or in any other degrading manner[50].

4.7. Statistical information

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

There were no further executions under the Uganda Penal Code until 29 June 1991, when nine prisoners convicted of aggravated robbery or murder were hanged in Luzira prison. Among them were three UNLA soldiers[51], William Otasono, Milton Ongom and Nicolas Okello, who were stationed at Mbuya General Headquarters near Kampala, and who had been convicted in July 1984 of robbing and murdering a man. Their appeal to the Supreme Court was rejected in March 1989.

In a report published in September 1992, Amnesty International reported 40 executions since 1987[52]. No civilians have been executed since May 1999, when 28 death row inmates were hanged at Luzira Prison. Two soldiers were executed by firing squad in 2002 and three soldiers were executed in March 2003[53].

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[50] Res 2005/59 on the quarter of death penalty

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

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

[53] Amnesty International Annual Report 2005

Every year, the UN Commission on Human Rights reiterates it's call upon states that still maintain the death penalty "to make available to the public information with regard to the imposition of the death penalty and to any scheduled execution[54]." As noted by the UN special Rapportuer on Extrajudicial, summary or Arbitrary executions, "secrecy prevents any informed public debate about capital punishment within the relevant society. Countries that have maintained the death penalty are not prohibited by clear obligation to disclose the details of their application of the penalty[55]." Uganda should consequently abide by the obligation to release such statistics publicly.

4.8 Statistics of Application of the Death Penalty between 1989 and 1999

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

Source: *Uganda Prisons Headquarters, quoted by Mr. Mr. Emmanuel Kasimazi, National coordinator of the BHCL Death Penalty project, Uganda and Dean of the faculty of Law at Makerere University, paper presented at the First International Conference on the Application of the*

[54] Res. 2004/67
[55] E/CN.4/2005/7, paras 57 and 59.

Death Penalty in commonwealth Afri0ca organized by the British Institute of International & Comparative Law held in Entebbe, Uganda from 10 to 11 May 2004.

Number of prisoners on the Death Row per Year between 1997 and 2004

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

Source: Amnesty International Annual Reports.

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

offence	**Length of stay in prison**						
	<1 year	**1-5 years**	**5-10 years**	**10-15 years**	**15-20 years**	**More than 20 years**	**Total**
Murder	84	165	48	8	2	-	307
Robbery	36	79	16	8	1	-	140
Treason	-	-	-	4	-	-	4
Kidnap					1	1	2
Mutiny	-	3	-	-	-	-	3
Cowardice	1	-	-	-	-	-	1
Total	121	247	64	20	4	1	157

Source: Uganda Prisons Headquarters, quoted by Mr. Mr. Emmanuel Kasimazi, National coordinator of the BHCL Death Penalty project, Uganda and Dean of the faculty of Law at Makerere University, paper presented at the First International Conference on the Application of the Death Penalty in commonwealth Afri0ca organized by the British Institute of International & Comparative Law held in Entebbe, Uganda from 10 to 11 May 2004.

4.9: Death sentences under Ugandan law

Offences punishable by death.

- Treason contrary to section 23(1), (2), (3) and (4) of the Penal Code.
- Smuggling where the offender is armed with, uses or threatens to use a deadly weapon, section 319 (2)
- Detention with sexual intent, where a person having authority to detain or keep the victim in custody participates in or facilitates unlawful sexual intercourse, section 134 (5)
- Murder contrary to section 189 of the Penal Code
- Kidnapping with intent to murder contrary to section 243 of the penal code Act.
- Rape contrary to section 124 of the Penal Code Act
- Defilement contrary to section 129 (1) of the Penal Code Act
- Robbery with aggravation contrary to section 286(2) of the Penal Code

The Uganda People's Defence Forces Act (formerly called the National Resistance Army Statute) established the military justice system of the Uganda People's Defense Forces (UPDF) and came into force on 20 March 1992. It includes a long list of offences which can attract the death penalty: treachery, mutiny, disobeying lawful orders, failing to execute one's duties, offences relating to prisoners of war, cowardice in action, offences by persons in condemned when in action, breaching concealment, failure to protect war materials, failure to brief, offences relating to security, spreading harmful propaganda, desertion, offences relating to convoys, losing , stranding or putting vessels in danger, wrongful acts in relation to aircraft, inaccurate certificate, dangerous acts in relation to aircraft, attempt to hijack aircraft, fire-raising[56].

Section 8 of the Act defines other terrorist offences. These include aiding, abetting, financing, harboring or rendering support to any person, knowing or having reasons to believe that the support will be applied or used for or in connection with the preparation or commission or instigation of acts of terrorism. Conviction on these offences also carried a penalty of death.

[56] Section 16 to 39, Uganda People's Defence Forces Act

4.10 The Notion of Most Serious Crimes

The fact that Ugandan legislation provides for the death penalty for a great number of crimes, including non –violent crimes, constitutes a violation of international human rights standards. In that regard, it should be noted that in 2004, the UN Human Rights Committee expressed its concern about the broad array of crimes for which the death penalty ma be imposed and urged the Ugandan authorities to limit the number of offences punishable by death[57].

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

People are rarely condemned for the offence of treason in Uganda. Those cases are political cases whereby the prosecution is used as a tool to eliminate or isolate political opponents and to strife dissent; the offence of treason is political and should not entail the death penalty. UHRC recommended to the Constitutional Review Commission the amendment of the legislation to remove the politically related offences from the list of crimes carrying a death sentence[58].

In 2002, the UN special Rapportuer on extrajudicial, summary or arbitrary executions said that these restrictions exclude the possibility of imposing death sentences for economic and other so-called victimless offences, actions relating to prevailing moral values, or activities of a religious or political nature, including acts of treason, espionage or other vaguely defined acts usually described as "crimes against the state[59]."

4.11 New crimes attracting the Death Penalty

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

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[57] Concluding observations of the UN Human Rights Committee, Uganda, CCPR/CO/80/UGA, 4 May 2004

[58] Ugandan Human Rights Commission , 6th Annual Report, 2003, para 10.13.4, page 98

[59] Report of Ms. Asma Jahangir, special Rapportuer on extrajudicial, summary of arbitrary executions, E/CN.4/2002/74, 9 January 2002

In its resolutions 2004/67 and 2005/59, the UN Commission on Human Rights called upon all states that still maintained the death penalty "to progressively restrict the number of offences for which it could be imposed and, at least, not to extend its application to crimes to which it did not at present apply[60]."

It is regrettable the recent extension of offences attracting death penalty under Ugandan Law, with the adoption of the Anti- terrorism Act, 2002, in its Article 7. UN is also very concerned by the Penal Code (Amendment) Bill 2004 concerning the crime of aggravated robbery[61]. The object of the Bill is to amend section 286(2) of the Penal Code Act, to provide that mere possession of deadly weapon at the time of or, immediately before or immediately after the time of robbery is sufficient to constitute robbery punishable by death.

In 1995, the UN Human Rights Committee ruled that the imposition of the death penalty for armed robbery not resulting in death or the wounding of any person violates article 6(2) of the ICCPR[62]. The planned amendment contravenes this ruling, and should therefore be abandoned.

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

4.12 Mandatory death sentences

Another subject of concern for the researcher is that many of these offences used to carry mandatory death penalty sentences, which was clearly in contravention of international standards.

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

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[60] The Un commission on human rights adopted resolution 2004/67 on the question of death penalty on 21 April 2004, and resolution 2005/59

[61] Bills supplement No. 1, Ugandan Gazette No. 7, Volume XCVII dated 13th February 2004

[62] See Luboto V Zambia, Communication no 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev. 1(1995)

As emphasized by Samuel Serwana Sengendo, Advocate of the High court of Uganda in his affidavit given in support of the petition, "over 99% of the petitioners have had no opportunity to appeal their sentences or to raise mitigating and exculpatory factors at their trials to reduce their sentences, which right is generally available to people accused of lesser offences[63]." The petitioners have raised this issue in their petition[64]."

The last resolution on the question of the death penalty adopted by the UN commission on Human rights urges all states that still maintain the death penalty to ensure that it is not imposed as a mandatory sentence[65].

The Human rights commission stated in Eversely Thompson V St –Vincent and the Grenadines[66] that " such system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case." The committee pointed out that the possibility of a pardon or a communication of sentence would not change this result, so that "the existence of a right to pardon or commutation... does not secure adequate protection to the right to life, as these discretionary measures by the Executive are subject to a large range of other considerations compare to judicial review in all aspects of a criminal case.

In Edwards and Others V. The Bahamas[67], the Inter –American commission found that the imposition of the mandatory death penalty violated numerous provisions of the American Declaration on the Rights and Duties of man.

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[63] Affidavit of Samuel Serwanga, vol. 4 of the petition, given in August 2003, and reiterated during the hearings in January 2005.

[64] Issue No. 3, " Whether the various laws of Uganda that prescribe mandatory death sentences upon conviction, and bar appeals these sentences are inconsistent with or in contravention of the constitution", in Susan Kigula , Fred Tindgwihura, Benn Ogwanga and 414 others versus the Attorney General.

[65] UN commission on Human Rights, Resolution 2005/59

[66] Eversely Thompson V St-Vincent and the Grenadines, communication No. 806/1998, UN Doc. CCPR/C/70/D/806/1998 (2000)

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

Mr. Livingstone Ssewanyana, of the Uganda foundation for human rights initiative, expressed his satisfaction on the issue when leaving the courthouse, pointing that "death row prisoners can now seek redress in court to have their case reconsidered, which was not possible before[68]."

The Eastern Caribbean court of Appeal, in the case Peter Hugues and Newton Spence V. The Queen[69] , had that the mandatory imposition of the death penalty was unconstitutional, as it amounted to inhuman and degrading punishment.

4.12 Vulnerable Groups

In accordance with established international standards, in particular Article 6 para. 5 of the ICCPR, Uganda legislation states that minors and pregnant women cannot be executed. Section 105 of the Trial on indictments Act provides that "sentences of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed, he or she was under the age of eighteen." Under section 103 of the same Act, where a woman convicted of an offence punishable with death is found to be pregnant, and the sentence to be passed on her shall be a sentence of imprisonment for life instead of a sentence of death.
According to para. 3 of the UN safeguards guaranteeing protection of the rights of those facing the death penalty, 'the death sentence shall (shall not) be carried out on persons who have become insane." The last resolution on the death penalty adopted by the UN commission on human rights urges that States who retain the death penalty "not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute nay such person[70]."

Dr. Margeret Mungherera, the only specialist forensic psychiatrist[71] amongst the twelve (12) psychiatrists who are all based in Kampala, is a notable figure in favour of the abolition of the death penalty. For her, it is not the job of the criminal justice system to execute prisoners because the

[68] Advocates John W. Katende explained a few hours after receiving the copies of the judgment that a large number of the petitioners could now seek to obtain a review of their sentence, mentioning those who had their sentence confirmed for more than two years and for whom the government had not exercised its prerogative of mercy in their favour, those who had not yet exhausted their right of appeal are now entailed to appeal against the death sentence and raise any points of mitigation, and those who have not yet been sentenced are entitled to raise any points of mitigation.
[69] Peter Hugues and Newton Spence V The queen, 2 April 2001, Eastern Caribbean court of Appeal, criminal Appeals 17/1997 and 20/1998.
[70] Un Commission on Human Rights , Resolution 2005/59
[71] Section 11, The Penal Code Act, Chapter 120 of the Laws of Uganda.

precedent regarding certain medical examination to determine the mental state of the offender before ascribing criminal responsibility. She also added a sociological dimension to criminality in Uganda thereby suggesting that if offenders enjoy certain socio-economic rights, then the crime rate will abate. As a result of treating several death row inmates in Luzira upper prison.

22% of condemned prisoners were soldiers mostly of the lowest ranks. The large numbers of low rank soldiers among the condemned and executed shows a "scape goat policy" to give the impression to the international community that the military deals swiftly and effectively wit those who have committed crime.

4.13 Political opponents

Although the situation of condemned prisoners is not clear due to the lack of public information, the number of people executed is much lower than the number of people condemned to death. One wonders what is the decision – making process leading to the choice of the persons to execute.
It seems that influential politicians exploit the corrupt system to accuse political opponents falsely of capital offenses in order to keep them out of circulation.
The researcher has observed a member of former political opponents, former political leaders form Obote's government, members of armed groups fighting against the Government, or military personnel among the prisoners executed, raising suspicion as to the selection of the people executed. The opacity of the procedure followed by the advisory committee on mercy requests reinforces the ambiguity of the whole process.

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

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

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

Mr. Chris Rwakasisi[72] who headed the dreaded NASA and who probably committed even worse crimes comes from the western part of the country, as do the majority of the senior members of the regime, including the president. He has never been executed and was recently paroled.
It is the researcher's view that on several occasions, the Ugandan government has attempted to legitimize the crimination or the repression of political opposition by using judicial procedures, many of which fail to meet the internationally accepted standards of a fair trial. The researcher does not pretend that those people had not committed crimes, but that the election of the people who were prosecuted and executed was politically motivated.

The researcher's assertion is reinforced by the research of Moses Kakungulu Wagabaza, Assistant commissioner of prisons, in which he established that 53%of the penitentially personnel was convicted that the selection of the people executed was unfair and discriminatory, based on religion, tribal or political agendas.
The argument against the death penalty is further strengthened when it is malised that politicians use it to eliminate their opponents.

4.14. No mercy for the military

The constitution precludes the committee from considering cases decided by a Field Martial Court[73]. This is a serious concern since military justice in Ugandan is the source of much abuse. The UN Human Rights committee denounced this fact in its concluding observations in 2004[74]. In addition, in practice the appeal from such decisions is not always possible and condemned prisoners are sometimes executed the same day.

[72] Mr. Rwakasisi was pardoned by the president after 22 years on the death row
[73] See article 126 of the constitution
[74] Concluding observations of the Un Human Rights Committee, Ugandan, CCPR/ Co/80/UGA, 4 may 2004

4.15. The road to abolition

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

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

Realizing that their submission to the constitutional review commission would fail, the group of prisoners decided to work on a petition challenging the constitutionality of the sentence. Helped by Father Tharcisio Agostoni and the Foundation for Human Rights Initiate (FHRI), the FIDH affiliate in Uganda, they convinced the other detainees on death row in Uganda and they all joined together and filed a petition in the constitutional court of Uganda in September 2003[75].

Several African countries had already experienced a similar legal challenge. In Zimbabwe the Supreme Court held, in 1993, that it would be unconstitutional to execute four prisoners under sentence of death because of the intense and prolonged suffering they had undergone on death row[76].

In Tanzania, a High court ruled that hanging as a form of punishment, was cruel, degrading and inhuman and therefore unconstitutional[77].

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[75] Susan Kigula, Fred Tindgwihura, ben Ogwang and 414 others V Attorney General, constitutional petition No.6 of 2003

[76] Catholic commission for justice and peace in Zimbabwe V Attorney General Zimbabwe and others, 1993 (4) SA 239 (ZSC), however, the government reacted to this decision by amending the constitution to foreclose such grounds for reviewing death sentences.

[77] Mbushuu Dominic Mnyaroje and Another V The Republic , criminal Appeal No. 142 of 1994. On appeal, the Tanzanian court of Appeal agreed that it was cruel and degrading, but rule that it was not unconstitutional.

In Nigeria, the court of Appeal decided in 1996 that condemned prisoners could ask a High court to determine whether they should be re-sentenced in view of their prolonged stay on death –row[78]. In Botswana, an attempt was also made to declare capital punishment unconstitutional in 1995, but the court of Appeal held that it was not unconstitutional[79].

In a landmark decision in 1995, the South African Constitutional court held that; " the proclamation of the right (to life) and the respect for it demanded from the State must surely deliberately, systematically and as an act of policy that denies in principle the value of the victim's life[80].

There is however a major difference in the Ugandan case, in that it involved the whole prison populations. This case is historical, and is a first step on the path to the abolition, whatever some of the members of the judiciary might think or declare, as judge G.W. kanyeihamba, professor of law and justice of the Supreme Court, who wrote that "the abolitionists tend to be small groups of elite minorities with the loudest voices in society[81]."

Capital punishment

This is a death penalty which is usually imposed by courts' for all types of crimes such as rape, murder, theft, blasphemy, treason, heresy, and so on. Throughout history, there have been men and women of good will who have condemned the death penalty as a form of punishment for whatever crime. Equally, there has always been men and women of hearts of stome who have always upheld the practice. Each of these groups has had its reasons and rationalizations for or against death penalty.

Those who have advocated the retention of the penalty – retentionalists – have argued in the following manner:

1) The death penalty is a deterrent. They contend that its abolition would unleash dangerous elements now restrained by their fear of the scaffold.

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[78] Peter Nemi V The Attorney general of Lagos and Anor. Appeal No. CA/L/221/95

[79] Patrick Ntesang V The state, court of Appeal, criminal Appeal No. 57 of 1994.

[80] Justice Didcott, in The State V T. Makwanyane and M. Mcchunu, case No. CCR/3/94, paragraph 176, referred to below as the South African constitutional court judgment.

[81] Reflections of a judge on the death penalty in Uganda, " The Uganda, "The Ugandan living law journal , Volume 2, Number one, June 2004 (published by the Uganda Law Reform Commission).

2) That men who are sentenced to death are usually those who are beyond hope of rehabilitation and that execution is less costly to the taxpayer than other alternatives such as imprisonment
3) Some retentionists have argued that life imprisonment is inhuman; and on humanitarian grounds, they advocate the use of capital punishment.
4) That with the abolition of death as a form of penalty, peace and law enforcement personnel would be exposed to greater risk form the criminals; and that even police and prison on guards would be prone to killing felons thus create a vicious circle.
5) That without the death penalty, society would return to lynching of even petty offenders
6) Others use holy scriptures to support their retention claims that God, in Genesis 9:6 says that whoever sheds man's blood, by man shall his blood be shed: for in the image of God made he man

4.16 The petition before the constitutional court invoked several arguments:

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

On 10 June 2005, the constitutional court of Uganda decided that, "Art. 22(1) of the constitution recognizes death penalty as an exception to the enjoyment of the right to life... (and) that the right to life i0s not included in article 44 (of the constitution) on the list of the non derogable rights.. Imposition of death penalty therefore, constitutes no cruel, inhuman or degrading punishment."

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

2. Mandatory death sentences are inconsistent with the right to appeal against sentence only.

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

Justice Okello concludes "I can think of no possible rationale at all for that distinction yet, a person facing death sentence should be the most deserving to be heard in mitigation. That provision which denies the court opportunity to inform itself of any mitigating factors regarding sentence of death, deprives the court the chance to exercise its discretion to determine the appropriateness of the sentence. It compels the court to impose the sentence of death merely because the law directs it to do so. This is an intrusion by the legislature into realm of the judiciary. There is clearly a violation of the principle of separation of power."

4.17 The death penalty and the Human Rights Standards:

In this chapter, the researcher examined the death penalty and the international human rights standards. What does international human rights statutes say about the death penalty? Has Uganda adhered to them? If not, why not

4.18 The Key Principle

Article 6(1) of the ICCPR provides that 'no one shall arbitrarily be deprived of his life." Are there instances when life is not taken arbitrarily?

4.18.1 Article 6(2) by implication provides one such instance. It provides that:

In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present covenant and to the convention on the prevention and punishment of the crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court".

The implication therein is that the right to life may be deprived in accordance with a sentence of a court of law i.e. when a death penalty is meted out.

However, the 2nd optional protocol to the ICCPR encourages state parties to abolish the death penalty.

4.18.2 Although the ICCPR does not make mention of other instances, domestic laws expressively indicate in which circumstances it would be lawful to take the life of another person. For example;

S.22 of the constitution of Uganda provides for just one derogation from the right to life.

In execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.
S.22 expressly prohibits abortion.

S.71 of the constitution of Kenya provides for the following derogations in addition to the death penalty.

i) For the defence of any person from violence or for the defence of property (note that the defence of property has been criticized as not a justified cause as envisaged by Article 6(1).

ii) In order to effect a lawful arrest or to present the escape for a person lawfully detained.

iii) For the purpose of suppressing a riot, insurrection or mutiny

iv) To prevent the commission by that person of a criminal offence or if he dies as a result of a lawful act of war.

4.19 Does invoking the qualification of the right to life amount to derogation?

Article 69(1) of the ICCPR provides that everyone has the right to life and in article 6(2) it recognizes that a state may however have the death penalty. Under article 2, the state therefore has the obligation to respect and ensure that everyone's right is upheld save for those sentenced to death. Thus the state would not be derogating from its obligation if someone is sentenced to death. That is, the ICCPR expressly takes into account states that maintain the death penalty.

4.20 Right to life and prohibition of arbitrary deprivation.

What is the right to life in its conceptualization in IHRL? The traditional conceptualization of the right under IHR instruments is in respect to the deprivation of the physical existence of the individual (UDHR, art 3; ICCPR, art 4; ACHR, art 4; ACHPR, art 4).

The protection of the right to life is premised on the prohibition of arbitrary (or unlawful) deprivation. Thus the key phrase in article 4 of ACHPR appears to be the phrase 'arbitrary'. This raises a number of aspects. Firstly, the right prohibits acts of deliberate and intentional deprivation of life. Therefore, the deliberate shooting at students and trade unions involved in demonstrations in Zaire and Malawi have been condemned as arbitrary deprivation of life. In any event, the

commission has held that justification could be made, in the guise of law and order, for depriving peaceful demonstrators of their right to life.

Apart from deliberate acts, the commission has also considered a state party to be in violation of article 4 of the Charter for 'omission' to act where this results in loss of life. There is thus a separate obligation on a state party in the form of a positive duty to protect the lives of persons within its territory, i.e. there is a failure of the state party to act in respect of actions on the part of third parties. (e.g. criminals). Therefore where a state party was warned of the danger to one of the assassination victims, its refusal to offer protection was regarded to be in contravention of article 4, apart from its general obligations under article 1 of ACHPR. On the other hand, where a victim detention at the hands of the state party required medical attention, the failure to avail such attention that results in death is in violation of article 4. The ACHPR has thus noted:

The protection of the right in Article 4 also includes a duty for the state not to purposefully let a person die while in its custody. Here at least one of the victim's lives was seriously endangered by the denial of medication during detention.

4.21 The right to life is violated even where there is no actual loss of life.

In Kazeem Aminu V Nigeria, ACHPR Commn No. 205/97, the complainant alleged that the series of arrests and detention suffered by his client, and his subsequent going into hiding in violation of his right to life under Article 4 of the ACHPR. The ACommHPR rejected a narrower understanding of the right to life:

It would be a narrow interpretation to this right to think that it can only be violated when one is deprived of it. It cannot be said that the right to respect for one's life and the dignity of his person,, which this article guarantees would be protected in a state of constant fear and or threats as experienced by Mr. kazeem Aminu. The commission therefore finds the above acts of security agents of the respondents state in violation of article 4 of the Charter (paras 11-2).

4.22 Protection of the right to life poses the question of the lawfulness of the death penalty under IHR instruments.

It means that the deprivation of life as ordered by the judicial process is lawful under the IHR instruments. The ACommHR condemnation of acts in commission Nationale is partly premised on

the tact that the victims had not been subjected to any charge or trial before ACHPR. Further it is observed that (a)s victims of civil conflict, they were not necessarily combatants and , as a result, have been arbitrarily deprived of their rights to life (para 43). In effect, the ACommHPR has been profoundly aware of massive violations of human rights during armed conflict where more often than not the extra-judicial killing of non – combatants in contravention of humanitarian law occurs. Thus the extra- judicial execution of civilians in violation of principles of humanitarian law occurs. Thus the extra-judicial execution of civilians in violation of principles of humanitarian law would prima facie entail violations of article 4 of the ACHPR.

However, as regards judicial deprivation, a number of factors come into question –(i) is the judicial deprivation arisen with due regard to the guarantees of a fair trial in terms of e.g. impartiality of courts/ tribunal or accused being afforded right of appeal. In international Pen, et al. on behalf of kens Saro-Wiwa. Jr. Case, the execution of individuals where the judicial process was flawed was condemned where the trial had itself been in violation of provisions of fair trial under art 7 of the ACHPR. The ACommHPR remarked of the execution of Saro-wiwa and the others supposedly after a criminal prosecution.

4.23 The Universal Declaration of Human Rights (UDHR)

"Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people."

Proclaims this (UDHR) as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind,, shall strive by teaching and education to promote respect for those rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member states themselves ad among the peoples of territories under jurisdiction."

With the above background and objectives in mind, the Assembly proceeded to set out international standards to be achieved by all member states.

Article 3 states: "Everyone has the right to life, liberty and security of person."

Article 5 states: "No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment."

It may be noted that the right to life is provided for separately, and the freedom from torture, cruel, inhuman or degrading punishment is also treated separately. It cannot be argued therefore that by these provisions, the Universal Declaration of Human Rights has thereby abolished the death penalty in the world. Indeed this could not have been so, for even as the declaration was being proclaimed, death sentences passed by International Tribunals were being carried out against war criminals in Germany and Japan.

4.24 International Covenant on civil and Political Rights

Ratification and accession by the General Assembly on 16th December 1996, need came into force on 23rd March, 1976.

Article 6(1) thereof states:- Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

This article amplifies Article 2 of the Universal Declaration of Human Rights (supra) by adding on that the right to life must be protected by law and may not be arbitrary taken away. The introduction of the word 'arbitrarily' is significant because it recognizes that under certain acceptable circumstances a person may be lawfully deprived of his life. This is further acknowledged in Article 6(2) which states:-

> "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present covenant and to the convention on the prevention and punishment of the crime of Genocide. This penalty can only be carried out pursuant to a trial judgment rendered by a competent court."

This provision recognized the reality that are were still countries that had not yet abolished capital punishment. It also seeks to set out safeguards that should be followed in the imposition of death sentences. Article 6(4) provides thus:-

> "Anyone sentenced to death shall have the right to seek pardon or communication of the sentence. Amnesty, pardon or commutation of the death sentence may be granted in all cases."

These safeguards are not to be construed as intended to delay or prevent the abolition of capital punishment, but they have to be followed by those countries which, for one reason or other peculiar to their circumstances, have not yet abolished the death penalty.

It is also significant to note that having so comprehensively provided for the death penalty in Article 6, the convention proceeds to provide separate sections for torture, cruel, inhuman or degrading treatment or punishment.

4.25 Thus Article 7 provides thus:-

> "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular no one shall be subjected without his free consent to medical or scientific experimentation."

It is noteworthy that the above provisions of the Covenant are in pari material with articles 22(1) and 24 of the Constitution of Uganda. There is no conflict between Articles 6 and 7 of this Covenant. This issue was considered by the Human Rights Committee of the United Nations in *UN Vs CANADA (COMMUNICATION NO 469/1991, UNHRC)* where the majority of the committee held that because the International Covenant contained provisions that permitted the imposition of capital punishment for the most serious crimes, but subject to certain qualifications, and notwithstanding the view of the committee that the execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 and the covenant could not be regarded as a breach of the obligations of the extraditing country.

4.26 Second Optional Protocol to International Covenant on Civil And Political Rights, Aiming at the Abolition of the Death Penalty.

By this Protocol, each of the States parties to it undertakes to "take all necessary measures to abolish the death penalty within its jurisdiction."

The United Nations having dealt with the need to establish death sentence in the above protocol proceeded to deal with matters of torture, cruel or inhuman punishment separately. Thus the United Nation General Assembly in December, 1975 adopted The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Subsequently on 10th December 1984, the United Nation General Assembly adopted the Convention Against Torture And other Cruel, Inhuman or Degrading Treatment or Punishment. This convention came into force on 26th June 1987.

The Convention offers a definition of what constitute torture, which in our opinion, leaves no doubt that it does not apply to a lawful death sentence.

Article 1 thereof states:

> " for the purpose of this convention, the term " torture" means any act by which severe pain or suffering , whether physical or mental is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind , when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

4.27 Convention against Torture

The General Assembly on 1st December 2002 adopted the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, whose objective is "to establish a system of regular visits undertaken by independent international and national

bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."

There are other International Instruments containing similar provisions on the right to life and on freedom from torture, cruel, inhuman or degrading treatment or punishment. The African Charter on Human and Peoples' Rights of 1981 in article 4 provides:-

> "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

In this charter, again the freedom from cruel, inhuman or degrading treatment is treated separately. Once again, one must note the use of the word " arbiturily."

It may further be pointed out that the United Nations Economic and Social Council on 25th May 1984 adopted a Resolution containing the safeguards guaranteeing protection of the rights of those facing the death penalty. Again some of the provisions of the resolution are instructive. Paragraph 1 states as follows: "In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crime, it being understood that their scope should not be beyond international crimes with lethal or other extremely grave consequences."

Paragraphs 4, 5, 6,7,8,9 and so thereof are as follows:-

1. "Capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts."
2. "Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial.
3. "Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory."
4. "Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.
5. "Capital punishment shall not be carried out pending any appeal or other recourse procedure of other proceedings relating to pardon or commutation of the sentence.
6. "Where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering."

The above instruments are some of those that lay out the framework governing the imposition of capital punishment. States are urged to strive to achieve the goal of the abolition of capital punishment by guaranteeing an unqualified right to life. But it is also recognized that for various reasons some countries still consider it desirable to have capital punishment on their statute books. The retention of capital punishment by itself is not illegal or unlawful or a violation of international law.

4.28 Global Overview of Death Penalty

For example in USA – between 1999 to 2004 the number of people put to death declined to 40% until the late 1990s 300 defendants on average were sentenced each year. In 2003, only 144 were sent to death row, a 50% drop. Thirty seven of 38 states with the death penalty now offer life method parole as an alternative sentencing option and still in the USA, since the 1970s, more than 120 death row inmates have been exonerated of their capital crimes[82].

The pursuit of the common good is linked directly to the defence of human life. At a time when the sanctity of life is threatened in many ways, taking life is not really a solution but may instead effectively undermine respect for life. Public policies that treat some lives as unworthy of protection or not are perceived as vengeful, fracture the moral conviction that human life is sacred.

The Catholic Church has made more noise and pronouncements about the death penalty and that it should be abolished. But unfortunately, the researcher's view, they have not considered the families, the loved ones of the victims who lost their lives.

The freedom from torture, cruel, inhuman and degrading treatment of punishment is guaranteed in the major IHR instruments (UDHR, arts 4, 5; ACHR, art 5, 6; ECHR, art 3: ACHPR, art 5) as well as in thematic HR instruments such as the Protocol on rights of women in Africa. These freedoms, together with freedoms from slavery and servitude, are very pertinent to the dignity and integrity of the individual.

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The ACommHPR has been critical of acts and conflict conduct that degrades the dignity or the legal status of the individual under article5 of the ACHPR. The question is what amounts to acts and conduct that degrades the dignity in violation of freedom from torture, cruel, inhuman and degrading treatment of punishment? As with the right, violations of these freedoms involve deliberate acts. In this respect, deliberate acts of physical beating or mistreatment have been condemned as being in violation of art 5 of the ACHPR. On the other hand, acts such as beatings, shackling and suspending of prisoners have been regarded to be in violation of art 5 of the ACHPR. In the world organization against torture, et al. case, the commission remarked that:

> "The beating of detainees with fists, sticks and boots, the keeping of prisoners in chains and subjecting them to electric shock, physical suspension and submersion in water, as detailed in communication 47/90, offended the human dignity. Such acts, together and separately constitute a violation of article 5.

Other dehumanizing acts such as solitary confinement and deprivation of food and water have been regarded as violations of article 5 of the Charter. These are in fact more psychological than physical acts offending against the dignity on the person of the individual.

4.29 The key issues being prison conditions in Africa and Arbitrary treatment, judicial remedies .

In the Krishna Achuthan on behalf of Aleke Banda, et al. case, apart from deliberate illegal acts committed against prisoners by prison officials, the ACommHPR considered the issue of prison conditions as presented in communications and observed that;

> "The complaints also describe general prison conditions in Malawi. These include.... overcrowding such that cells for 70 people are occupied by up to 200. Such conditions offend the dignity of the person and violate article 5 of the Charter. In addition, the inability of prisoners to leave their cells for up to 14 hours at a time, lack of organized sports, lack of medical treatment, poor sanitary conditions and lack of access to visitors, post and reading materials are all violations of article 5."

The state and conditions of prisons in African states was further criticized by the commission in a resolution in 1995 as not being in conformity with the provisions of the Charter and international

norms and standards for protection of the human rights of prisoners. The commission has also since appointed a special Rapportuer on prisons and conditions of detention in Africa to visit and report on prison condition in the state parties.

The freedom from torture, cruel, inhuman and degrading treatment or punishment has been applied with regards to the death penalty (or death row phenomenon). This is particularly the case in situations where an extradition of a fugitive is sought by a state where the death penalty exists or the likelihood of death row is evident.

The right to personal liberty is guaranteed in IHR instruments (e.g UDHR, art 3,9; ACHR, art 7;ECHR, art 4;ACHPR, art 6). The right also embodies what is referred to as the right to security of the person (i.e. protection with respect to incommunicado detention or disappearances).

4.30 Arbitrary Treatment

Given that there are instances of lawful/justified deprivation of personal liberty (e.g arrest for commission of a criminal offense). In effect, it is the element of arbitrariness that has been condemned in acts and conduct of state parties. To that end, an individual must be afforded reasons for arrest or det9netion, lest the deprivation of personal liberty will be arbitrary. In commission Nationale des Droits de I'homme et des liberties v Chad, ACHPR Commn. No. 74/92, the ACommHPR noted that the arrest of members of opposition parties without charge or judicial intervention constituted an arbitrary act in violation of article 6 of the ACHPR. Furthermore, the ACommHPR held that the disappearance of individuals reflected a failure of a state to secure the security of the person of such individuals:

> "In respect of forced disappearances, where the government denies knowledge as to the whereabouts of individuals, the commission finds that such acts violate the physical integrity and security of the person under article 6."

6.16 In constitutional rights project, civil liberties organization and Media rights Agenda V. Nigeria, ACHPR Commn Nos. 141/94, 145/95, the ACommHPR held that: to detain persons on account of their political beliefs, especially where no charges are brought against them renders the deprivation of liberty arbitrary.

A regards preventive (incommunicado) detention, a practice where individuals are detained for long periods of time without trial, this is a violation of the right to liberty. Thus, although the complaint was released in Henry kalena V Zambia, ACHPR Commn. NO. 11/88, the ACommHPR noted that, the detention on Mr. Kelenga for three years, without charge r trial, would violate article 6 of the Charter. In the International Pen, et al, on behalf of Ken Saro-Wiwa. Jr. case, the ACommHPR was even more critical, given that preventive detention had been provided for under specific legislative enactments , viz, the state security (Detention of persons) Act of 1984 (and its amendment decree of 1994 of 1994). The ACommHPR observed that:

> "This decree allows the government to arbitrary hold people critical of the government for up to 3 months without having to explain themselves and without any opportunity for the complainant to challenge the arrest and detention before a court of law. The decree therefore prima facie violates the right not to be arbitrarily arrested or detained protected in article 6."

4.31 Judicial Remedies

The most significant is the writ of habeaus corpus. In the American HR system, the remedy is specifically protected (arts 25 and 27 of the ACHR) and it cannot be suspended or derogated from situations of emergency.

Under the African HR system, the remedy has been read into art 6 of ACHPR. In constitutional Rights project and civil liberties Organizations V. Nigeria. ACHPR Commn Nos. 143/5, 15096, the government prohibited issuance by any court of the writ of habeaus corpus or any prerogative order for the production of any person detained under Decree No. 2 of 1984. The ACommHPR highlighted the significance of the remedy:

> "The problem of the arbitrary detention has existed for hundreds of years. The writ of habeaus corpus was developed as the response of common law to arbitrary detention, permitting detained persons and their representatives to challenge such detention and demand that the authority either release or justify all imprisonment... Habeaus corpus has become a fundamental facet of common law legal systems. It permits individuals to challenge their detention proactively and collaterally, rather than waiting for the outcome of whatever legal proceedings may be brought against them. It is especially vital in those instances in which charges have not, or may never be, brought against the detained individual."

The challenges facing the stakeholders is how do you stop the ever increasing violent crime in the society without enacting laws that are inconsistent with human rights standards. It should be noted that the state machinery that detect crime are still backwards. They lack basic aids like advanced DNA machines which can link the suspect to the crime, etc as in USA, Britain. The researcher is not saying that because of lack of advanced technology as far as crime detection is concerned, the government should enact laws ignoring human rights standards rather the researcher is of the view that laws made should be able to accommodate human rights standards as well. This would at least show that Uganda has not totally ignored human rights standards even articles some of which Uganda has ratified. The ICC relevance on the death penalty in Uganda cannot be ignored though it does not have complete jurisdiction over the death penalty in Uganda. Its influence cannot be overlooked or ignored.

In the next chapter the researcher will critically examine the distinction between the death penalty generally and the mandatory death sentence, court's view of the death penalty as a violation of human rights and any new imports in the Ugandan constitution brought about by Suzan Kigula case.

4.32 The Suzan Kigula case: a step ahead or a bar to abolition of the death penalty in Uganda?

4.33 Distinction between the death penalty generally and the mandatory death penalty.

The death penalty can be imposed in a number of cases on conviction e.g. defilement where the trial court has a discretion to sentence any period up to life imprisonment and considering the gravity and the circumstances surrounding the case before it. In fact no one has ever been sentenced to death in Uganda- the maximum sentence given so far is 30 years imprisonment for defilement and rape. For a list of crimes carrying a death sentence under Uganda law (See chapter 5.9)

In mandatory death sentence the convict is automatically sentenced to death what ever the mitigating factors that may be present. In cases where a mandatory death sentence is prescribed the hands of the judge are tied. The trial court has to impose that sentence. In fact law filters the discretion of the court. This was the position in Uganda until the Suzan Kigula case made all the difference- when the Supreme Court ruled that mandatory death sentences were no longer legal. In the armed forces the death penalty is often carried out on its soldiers who kill either civilians or fellow soldiers. This is done hastily and the public only learn of it after the execution. The trials are often carried out by unit court marshal and the punishment is normally shift.

4.34 The court's view on the death penalty as violation on human rights.

The appellants in the Suzan Kigula case filed their petition in the constitutional court under article 237(3) of the constitution challenging the constitutionality of the death penalty under the constitution of Uganda. The respondents were persons who had been convicted of diverse offenses under the penal code act and had been sentenced to death as provided for under the laws of Uganda. They contended that the imposition on them of the death penalty death was inconsistent with articles 24 and 44 of the constitution.

Counsel for the appellants fully supported the decision of the constitutional court that articles 24 and 44 were not meant to apply to article 22(1) of the constitution and that the death penalty has provided for in article 22(1) was unconstitutional in Uganda.

The Supreme Court started from what appeared to be a common position, namely; that the right to life is the most fundamental of all rights.

The taking away of such a right is, therefore, a matter of great consequence deserving serious consideration by those who make constitutions as well as those who interpret those constitutions. One must also bear in mind that different constitutions may provide for different things precisely because each constitution is dealing with a philosophy and circumstances of a particular country. Nevertheless there are common standards of humanity that all constitutions set out to achieve. In discussing this matter the court made references on the subject.

CHAPTER FIVE

DATA ANALYSIS, INTERPRETATION AND PRESENTATION

5.0 Introduction

The study research studied Susan Kigula and others case in the constitutionality of Uganda. The research featured several field studies, and derivatives duly obtained and tabulated in a research-based format.

5.1 Respondent Identification

Table 1: Respondent's Identification and particulars

RESPONDENTS	FREQUENCY	PERCENTAGE
LOCATION		
PRIVATE PRACTICE	23	57.5
GOVERNMENT PRACTICE	7	17.5
CIVIL SERVANT	4	10
PUBLIC OFFICER		
TEACHER		
OTHER	6	15
TOTAL	**40**	**100**

Source: Field Work

From table 1 above the research shows an indication of 57.5% of the respondents worked in private firms. This indication shows that most of those who responded to the questionnaires were a classified class of professionals with 17.5% derived from the government.

Public officers and teachers could not participate in the research and hence showing a combination of factors aiding their absence in the study.

5.2 Background – Bio data Information

Table 2: Showing the bio data of the respondents

RESPONDENTS	FREQUENCY	PERCENTAGE
MALE	24	60
FEMALE	16	40
TOTAL	**40**	**100**

Source: Primary data

From table 2, the number of respondents interviewed varied to a greater extend. In this context, the study was sensitive to gender and had a balanced approach with 24 (60%) male and 16 (40%) female actively participating in the study.

5.3 Age of the Respondents

Table 3: Showing the age of the respondents

AGE	FREQUENCY	PERCENTAGE
18-30	15	37.5
31-40	15	37.5
41-50	7	17.5
50+	3	7.5
TOTAL	**40**	**100**

Source: Primary data

Table 3, showing the ages of the respondents provides a platform for varied comparisons of the age ranges of those interviewed. The largest category, age 18-30, 15(37.5%) and 31-40, 15(37.5%) indicates a comparative level of the study clearly indicating that the active participants were the young active professionals in the field.

This indicated a valuable study platform for the research and it further illustrates that the study intended to get opinions from all age ranges, 41-50, 7(17.5%) and 50+, 3(7.5%)

5.4 Marital status of the Respondents

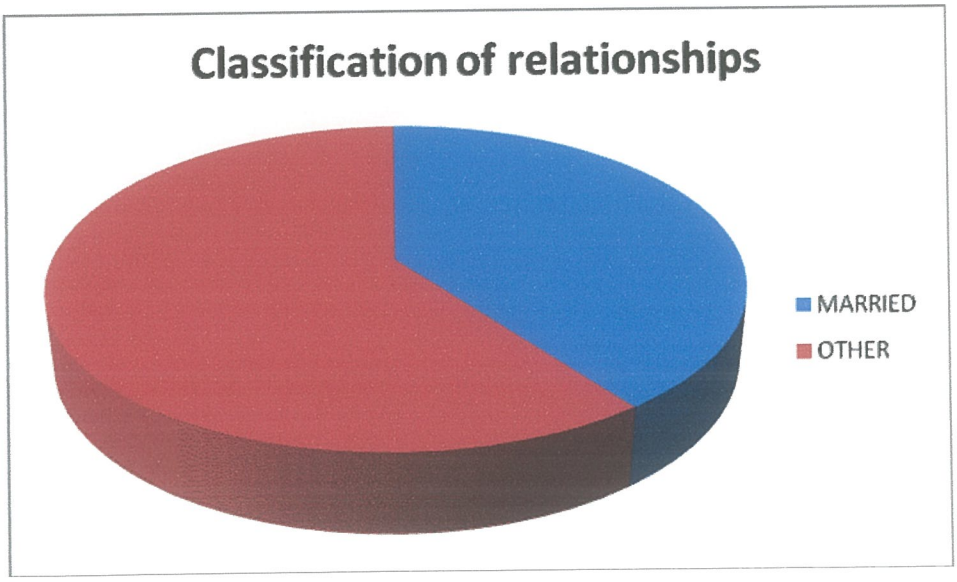
Table 4: The martial status of the respondents

MARITAL STATUS	FREQUENCY	PERCENTAGE
MARRIED	16	40
OTHER	24	60
TOTAL	**40**	**100**

Source: Primary data

From table 4 above, it can be easily confirmed that marital status play a big role in the specified area of study. The study considered greatly views from both the married and the other classes of relationships. The largest respondents, Other 24(60) show a classified group of relationships combined at a range. The married, 16(40%) show an equitable class of people whose participation was also a real classification of a more stable group with an experience in the area being studied.

Figure 1. Classification of relationships



Source: Primary data

The graphical representation above shows a comparative level in percentages.

5.5 Education background of the Respondents

Table 5: Showing the educational background of the respondents

EDUCATION	FREQUENCY	PERCENTAGE
NEVER WENT TO SCHOOL		
PRIMARY		
SECONDARY		
DIPLOMA	6	15
DEGREE	29	72.5
MASTERS DEGREE	5	12.5
TOTAL	**40**	**100**

Source: Primary data

From table 5 above, it will be clearly marked that the greatest number of those who responded had first degrees, 29(72.5%), and 6(15%) falls under the category of diploma. A few correspondents had master's degree, 4(12.5%).

None of the correspondents was a secondary or a primary graduate indicating a strong link between the level of responses and their education hence enhancing the quality of the study.

5.6 Death penalty Awareness & Legality

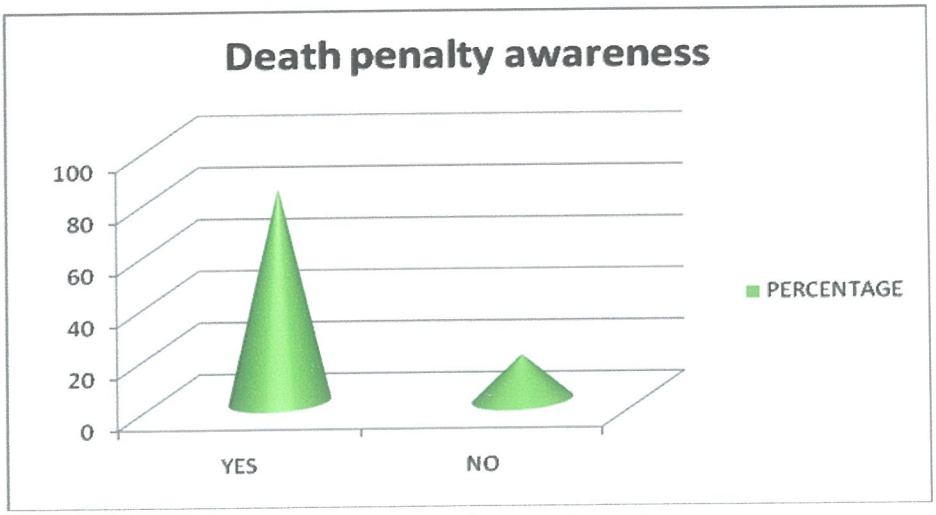
Table 6: Showing death penalty awareness and legality

LEGALITY	FREQUENCY	PERCENTAGE
YES	33	82.5
NO	7	17.5
TOTAL	**40**	**100**

Source: Primary data

Table 6 above indicate that 33(82.5%) of the respondents are aware of the existence of death penalty and possible a huge indication of absolute legality within the boundaries of justice and only 7 (17.5%) of this having no knowledge of the existence of death penalty.

Figure 2. Death penalty awareness



Source: Primary data

5.7 Persons in Death Sentence Awareness

Table 7: Showing persons in death sentence awareness

PERSONS SENTENCED	FREQUENCY	PERCENTAGE
YES	34	85
NO	6	15
TOTAL	**40**	**100**

Source: Primary data

Table 7 above clearly indicate that majority of the respondents, 34(85%) were aware of some people convicted of crimes related to death sentences. It implies from the study that these respondents had a comparative information or even experience on people who have committed similar crimes. A negligible number, 6(15%) allege not to have any experience of a person sentenced to death.

5.8 Crimes Committed

Table 8: Showing crimes committed

CRIMES COMMITTED	FREQUENCY	PERCENTAGE
AGGRAVATED ROBBERY	10	25
MURDER	27	67.5
DEFILEMENT		
OTHER SERIOUS CRIMES		
DON'T KNOW	3	7.5
TOTAL	**40**	**100**

Source: Primary data

As shown in table 8 above, the study stated that the number of respondents indicating crimes committed shows that 27(67.5) committed crimes related to murder. Another 10(25%) indicate that the crimes committed were aggravated robbery. And unlike other serious crimes and defilement, other respondents suggested that they weren't aware of any crime, 3(7.5%)

5.9 Effectiveness of Death Sentence

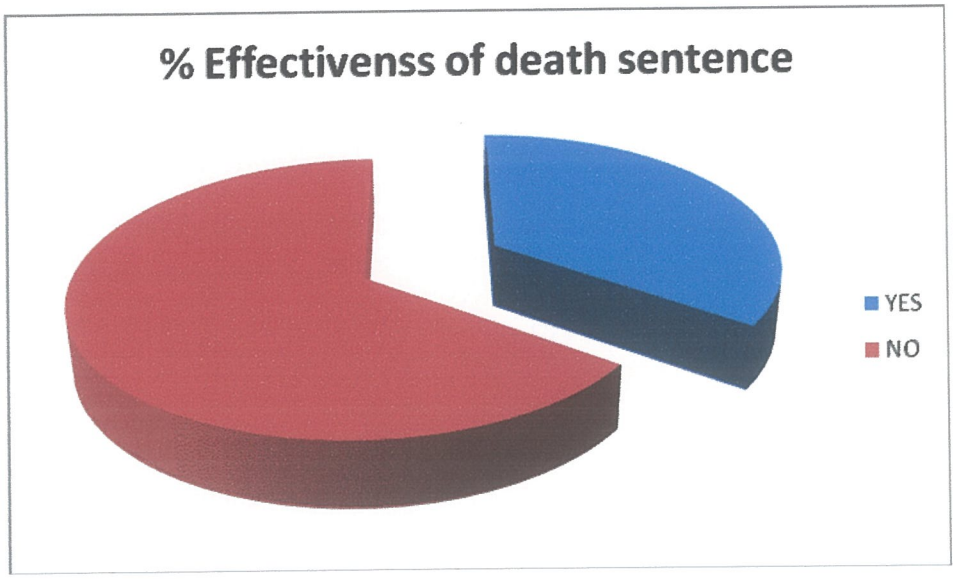
Table 9: Effectiveness of death sentence

EFFECTIVE	FREQUENCY	PERCENTAGE
YES	14	35
NO	26	65
TOTAL	40	100

Source: Primary data

The study indicates that majority of respondents believed that death sentences passed on to guilty persons was not effective, 26(65%), an arbitrary believe that there was a limited justification of death sentence in relation to the crimes committed. Another 14(35%) believe that death sentence was effective.

Figure 3: Percentage effectiveness of death sentence



Source: Primary data

Graph above showing an equivalent ratios in percentages.

5.10 Abolishment of Death Sentence

Table 10: Showing death sentence abolishment

ABOLISHMENT	FREQUENCY	PERCENTAGE
YES	20	50
NO	20	50
TOTAL	40	100

Source: Primary data

20(50%) of the respondents believed that death sentence had significant role in the pursuit of justice in the table study above. A similar margin (50%) also believed that death penalty should not be abolished.

5.11 Death Penalty an Effective Deterrent Punishment

Table 11: Showing death penalty as an effective punishment.

EFFECTIVE PUNISHMENT	FREQUENCY	PERCENTAGE
YES	23	57.5
NO	17	42.5
TOTAL	40	100

Source: Primary data

From the table above, most respondents agreed that death sentence is satisfactory and could impact greatly on those found guilty, 23(57.5%) of this on this view. Other respondents, 17(42.5%) of the respondents were of the opinion that this method of administering justice was not effective enough.

Figure 4: Administering justice through Death penalty

Source: Primary data

5.12 Death Penalty violate the Right to life

Table 12: Showing death penalty violation to the right to life

LIFE VIOLATION	FREQUENCY	PERCENTAGE
YES	24	60
NO	16	40
TOTAL	40	100

Source: Primary data

From table 12 shown above, 24(60%) of the respondents indicate that death penalty was a violation of right to life and hence no justifiable reasons to have it imposed.

Another 16(24%) of the respondents in their opinion believed that death sentence was justified and should be enforced as a deterrent means of punishment for extreme offenders.

5.13 Death Penalty affirm Right to life

Table 13:: Showing if death penalty affirms right to life

RIGHT TO LIFE	FREQUENCY	PERCENTAGE
YES	10	25
NO	30	75
TOTAL	40	100

Source: Primary data

Table 13 above indicate a relatively huge range of comparison, 30(75%) of respondents indicating that death penalty does not affirm the rights to life, while in their opinion, 10(25%) of the respondents affirms that it does affirms right to life.

5.14 Ethical Acceptance

Table 14: Showing if death penalty is ethical accepted

ACCEPTANCE	FREQUENCY	PERCENTAGE
YES	20	50
NO	20	50
TOTAL	40	100

Source: Primary data

Of the 40 participants who took part in the study, 20(50%) think that death penalty is ethically accepted norm in the society. A similar capacity, 20(50%) indicate otherwise arbitrarily showing that this means does not conform to nature.

5.15 Death Penalty & Community Crime Method

Table 15: Showing whether the death reality deters would be from community crime

COMMUNITY CRIME	FREQUENCY	PERCENTAGE
YES	20	50
NO	20	50
TOTAL	40	100

Source: Primary data

From the study, 20(50%) of the respondents agreed that death reality deter would be from community crime, while a similar margin, 20(50%) disagreed with this view.

5.16 Abolishing Death Penalty in Uganda

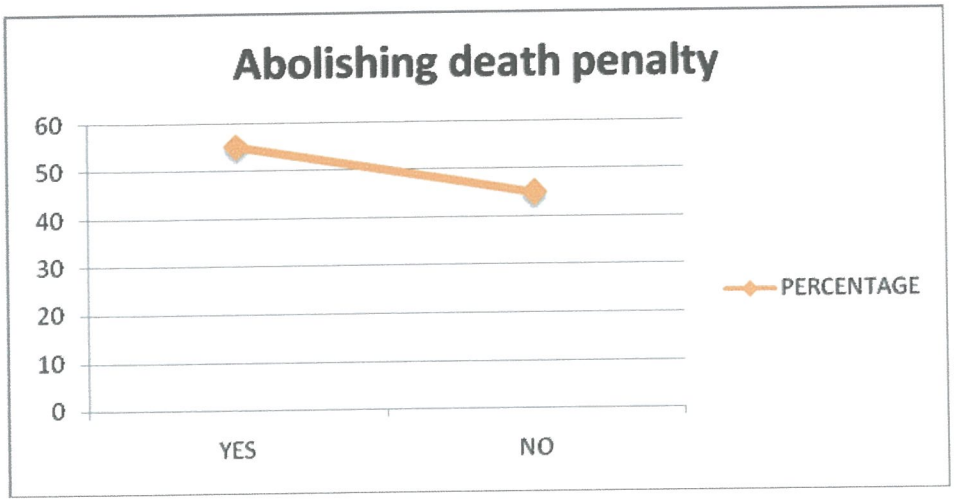
Table 16: Showing whether death penalty should be abolished in Uganda

DEATH PENALITY	FREQUENCY	PERCENTAGE
YES	22	55
NO	18	45
TOTAL	40	100

Source: Primary data

The study above indicate that majority of the respondents 22(55%) believe that death sentence should be abolished. A smaller number 15(45%) believe that death penalty should not be abolished.

Figure 5:Abolishing death penalty



Source: Primary data

5.17 innocent Persons Sentenced to Death Awareness

Table 17: Showing if innocent people have been sentenced to death

INNOCENT PERSONS SENTENCED	FREQUENCY	PERCENTAGE
YES	13	32
NO	27	68
TOTAL	40	100

Source: Primary data

Table 17 indicate that a negligible number of respondents believed that innocent people were convicted 13(32%) while a huge percentage, 27(68%) believed that no innocent person/people were sentenced to death.

5.18 REPLACEMENT OF DEATH SENTENCE

Table 18:: If death penalty shall be replaced by an alternative punishment

REPLACEMENT OF DEATH SENTENCE	FREQUENCY	PERCENTAGE
YES	20	50
NO	20	50
TOTAL	**40**	**100**

Source: Primary data

From table 18, the research sought to find out if other means of punishment were available. A comparative number of respondents on either side had a moderate view, 20(50%) on each support declaring either positions on the same.

5.19 Death Sentence conformity with Human Rights

Table 19: Showing if death penalty against human rights

CONFORMITY	FREQUENCY	PERCENTAGE
YES	28	70
NO	12	30
TOTAL	**40**	**100**

Source: Primary data

From table 19, it is indicated that a majority of the respondents 28(70%) believed that death sentence is against human rights, or violates human rights of a person being convicted. At the same time, 12(30%) of the respondents believe that this method of administering justice is in line with human rights and hence no violation of any kind.

5.20 Other Views on Death Penalty in Uganda

Table 20: other comments on death penalty

AVAILABLE VIEWS	FREQUENCY	PERCENTAGE
YES	24	60
NO	16	40
TOTAL	**40**	**100**

Source: Primary data

The research sought from table 20 to find out if the respondents had other added information regarding death penalty. 24(60%) of these respondents believe that more information could be discussed and other reviews updated on matters related to death penalty and the society. 16(40%) of the respondents believed they had no other ideas to share.

5.21 Further contacts on this work

Table 21: If contacted later

FURTHER RESEARCH	FREQUENCY	PERCENTAGE
YES	24	60
NO	16	40
TOTAL	**40**	**100**

Source: Primary data

Finally, the researcher sought from respondents if they could be contacted later for further information. In this study, 24% said YES while 16% said NO.

CHAPTER SIX

6.0 Conclusion and Recommendations

In this chapter, the researcher draws his conclusions of the research and some recommendations to the Uganda government and organizations and general public.

The death penalty in Uganda is constitutional. As of today the number of people condemned to death by the military is unknown and those condemned by the civil courts is not exactly known. The researcher strongly believes that the government is not doing enough to favour the emergence of an informed public debate about the death penalty and its possible abolition. Neither has the media done any better in this direction! Nothing has been done to test if the strong public support for the death penalty as was found by the Odoki commission ten years ago is still strong or whether people have changed their views since then.

No one knows whether this is a pretext to retain the death penalty or not. There is great indifference towards the abolition of the death penalty and at times the speed at which it (death penalty is carried out within the army units may be a sign that there is no political will to introduce serious debate on the issue.

The mental torture, death row syndrome and the continuous fear that any time the execution may be carried out constitutes an inhuman and degrading treatment. This procedure before the execution fails to respect human dignity of the prisoner and violates articles 7 and 10(1)of the ICCPR.
It is not possible to ascertain whether the conditions of the detention of death row inmates comply with international standards:

Because of lack of access by specialized independent bodies. The lack of seriousness of the clemency committee to meet as often as possible (responding to the need) do not permit public scrutiny and violates the right to seek pardon or commutations of the sentence enshrined in article 6 of the ICCPR.

The retention of the death penalty (it was ruled that it was constitutional) is a violation of international standards. In spite of the unsuccessful judicial challenge by the Kigula case to the death penalty, the courts have continued to reaffirm the death sentences afresh. But court's judicial notice of the international trend for abolition and the advice to the law makers to consider the abolition of the death penalty are indeed encouraging moves. It is hooped that the courts of Uganda may have a leading role to play towards the abolition of the capital punishment as an inhuman, degrading and cruel punishment has been the case in South Africa.

The Kigula case and the decision of the Supreme Court where a wake up call to many. It was held that the mandatory death compromised the principal of a fair trial because normally the court takes into account the evidence, the nature of the offense and the circumstances of the case in order to arrive at an appropriate sentence.

Section 94 of the Trial in indictment Act provides , " If the accused person is found guilty.... the judge shall ask him.... whether he or she has anything to say why the sentence should not be passed upon him/ her according to the law."

The reason why the accused is given this right is that so that he may present some mitigating factors- which may affect the sentence to be passed on him. This was also a new import into the Uganda criminal laws brought about by the Kigula decision. The judges in the Kigula case found that it was unfair and inconsistent with the law to allow an accused to say something in mitigation when he is charged with stealing a hen and deny any chance to one accused of murder (and whose life is at stake) to say anything in mitigation. Under article 121(5) of the constitution the judge is obliged to conduct an inquiry. And if there was any circumstances which the framers envisaged when an inquiry could be made, it must have been where a death penalty was involved.

Under article 126 of the constitution, the administration of justice is the function of the judiciary. The entire process of trial from alignment of the accused to his or her sentencing is what constitutes administration of justice. The mandatory death sentence had taken away that power or of the judiciary and thus it was held to be inconsistent with article 126 of the constitution. The law passed by parliament must not be consistent with the constitution was provided for in article 2(2) of the

constitution. The constitution provides for the separation of powers between the legislature and the judiciary. Any law passed by parliament which has the effect of tying the hands of the judiciary in executing its functions o administer justice is inconsistent with the constitution. Hence forth all mandatory death sentences are now maximum death sentences.

Any person convicted and sentenced to death must be given as much latitude to exhaust all the appeal court processes and all processes for clemency before the sentencing can be carried out. Now if a person is sentenced to death and he exhausts all the appeal processes, if he is not executed within a period of 3 years the death will be deemed to have been commuted to life imprisonment with remission. If this period elapses then the executive will have nothing to do with this particular file. The law requires that execution must be carried out according to law, it must have been envisaged that the legislature would continue to study scientifically the available methods of execution and adopt and provide for one which confirms two "evolving standards of decency". The legislature was requested to do this.

The legislature was argued among other things to reopen the debate on the desirability of the death penalty in the constitution. The inactivity of the executive in either direction would seem to indicate a desire to do away with the death penalty.

Overwhelming evidence compels the conclusion that the death penalty system is broken. Racial prejudice (particularly in USA, Japan etc), incompetent government counsels, inadequate funding and human mistake contribute to a death penalty realty of wrongful convictions and injustice. The risk that we have, that will execute an innocent is very real in system so replete with error. Reform is essential and agent for the men, women and children on the death row. It is our challenge to work for a systematic change that will guarantee due process, fairness and equal access to justice to all those facing the death sentence.

During the course of the research, the researcher identified number of elements inconsistent with the international human rights obligations of Uganda in the context of the adminitr6ation of the death penalty.

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

In addition, new crimes entailing the death penalty have been established after ratification of the ICCPR by Uganda. This is notably the case wit the crime of terrorism. A bill concerning aggravated robbery currently under discussion in parliament also carries the death sentence. Covenant to progressively restrict the number of offenses for which the death penalty could be imposed, and to tend towards the abolition of the death penalty.

It is furthermore in contradiction with the fact that Uganda ratified the statute of the ICC, which excludes recourse to the death penalty, in particular for the most serious international crimes.
The restriction of the death penalty on persons with a mental deficiency is not broad enough to be in line with international standards in that regard.

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

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

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

The conditions of detention are largely below international human rights standards. Only a registered nurse or paramedic is based on a permanent basis in the prison, where there should be a doctor. Pharmaceuticals are insufficient; diet is of very poor quality and is not adequate for sick people.

Accommodation and sanitation are extremely poor, in particular in Luzira prison. Solitary confinement is still used as a disciplinary measure for up to 14 consecutive days.
In views of the accounts and testimonies of detainees or former detainees from condemned section of the Luzira prison, the researcher considers that execution by hanging in Uganda clearly amounts to an inhuman treatment as well as torture.

Unfortunately greater attention has been forced on the abolition of the death penalty the world over. What the abolitionists have failed to do is to consider the plight of the victim's families. Did the victims not have human rights whose rights were cut short by deliberate criminal behaviours? Why should someone take another's life brutally and then be allowed to live and be protected and fed on tax payer's money? As the death penalty really failed to accomplish what it was intended to do-namely to act as a deterrence? There are no statistics of this. The numbers of mothers have gone up, but who knows, the numbers would have been higher. Since there are no figures to go by, that so and so had planned to commit a murder but because of the death penalty he gave up. There are no figures to guide us. The researcher is of the view that this would be wrong to over emphasize the point that the death penalty has no deterrence effect.

6.1. Recommendations

6.1.1 To the government of Uganda

1. Officially adopt a moratorium on the death penalty as a first step towards its abolition. In Uganda the convicted prisoners and their relatives are left in total suspense-not knowing when they would be executed. This has been the case for a long time. It is only fair that the prisoners are not kept in the dark for such a long time-sometimes as long as 20 years. The prisoners should be given sufficient notice about the death warrant and the date of execution and allow them visits by their relative (prisoner)
2. As a first step, restrict the number of offences carrying the death sentence to the most serious crimes only, in conformity with international human rights law. In fact there is no need to keep

on extending the list of crimes that carry the death penalty e.g. terrorism. The list should not only be left as it is but should also be in line with the international human rights law. The government should refrain from adopting new crimes entailing capital punishment.

3. Clearly exclude the imposition of the death penalty from persons with any mental or intellectual deficiency. The courts should exclude the imposition of the death penalty from persons with mental or intellectual deficiency. They should first be subjected to psychiatric examination to determine their mental state at the time the crime was committed.
4. Ensure transparency in the composition and the proceedings of the advisory committee in charge of the prerogative of mercy, as requested by the constitutional court of Uganda in its 10 June 2005 ruling.
5. Ensure that appeal against death sentences pronounced by military courts be a matter of course mandatory, and that request for mercy be possible. Because those normally convicted lack legal representation and where this is offered, it is the army personnel. To the laymen, it gives the impression that the same group of people who are prosecuting, judging and perhaps 'pretending' to defend. This will also necessitate the military courts to refrain from carrying out the punishment hastily-The prisoner is executed immediately after conviction. The procedure of revision against death sentences pronounced by the court martial should be reformed. This would guarantee an effective right of appeal by the accused. It should be ensured that persons condemned by military courts benefit effectively from the right to appeal and this appeal should be automatic in case of the death penalty and ensure more generally that military courts abide by the fair guarantees (independence, impartiality, etc).
6. Make public statistics on the number of death sentences pronounced and executed every year, differentiated by age, gender, charges etc and allow for an informed public debate on the issue. This is important for the record. It will also assist the stakeholders to make an informed decision(s), instead of availing the record whenever they like. At least this should be done periodically.
7. Conduct sensitization campaigns to make the Ugandan population aware of the necessity to abolish the death penalty. In Uganda where mob justice is rampant, the population needs to be sensitized about the death penalty. This in long run will help them make informed decisions.

8. Protocol II to the ICCPR abolishing the death penalty should be ratified. There should be support initiative of the African commission for the adoption of a protocol to the African charter abolishing the death penalty. Uganda must make a positive move- and the sooner the better.
9. A law should be passed to assist the victims families, i.e. by offering financial support where the victim has been the sole breadwinner – or in any other way that is possible so that the families can continue to live a near normal life. This is very important in a state like Uganda where there is no welfare system.
10. To set up legal training for judges and lawyers, in particular on human rights, with a special focus on capital punishment and the regional and international standards relating to the fair trial guarantees. This will not only go a long way to supplement and enhance their knowledge in their field/course of work. To provide an explicit and systematic rule of impartiality in the courts.

11. To allow the accused to present further evidence to the clemency committee. The convict on the death row should be given an opportunity to present additional evidence to this committee. This would require the payment of expenses to the witnesses if any – and the government should pay those witnesses because in most cases the convict will have no money. The witnesses of the accused persons who cannot afford to procure their attendance should be funded by the government.
12. To reform the procedure of revision against death sentences pronounced by the court Martial. In order to guarantee an effective right of appeal by the convict.
13. To give prisoners sufficient notice about the death warrant and the date of execution. The families of the prisoner should be informed of the exact date of the execution and to allow it to visit the prisoner.

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APPENDIX 1

TRANSMITTAL LETTER

This is a letter attached from the school of postgraduate studies and research

APPENDIX II

CLEARANCE FROM ETHICS COMMITTEE

APPENDIX III
INFORMED CONSENT

APPENDIX IV
RESEARCH INSTRUMENT

INTERVIEW

To be administered to Advocates in Private Practice or Government Service, Government, Prison Officers :

The Researcher is a student at Kampala International University pursuing a Masters of Laws Degree (Criminology) He is doing research on "The Impact of the Susan Kigula and Others Case in the Constitutionality of Uganda."

Your input is very important to accomplish the objectives of this research.

Kindly answer the questions set herein as honestly as possible. You do not need to disclose your name unless you so wish.

This information obtained will be treated with utmost confidentiality and only for purpose of this study.

Thank you for participating in this research project.

SECTION A

1.0 RESPONDENT'S INDENTIFICATION PARTICULARS

	CODES
1.0 Location (Village District)	☐
1.2 Respondents number 10	☐
1.3 Date of interview August 2010	☐
1.4 Private practice	☐
1.5 Government practice	☐
1.6 Civil servant	☐
1.7 Public Officer	☐
1.8 Teacher	☐
1.9 Other	☐

SECTION B

2.0 BACKGROUND (BIO DATA INFORMATION)

2.1 State occupation

2.2 Gender

1. Male ☐
2. Female ☐

2.3 Age of Respondents

1. 18 – 30 ☐
2. 31 – 40 ☐
3. 41 – 50 ☐
4. 50+ ☐

5. I don't know ☐

3.1.4 Has the death penalty been an effective deterrent?

Yes ☐ No ☐

4.1 Should the death penalty be abolished?

Yes ☐ No ☐

4.2 Is the death penalty an effective deterrent punishment?

Yes ☐ No ☐

4.3 Does the death penalty violate the right to life?

Yes ☐ No ☐

4.4 Does the death penalty affirm the right to life?

Yes ☐ No ☐

4.5 Do you personally support the death penalty?

Why.....

.....

4.6 Is the death penalty ethically acceptable?

Yes ☐ No ☐

4.7 Is there a way to tell whether the death reality deters would be XXXXXXXXXXX from community crime?

Yes ☐ No ☐

5.1 Should the death penalty be abolished in Uganda?

Yes ☐ No ☐

5.2 Are you aware of any innocent person who has been sentenced to death?

Yes ☐ No ☐

5.3 Shall the death penalty be replaced by an alternative punishment?

Yes ☐ No ☐

5.4 Is the death penalty against human rights in Uganda?

Yes ☐ No ☐

5.5 WHO shall play an important role in the abolition of the death penalty in Uganda?

Yes ☐ No ☐

6.1 Do you have any comments to make on the death penalty in Uganda or generally?

Yes ☐ No ☐

If yes, please be very brief

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6.2 Do you mind if the researcher contacts you again?

Yes ☐ No ☐