

The death Penalty in Uganda: Obstacles to the adoption of the draft Protocol and strategies the civil society could undertake to mitigate them.

Lucy Peace Nantume¹

Round table on the draft Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the death penalty in Africa.

World Congress against the Death Penalty

Oslo – Norway, 23rd June 2016

Status of the death penalty in Uganda

The death penalty is enshrined in article 22 (1) of the Constitution of the Republic of Uganda. It states, “No person shall be deprived of life intentionally **except** 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.” The statutes which prescribe offences that attract the death penalty are: the *Penal Code Act, Cap 120*, the *Anti-Terrorism Act, 2002 amended in 2015* and the *Uganda Peoples Defence Forces (UPDF) Act, 2005*.²

¹ Human rights lawyer and activist, Manager-death penalty project, Foundation for Human Rights Initiative Uganda.

² *The Penal Code Act, Cap 120* accounts for eight offences that attract the death penalty which are: Murder (Section 189), Aggravated Robbery (Section 286 (2)), Rape (Section 123), Aggravated Defilement (129 (1) of the Penal Code Amendment Act 2007), Treason and Offences against the State (Section 23), Kidnap with Intent to Murder (Section 243), Smuggling while Armed (Section 319(2)) and Detention with Sexual Intent (Section 134).

The *Anti-Terrorism Act* accounts for three offences that attract the death penalty which are: Engaging in or Carrying out Acts of Terrorism (Section 7(1)), Aiding and Abetting terrorism (Section 8) and Establishment of Terrorist Institutions (Section 9). The *UPDF Act, 2005* accounts for seventeen offences that attract the death penalty which are: Treachery (Section 16), Mutiny (Section 18), Failing to execute one's duties where such failure results in failure of an operation or loss of life (Section 20), Offences related to prisoners of war where a prisoner of war fails to re-join the army when able to do so, or serves with or aids the enemy (Section 21), Cowardice in action where it results in failure of operation or loss of life (Section 29), Failure by person in command to bring officers under his command into action, or failure to encourage officers under his command to fight courageously or gives premature orders to attack, resulting into failure of operation or loss of life (Section 30), Breaching concealment (Section 31), Failure to protect war materials (Section 32), Failure to brief or give instructions for an operation leading to failure of operation or loss of life (Section 35), Disclosure of confidential information to the enemy or unauthorised persons or discussion of confidential information in unauthorised places, and anything deemed to be prejudicial to the security of the army (Section 37), Spreading harmful propaganda where there is failure of operation or loss of life (Section 38), Desertion if the desertion endangers life, or leads to loss of life, or if the person deserts with ammunition or war materials or joins the enemy (Section 39), Failure to defend a ship or vessel when attacked or cowardly abandons it (Section 50), Inaccurate certification of an air craft or air material (Section 54), Dangerous acts in relation to an aircraft

Uganda has 28 offences (civilian and military) that attract the death sentence. This is the highest number of offences providing for the death penalty in the East African region.³ Nevertheless, the law exempts certain categories of people from being sentenced to death. These are: juveniles, pregnant women, and mentally ill persons. Section 99 of the *Trial on Indictments Act, Cap 23* provides that hanging is the preferred mode of execution for offenders sentenced to death by civilian courts; while firing squad is the preferred mode of execution for offenders sentenced to death by military courts.

On the 4th of September 2003 Katende Ssempebwa & Company advocates under instructions of the Foundation for Human Rights Initiative (FHRI)⁴ filed a petition before the Ugandan Constitutional Court on behalf of all the 417 living inmates sentenced to death in Uganda at the time - The Susan Kigula case.⁵ It was the first time in the world history that a country's entire death row population filed a joint petition against capital punishment. The ruling was made on 10th June 2005. In 2006 an appeal was made to the Supreme Court by the Attorney General and a cross appeal by the petitioners. The former was unanimously dismissed and the later dismissed by majority decision on 21st January 2009. The Supreme Court confirmed the declarations made by the constitutional court with a few modifications to the orders.

Although the Kigula case did not lead to full abolition of the death penalty by the courts, it led to two main outcomes; mandatory death penalty and a delay of 3 or more years in carrying out the execution following confirmation of the sentence by the Supreme Court were held unconstitutional. As an outcome, all prisoners who had spent above 3 years on death row after confirmation of their sentence by the highest appellant courts had the sentence commuted to life imprisonment without parole. Those whose sentences arose from mandatory sentence provisions and were still pending before appellate courts had their cases remitted to the High Court for them to be heard only on mitigation of sentence and new sentences passed.⁶ This led to a drastic decline in the

which may result in loss of life or bodily injury (Section 55), Attempt to hijack an aircraft or vessel used by the army or belonging to the army (section 58), Causing fire where fire results in death (Section 61).

³ Kenya has 5; Tanzania 4 ; while Rwanda and Burundi abolished the death penalty.

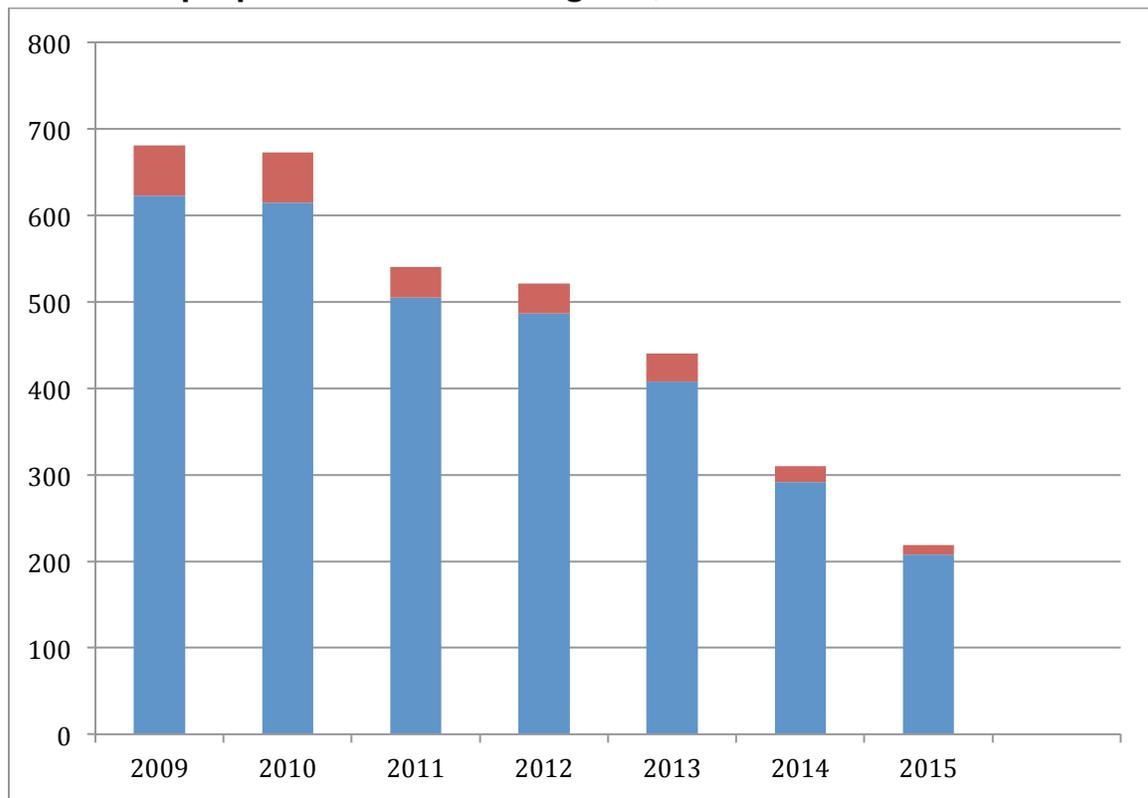
⁴ FHRI is an independent, non-governmental, non-partisan and not-for profit human rights organization established in December 1991. FHRI has, since 1993, led the campaign for the abolition of the death penalty in Uganda. It led the formation of the Civil Society Coalition against the death penalty in Uganda (CADP) and further extended the death penalty campaign to East Africa leading to the formation of the East African Coalition against the death penalty currently chaired by it. FHRI is also a member of the World Coalition against the death penalty (WCADP) to which it is currently a steering committee member and works closely with other organisations advocating for and supporting abolition like the Uganda Prisons Service, Penal Reform International (PRI), International Federation for Human Rights (FIDH) and Parliamentarians for Global Action (PGA).

⁵ Attorney General v Susan Kigula & 417 Others (Constitutional Appeal No.3 of 2006) [2009]UGSC (21st January 2009, p.43

⁶ Supreme court judgement pages 63 and 64

death row population arising mainly from mitigation hearings, which saw most of the death sentences quashed.⁷ Since the ruling, 13 formerly condemned women have been released,⁸ while 18 are serving long-term sentences. On the part of men, 48 are serving 20 years without remission, 264 are through with mitigation, 19 are pending mitigation, 8 were released from court after the mitigation hearings, 15 were given terms of imprisonment and they served and were released, 21 were sentenced to life in prison, 119 were given determinate sentences (5 to 50 years), 20 had their death sentences confirmed, 2 were sent to mental hospital, 2 are pending Minister's Order and 2 were pardoned. The death sentence is still being handed down. 4 new admissions were received in 2015. Overall there are 75 new admissions since the Kigula ruling and the general death row population is 208 (197 men and 11 women).⁹

Number of people on Death row in Uganda, 2009 – 2015

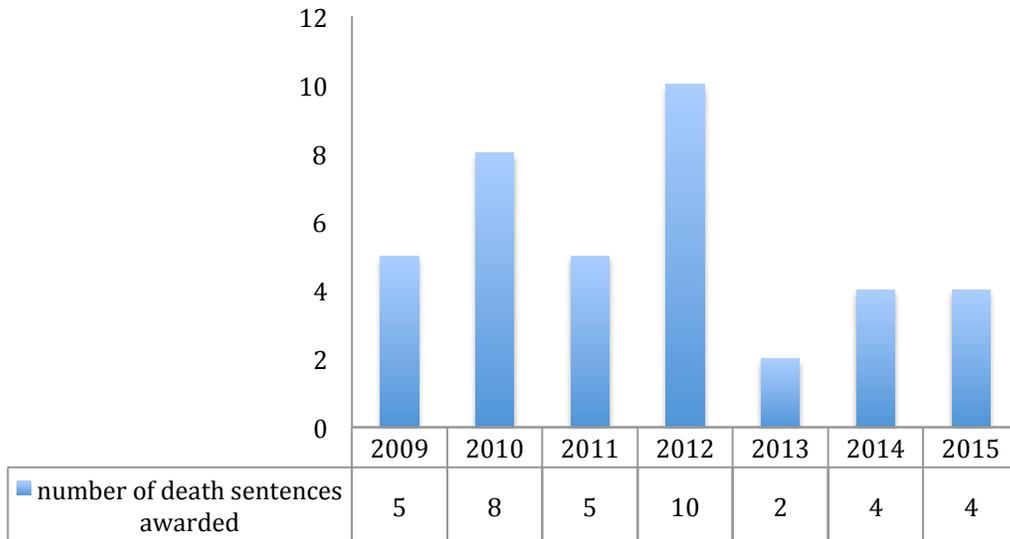


⁷ Before the Susan Kigula ruling, mitigation factors were not heard during trials for capital offenders as per Section 98 of the Trial on Indictments Act, which the Bill seeks to amend.

⁸ Including the lead petitioner Susan Kigula who was released on 22nd January 2016.

⁹ Established from Ms Aliyo Natukunda of Uganda Prisons Service at a Capacity building Forum organized by FHRI on 15th March 2016.

Death sentences awarded since 2009



Recent developments.

Although Uganda has not carried out any executions since 1999 (for civilian) and 2005 (for military), it is still categorised as a retentionist instead of abolitionist de facto country because it rejected all recommendations to abolish the death penalty at its last Universal Periodic Review before the U.N. Human Rights Council¹⁰ and signed four Notes Verbales denouncing the U.N. General Assembly's Resolution to impose a global moratorium on the use of capital punishment. It is however worth noting that during the vote in 2014, for the first time Uganda abstained from voting instead of its previous vote against.

Uganda attracted international scrutiny from 2009, when a Private members' bill was introduced to Parliament, which would have mandated the death penalty for aggravated homosexuality¹¹. The Bill was ultimately passed by the Parliament in December 2013 and signed into law by the president in February 2014, but the capital punishment provision was eliminated and substituted with life imprisonment. The Constitutional Court however ruled the Anti-Homosexuality Act invalid in August 2014 on procedural grounds, as it was not passed with the required quorum.

¹⁰ U.N.G.A., 65th Session, 71st Plenary Meeting, pp. 18-19, U.N. Doc. A/65/PV.71, Dec. 21, 2010. [

¹¹ "Aggravated homosexuality" was defined to include a same-sex sexual act: with a person under the age of 18; committed by a person who is HIV-positive; by a parent or guardian of the person with whom the act is committed; by a person in authority over the person with whom the act is committed; the victim of which is a person with a disability; by a serial offender; or by a person who administers any drug, matter, or thing with the intent to stupefy or overpower another person to enable a same-sex act to be committed.

After the Kigula ruling, some judges who are proponents of the death penalty resorted to issuing sentences beyond 50 years because the ruling was to the effect that those who stay on death row beyond 3 years will have their sentences commuted to life imprisonment which according to the Prisons' Act is construed to mean 20 years.¹² In April 2013, former Chief Justice Benjamin Odoki issued the "Sentencing Guidelines for Courts of Judicature", aimed at strengthening humane, predictable and consistent sentencing¹³. These Guidelines do not address the issue of the death penalty, but stress the importance of taking into account aggravating or mitigating circumstances and the necessity to introduce further transparency and uniformity in the sentencing process. They define a long-term sentence to mean a custodial sentence ranging from 30 to 45 years.¹⁴

Whereas both the Constitutional and the Supreme Courts held that mandatory death penalties are unconstitutional in 2005 and 2009 respectively, with the exception of the Anti- Terrorism Act 2002 which during amendment in 2015 had mandatory death penalty replaced with discretionary, to date, the laws have not been revised to remove the inconsistency. Upon this premise, a private members' Bill titled the Law Revision (Penalties in Criminal Matters) Miscellaneous Amendment Bill, 2015 was presented before Parliament.¹⁵ The Bill further aims at restricting the death penalty to the most serious crimes in accordance with international standards. The Bill received its first reading and was sent before the Legal and Parliamentary affairs committee for consideration. Early this year, the committee received positions and reports from various stakeholders and is in the process of preparing its report. This among other factors has kept the debate on the viability of the death penalty alive in Uganda.

In a remarkable move, convicted terrorists of the 2010 Kampala twin bombings resulting into death of 76 people and leaving many injured were on 26th May 2016 not sentenced to the maximum penalty of death. This depicted the great progress made by the campaign for the abolition of the death penalty. In his ruling, the judge stated that;

"Grave crimes of terrorism and murder must correspondingly attract severe punishment. I however, do not believe that the death sentence would really assuage the victims and give them

¹² Section 86(3) of the Prison Act, 2006 *states that for the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years imprisonment.*"

¹³ <http://www.loc.gov/law/help/sentencing-guidelines/uganda.php>

¹⁴ Paragraph 4 , Sentencing Guidelines Practice Directions, 2013

¹⁵ The Bill was developed by FHRI in 2013. 4 Members of Parliament were identified to take the lead in its advocacy; Hon. Alice Alaso, Hon. Fox Odoi, Hon. Paul Mwiru and Hon. Medard Ssegona

*closure to the indelible pain that the society has suffered on account of terrorism and murderous acts...*¹⁶

Obstacles to the adoption of the Protocol / abolition of the death penalty.

There are many factors contributing to maintaining the death penalty in most African countries like Uganda including: political considerations such as suppressing activities described as ‘subversive’ and the so-called ‘war on terrorism’; considerations regarding the specific or particular local environment such as political and social instability; the idea that international law represents some kind of threat to national sovereignty and the authority of the State; the lack of a unifying system of values, and wide divergences in the fields of politics, the law and culture; continuation of the colonial ideology which is essentially cruel, inhuman and degrading, a continuity expressed in maintaining the death penalty, one of the penal provisions bequeathed by the colonial power, the objective being to subjugate the African people and making them respect a political order to which they did not consent; lack of strong commitment or political will to speed up the process of abolishing the death penalty; a misconception that religions approve of the death penalty; illiteracy amongst some of the population which makes it difficult to promote abolitionist arguments and public conviction that the death penalty is an effective weapon against serious crime. Four main obstacles advanced in Uganda are addressed in this paper.

a) Public opinion

Whereas the Uganda Constitutional Commission recommended in 1992 that “*the issue of maintaining the death penalty should be regularly reviewed through national and public debates to discover whether the views of the people on it have changed to abolition or not*”¹⁷ the only review that was made ten years later (in 2003) by the Constitutional Review Commission (CRC) recommended that the death penalty should be retained and restricted to the crimes of murder, aggravated robbery, kidnapping with intent to murder and defilement of minors.” because it enjoyed support of the “**overwhelming majority**”.¹⁸ However, according to a CRC member closely involved with its statistical analysis, the survey only reflected the views of the 23,656 citizens who responded (0.12% of the population). He contended that regardless of the survey, the 57% of

¹⁶ This ruling was made by Justice Owiny-Dollo. 5 convicted terrorists were sentenced to life imprisonment and 2 to 50 years in prison each.

¹⁷ The Report of the Uganda Constitutional Commission 1992 para 7.107

¹⁸ The Report of the Commission of Inquiry (Constitutional Review) para 13.7

Ugandans who voted for retaining the death penalty were not an “overwhelming majority”.¹⁹

When interpreting issues before them Constitutional courts must decide in accordance with the Constitution and not the prevailing mood of the vocal majority because this can set a very dangerous precedent. Linking judicial protection of fundamental rights to the majority’s wishes can sometimes be dangerous, and defeats the purpose of constitutionalising these rights in the first place. The majority’s wishes can be used to justify egregious human rights violations, even genocide. According to internationally renowned academic Roger Hood, public support has virtually never compelled death penalty abolition.²⁰ In addition, reforms and public policies should not be dictated by public opinion only. Often, necessary reforms are unpopular (taxes etc) but it is parliamentarians’ role to lead public opinion to understand the necessity to move away from revenge and retaliation.²¹

In Uganda, in 2008, FHRI commissioned Steadman Group to undertake a study of the Human Rights situation in Uganda. The study included a survey on the public opinion regarding the death penalty. By then, death penalty was largely discussed due to the Kigula case. The survey showed that 42% of the population sampled was against the death penalty, 39% supported the death penalty and 19% were neither for nor against.²² In 2013, FHRI contracted Ipsos to carry out an opinion poll seeking the views of the public on the death penalty in Uganda among other issues.²³ The findings showed that 32% were against the death penalty, 53% supported it, 10% were undecided while 5% offered no response. However, it is important to note that even though 53% of the participants were in favour of retaining the death penalty, when asked why it should be abolished, 63% stated that it violated individual human rights.

b) Death penalty as a political tool

One of the main reasons for retaining the death penalty in Uganda and many states is political considerations. Uganda can justifiably be described as an illiberal state. One of

¹⁹ For a detailed discussion of this refer to the book “Towards abolition of the death penalty in Uganda” by the civil society coalition on the abolition of the death penalty in Uganda spearheaded by the Foundation for Human Rights Initiative pgs 97 - 100

²⁰ Roger Hood, *The Death Penalty: A Worldwide Perspective*, Oxford University Press, 3rd Ed. 2002, p.234

²¹ Many countries have abolished the death penalty though public opinion favoured it e.g Rwanda. In France although public opinion seemed to be in favour of retention of death penalty (68%), its abolition in 1981 following the commitment of the President at the time during his elections’ campaign did not lead to any protests nor increased crime rates.

²² Steadman Group, Baseline Survey Report, 2008

²³ Ipsos is a global market research company.

its defining features is state institutions that oppress government's opponents who express discontent with its policies. A main weapon in effecting this is through charging the opponents with offences of a capital nature that carry death sentence. In 2006, the leader of the most popular opposition party, the Forum for Democratic Change (FDC), Dr. Kiiza Besigye was charged with rape, treason and terrorism during the election campaigns. In 2011 there were various arrests of opposition members who were charged with treason and terrorism as a result of participating in peaceful civil protests called "walk to work". The same situation was repeated during the recently concluded 2016 elections and currently, the FDC presidential aspirant is on remand in Luzira prison again on treason charges. The offence of treason in Uganda has in practice been used as a means of suppressing the political opposition from expressing dissenting views. Thus the presence of the death penalty on the statute books in Uganda presents a threat to democracy since the power to sign the death warrants or pardon offenders lies with the President.²⁴

The above situation is worsened by the President's express support for the death penalty as quoted on various occasions. In the early years of the campaign for the abolition of the death penalty, he was quoted stating in response to the call by human rights organisations to abolish that; *"I hear some people saying that the death sentence is inhuman. Very sorry. We shall shoot anybody who kills a human being. You are the one who kills, why can't we kill you? When our soldiers make mistakes, we punish them."*²⁵ He still holds the same views because at the opening of the 17th Judges' conference, on 23rd February 2015, he said; *"those who willfully kill others should be sentenced to death and hanged under the law."* In a country like Uganda where Parliamentarians fear the wrath of their constituencies and party, rarely will a Bill un supported by the president be passed into law.

c) Alternative to death penalty

One of the key questions received by campaigners for abolition of the death penalty is the alternative proposed. This is because the public opinion believes that abolition of the death penalty may lead to impunity because of the general perception that without the death penalty offenders will be unleashed to the public. The biggest population in Uganda supports life without parole as the suitable alternative. Punishment is majorly looked at in the lens of retribution vis a vis reformation. The lacuna in the laws of Uganda further prevents a challenge. Life imprisonment is not defined by the Laws of

²⁴ Article 121 of the Constitution of Uganda.

²⁵ J Etyang 'Condemned appeal death row' New Vision Newspaper 24 June 2003.

Uganda. The only reference to what life imprisonment may mean is contained in section 86(3) of the Prison Act, 2006²⁶ which provides that:

(a) *“For the purpose of calculating remission of sentence, imprisonment for life shall be deemed to be twenty years imprisonment.”*

This is often cited as the authority for the proposition that life imprisonment in Uganda means twenty years imprisonment. However, on 10th May 2011, the Supreme Court ruled in *Tigo Stephen vs. Uganda*²⁷ that section 86(3) of the Prisons Act, 2006 was insufficient authority for the definition of life imprisonment. The Court ruled that life imprisonment or imprisonment for life means imprisonment for the natural life of the person. This has however, not been reflected in any law. The Bill before Parliament also seeks to define life imprisonment or imprisonment for life to mean ‘imprisonment for the natural life of a person’ because this is the generally acceptable alternative.²⁸ For retentionist states like Uganda, the middle ground for now is to achieve abolition and later have a second debate on penalties.

d) Value for life

In Uganda there is generally low appreciation of the right to life as a fundamental human right. Several studies have found that that the right to life is the most violated human right in Uganda.²⁹ This is evidenced from several arbitrary or unlawful killings of citizens by government or its agents, killings by non-state actors and politically motivated disappearances especially of political opponents. Disrespect for human life is also exhibited through disrespect for other related rights for example use of excessive force and torture during arrests and other law enforcement operations resulting into casualties; arbitrarily arrests and detention of people, long periods of pretrial custody, life threatening prison conditions like overcrowding and inadequate food; corruption leading to lack of access to services like hospitals for the poor, ritual killings of children, general abuse of children and women’s rights and a general disrespect of human rights.³⁰ A society that disrespects rights of the most innocent – the children cannot appreciate

²⁶ Act 17 of 2006

²⁷ Criminal Appeal No. 08 of 2009

²⁸ In its submission to Parliament, FHRI proposed a definition of life imprisonment to mean imprisonment for life with a possibility of remission. The submission is available at the website www.fhri.or.ug

²⁹ An analysis of human rights issues in Uganda: a case of East and Horn of Africa Human Rights Defenders Project (EHAHRDP) Uganda by Institute of diplomacy and international studies accessed on <http://idis.uonbi.ac.ke/node/370>

³⁰ See details of human rights situation in Uganda in 2015 at www.state.gov/j/drl/rls/humanrightsreport

that capital offenders have rights and that keeping them alive is important. When hospitals have no medicine, it gets hard to argue that capital offenders should be given life imprisonment at the cost of the state.

Mitigation strategies

Civil society has played a crucial role in the abolition of the death penalty worldwide. The same is true for Uganda. FHRI has, since 1993, led the campaign for the abolition of the death penalty in Uganda. A lot has been done towards the advancement of this cause including; producing feature articles, regular talk shows and press interviews, training workshops, meetings, seminars and trainings, and submission of memoranda to the Constitutional Review Commissions and other international bodies, legal representation to capital offenders, petitioning constitutional and supreme courts on the validity of the death penalty and development of a private members' Bill. It further led the formation of the Civil Society Coalition against the death penalty in Uganda in 2005 with seven members; Amnesty International, Friends of Hope for condemned prisoners, Human Rights Network (HURINET-U), Public Defenders Association (PDAU), Uganda Association of Women Lawyers (FIDA-U) and Uganda Joint Christian Council (UJCC). Over time, other civil society organisations and individuals have come on board. These civil society organisations have gained the abolition campaign many advances and can build on this using various strategies as outlined below to mitigate obstacles to the abolition of the death penalty and adoption of the protocol both in Uganda and the rest of Africa.

- ✓ Building pressure from below by enhancing knowledge and understanding of the contents of the protocol and building a local; support base.
- ✓ Engaging more at the African Union. CSO's engagement at the African commission is applauded however engagement at the African Union is lacking. This can take various forms including letters to the presidents and one on one engagement with state ambassadors.
- ✓ More engagements in the work of the African Commission e.g the NGO Forum because the Commission usually takes its resolutions. In it's meeting in April 2016, the death penalty was not among the issues discussed and following up the work of the working group on the death penalty and providing inputs to it.
- ✓ Show casing countries that support the protocol and abolition in the region and using their countries' experiences.
- ✓ Deeper engagements with relevant government authorities e.g. the Minister of Justice and Constitutional affairs, the speaker of Parliament, the Attorney general, Uganda Law Reform Commission, Directorate of Public prosecutions.

- These could take the form of individual lobbying meetings vis a vis conferences and workshops.
- ✓ Individual lobbying of influential leaders in private institutions whose position could favorably influence the cause.
 - ✓ Engaging the judiciary more because ultimately when they stop giving death sentences, the penalty's efficacy will be no more.
 - ✓ In-house lobbying. Some CSOs are not on board with the cause of abolition. There is need to have engagements with them as well as make the coalition against the death penalty more active so that the voice for abolition is made stronger.
 - ✓ Engaging state heads to grant clemency especially when commemorating big milestones like independence
 - ✓ Country specific research on issues like deterrence to build a basis for arguments for abolition.
 - ✓ Victims' support groups both for those offended and the offenders' families/those who have been executed.
 - ✓ Changing campaign strategies to conversations and dialogues vs debates.
 - ✓ Taking the campaign to the youths and students. Since it is a long-term campaign, having these on board may yield more results in the future when they take up leadership positions.
 - ✓ Making use of religious leaders. Uganda like many African states is deeply religious and the general population believes more in religious leaders than political leaders.
 - ✓ Utilising modern campaign strategies e.g. social media, using a celebrity etc. It's also crucial to keep the debate alive in public through print media and radio, which is often the only means of mass communication capable of bringing essential information quickly to a vast and scattered audience.

Whereas campaigns for the abolition of the death penalty have achieved fast results in some states, in others especially those facing democratic challenges like Uganda, it is a slow process that requires a lot of engagements. The strides so far made however point to a future where the death penalty will be no more. The adoption of an African Protocol on the abolition of the death penalty will play a crucial role in changing perceptions of African Union Member States from death penalty abolition being an European imposition by making them develop a sense of ownership of the abolitionist movement as well as strengthening the continental dimension of the abolition of the death penalty.