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International Federation for Human Rights

LEGAL AND HUMAN RIGHTS CENTRE
LHRC
KITUO CHA SHERIA NA HAKI ZA BINADAMU

Report

International Fact-finding Mission

Tanzania: The death sentence institutionnalised ?

n°414/2 - April 2005

This report was elaborated with the support of the European Commission (European Initiative for Democracy and Human Rights- EIDHR) and the Fund for FIDH Missions.

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Foreword: Why mobilise against the Death Penalty

The FIDH strongly opposes the death penalty. The FIDH maintains that the death penalty is contrary to the very notion of human dignity and liberty; furthermore, it is utterly ineffective as a deterrent. As a result, neither principles nor utilitarian considerations can justify the use of capital punishment.

1. The death penalty is inconsistent with notions of human dignity and liberty

Human rights and human dignity are universally acknowledged as fundamental norms that form the basis of politically organised society. The death penalty directly contradicts this very premise and is based on a misconception of justice.

Justice is based on freedom and dignity: a criminal can and should be punished because she/he freely committed an act disruptive of the legal order. It is the very reason why children or insane persons cannot be held responsible for their actions in a criminal justice system. The death penalty is a contradiction in terms since it means that at the very moment of conviction, when the criminal is held responsible, and is thus considered as having acted freely and consciously, she/he is being denied this very freedom as the death penalty is irreversible. Human freedom is indeed also defined as the possibility to change and improve the orientation of one's existence, which in the case of the criminal justice system will involve the opportunity for rehabilitation and resocialisation. The irreversibility of the death penalty thus simply contradicts the notion of freedom and dignity.

The irreversibility argument has another aspect. Even in the most sophisticated legal system, which has the strongest framework of judicial safeguards and guarantees of due process, the possibility of miscarriages of justice always remains. Capital punishment can result in the execution of innocent people. This is the very reason why Governor Ryan decided to impose a moratorium on death penalty in Illinois, after having discovered that thirteen detainees awaiting execution were innocent of the crimes of which they had been accused of and decided in January 2003 to commute 167 death sentences to life imprisonment. The report of the Commission stressed that: "*no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death*." In this case, "*society as a whole - i.e. all of us - in whose name the verdict was reached becomes collectively guilty because its justice system has made the supreme injustice possible*" said Robert Badinter, French Minister of Justice, in 1981. For a society as a whole, accepting the possibility of condemning innocent people to death is utterly contrary to the fundamental principles of human dignity and justice.

Justice is based on human rights guarantees: the existence of human rights guarantees is the distinctive character of a reliable and legitimate judicial system; notably, these include the guarantees of the right to a fair trial - including e.g. the rejection of evidence obtained through torture or other inhuman and degrading treatment. From this perspective, the FIDH is convinced that the full respect of these human rights and the rejection of legally sanctioned violence are at the core of the legitimacy of any criminal justice system. Justice, especially when the most serious crimes are concerned and a life is at stake, should not rely on chance and fortune. An individual's life should not depend on random elements such as the jury selection, media pressure, and the competence of a defence attorney. The rejection of inhuman sentences, first and foremost the death penalty, clearly contributes to the building of a judicial system based on universally accepted principles, in which vengeance has no place and that the population as a whole can trust.

The **"death row phenomenon"** refers to the conditions of detention of a person condemned to capital punishment while awaiting the execution of the sentence. The usual conditions of detention - notably its long duration, the total isolation in individual cells, the uncertainty of the moment of the execution and deprivation of contacts with the outside world, sometimes including family members and legal counsel - often amount to inhuman treatment.

Justice is fundamentally different from vengeance. The death penalty is nothing but a remnant of an outmoded system of criminal justice based on vengeance: that s/he who has taken a life should suffer the same fate. If applied consistently, this would mean stealing from the stealer, torturing the torturer, raping the rapist. Justice has risen above such a traditional notion of punishment by adopting a principle of a *symbolic, yet proportional* sanction to the harm done including fines, imprisonment and other disposals, which preserve the dignity of both victim and perpetrator.

Furthermore, **the FIDH does not believe in the supposed necessity of the death penalty as a means to vindicate the victims and their relatives.** The FIDH reaffirms that the victims' right to justice and compensation is fundamental in a balanced and fair justice system. A solemn and public recognition by a criminal court of the suffering of the victim plays an important role in preventing the need for vengeance ("judicial truth"). The FIDH holds that answering the call for justice by the death penalty serves only to relieve the basest emotional need for vengeance, and does not serve the cause of justice and dignity (even that of the victims) as a whole. Paradoxically, the victims' dignity is itself better served by rising above vengeance. The recognition of the victim in the criminal procedure responds his or her need to be acknowledged as an actor from whom the process has a particular and personal significance. Providing psychological support and financial compensation to the victims also contributes to their feeling that justice has been done and that private vengeance is unnecessary and would have no added value. In the case that these factors are addressed, the need of the victims for vengeance as an argument in favour of the death penalty becomes irrelevant.

Furthermore, the FIDH notes that the death penalty is used in a discriminatory manner, for example in the USA, where it particularly affects ethnic minorities, or in Saudi Arabia where foreigners are more likely to be sentenced to the death penalty.

2. The death penalty is ineffective

Among the most common arguments in favour of the death penalty, is that is effective in the reduction of crime. The death penalty supposedly protects society from its most dangerous elements, and acts as a deterrent for future criminals. These arguments have been proven to be fallacious.

Does the death penalty protect a society from crime? It does not appear so: not only are societies which apply capital punishment no less protected from crime than societies which do not, where other sanctions are available in order to protect society, notably imprisonment. Protection of society does not require the physical elimination of criminals. In addition, it can be argued that the precautions taken to avoid suicide by death row inmates demonstrate that the physical elimination of the criminal is not the main aim of death penalty: what seems to matter is that the sanction is executed against the will of the prisoner.

The ineffectiveness of the death penalty and other cruel punishments have been substantiated by a number of studies. All systematic studies undertaken in a number of different countries show that death penalty does not contribute to a reduction in the crime rate. In Canada, for example, the homicide rate per 100,000 people fell from a peak of 3.09 in 1975, the year before the abolition of the death penalty for murder, to 2.41 in 1980. In 2000, whereas in the United States there were 5.5 homicides per 100,000 people, in Canada there were 1.8 per 100,000 people.

The most recent survey of research on this subject, conducted by Roger Hood for the United Nations in 1988 and updated in 2002, concluded that "the fact that the statistics... continue to point in the same direction is persuasive evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty".[1]

This should obviously not come as a surprise: a criminal does not commit a crime by calculating the possible sanction, and by thinking that he will get a life sentence rather than the death penalty. Furthermore, as Beccaria noted in the 18th century, "it seems absurd that the laws, which are the expression of the public will, and which hate and punish murder, should themselves commit one, and that to deter citizens from murder, they should decree a public murder".

Finally, the FIDH notes that the death penalty is very often an important indicator of the respect for human rights in the country concerned.

3. Arguments from international human rights law

The evolution of international law has tended towards the abolition of the death penalty: the Rome Statute of the International Criminal Court and the UN Security Council resolutions establishing the International Criminal Tribunals for the Former Yugoslavia and for Rwanda do not provide for the death penalty in the range of sanctions although those jurisdictions have been established to try the most serious crimes.

Specific international and regional instruments have been adopted which seek the abolition of the capital punishment: the UN Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), the Protocol to the American Convention on Human Rights to abolish the death penalty (Organisation of American States), the Protocol

6 and the new Protocol 13 to the European Convention on Human Rights (Council of Europe) require the abolition of the death penalty. The Guidelines to EU Policy towards Third Countries on the Death Penalty, adopted by the European Union on 29 June 1998, stress that one objective of the EU is "to work towards the universal abolition of the death penalty as a strongly held policy view agreed by all EU member states". Moreover, "the objectives of the European Union are, where the death penalty still exists, to call for its use to be progressively restricted and to insist that it be carried out according to minimum standards (...). The EU will make these objectives known as an integral part of its human rights policy". The newly adopted EU Charter of Fundamental Rights also states that "no one shall be condemned to the death penalty, or executed".

At the universal level, even if the ICCPR expressly provides for the death penalty as an exception to the right to life and surrounds it by a number of specific safeguards, the General Comment adopted by the Human Rights Committee clearly states that Article 6 on the right to life "refers generally to abolition in terms which strongly suggest that abolition is desirable... all measures of abolition should be considered as progress in the enjoyment of the right to life".

Moreover, in its resolution 1745 of 16 May 1973, the United Nations Economic and Social Council invited the Secretary General to submit to it, at five-year intervals, periodic updated and analytical reports on capital punishment. In its resolution 1995/57 of 28 July 1995, the Council recommended that the quinquennial reports of the Secretary-General should also deal with the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty.[2]

Every year since 1997 the UN Commission on Human Rights has called upon all states that still maintain the death penalty "to establish a moratorium on executions, with a view to completely abolishing the death penalty".[3]

On 8 December 1977, the UN General Assembly also adopted a resolution on capital punishment stating, "The main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment".[4]

1. Roger Hood, the Death Penalty: A Worldwide Perspective, 3rd ed. (London: Oxford University Press, 2002) 214.
2. ECOSOC resolution 1984/50 of 25 May 1984.
3. See notably resolution 2002/77, 2001/68, 2000/65 and 1999/61.
4. UN General Assembly resolution 32/61, 8 December 1977, paragraph 1.

Introduction

In the framework of its involvement in the international campaign for the abolition of the death penalty throughout the world, the FIDH carries out international missions of investigation in countries where this inhumane penalty is still being pronounced, or even carried out.

These missions pursue four aims: (1) to stigmatise this inhuman punishment. 80 countries have abolished the death penalty in law, 15 have abolished it for all but exceptional crimes such as war crimes, and 23 countries can be considered abolitionist de facto: they retain the death penalty in law but have not carried out any executions for ten years or more; (2) to show that generally, prisoners who have been condemned or executed throughout the world did not benefit from the right to a fair trial, as enshrined in the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Civil and Political Rights. This makes their state-sanctioned executions all the more unacceptable. These missions of investigation also aim to (3) shed light on and denounce the treatment of death row inmates from conviction to execution; the situation of these inmates often amounts to a "cruel, inhuman and degrading treatment", prohibited by international human rights law. (4) By carrying such missions of investigation, the FIDH seeks to formulate recommendations to the relevant state authorities of the country concerned as well as to other relevant actors, in a spirit of dialogue in order to support their efforts towards the abolition of the death penalty or, as a first step, towards the adoption of a moratorium on executions.

In Tanzania, no executions have taken place since 1994. However individuals are regularly sentenced to death but no statistics are published about the number of condemnations. The FIDH therefore decided to send an international fact-finding mission in Tanzania focused on the death penalty and the administration of criminal justice. The present report is the result of that international mission of investigation, which was carried out by two FIDH delegates, Arnold Tsunga (Zimbabwe), lawyer and President of Zimrights, and Eric Mirguet (France), lawyer - carried out in Tanzania from 6 to 19 October 2004. The mission has been prepared jointly with the Legal Human Rights Center (LHRC), FIDH member organisation in Tanzania, whom the FIDH would like to sincerely thank for its support.

The mission met with a total of over 40 individuals, including members of the legal profession (Law Society members, advocates), the Vice Chairman of the Commission for Human Rights and Good Governance, the Chairman of the Human Rights Committee of the Tanganyika Law Society, the Chairman of the Tanzania Law Reform Commission. The mission also met with the Director of Constitutional Affairs and Human Rights (Ministry of Justice and Constitutional Affairs), the Director of Public Prosecution, representatives of political parties and the police.

In Zanzibar, the mission met with several assistants of the Commissioner of Police, the Assistant Commissioner for Prisons, the Deputy Chairman of Zanzibar Law Society, the Principal Secretary of the Constitutional Affairs and Good Governance Department and the Deputy Attorney General. Several human rights activists also shared their concerns with the FIDH delegates.

The FIDH would like to thank the Tanzanian authorities for their cooperation and in particular the authorities in Zanzibar who answered promptly to its requests and allowed the delegates to have a free access to death row inmates. Unfortunately, the Tanzanian mainland authorities have been less cooperative, as the prison authorities refused access to any prison facility, considering that such visit was not relevant for the study, an opinion the FIDH strongly refutes. The FIDH had requested to visit the following prisons: the Tanga Prison, the Dodoma Prison and the Morogoro Prison.

The Prevention of Corruption Bureau also refused to receive the mission despite several requests and visits to their office in Dar es Salaam. This is a regrettable decision as corruption appeared as a major threat to the rule of law around throughout country, and the delegates considered it extremely important that critical information be obtained from them.

The FIDH would also like to thank many of the local organizations who helped and directed the delegates in their research, and in particular the Tanzanian section of Amnesty International who provided the delegates with valuable information and advices.

I. The Tanzanian political and judicial system

The United Republic of Tanzania is in East Africa. It is bordered on the north by Kenya and Uganda, on the east by the Indian Ocean, on the south by Mozambique, Malawi and Zambia and on the west by Rwanda, Burundi, Lake Tanganyika and the Democratic Republic of Congo. The country includes the Islands of Zanzibar and Pemba and other offshore islands in the Indian Ocean. The total geographical area of Tanzania is 945,100 square kilometres and it has a population of 34,569, 232 people.

There are approximately 130 ethnics groups in Tanzania and most of their languages are similar to the Bantu language. People of Indian and Arab descent constitute approximately 1% of the population who are mostly concentrated in Zanzibar.

Kiswahili and English are official languages, however, Kiswahili is the national language. Kiswahili is the language of instruction at primary school while English is used at higher educational levels. Debates in the Parliament are conducted in Kiswahili while the court system is conducted in English, with the exception of Primary Courts where all proceedings must be conducted in Kiswahili.

Dar es Salaam is the former capital and the current commercial centre and largest city in Tanzania. The Tanzanian legislature moved to the new administrative capital of Dodoma in 1996, but many government offices remain in Dar es Salaam.

1. The creation of the country

Tanzania is a united Republic. It is the Union of two former separate states: the Republic of Tanganyika and the People's Republic of Zanzibar which existed as separate entities until 26th April 1964 when they united.

Tanganyika, now referred as Tanzania mainland, gained independence on 9th December 1961, and a year later it became a Republic.

Zanzibar gained independence on 10 December 1963. A month later, on the 12 of January 1964, there was a revolution, which overthrew the Sultan, and resulted in the suspension of the Constitution. For the next 15 years Zanzibar was ruled by presidential decrees.

The Union was agreed in such a way that the Government of Tanganyika disappeared while that of Zanzibar remained in place. Therefore Zanzibar has a separate President government, judiciary, and a House of Representatives, which acts as the Parliament for Zanzibar.

The Union institutions serve the Tanzania mainland. This arrangement has led mainlanders to agitate from time to time for a separate government of Tanganyika and this question is a standing item on the political agenda.

On the issue of the protection and promotion of human rights, Tanzania mainland and Zanzibar have a very distinctive history[5].

At independence in 1963 Zanzibar entrenched fundamental rights and freedom in its Constitution through a Bill of Rights. However, this Constitution did not last more than a month. After the Revolution of 12 January 1964, it was discarded and what followed was a one-man rule by presidential decrees.

On the mainland, the guarantee of fundamental rights and freedoms in a form of a Bill of Rights was rejected by the newly formed government after independence.

During independence negotiations around 1960, the British had insisted on the incorporation of a Bill of Rights into the Constitution of independent Tanganyika. The nationalists led by the Tanganyika African National Union (TANU) refused, arguing that such a Bill would hamper the new government in its endeavours to develop the country. It is in this context that the then Prime Minister Rashid Kawawa characterised a Bill of Rights as a luxury that merely invites conflicts[6].

According to the views of Chris Peter Maina, Professor of Law in the Department of International Law, University of Dar es Salaam, the inclusion of a Bill of Rights in the Constitution at the time of independence could have acted as a check on some of the many undemocratic decisions made in the early period and which cemented the culture of lack of respect of fundamental rights and freedoms and disregard of the rule of law and the Constitution by both the ruling Party and its government[7]. For instance, it would have been impossible to declare a one-party political system[8] because that would have been a violation of the right of political participation and freedom of expression and opinion.

This vacuum also gave an opportunity to the incumbent government then in place to enact a series of oppressive and objectionable laws[9]. These were laws, which would not withstand a test of validity in a constitutional system in which a Bill of Rights was entrenched in the Constitution.

The new Constitution adopted in 1977 did not contain a Bill of Rights, like its predecessor. It is only in 1983 that a movement advocating for the inclusion of such provisions in the Constitution gathered strength and resulted in the Fifth Amendment to the Constitution, in 1984, incorporating the Bill of Rights into the Constitution of the United Republic of Tanzania.

These changes came into operation in March 1985. However, the possibility to challenge the constitutionality of domestic legislation (in particular, with regard to human rights constitutional guarantees) before the Courts was suspended for a period of three years by the Constitution Act 1984[10]. And the Bill included several claw-back clauses, the name given to the clauses permitting a breach of a provision included in the Bill by a law passed by the Parliament (these clauses adopt formulations such as "subject to the provisions of the relevant laws of the land", or "without prejudice to the laws of the land"[11]) [12].

At the end of the three year suspension period, these provisions were not amended by the government, and it was for the High Court to determine the constitutionality of various pieces of legislation. However, the matter must be brought before the court by a party to litigation or the court itself can raise the matter proprio motu as an exercise of its inherent jurisdiction. As a natural consequence the laws not challenged in the courts, unconstitutional as they might be, would remain in the statute books.

Also, this new Constitution formed a strange legal situation in the country: a one-party administered democracy, allowing freedom of peaceful assembly, association and expression, but forbidding the creation of another political party, and internally deporting those trying to establish one[13].

In the Eight Amendment to the Constitution, which entered into force on 1 July 1992, Article 3 of the Constitution, which had provided for a one-party system, was amended to provide for a multi-party system. Article 10 which provided for party supremacy and monopoly of political activities in the country by the single ruling party was repealed.

The ruling party was (and still is) Chama Cha Mapinduzi (CCM). The Civic United Front (CUF) is generally referred to as the main opposition party particularly in Zanzibar. Additionally, there are 14 other legally registered political parties. The parties are, in order of their official registration date: Chama cha democrasia na Maendeleo (CHADEMA), Union for Multiparty Democracy (UMD), National Convention for Construction and Reform (NCCR-M), National League for Democracy (NLD), National Reconstruction Alliance (NRA), Tanzania Democratic Alliance Party (TADEA), Tanzania Labour Party (TLP), United Democratic Party (UDP), United Peoples' Democratic Party (UPDP), Chama cha Haki na Ustawi (CHAUSTA), Demokrasia Makini (MAKINI), The Forum for Restoration of Democracy (FORD) and Progressive Party of Tanzania (PPT-MAENDELEO).

The Presidents of mainland Tanzania and of Zanzibar are both CCM members. However, the CUF has a strong presence in the Zanzibar Islands. CCM, CUF, TLP, CHADEMA and UDP are all represented both in Parliament and in the Zanzibar House of Representatives.

In 1995, the first multi-party presidential elections in 31 years were organised, and saw the victory of Benjamin William Mkapa, who is still the President of Tanzania at present.

Salmin Almour won the first elections in Zanzibar. Today, Amani Abeid Karume is the President of Zanzibar since the October 2000 elections, which were seriously flawed according to international observers[14].

The next elections are scheduled in October 2005.

2. The Tanzanian criminal justice system

The courts in Tanzania apply customary law, statutory law and English common law.

The criminal Court system consists of Primary Courts, District/Resident Magistrates' Courts, the High Court and the Court of Appeal of Tanzania.

The High Court is the court of first instance for serious offences such as murder and treason. In conducting trials, a Judge in the High Court sits with assessors whose opinions are not binding. Appeal is from the Primary Courts through the District Courts, Resident Magistrates' Courts to the High Courts, and Courts of Appeals.

Trials in the High Court cannot commence before a preliminary inquiry (committal proceedings) is held in a

subordinate court (District/Resident Magistrates' courts) as provided for in Sections 178, 243 and 244 of the Criminal Procedure Act 1985.

Section 173 of the Criminal Procedure Act 1985, empowers the Minister for Justice to vest any Resident Magistrate with power to try any category of offences including murder, which would ordinarily be tried by the High Court. Section 175 of the Act further provides that every sentence of death passed by a subordinate court exercising power conferred upon it under Section 173, shall, if the accused does not appeal to the Court of Appeal, be confirmed by the High Court.

Appeals against the High Court's sentences and those from subordinate courts exercising extended jurisdiction power are to the Tanzanian Court of Appeal.

Appeals from the High Court of Zanzibar also go to the Tanzanian Court of Appeal.

Police Prosecutors prosecute accused persons in District/Resident Magistrates' Courts. State Attorneys prosecute accused persons in the High Court, which has jurisdiction over murder and treason cases.

For serious offences attracting the death penalty, such as murder and treason, an accused person is automatically entitled to legal representation.

By December 2003, mainland Tanzania had 735 members of the Bar of which 641 members were actively practicing lawyers. During that year more than 80 percent of the practicing advocates were based in the country's largest city of Dar Es Salaam. Based on the current population of 34,569,232 people, there is one advocate for every 53,930 people.

Lawyers are assigned to represent indigent accused persons in High Court and on appeal. Section 310 of Criminal Procedure Act 1985 declares, "a person accused before a criminal court, other than a primary Court may as of right be defended by an Advocate of the High Court". Otherwise, the Legal Aid (Criminal Proceedings) Act 1969, provides that "where in any proceedings it appears to the certifying authority that it is desirable, in the interests of justice, that an accused should have legal aid in the preparation and conduct of his defence or appeal, as the case may be, and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have such legal aid and upon such certificate being issued the registrar shall, where it is practicable to do so, assign to the accused an advocate for the purpose of the preparation and conduct of his defence or appeal, as the case may be" (Article 3).

Juvenile criminal justice is primarily administered under the Children and Young Persons Ordinance of 1937 Chapter 13.

Zanzibar has its own criminal justice system, which deals with criminal cases in Zanzibar.

3. Ratification of Human rights treaties

Tanzania is a party to various human rights treaties including (but not limited to):
- The International Covenant on Civil and Political Rights (ICCPR);
- The International Covenant on Economic, social and cultural rights (ICESCR) of 1966[15];
- The International Convention on the Elimination of all forms of Racial Discrimination of 1972[16];
- The International Convention on the Rights of the Child of 1989[17];
- The Rome Statute of the International Criminal Court[18];
- The African Charter on Human and People's Rights of 1981[19].

Tanzania is a dualist legal system in which the provisions of an international treaty become applicable into domestic law only after both ratification of the treaty and its incorporation into domestic legislation[20].

Such domestic legislation has not been adopted to date, although the FIDH delegates have been informed by Mr. Frederick Werema, Director of Constitutional Affairs and Human Rights at the Ministry of Justice & Constitutional Affairs, that a Working Group had been established on the implementation of the Rome Statute, which is yet to take any specific action on the issue[21]. Judge Bahati, Chairman of the Law Reform Commission informed the delegates that the commission is also working on the subject, but that it has not issued any proposals on human rights treaties at this stage.

5. See Chris Maina Peter, *Human rights in Tanzania, Selected cases and Materials*, Rüdiger Köppe Verlag, Köln, 1997, page 3
6. See Parliamentary Debates, National Assembly 3rd meeting, 1088, 28th June 1962.
7. Ibid, pages 3-4
8. The Interim Constitution of Tanzania, adopted in 1965, provides in its Article 3(1) that " there shall be one political party in Tanzania ".

9. Of particular note is the Preventive Detention Act, 1962, which empowers the President to detain indefinitely " any person...conducting himself so as to be dangerous to peace and good order ", or any person who is "acting in a manner prejudicial to the defence...or security of the State". The Act ousted the jurisdiction of the courts, "no order made under this Act shall be questioned in any court". During his final year as President, Nyerere, while addressing judges and magistrates stated that: "on too many occasions we have used this law to arrest criminals, or people believed to be criminals, whose acts do not relate to the security of the State. This is a bad use of a necessary law, and can introduce the practice of evading the use of normal legal procedures for ordinary crimes. It is essential that we should correct ourselves in this respect, and i am sure that the first person who has to correct himself is the president". The same kinds of provisions are contained in the Deportation Ordinance. Both pieces of legislation are used as means to circumvent the regular judicial process.
10. "Notwithstanding the amendment of the Constitution and, in particular, the justiciablility of the provisions relating to basic rights, freedoms and duties, no existing law or any other provision in any existing law may, until after three years from the date of the commencement of the Act, be construed by any court in the United Republic as being unconstitutional or otherwise inconsistent with any provision of the Constitution".
11. The right to property, freedom of expression, freedom of religion and freedom of association all include claw-back clauses. The right to life is formulated in a similar manner (it is guaranteed "in accordance with law"), contrary to international law . Last year the Government introduced into Parliament the 14th Constitutional Amendment Bill of October 2003, in order to remove from the Constitution some of these claw back clauses. However, those proposed to be removed were the clauses commencing with "Subject to...", not the clauses that include the phrase "in accordance with", such as the right to life.
12. It should be stressed, however, that in, February 2005, the Parliament intends to amend the Constitution and, among those amendments, it is considering the removal of these claw-back clauses, but only in Articles 18 to 24 of the Constitution. Other Articles such as those, which provide for the Bill of Rights and Duties -Articles 12 to 17 and 25 to 29 -, will remain as they are, that is, with claw-back clauses. Any legislation amending the Constitution only comes into force after the President has given his assent and the relevant minister has gazetted the provisions.
13. After independence, the government adopted a Deportation Ordinance allowing the President to order a person to be deported from any part of the country to another "where it is shown by evidence on oath to the satisfaction of the president that such person is conducting himself so as to be dangerous to peace and good order...or is endeavouring to excite enmity between the people of Tanzania and the Government. Many opposition leaders were sent to remote areas in the 1960's under this ordinance, which was declared unconstitutional in 1991.
14. "We wish to record our sadness and deep disappointment," noted the chairperson of the Commonwealth observer mission, "at the way in which so many voters were treated by the ZEC [Zanzibar Electoral Commission] ... in many places this election is a shambles. The cause is either massive incompetence or a deliberate attempt to wreck at least part of this election. Either way the outcome represents a colossal contempt for ordinary Zanzibar people and their aspirations for democracy."
See also FIDH Report "Wave of Violence" on Election Mismanagement and Police Brutality in Zanzibar published in June 2001 (http://www.fidh.org/article.php3?id_article=1000)
15. Both ratified on 11 September 1976.
16. Ratified on 26 November 1972.
17. Ratified on 10 July 1991.
18. Ratified on 20 August 2002.
19. Ratified on 18 February 1984.
20. However, in the Mbushuu case Justice Mwalusanya held that he was "of the considered view that international human rights instruments and court decisions of other countries provide valuable information and guidance in interpreting the basic human rights in our constitution and so a judge in my present situation should look to them in seeking a solution". The FIDH wish more members of the Judiciary will adopt this position. See Tanzanian Law Review (TLR), 1994, page 151. Additionally, the Bangalore Principles, adopted by a group of Commonwealth Judges, recognised and affirmed the relevance and importance of:" a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law-whether constitutional, statute or common law- is uncertain or incomplete". The Commonwealth Judges in the Harare Declaration of Human Rights and also in the Banjul Affirmation reiterated that view. Accordingly, in *Ubani v Director of State Security Services & Anor* (1999), the Nigerian Court of Appeal held that the African Charter on Human and Peoples' Rights is superior to all municipal laws, including military decrees. In *South African National Defence Union v Minister of Defence & Ors* the South African Constitutional Court held that treaties are relevant to the interpretation of constitutional provisions
21. The failure to implement the ICC statute has been denounced by local human rights organisations for years, without drawing any reaction from government. The FIDH recalls that with regard to the ICC, the African Commission called States who have ratified the ICC Statute "to rapidly incorporate it into their domestic legislation in order to be able to fully cooperate with the ICC and implement the principle of complementarity with their national courts" - see Resolution on the Ratification of the Statute on the International Criminal Court by OAU members State, Pretoria, South Africa, May 2002.

II. Death penalty and the international standards

1. The United Nations system

When the Universal Declaration on Human Rights (UDHR) was drafted, there was much discussion amongst states parties as to whether or not there should be a formal statement that states parties should move towards abolition of the death penalty, or whether the death penalty should be included as an express exception to the right to life. As most of the countries were using the death penalty at the time, expressions in support of the abolition had little chance of success.

The compromise adopted was to remain silent on the subject; hence Article 3 of the UDHR states, "everyone has the right to life, liberty and security of person".

The ICCPR was adopted by the UN General Assembly in 1966 and came into force on 23 March 1976. Article 6 of the Covenant begins with the statement "every human being has the inherent right to life". It then adds, "this right shall be protected by law. No one shall be arbitrarily deprived of his life".

The ICCPR established a monitoring body, the Human Rights Committee, which has issued a number of General Comments on the interpretation of the Covenant, including the right to life.

The Human Rights Committee has stated that "arbitrariness' should not be equated with 'against the law" but that it should be interpreted more broadly, to include notions of inappropriateness, injustice and lack of predictability.[22]

Paragraph 2 of Article 6 declares that the death penalty may only be applied for the "most serious crimes'. This provision was frequently criticised during the drafting of the Covenant, and some delegates had argued for a specific enumeration of serious crimes. In interpreting the provision of Article 6, the Human Rights Committee has stated that: "the expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure".[23]

The UN Safeguards Guaranteeing Protection of Those Facing the Death Penalty adopted by the Economic and Social Council in 1984 and subsequently endorsed by the General Assembly, declare that the ambit of the term 'most serious crimes' "should not go beyond intentional crimes, with lethal or other extremely grave consequences".[24]

The Committee added in its General Comment on Article 6 that "it also follows from the express terms of Article 6 that it can only be imposed in accordance with the law in force at the time of the commission of the crime and not contrary to the Covenant".

This means that Article 14 of the ICCPR concerning the right to a fair trial must be strictly respected in any procedure leading to a death sentence, rendering unlawful any attempt to execute following an unfair trial, i.e. circumstances where the accused does not have legal representation, the tribunal is not independent and impartial, there is no right to appeal or there is an unreasonable delay prior to trial. This link is also reaffirmed in the UN Safeguards of 1984: "capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings" (Paragraph 5).

In Reid v. *Jamaica*, the Human Rights Committee stated that "in capital cases, the duty of states parties to observe rigorously all the guarantees for a fair trial set out in Article 14 of the Covenant is even more imperative".[25]

The UN Safeguards Guaranteeing Protection of Those Facing the Death Penalty are subject to interpretation by the Committee on Crime Prevention and Control and five-yearly report by the UN Secretary General.

The Committee on Crime Prevention and Control has provided further guidance. In 1988, it stated that the protection offered in Safeguard 5 makes clear that capital punishment cases must use a standard of proof that goes beyond the protection afforded in non-capital cases. It recommended that there should be a maximum age for the imposition of the death penalty and also that "persons suffering from mental retardation or extremely limited mental competence" should not be subject to the death penalty.

The Second Optional Protocol to the ICCPR was adopted by the UN General Assembly in 1989 and came into force in 1991 in those countries that had ratified it. The Protocol requires state parties to abolish the death penalty, and prevents any reservation to that abolition, save for a reservation allowing for

capital punishment in time of war. To date, 52 countries have ratified the Protocol, including six African countries.[26]

The issue of the death penalty remains a regular item on the agenda of the United Nations Commission on Human Rights. In Resolution 2004/67[27], the Commission 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; to abolish the death penalty completely and, in the meantime, to establish a moratorium on executions and make information available to the public regarding the imposition of the death penalty and any scheduled execution.

As of January 2005, there were a total of 118 abolitionist countries in law or in practice and 78 retentionist countries[28].

2. The Regional System: The African Charter on Human and People's Rights

a. The legal framework

The African Charter on Human and People's Rights, adopted in 1981 by the Organisation of African Unity, does not refer to the death penalty.

However, like the other regional conventions, the African Charter recognises the right to life, with Article 4 stating that: "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".

According to the analysis of William Schabas[29], the language of Article 4 of the African Charter, with its reference to 'arbitrary' deprivation of life, echoes Article 6 paragraph 1 of the ICCPR and most certainly indicates a prohibition of the arbitrary use of capital punishment. He adds that "it would seem reasonable that Article 4 of the African Charter be interpreted in such a way as to incorporate norms such as those set out in the UN Safeguards Guaranteeing the Rights of Those Facing the Death Penalty[30].

Additionally, at its twenty-sixth ordinary session in November 1999, the African Commission on Human and Peoples' Rights adopted the 'Resolution Urging States to Envisage a Moratorium on the Death Penalty'. The resolution expresses a concern that some state parties to the African Charter impose the death penalty without respecting the right to a fair trial guaranteed therein.

The operative paragraphs of the resolution read as follows:
1. Urges all States parties to the African Charter on Human and Peoples' Rights that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure that person accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter;
2. Calls upon all States parties that still maintain the death penalty to: a) limit the imposition of the death penalty only to the most serious crimes, b) consider establishing a moratorium on executions of death penalty, c) reflect on the possibility of abolishing the death penalty.[31]

The African Commission also called the States party to apply the UN Safeguards in countries where the death penalty has not been abolished yet.[32]

The body monitoring the implementation of the African Charter provisions is the African Commission on Human and Peoples' Rights. States parties to the Charter are required to submit periodic reports to the Commission, although compliance is irregular and reports that are submitted rarely address the issue of capital punishment.[33]

Unfortunately, the individual petition mechanism provided by the Charter is not as effective as one would wish.[34] Several cases have, however, addressed issues related to death penalty. The most important of these cases concerned the execution of human rights defender Ken Saro-wiwa in Nigeria in November 1995.

With respect to Article 4 of the Charter, the Commission observed: "given that the trial which ordered the execution itself violates Article 7, any subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of Article 4...The protection of the right to life in Article 4 also includes a duty for the State not to purposefully let a person die while in custody. Here, at least one of the victims' lives was seriously endangered by the denial of medication during detention. Thus, there are multiple violations of Article 4". The Commission concluded that there had been a violation of Articles 4 and 7 "in relation to the conduct of the trial and the execution of the victims".[35]

The Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People Rights, adopted in Ouagadougou (Burkina Faso) on 9 June 1998 entered into force on 25 January 2004, one month after the ratification by the 15th State, Comoros, on 26 December 2003. Expectations with regard to this new

jurisdiction in the African human rights system are high. The Protocol allows individuals and NGOs to access to the Court, indirectly through the African Commission on Human and Peoples' Rights or directly, if and only if, the respondent State accepts such remedy by making a declaration under Article 34 paragraph 6 of the Protocol.

The African Charter of the Rights and Welfare of the Child, which was adopted in 1990, but came into force only on 29 November 1999, establishes that: "death sentence shall not be pronounced for crimes committed by children" (Article 5 paragraph 3).

Article 2 defines a child as "every human being below the age of 18 years old". Article 17 stipulates that children should not be subject to inhuman or degrading treatment, and that the essential purpose of the criminal justice system is to promote reintegration into the family and rehabilitation.

The African Committee of Experts on the Rights and Welfare of the Child is charged with monitoring the implementation of the instrument (Article 32 and Seq.).

The Charter authorizes the Committee of Experts to receive communications on any issue covered by the Charter. These communications may be submitted by any individual, group or non-governmental organisation recognised by the OAU/AU, a member state or the United Nations [36]

The African Commission on Human and Peoples' Rights, in its 33rd ordinary session in May 2003, also adopted the Guidelines on the Right to Fair Trial and Legal Aid in Africa[37], urging that every effort be made so that they become generally known to the public in Africa and calling States to respect them and to incorporate them into their domestic legislation. Those Guidelines are also relevant to the death penalty cases.

b. The practice of neighbouring States

In 1990, **Cape Verde** was the only African country that did not provide for capital punishment in its legislation. In 1995, the **South African** Constitutional Court declared capital punishment to be contrary to the country's interim Constitution. [38]

In **Malawi**, although the death penalty is still on the statute books, there have been no executions since 1992 and President Muluzi has made a personal commitment not to sign execution orders while in office. He has commuted death sentences on a number of occasions. For example on 9 April 2004, he commuted 79 death sentences.

The President Mawanawasa of **Zambia** has made a similar commitment not to sign execution orders, and in February 2004 commuted the death sentences of 44 soldiers who were sentenced to death for their role in a failed 1997 coup and reiterated that there would be no executions during his presidency. “For as long as I remain President, I will not execute a death warrant” he said.[39]

No executions have been carried out in **Kenya** since the mid 1980s and in February 2003 President Kibaki commuted 195 death sentences. The announcement came soon after the Minister for Home Affairs and National Heritage, Moody Awori, had visited various prisons and made public his concerns regarding the conditions of detention.

The Commissioner of Prisons, Abraham Kamakil, praised this unprecedented and historic event, saying that the death penalty should be abolished because it claims innocent lives. In *The Daily Nation* newspaper, he said, "we are longing for the day Parliament will remove the death penalty from our Constitution."

The Minister for Justice, Kiraitu Murungi, also supports abolition and had lobbied for it as a member of parliament in two previous attempts to abolish the death penalty in 1994 and 2000, which were rejected by the former government. Convictions for murder and armed robbery carry a mandatory death sentence in Kenya. The last executions were in 1987.

22. *Van Alphen v. The Netherlands* (No 305/1988), UN Doc. A/45/40, Vol II, p.108, para. 5.8.
23. General Comment 6 (16), UN Doc CCPR/C/21/Add.1.
24. ESC Resolution 1984/50; GA Res 39/118.
25. *Reid v. Jamaica*, Communication No. 355/1989, UN Doc. CCPR/C/51/D/335/1989 (1994).
26. Mozambique (21 July 1993), Namibia (28 November 1994), Seychelles (15 December 1994), Cape Verde (19 May 2000), South Africa (28 August 2002) and Djibouti (5 February 2003). It should be noted that Säo Tomé and Principe (6 September 2000) and Guinea Bissau (12 September 2000) are signatories to the Protocol.
27. The UN Commission on Human Rights adopted Resolution 2004/67 on the question of death penalty on 21 April 2004 at the Commission's 60th session in Geneva. It was the eighth such resolution adopted by the Commission on Human Rights since 1997. 76 countries, one more than the

previous year sponsored it. Iraq, Kiribati, Samoa and the Solomon Islands co-sponsored the resolution for the first time. The resolution was adopted by a recorded vote of 29 countries in favour and 19 against, with five abstentions - a larger margin than in 2003, when there were 24 countries in favour, 18 against and 10 abstentions. Bhutan and Gabon voted for the resolution for the first time. South Korea, which had voted against the resolution in 2003, abstained in 2004.

28. See http://web.amnesty.org/pages/deathpenalty-countries-eng

29. Schabas William, *The abolition of the death penalty in international law* (Cambridge Press, London 2002).

30. ESC Resolution 1984/50 subsequently endorsed as General Assembly Resolution 39/118.

31. Resolution Urging States to Envisage a Moratorium on the Death Penalty, 13th Activity Report of the African Commission on Human and Peoples' Rights', OUA Doc. AHG/Dec 153 (XXXVI), Annex IV.

32. See The Ouagadougou Declaration and Plan of Action on accelerating Prisons and Penal Reform in Africa, September 2002.

33. Nigeria, in its periodic report dated 1993, referred to the abolition of the death penalty for drug trafficking, unlawful dealing in petroleum products and counterfeiting of currency and its replacement with life imprisonment. Other States make no reference at all to the death penalty in their reports.

34. The delay for examining communications varies greatly and is often lenghty, from two to eight years. The Commissioners often favour amicable settlements at the expense of efficiency, in spite of the urgency of the cases presented to them. The delays are also prolonged by the time lapse between the receipt of the communication and a decision on admissibility; the grouping of communications related to the same country; the failure to set priorities for the examination of communications; the imprecision of the procedure; sessions shortened by the lack of financial resources; delays in the implementation of information missions and in the finalization of reports and a lack of staff in the Commission's Secretariat. If the Commission's decisions on communications are interesting and progressive regarding the protection of human rights, they are devoid of any effect because they are generally not implemented by the States concerned. For more details, see FIDH Guide on the African Court on Human and Peoples' Rights: 10 keys to Understand and use the African Court on Human and Peoples' Rights, November 2004 (www.fidh.org)

35. *International Pen, Constitutional Rights project, Interights on behalf of Ken Saro-wiwa jr and Civil Liberties Organisation v. Nigeria* (Comm. No. 137/94, 139/94, 154/96 and 161/97), Twelfth Activity Report of the African Commission on Human and Peoples' Rights, 1998-1999), paragraphs 103-104.

36. Article 44 of the African Charter of the Rights and Welfare of the Child, 1990.

37. 33rd Ordinary Session, African Commission on Human and Peoples' Rights, held in Niamey, Niger, from 15th to 29th of May 2003. See XVIth Annual Activity Report of the African Commission on Human and Peoples' Rights, pages. 14-15.

38. *South Africa v. Makwanyane*, 1995 (3) SA 391.

39. Amnesty International Canada, Death penalty news, June 2004, accessed at http://www.amnesty.ca/resource_centre/reports/view.php?load=arcview&article=1707&c=Resource+Centre+Reports

III. Compliance with the Rule of law: Justice under Siege

During its visit in Tanzania, the FIDH delegates noticed a certain number of dysfunctions in the Tanzanian legal system, which seem to represent a threat to the rule of law, and an obstacle to a reform.

The attention of the FIDH delegates was particularly drawn to two major problems:
(1) The unwillingness of the Executive power to have its decisions challenged in judicial proceedings and,
(2) the fact that the criminal system is essentially based on retaliation and revenge towards the offenders.
The FIDH is convinced that these two issues should be seriously addressed and solutions implemented in order to overcome them. The possibility to challenge government decisions in judicial proceedings, and a penal system based on the belief that criminals can be educated, rehabilitated and reintegrated are key elements to build a peaceful society and the rule of law.
Furthermore, the existence of corruption, which, if not seriously confronted, represents a serious threat to the rule of law.

1. The king and the government can do no wrong

As discussed above, upon independence, the National Assembly decided to adopt a Constitution without a Bill of Rights, and the Bill of Rights that was later included, some twenty three years later, was made subject to a temporal limitation on its application and numerous claw-back clauses (*see above*).

The initial distrust of the judiciary and its role in overseeing the exercise of government power is still present today. It is exemplified at the international level by a reluctance to adhere to human rights treaties including monitoring mechanisms and, at the domestic level by a marginalisation of the judiciary and a strict control on any proceeding challenging the government.

a. A reluctance to adhere or comply with the decisions of treaty-based monitoring systems

First, although the Tanzanian government has ratified a number of key international human rights conventions, it does stay away from treaties allowing individual petitions. As such, these texts have not been ratified, probably purposely:
- The Optional Protocol to the International Covenant on Civil and Political Rights which allows individuals to submit complaints to the UN Human Rights Committee;
- The Optional Protocol to the Convention on Elimination of All Forms of Discrimination against Women, which allows individuals or groups of individuals to submit complaints to the Committee on the Elimination of Discrimination against Women;
- The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which allows victims to submit a communication to the Committee Against Torture if the State accused of having committed a violation has accepted the jurisdiction of the Committee (Article 22).
- The Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights which will allow individuals and NGOs to access to the Court, indirectly through the African Commission on Human and Peoples' Rights or directly only if, the respondent State has accepted such remedy by making a declaration under article 34 paragraph of the Protocol.

In addition, the government appears to have neglected observations made by Special Rapporteur of the UN Commission on Human Rights. For example, by a letter dated 8 October 2003, the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment reminded the Government of the United Republic of Tanzania of a number of cases transmitted in 2001 and 2000 for which no response had been received. In addition, the government of Tanzania has not yet issued a standing invitation to the UN special procedures.

The cooperation with UN Treaty bodies is not satisfactory, as 15 overdue reports have not yet been submitted. Among those there is the Initial State Report under the ICESCR (due 1990), as well as periodic reports under the ICCPR (due 2002), CEDAW (due 1998) and CERD (due 1987). This attitude illustrates the wish of the authorities to avoid scrutiny whether from its citizens, members of the judiciary or international human rights mechanisms.

The FIDH considers that cooperation with such mechanisms is extremely useful as they open a constructive dialogue between the state and the UN monitoring bodies that can have positive outcomes in advancing the rule of law and respect for human rights.

The Chairman of the Tanzania Law Reform Commission,

Judge Bahati, and the Director of Constitutional Affairs and Human Rights, Ministry of Justice & Constitutional Affairs, Mr Werema, told the FIDH delegates that Tanzania contemplates to increase compliance with its international human rights obligations and to ratify additional international human rights instruments. The FIDH hopes that these intentions will be translated into substantive action.

b. Distrust of the judiciary

On a number of occasions, former President Nyerere expressed his concern that magistrates were in charge of handing down sentences in relation to systemic criminal action or civil unrest. In the past, Tanzania has faced some specific waves of crimes, such as the theft of cattle (which led to the establishment of the *Sungusungu* groups), the theft of government property, or the action of those referred to as the racketeers and economic saboteurs, which led to the introduction of ouster clauses and administrative tribunals.

In 1983, the former President declared "i ask magistrates to forgive us if we hesitate to take culprits to courts of law. At times racketeers have been taken to courts where they have received light sentences or have been set free. In the Courts the racketeers could use their ill-gotten money to engage lawyers or use that money to twist the law to their favour".

Consequently, the Government adopted various instruments in order to avoid any judicial control of government activities and decisions.

Two approaches have been adopted: (1) by marginalising the judiciary in cases regarded as too important or too sensitive politically to be left in the hands of the judiciary, and (2) by avoiding any serious judicial review of its actions through imposing strict controls on any procedure challenging the action of the Government.

The marginalisation and side-stepping of the judiciary has been effected by:

- The use of ouster clauses in legislation

Ouster clauses are statutory provisions excluding application for prerogative: remedies in courts of law.[40] They make the administration immune to judicial review. Such a practice has been unequivocally denounced by the African Commission for Human and Peoples' Rights.[41]

- The promotion of self-organised militias to patrol the streets and fight crime (the most famous example being the *sungusungu*) which are considered closer to the "real life"[42].
- The Minimum Sentences Act 1963: the Government imposes high minimum in the sentences, in order to limit the use of judicial discretion, and to ensure that heavy sentences be applied.
- The adoption of retroactive legislation to overturn rulings of judiciary. This practice has been denounced by several practitioners met by the FIDH delegates. As they say, "when you fight against the Tanzanian government, you may win on one side, but they will use another one to overcome you". Chris Maina Peter gave the example of the Deportation Ordinance Act 1921, which has been declared unconstitutional and void by the High Court. *As he says, "interestingly, the Government sent a Bill to the Parliament purporting to amend the legislation which had been declared void*."[43] Justice Mwalusanya called this act of the Government "an exercise in futility as it is just common sense that you cannot amend a legislation which is non-existent [because already declared unconstitutional by the High Court]".
- The use of threats against members of the judiciary. It was confirmed to the FIDH delegates that Justice Mwalusanya, whose rulings are extensively quoted in this report, was forced to retire following threats. If this kind of event can happen to a respected judge of the High Court, we can only express fear that lower level members of the judiciary face a similar situation.

This also explains the over cautiousness of several magistrates on important rulings, particularly among the members of the Court of Appeal of Tanzania.

The strict control of procedures challenging the government's action has been effected by:

- The use of claw-back clauses included in the Bill of Rights, making provisions of the Bill "subject to laws". They allow the Government to adopt or maintain provisions that violate human rights.
- The permission necessary to initiate litigation against the Government, through the Government Proceeding Act 1967. According to this legislation, a person seeking to sue the Government was first required to seek permission from the Government itself through the Attorney General. This led to many injustices, as illustrated by the case of Scarion Bruno. Beaten by an interrogator while under police custody, he was imprisoned for one year without access to bail and was denied medical assistance. Three years later, he sought the permission of the Attorney general to sue the police department and the police officer who had injured him for damages. He died three years later, still awaiting the response from the Attorney General. Although this Act has been amended recently, it remains a real limitation on obtaining review of Government decisions: under the Government Proceedings (Amended) Act 1994 (Act No. 30 of 1994), Art 2

paragraph 2, the petitioner must declare its intention to do so 90 days before filing his/her complaint[44].

- The Enforcement of Constitutional Basic Rights and Duties Act 1994. That legislation expressly states that "the High Court shall, instead of declaring the law or action to be invalid or unconstitutional, have the power and the discretion in an appropriate case to allow Parliament or other authority concerned, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it, and the law or action impugned shall until the correction is made or the expiry of the limit set by the High Court, be deemed valid".

2. A criminal system based on retaliation and revenge

In Tanzania, there is a general belief that crime is solely the fault of the offender and there is no regard for his or her social circumstances.[45] Instead of trying to educate and rehabilitate the offenders, an approach has been adopted that sanctions the use of physical violence by offenders and stigmatise criminal behaviour without regard to the social environment in which he lives.[46] A sentence must be passed, and everybody should know about it.

This is exemplified in two regards: the imposition of punishments marking the offender's body, and the adoption of severe mandatory prison sentences.

Corporal punishment and the death penalty

Both corporal punishment and the death penalty were introduced under colonial rule. They are maintained up to now. Although not the direct focus of this report, the issue of corporal punishment is important to understand how punishment is conceived in Tanzania.

Concerned about the level of crime in the country, and uncertain of the reaction of the judiciary, the government decided to introduce legislation setting down minimum sentences.

The regime started with the adoption of the Minimum Sentences Act 1963. The official justification was that the government was concerned by the increase in theft in government offices, stock thefts, housebreakings, burglaries, robberies and corruption. It was the view of the government that the courts were too lenient in their sentencing, often handing down sentences well below the maximum penalty set down in legislation.

The initial policy of the government was extremely harsh: a minimum of sentence of two years imprisonment and twenty-four strokes each year. Corporal punishment was to be administered in instalments of six strokes every three months. According to the then Minister of Home Affairs "even if a person is imprisoned for ten years he shall get six strokes every three months throughout that period".[47]

With full support from members of the Parliament[48], the text adopted eventually provided for corporal punishment fixed at twenty four strokes to be administered in two equal instalments, one at the beginning of imprisonment and the other on the last day of imprisonment.

At the same time, the Home Affairs Minister announced that prison conditions were to be more harsh, for an example, he said that prisoners would no longer have mattresses and a number of blankets and bed sheets but would instead receive only one mat with one blanket and would sleep on the floor.

The implementation of corporal punishment increased dramatically in the following years: while only 13 cases of corporal punishment had been administered in 1958, they were 1,508 in 1963 and 3,511 in 1965, after which official figures were no longer made available to the public.

A study carried out in 1967 showed that the judiciary was very reluctant to apply these harsh provisions, revealing that the judiciary found this legislation to be unpalatable and sought to restrict its application whenever possible.[49]

However, the Government was convinced of the appropriateness of its policy, as explained by the then Prime Minister: "we have to make people recognize that to commit an offence again the nation, or any of its citizens, is an evil thing, which is a disgrace to the man who does it. When this attitude is adopted generally, then we shall be able to revise our method of dealing with offenders, but until then we can have no mercy".[50]

Professor Shaidi expressed his concern to the FIDH delegates that corporal punishment is still in use in Tanzania although no official statistics are made public. However, Mr Rweyongeza, defence lawyer, told the FIDH delegates that these provisions are rarely implemented.

The Corporal Punishment Act 1970 was recently amended in 1998, with the adoption of the Sexual Offences (Special

Provisions) Act 1998. This new Act amends the previous punishment for rape, which set down a sentence of "*life imprisonment with or without corporal punishment*". The new section 131 of the Penal Code stipulates, "*the imprisonment for life, and in any case for imprisonment of not less than thirty years with corporal punishment, and with fine, and shall in addition be ordered to pay compensation of an amount determined by the court, for the person in respect of whom the offence was committed for the injuries caused to such person*". The application of corporal punishment has consequently become mandatory in case of rape.

The three Schedules (I, II and III) annexed to the Corporal Punishment Act 1970, list the numerous offences for which corporal punishment may be imposed upon adults under the Act.

The FIDH recalls that corporal punishment clearly violates international human rights standards. They are in contradiction with Article 1 of the UN Convention Against Torture and Article 7 of the ICCPR, as a form of cruel, inhuman or degrading treatment. The UN Special Rapporteur On Torture considers that corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, inter alia, in the Universal Declaration of Human Rights, the ICCPR, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[51] In his general recommendations, the Special Rapporteur stated "legislation providing for corporal punishment, including excessive chastisement ordered as a punishment for a crime or disciplinary punishment, should be abolished".[52]

In addition, the UN Human Rights Committee has affirmed on at least two occasions that the prohibition on torture and cruel, inhuman or degrading treatment or punishment contained in Article 7 of the International Covenant on Civil and Political Rights extends to corporal punishment.[53]

In addition, Article 5 of the African Charter on Human and Peoples' Rights prohibits torture and other cruel, inhuman or degrading treatment[54], and the African Commission on Human and Peoples' Rights has clearly stated that "there is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state sponsored torture under the Charter and contrary to the very nature of this human rights treaty" and thus requested the Government of Sudan to immediately amend its Criminal Law of 1991 to conform with its obligations under the African Charter and other relevant international human rights instruments, and to abolish the penalty of lashes, regardless of the crime.[55]

Similar provisions have also been declared unconstitutional in other countries, such as Zimbabwe, where the Supreme Court observed that, "the manner in which it is administered is reminiscent of floggings at the whipping post, a barbaric occurrence particularly prevalent in the past. It is a punishment, not only brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one, which strips the recipient of all dignity and self-respect... It causes the executioner, and through him society, to stoop to the level of the criminal".[56]

The FIDH calls upon the Tanzanian authorities to bring the domestic legislation in conformity with international human rights standards and abolish corporal punishment in all circumstances

Minimum sentences continuously increased

As discussed above, the practice of adopting minimum sentences legislation started immediately after independence, the then Government believing that the judges were too lenient in their sentencing of the offenders. This policy appears to have no end as sentences have continued to be increased.

The Minimum Sentences Act was amended in 1989 to raise the minimum term of imprisonment for armed robbery from 7 to 30 years imprisonment, and that of robbery with violence to 15 years. The Act amended again in 1998 with the minimum term of imprisonment for rape and attempted rape increased to 30 years imprisonment with corporal punishment. Section 156 of the Penal Code was also amended and the minimum sentence for "indecent assault" was increased from 7 years imprisonment to life imprisonment.

A section 10 was added to the Minimum Sentences Act, stating that "nothing in this Act shall be construed as precluding a court from imposing, in relation to a scheduled offence, a sentence of imprisonment for a term longer than the minimum term of imprisonment, prescribed for such offence by this Act".

Considering that many of these minimum sentences are fixed

at thirty years imprisonment, it is difficult to imagine how a judge could consider a harsher sentence. Professor Shaidi told the FIDH delegates that presently, minimum sentences of thirty years are supported by the Parliament and the population at large.

The first Tanzanian Commissioner of Prisons stated in the 1963 Prisons Annual Report that "the task of the Prison Administration is to evolve a new policy consistent with civilised thinking, to make it serve not only a punitive purpose but essentially a reformative one". It had been decided that the reformation of the offenders was the primary goal of the imprisonment. As such, section 62 of the Prisons Act 1967 stipulates that "every prisoner sentenced to imprisonment and detained in prison shall...be *employed, trained and treated* in such manner as the Commissioner may determine, and for that purpose the prisoner shall, at all times, perform such labour, tasks and other duties as may be assigned to him by the officer in charge." Section 63 makes the same reference to training of female prisoners.

However, one hardly sees any reformative effect in a thirty years sentence. This type of sentencing is intended to remove a person from the society, and if an individual survives to such a sentence[57], there is no doubt that he or she will bear a mark for the rest of his or her life.

The practice of minimum sentencing not only shows the distrust of the Tanzanian government towards the judiciary but might also be considered a breach of the separation of powers, as the Parliament in fact fixes the sentences and constrains the exercise of judicial discretion.

Since such severe minimum sentences do not permit an examination of the personal circumstances of the accused[58], they can result in sentences disproportionate to the crime committed. Under those circumstances, a minimum sentence of 30 years imprisonment might constitute inhuman and degrading treatment, in violation of the ICCPR, the African Charter and the Constitution of Tanzania.[59]

Such heavy minimum sentences are yet another illustration of the fact that the Tanzanian criminal justice system is based on revenge, on the suffering imposed on the offender who has transgressed the law. Ordinary criminality is considered as a direct offence against the authorities, and as such, deserves a stiff and visible punishment: namely the death penalty, corporal punishment or life imprisonment with a minimum 30 year term.

This approach to criminality is a reminiscent of the Dark Ages, as stated by a member of Parliament[60], and as such, should have no place in present day criminal justice. The FIDH believes that Tanzania cannot secure peace and public order through such a regime, which perpetuate hatred and violence throughout society.

3. Corruption: a threat to the reform process

Throughout the interviews carried out by the FIDH delegation, corruption has been the key word attached to a number of the dysfunctional aspects of the judiciary that have led to human rights violations. Corruption runs rampant in Tanzania with official statistics showing that the police and the judiciary rank high in this shameful competition.

It became very quickly clear that the FIDH delegates urgently needed to discuss the topic with the authority in charge of the problem, the Prevention of Corruption Bureau (PCB). Unfortunately, despite two attempts and after waiting a few hours in the PCB's waiting room, the mission was not able to find anyone willing to answer to its questions, or at least able to provide accurate information and statistics.

However, the FIDH has been able to collect relevant information from press conferences, newspapers headlines and interviews.

The description of the situation in the country made by Ibrahim Seushi, Chairman of Transparency International in Tanzania, is frightening: the corrupt behaviour of top-politicians leads to fraud and embezzlement costing the Tanzanian people billions of Shillings every year.

People wishing to be appointed at high-level public posts will often either pay to secure their positions or obtain sponsorships from wealthy persons. Ibrahim Seushi is convinced that corrupt practices flourish at the highest political level in Tanzania and are undermining reforms and the fight against bribery and large-scale corruption.[61]

Concerning the PCB, the judgment is equally critical: "the PCB must have full support from the government and must have the power to investigate and prosecute all cases. Today, the PCB is not adequately equipped - neither with skills nor with equipment".

This view, expressed in 2002, is sadly still true. On the subject of justice in particular, the situation is bleak. Christina John, Acting Head of the Tanzania Prevention of Corruption Bureau,

while making a presentation at the Prevention of Corruption workshop held in Dar es Salaam on 2 December 2003, reported that among all government departments, the Police is subject to the highest number of corruption allegations besides the judiciary and the central government.[62]

While the FIDH delegates were in the country, a newspaper reported that the Prevention of Corruption Bureau in Korogwe district Tange Regin, had arrested a primary court magistrate, Masengwa Innoncent Mihayo, for asking and receiving a 50,000 Tsh. bribe.[63]

Corruption is reportedly to be prevalent in opening case files, setting hearing dates, tracing case files, granting temporary court injunctions, providing copies of judgments and court proceedings, granting of bail, issuing attachment orders, granting chamber applications, payment of assessors, and so on. These practices are greatly endangering the lives of innocents who may end up sentenced to death because at one stage of the procedure they were not provided with the adequate documents, or they were unable to exercise their rights, because they were unable to find the 50,000 Tsh[64] requested by a corrupt magistrate or police officer.

The Tanzanian authorities should do more than simply observe that corruption is plaguing the justice system and plan a better future for the year 2025.[65] More should be done than establishing an anti-corruption telephone number, which seems to never work[66], and a Public Corruption Bureau, which cannot be reached. Put simply, the situation is such that concerted, adequately funded, effort must be made immediately. However, corruption has reached such a level in the country that adopting a law would not be sufficient: public perceptions and beliefs must change; in that perspective, advocacy and awareness programs on the issue must be further developed.

40. As an example, the Preventive Detention Act 1962, states that "no order made under this Act shall be questioned in any Court", although it entitles the President to detain indefinitely "any person...conducting himself so as to be dangerous to peace and good order" or any person who is "acting in a manner prejudicial to the Defence...or security of the State". The Act was amended in 1985 to allow the High Court to examine these decisions.
41. See *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria,* Com. 143/95, 150/96. "In all of the cases cited above, the Commission found that the ouster clauses render local remedies non-existent, ineffective or illegal. They create a legal situation in which the judiciary can provide no check on the executive branch of government...The ouster clauses were found to constitute violations of Article 7. The Commission must take this opportunity, not only to reiterate the conclusions made before, that the constitution and procedures of the special tribunals violate Articles 7 (1)(a) and (c) and 26, *but to recommend an end to the practice of removing entire areas of law from the jurisdiction of the ordinary courts*."
42. President Nyerere is reported to have argued that sungusungu were in a better position than the police and the courts to know who the thieves and rustlers were. See Sunday News, 25th May 1986.
43. See Chris Maina Peter, Human Rights in Tanzania, pages 743-745.
44. "No suit against the government shall be instituted and heard unless the claimant previously submits to the government Minister, Department or officer concerned a notice of not less than ninety days of his intention to sue the Government, specifying the basis of his claim against the government and he shall send a copy to the Attorney General."
45. For example, in 1969, the official explanation given on the rising crime rate listed five major causes: first, some people are born criminals; second, differential association; third, bad upbringing; fourth, anomia and fifth, laziness. (Hansard, 18th Session, October, in *the penal system: Retribution or correction of offenders*, Prof. Leonard P Shaidi,). Though this is no longer the official position, the practice shows that such conceptions are still influential.
46. Justice Mwalusanya expressed it very clearly: "the State does not disclose the fact that most poor persons kill during robbery because of the poor living conditions and the unequal distribution of the national cake. The grinding poverty and hunger lead to brutalization because the economy has been mismanaged by the government. Instead of the State revealing that the poor kill because of the poor living conditions, it says that the killer is morally depraved... In the institution of State killing, the public is invited to bury knowledge of the conditions, which have led to the crime and concentrate on the individual. It is the individual that must be regarded as depraved not a system founded on ruthless exploitation, economic mismanagement and enforced impoverishment". See TLR (1994), page 170.
47. Hansard, 6th Session, April 1963.
48. Some even suggested that floggings should be in public, others that hands of thieves should be amputated, some even opposed the provisions in the Act which exempted women, children and elderly people from the corporal punishment. The only contary statements came from two female members of the Parliament who said that a self-respecting nation could not be proud of a law of this nature.
49. Stephen Huber, 'Statutory interpretation and judicial discretion', (1967) 2 *Denning Law Journal*, 99.
50. Cited in James Read, 'Minimum sentences in Tanzania', (1965) 9 J*ournal of African Law*, 22-23.
51. Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1995/37, E/CN.4/1997/7, 10 January 1997.
52. General Recommendations of the UN Special Rapporteur on Torture, paragraph C, accessed at http://www.ohchr.org/english/issues/torture/rapporteur/index.htm.
53. General Comments 7 (16) and 20 (44).
54. Article 5 of the African Charter reads: "every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading

punishment and treatment shall be prohibited".
55. Communication 236/2000, Curtis Francis Doebbler v. Sudan, 15-29 May 2003, Sixteenth annual activity report of the African Commission for Human and People rights, 2002-2003, p 56-61.
56. Supreme Court of Zimbabwe, Judgement no. S.C. 156/87 of 1987.
57. One has to consider that this is almost the life expectancy at birth in Tanzania, estimated at 46 years, by the World Health Organisation in the World Health Report, 2004 (Annex 9).
58. As an example, armed robbery attracts a minimum sentence of 30 years, even for theft of an amount as little as 500 Tanzanian shillings (Tsh).
59. If you apply the disproportionality test (this test provides that an arbitrary, unusual or disproportionate sentence to the offence committed which shocks the public conscience, that is the conscience of a reasonable man, is prohibited), we can only arrive to that conclusion. This test was applied by the Supreme Court of Papua New Guinea in *Constitutional Reference by the Morobe Provincial Government* (1985) and by the Zimbabwe Supreme Court in the case of *The State v. Arab* (1990). More recently, the Supreme Court of Namibia declared the Arms and Amunition Act 1996 to be unconstitutional which prescribes a minimum sentence of 10 years imprisonment. The judges ruled that "whether a particular form of punishment authorized by the law can properly be said to be inhuman involves a value judgment by the court which must reflect the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in their national institutions and the Constitution, as well as the emerging consensus of values in the civilized international community [...] The applicable test is that a court cannot interfere with the sentence unless 'it is so clearly excessive that no reasonable man would have imposed it'", and concluded that "the minimum sentence of 10 years is grossly disproportionate when seen in the light of the very wide net cast by s 29(1)(a). Since similar cases are likely to arise, the court should not only declare s 38(2) (a) to be of no force in the instant case, but in all cases. The appropriate course is to strike out the words 'of not less than ten years, but' from s 38(2)(a) of the Act". See State v Likuwa [1999] ICHRL 41 (24 March 1999).
60. "At first sight, sir, the Bill may be a throw back to the Dark Ages, but that precisely is an argument in its favour. As it is, the severity of punishment in Germany times was the most effective deterrent to the Commission of offences of the type under review in the Bill. The wheel has turned full circle". These are the words of the Honourable MP Mr Bajaj, cited by Professor. Shaidi in *The penal system: Retribution or correction of offenders*.
61. Statement made in 2002 when the Annual Report of Transparency International was released.
62. 'Polisi waongoza Kwa Rushwa ', *Nipashe* 3 December 2003. We were told by the police authority in Zanzibar that the issue was on the agenda, and we were shown signs saying that police services are free, posted in every police station. Also, a regulation states that a police officer who brings someone to jail cannot order his liberation, in order to avoid the 'cell business'. However, these attempts seem insufficient according to reports published in the press.
63. "Magistrate arrested over 50 000 Tsh bribe", *Daily news*, 9 October 2004.
64. Equivalent to 4.5 euros in October 2004.
65. The Justice Minister said in a press conference held in Dar es Salaam on 9 October 2004 on the Vision 2025 reform agenda that, apart from the lack of integrity and fairness of the legal system, corruption was another problem hindering the fair administration of justice in the country.
66. The FIDH delegates tried several times to call the anti-corruption phone line 113 on 18 October 2004 without reaching anyone.

IV. Offences punishable by the death penalty in Tanzania

Three offences are punished by the death sentence in the Tanzanian legal system. These offences are murder, treason and misconduct of commanders or any service man in presence of enemy.

1. Murder

Chapter 16 of the Penal Code states in the section 196 that "any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder". Section 197 states that "any person convicted of murder shall be sentenced to death".

The sentence is mandatory providing that it is proven beyond reasonable doubt that the accused committed murder.

In practice, most prosecutions for murder result in a verdict of manslaughter, which does not carry the death penalty. Section 195 stipulates, "any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter".

Section 211 provides that "any person who attempts unlawfully to cause the death of another is guilty of a felony, and is liable to imprisonment to life".

In terms of statistics as of April 2003, in the Tanzanian mainland prisons, 549 accused persons who were charged of murder were finally convicted of manslaughter. At 1 April 2003, there were 370 prisoners who were convicted of murder and sentenced to death.[67]

Despite the attenuating practice of handing down a verdict of manslaughter, mandatory sentencing is maintained in the Tanzanian Penal Code. The UN Human Rights Committee as well as a number of domestic courts throughout the world have considered mandatory death sentences as a violation of the right to life.

The Human Rights Committee stated in *Eversley Thompson v. St-Vincent and the Grenadines* 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".[68]

The Committee stated that the possibility of a pardon or commutation possibility 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 compared to judicial review in all aspects of a criminal case".

In *Edwards and Others v. The Bahamas*, 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.[69]

The Eastern Caribbean Court of Appeal has held that the mandatory imposition of the death penalty was unconstitutional, as it amounted to inhuman and degrading punishment.[70] This decision is particularly relevant here, as this decision has legal effect in six commonwealth countries. The Court also ruled on the "saving clauses" included in the Eastern Caribbean Constitution, very similar to the claw-back clauses found in the Tanzanian Constitution.

Despite the fact that judges routinely hand down death sentences on murder charges (and without particular emotion, as Judge Bahati told the FIDH delegates, a former judge of the High Court, now the Head of the Law Reform Commission of Tanzania), Tanzania continues to operate in violation of the established international standards, and should therefore consider abolishing death penalty and introduce a degree of discretion in the sentencing.

2. Treason

Under sections 39 and 40 of the Penal Code, treason is punishable by the death penalty. However, the wording "shall be liable on conviction to suffer death" has been interpreted by tanzanian courts as merely setting the upper limit, rather than a mandatory sentence.

No person has been sentenced to death in treason cases since independence.[71] However, the FIDH considers that the maintenance of this offence in the Tanzanian Penal Code violates international standards. Indeed, Article 6 (2) of the ICCPR states that: "in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes". The General Comment adopted by the Human Rights Committee states that: "while it follows from Article 6 (2) to (6) that states parties are not obliged to

abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes".

Moreover, the UN Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty specify that "*...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.*"

The notion of 'most serious crimes' does not include offences like treason, which are of a political nature. The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated 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"[72].

Certain Tanzanian officials told the FIDH that this offence could be removed from the Penal Code, as nobody has ever been sentenced to death on this charge. The FIDH believes that it should be done promptly in accordance with international human rights instruments, which place clear obligations on the Government of Tanzania.

3. Misconduct of commanders or any service man in presence of enemy

The First Schedule to the National Defence Act No 24 of 1996 permits the imposition of the death penalty for traitorous acts by commanders or any service man in the presence of an enemy. The death penalty under these provisions is not mandatory (see clause 11, 12, 13, 14, 16 and 17 of the First Schedule to the National Defence Act No 24 of 1966).

This provision has never been applied. However, the reasoning regarding treason is equally applicable to this offence and the provision should therefore be abolished.

Vulnerable groups

According to international human rights standards, persons below the age of 18 at the time of the commission of the crime cannot be sentenced to death, while death sentence shall not be carried out on pregnant women or new mothers and persons who have become insane[73].

In Tanzanian law, it is expressly provided by paragraph 2 of Section 25 of the Penal Code that the "sentence of death shall not be pronounced on or recorded against any person who, in the opinion of the court, is **under eighteen years of age**".

Concerningly, the wording is unclear as to whether this age limit refers to the time of the commission of the offence (as provided by international standards) or upon sentencing.

In the case of *Republic of Tanzania v. Lubasha Maderenya and Tegai Lebasha*[74], the High Court refused to impose the death penalty on one of the accused who was below 18 years at the time of the commission of the murder. On appeal, the Court of Appeal reversed the ruling. Such a decision violates international standards, and it is regrettable that it is the result of a ruling by the highest court in the Tanzanian legal system. Hopefully, this decision is an exception and will remain as a reminder of an injustice not to be repeated.

The question of **pregnant women** is also taken into account under Section 197 of the Penal Code which stipulates that "if a woman convicted of an offence punishable with death is alleged to be pregnant, the Court shall inquire into the fact and, if it is proved to the satisfaction of such court that she is pregnant the sentence to be passed shall be a sentence of imprisonment for life instead of a sentence of death".

The status of **mentally ill** accused is more problematic. The Penal Code states in section 12 that "every person is presumed to be sound of mind, and to have been sound of mind at any time which comes in question, until the contrary is proven", introducing a presumption of sanity that is difficult to rebut.[75]

The Penal Code states "a person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission". But it adds that "a person may be criminally responsible for an act or omission although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission."

In practice, several accused have been sentenced to death although medical experts had satisfied the court that the person was suffering of a serious mental disease, but where it could not be proven that this disease had affected his mind

sufficiently to make him incapable of understanding what he was doing. In the case of *Saidi Abdallah Mwamwindi v. The Republic*[76], the accused was sentenced to death (and executed) despite the fact that a respected psychiatrist, Dr. W.S. Pendaeli, had testified that the accused had a mental disease called *Catatonic Schizophrenia*.

The majority of the judges of the Court of Appeal are aware of this injustice and of the fact that this text is outdated, but none of them seems to be ready to reject the application of this provision.

This sentiment was clearly expressed by the Tanzanian Court of Appeal in the case of Agnes Doris Liundi v. Republic where it said: "it is possible, indeed likely, that our law on the issue of insanity is antiquated and out of date. Parliament, in its wisdom, may wish to amend this particular branch of the law and bring it into line with modern medical knowledge on the subject".[77]

Until now, the government has not taken any initiative to amend that legislation and bring it in line with international human rights standards.

67. The Honourable Omar Mapuri (MP), Minister of Home Affairs, Speech to Parliament during the Parliament Budget Session, 2003/2004, page 52).
68. *Eversley Thompson v. St-Vincent and the Grenadines*, Communication No. 806/1998, U.N. Doc. CCPR/C/70/D/806/1998 (2000).
69. Report No. 48/01 (4th April 2001), Annual Report of the Inter-American Commission on Human Rights (IACHR) 2000
70. *Peter Hugues and Newton Spence v. The Queen*, 2nd April 2001, Eastern Caribbean Court of Appeal, Criminal Appeals 17/1997 and 20/1998. The Judicial Committee of the Privy Council (the final Court of appeal for countries in the Commonwealth Caribbean) had remitted the matter to the Eastern Court to consider and determine the constitutionality of the mandatory death penalty.
71. *In SMZ v. Machano Khamis Ali & seventeen others*, Court of Appeal of Tanzania, Criminal Application No. 8 of 2000, 3 April 2000 (unreported): It was held by the Court of Appeal that treason is an offence against the Union only, and as such, it cannot be directed, as alleged in the indictment, against the Revolutionary Government of Zanzibar, the official government of Zanzibar. So the judges quashed the indictment, as an element of the offence was not made out.
72. See Civil and Political Rights, including questions of Disappearance and Summary Executions. Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Ms. Asma Jahangir, submitted pursuant to Commission on Human Rights Resolution 2001/45. UN Doc. E/CN.4/2002/74.
73. ICCPR, Article 6, paragraph 5; 'Safeguards guaranteeing protection of the rights of those facing death penalty' (adopted by Economic and Social Council resolution 1984/50 of 25 May 1984), Article 3; Convention on the Rights of the Child, 1989, Article 37(a).
74. High Court (Mwanza) Criminal Sessions Case No 143 of 1977
75. This is drawn from the decision in *R.v. Mc Naghten* (1843), 10 CL. And F, 200, which presumes that every person is sane unless it is proven that as a result of a disease of the mind at the material time he was incapable of understanding what he was doing or he was incapable of knowing that what he was doing was wrong.
76. Saidi Abdallah Mwamwindi v. The Republic, 1972 H.C.D. No. 212. The result was similar in *R. v. Asha Mkwizu Hauli,* where two prominent psychiatrists, Dr. K.F. Rugeiyamu and Dr. W.S. Pendaeli, testified that the accused was mentally ill. In D.P.P. *v. Leganzo Nyanje*, the psychiatrists had confirmed that the accused suffered from paranoid schizophrenia and yet he was sentenced to death.
77. Tanzania Law Reports, 46 (1980).

V. Manufacturing convicts: a journey through the Tanzanian criminal system

"The possibility of a judicial error, for whatever reason, assumes ever greater importance because the death penalty is irreversible, it is the end of the matter, and it cannot be corrected. And mind you, convictions for murder in error (after the appeals) are not rare ", Justice Mwalusanya.[78]

This study will only focus on people charged with murder, as this is the main offence attracting the death penalty. These particular offenders are indeed far from an exception in the administration of criminal justice, as on 1 April 2003, 7090 prisoners on remand in the mainland Tanzania Prisons were charged with murder out a total of 19117 prisoners on remand[79] (37% of all remandees).

1. The arrest of a suspect

Once an offence has been committed and the crime has been reported to the police, then the police will undertake investigations, which will determine if an arrest can be made.

If investigations reveal a potential suspect then the suspect will usually be arrested in the case of an arrestable offence, such as murder. The arrest may even be made by any individual who is in presence of the suspect for any of the offences listed in Section 14 of the Criminal Procedure Act.

The FIDH delegation notably met two convicts, Mr Emmanuel and Mr Geredje, in the Kilimani Central Prison of Zanzibar; in their case, the offence had been committed in October 1998 and they were both arrested in November 1998.

According to the Tanzanian Criminal Procedure, the suspect must be brought before a judge within 24 hours. Unfortunately, according to a number of witnesses met by the FIDH mission, this regulation is rarely enforced. People are often maintained in police custody for several days before they are brought before a judge. As an example, Mr Geredje was detained three days before he was brought before a judge. In the case of Mr Emmanuel, he was first detained for a few days, then freed, and rearrested a few days later, when he stayed for another two days in police custody before being brought before a judge.

This practice of arrest-release-rearrest is widely used in the police stations, as the FIDH has been told by practicing advocates. Sometimes this can involve a release of 10 minutes, just the time to walk outside the police station before they are rearrested, and so on. Usually, the judge is never informed of this conduct, so that it is unlikely that there will be any remedy.

The **wide power of arrest** is denounced by local lawyers as well as local[80] and international[81] human rights organisations. The Law Reform Commission of Tanzania considers that "it would appear that police powers of arrest are too wide. Ideally arrests should be made only after investigations have been completed unless of course the arrest is made at the time of commission of offence. It is submitted that a lot of miscarriage of justice takes place at this first level of the justice system.[82]

Detainees provided information on the police practice of arrest and confinement in jail of relatives or friends, including children and wives of suspects when the suspect flees to avoid arrest.[83] This practice, amounting to **collective punishment**, is a clear violation of the individual character of criminal responsibility. It is contradictory to the concept of due process. The UDHR and ICCPR provisions regarding the right to a fair trial are based on the principle that the criminal responsibility is individual - never collective.

In Tanzania, the investigation stage usually comes after the arrest. It is common for police officers to seek adjournments on the ground that investigations are not complete.

In addition, according to the testimonies collected, **arbitrary arrests** range from individual threats and coercion (I arrest you if you don't pay me) to private revenge (false accusations of murder can lead to a jail sentence), up to the higher authorities arresting people on false charge, which will later be dropped.

Human rights activist Ally Saleh[84] of the Zanzibar Human Rights Association told the FIDH that arbitrary arrest are common practice in Zanzibar in the run-up to elections with political opponents being silenced in this way for a few months. He expects this method will be used in the coming months as elections are scheduled to take place in the Union in 2005.

Another example can be seen on mainland Tanzania, when on 16 July 2003, six CHADEMA[85] leaders were arrested without being provided a reason. They were later charged with theft and unlawful possession of a weapon, charges they denied.

They were detained in the CCM office, where they were alleged to have been badly beaten.[86]

The misuse of the existing legal provisions and the lack of proper controls are not the only problem occurring at this early stage of the criminal proceedings.

The conditions of detention in police stations are appalling in many areas. For example, in November 2002, 17 prisoners suffocated to death at the Mbarali police station in Mbeya. The dead were among 112 remanded suspects who were detained together in a small room only capable of holding 30 people.[87]

Criminal suspects were reportedly congested at the Morogoro District Resident Magistrate's Court in a small cell, which had no window for detainees to receive air. Due to these circumstances, on 25 June 2003, the detainees at the Court[88] refused to enter into the small room.[89]

Such conditions of detention clearly constitute an inhuman and degrading treatment prohibited by regional and international standards.[90]

The African Commission for Human and Peoples' Rights in the Saro-Wiwa case stated, "the protection of the right to life in Article 4 also includes a duty for the state not to purposefully let a person die while in its custody".[91] The Commission made it clear that the responsibility of the government is heightened in cases where an individual is in its custody and *therefore someone whose integrity and well-being is completely dependent on the actions of the authorities* (paragraph. 112).

Another area of serious concern is the use of **violence** of a number of police officers. This goes from police brutalities in detention cell to extra-judicial killings.

As an example of this violence, mention can be made of a case involving three police officers who were shot in May 2003 by alleged bandits in Kawe area, Dar es Salaam. The police arrested Emmanuel Lugema (aged 27), who was thought to be the mastermind of the officers' killings. After his arrest, Lugema's handcuffs were removed and he reportedly attempted to run away. The pursuing police officers shot and killed him on the spot.[92] The police justified the killing by reporting that the victim was shot in crossfire. However, human rights defenders believe that some alleged offenders were shot to death deliberately and in circumstances that did not pose any danger to the lives of police.

The reluctance to cooperate with the investigators of the Tanzania Commission for Human Rights and Good Governance is regrettable under these circumstances. Such reluctance has notably been denounced by the Vice-Chairman of the Commission, Ambassador Mohamed Ramia Abdiwawa. For example, regional police officers denied access to the investigators to the police cell in Lindi.

The opinion of the police is that the Commission makes their work more difficult, which shows a real problem of understanding by the police authorities. As the Chairman of the Human Rights Committee of the Tanganyika Law Society, Mr Francis Stolla has stated: "for the police, every suspect is a culprit. Such an attitude is an opened door to abuses and brutalities by the police"

The use of violence against remanded detainees is a huge problem. The use of physical coercion to obtain a confession before the suspect is brought before a judge is far too common.[93] The attitude of the police hierarchy and of the government obstructs any change. The Tanzanian mainland Police authorities denied the existence of any such problem.[94] Past declarations from the President Mpaka, warning offenders to never attempt killing security forces[95] and from the Prime Minister, addressing the Parliament and declaring that the government will continue to deal harshly with offenders and that force will be used, condone violence against detainees.

The fact that police authorities have included in their training courses information on human rights issues[96] is insufficient if it is not supported by a dedicated will to change the situation.

The UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states, "no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment" (Principle 6). The mistreatment of prisoners also contradicts the Articles 7 and 10 of the ICCPR[97], which are binding on Tanzania. Furthermore, it also contradicts Article 2 of the UN Convention against Torture, which Tanzania has not yet ratified.

Section M (7) (b) of the Guidelines on the Right to a Fair Trial in Africa state that "states must ensure that no person, lawfully deprived of his or her liberty, is subjected to torture or to cruel, inhuman or degrading treatment or punishment". Section (e) adds "no detained person while being interrogated

shall be subjected to violence, threats or methods of interrogation, which impair his or her capacity of decision or his or her judgement". UN Body of Principles states, "no person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment."(Principle 6).

On the same issue of violence upon arrest, the development of local militias to police the streets of many towns in Tanzania and the inaction of the police authorities to control and impede the violence committed by these self-organised groups is a real threat to the due process of law.

This practice started with the *Sungusungu* groups. The first group was established in 1982 in the region of Shinyanga by a person known as Kishosha Mang'ombe, "the returner of cattle". These groups began in cattle-rich area, and their specific aim was to provide protection against theft. Leading the support of *Sungusungu* was President Julius Nyerere, the former CCM Party Chairman. He is said to have been impressed by the grassroots nature of those groups and described them as a revolutionary force at village level, which should be encouraged and subject to harassment. On several occasions, he appealed for the release of arrested members of Sungusungu groups as in his opinion: "the law under which they have been charged was bad law because it worked against the peoples' interests and was creating conflict between the people and the State".[98]

The activities of these groups rapidly developed into a parallel system for the administration of justice, in which fundamental rights are simply ignored. Chris Maina Peter gave the example of Busangi, in Kahama District, where the Sungusungus have established their own judicial system with a catalogue of offences and corresponding penalties.[99]

Justice Mwalusanya described in details the provisions of the *Code for the Operation of the Traditional Army* in Mara region, and strongly condemned the establishment and the conduct of these groups: "those who advocate that the traditional armies should continue to operate outside the rule of law would do well to search and commute their consciences on the matter". He recalled that "dealing with the offender outside the laid down procedure for offences recognised by our law is a criminal offence" and dismissed the appeal of eight members of the army who had lodged an appeal against their conviction.[100] While the FIDH mission was in the country there were anti-crime demonstrations by the public in Mwanza, where demonstrators urged the government to re-introduce the traditional militia, the *Sungusungu*. In response, the Regional Commissioner Njoolay pledged that the government would do everything possible to curb the rampant crime within the region.[101]

Although this army-like system collapsed at the beginning of the 1990's, it had a sufficient impact on people minds' to wreak havoc. The belief of the people that they can take the law in their own hands still prevails to a certain extent in Tanzania. This is notably exemplified by a number of bloody events, which were described in the Tanzanian newspapers in recent months that have reported killings for minor offences or vague suspicions. In January 2003, Abasi Magwizi (aged 47) and Kagembe Salehe (aged 45) were killed in Lushoto by an angry mob of about 200 people. The victims were killed on the suspicion that they were involved in the killing of another person. Before killing them, the mob invaded, demolished and set to fire to their homes.[102]

In November 2003, three people, Mashaka Hassani (aged 51), Juma Pazia (aged 32) and another unidentified man, were killed by a mob in Tanga municipality on suspicion of stealing from the Masiwani Primary School. The suspects were beaten with machetes, sticks and stones and then set on fire.[103]

On a single day in December 2003, two incidents took place in Dar es Salaam: two people suspected of car theft were beaten to death by people in Mbezi area in Kinondoni District, and one suspected thief was beaten to death along the Mandazi Road in Msasani.[104] According to LHRC's Human Rights Report 2004, to be published shortly, mob justice against suspected criminals persists despite government warnings against it. Throughout the year the media reported numerous incidents in which mobs killed suspects of crime who were stoned, lynched or beaten to death. On 7 June 2004, for instance, it was reported that a Form Two Student at Nronga Secondary School in Hai district, Kilimanjaro region named Ismail Tambwe (aged 16) was beaten and stoned to death by the so-called annoyed citizens of Tanga town on the suspicion of stealing a bicycle and after his death it was learnt that he was innocent.

The police authorities in Zanzibar told the FIDH delegates that suspects often arrive at the police station already injured because they have been beaten by members of the public. Under Section 5 of the Police Force Ordinance of 1953, the police force is entrusted with the preservation of peace, maintenance of law, order and prevention and detection of

crimes, apprehension and guarding of offenders and protection of property. That legislation should be implemented and such self-revenge should not be tolerated. Improving the functioning of the judiciary would be a way to contribute to the prevention such acts.

The prosecution of alleged offenders

a. Duration of the pre-trial detention

Once the suspect has been taken before a judge, the charges are read to him, and the investigation stage then starts. The suspect, now an accused is taken to prison on remand.

By virtue of Section 158 of the Criminal Procedure Act 1985, bail applications cannot be made by accused charged with murder and treason and several other offences.[105]

The existence of these offences for which bail is not available in the Tanzanian legislation is a serious threat to the due process of law. This provision does introduce a presumption of guiltiness, and as such it contravenes Articles 13 (6)(b)[106] and 15 (1)[107] of the Constitution.

Non-bailable offences virtually allow *prima facie* indictment, and may force the police investigators to seek for evidence supporting the charges by any means in order to justify a *posteriori* the arrest and a lengthy detention.

Surprisingly, the fact that there are non-bailable offences has been rarely challenged. In the case of Daudi s*/o Pete v. The United Republic*[108], Justice Mwalusanya ruled that bail for an accused person is a right and not a privilege. He held that section 148 of the Criminal Procedure Act was unconstitutional as it replaced the doctrine of innocence of the accused and removed the judicial discretion in matters of bail and in so doing offended the doctrine of separation of powers. He held further that the objection to bail must be substantiated by solid reasons and not simply vague fears or suspicions. The Court of Appeal upheld the decision.[109]

The subject was dealt with again in a murder case, in Anjelina Ojare[110], when a Resident's Magistrate granted bail, stating that section 148 (5) (a) of the Criminal Procedure Act violates Articles 13 (6)(b) and 15 (1) of the Constitution. The decision was then confirmed by a judge of the High Court.

The Director of Public Prosecutions appealed against that decision, but the Court of Appeal refused to pronounce on the matter and overruled the judgement holding "that the trial magistrate had no competence or jurisdiction to hear and decide on the constitutionality of section 148 (5)(a) of the Criminal Procedure Act which was raised before him. That was a matter to be referred to the High Court for decision, which was not done. To the extent of such omission or error, the proceedings in the district court were null and void" [111]

The FIDH recalls that Article 9 paragraph 3 of the ICCPR states that "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement." In addition, Principle 39 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that "except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review." The existence of non-bailable offences violates the principle of the presumption of innocence and the provisions mentioned above.

The African Commission on Human and People Rights' recommended to States Parties in the Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reform in Africa 2002, to improve access to bail, through widening police powers of bail and involving community representatives in the bail process in order to reduce the time spent in prison by persons awaiting trial.

This inability to obtain bail raises even more concerns in view of the length of the criminal investigations in Tanzania and the condition of detention of the detainees on remand.

The two prisoners mentioned above were both arrested in November 1998, but their cases were heard in 2001. As a result, both spent almost three years on remand, during which time none of them received any information on the progress of the investigations.

All five prisoners met by the FIDH confirmed that once taken to the prison, they never received any information about their case, until the day they were taken to a judge for a preliminary inquiry, a mandatory stage before the hearing at the High Court.

The police authorities of the Union decided in 2003 to implement a regime of self-regulation to reduce the delay in completing investigations: under this regime it should take

between 6 and 9 months to proceed to trial rather than the three years period currently needed in practice. None of the authorities met by the FIDH was able to provide information on the implementation of this policy.

The FIDH can only praise this policy, which constitutes a bright contrast to the inertia of the legislative in addressing this problem. However, more realistic figures, resulting of a thorough study, would have been more efficient in tackling the judicial backlog.

The most recent public statistics concerned the situation held as 1 April 2003.[112] At that time, 19117 detainees were awaiting trial (See full table in Appendix, Part 2):

Duration of incarceration awaiting trial	Number of detainees awaiting trial (for all offences)	Among which number of Men on murder charges	Among which number of Women on murder charges
Between 6 months and two years	4667	2334	227
Between two to four years	2085	1633	143
More than five years	1171		
More than ten years	34 (all on murder charges)		
From eight to 10 years	93 (all on murder charges)		

However complex and difficult the investigation of an offence can be, nothing can justify these extremely lengthy delays.

The fact that beyond 6 years of detention, 366 out of 368 detainees are charged with murder offences illustrates without any doubt the bias towards the treatment of these offenders in the Tanzanian justice system, as they are already considered as culprits, if not living-dead once they cross the door of the prison.[113]

It must also be recalled that this situation violates both regional and international human rights standards, in particular the ICCPR, Article 9 (3)[114], the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11[115], the African Charter on Human and Peoples' Rights (Article 7)[116] and the African Guidelines on a Fair Trial.[117]

In considering the jurisprudence of the UN Human Rights Committee on pre-trial detention, William Schabas has estimated that "at about 21 months, the Committee's threshold of tolerance starts to break down, and it has generally condemned violations that exceed this amount as being excessive'.[118] According to the official figures provided by the Tanzanian Government, 3256 detainees on remand have already spent more than 24 months in detention (about 17 % off all detainees, but 41% of detainees charged with murder), thus constituting a violation of the acceptable standards set up by the Committee.[119]

b. Conditions of detention of detainees on remand

Detention and treatment of prisoners on remand are described in Part XII of the Prison Act 1967.

Although the FIDH delegates did not have access to remandees' cells, they have been provided with appalling descriptions from an indisputable institution: The Tanzania Commission of Human Rights and Good Governance, in its Special report on Prison Situation of Mainland Tanzania, 2002/2003.

In the Description of Prisoners and Detainees in General (page 19), it is stated that the bedding provided to prisoners is inadequate and in poor condition and insufficient for winter conditions, particularly in Arusha. Not all detainees are provided with the required bedding as their number is limited and prisoner numbers exceed supplies.

Overcrowding of the cells is a serious issue of concern. The capacity of the 45 prisons visited by the Commission is only of 12,540 inmates, but at the time of the visit, there were 26,078 inmates in these prisons.

Even these figures are insufficient to describe the situation in some places of detention. When the Deputy Minister for Home Affairs, John Chiligati, visited Bangwe Prison in Kigoma, Western Tanzania in early 2003, he was reportedly shocked by an extreme overcrowding. Prison authorities there told him that the jail, which has a capacity of 67 inmates, was holding

500 prisoners. Sumbawanga prison held about 350 inmates in spite of its capacity of 92.[120]

These precarious conditions can only lead to disastrous consequences, like the one reported by Mbeya municipality Assistant Health Officer, Danford Kamenya, who stated in 2003 that a total of 101 detainees at the Ruanda prison in Mbeya had died due to infectious diseases and beatings in the previous two years.[121]

The rate of deaths in prisons is alarming and has increased over time. An old study shows that in 1962, 28 prisoners had died (with a population of 10,108 detainees), in 1972, 74 (out of 21, 968), and in 1982, 331 (out of 33,979). On 17 November 2002, in the Mbeya region, 17 remanded suspects at Mbarali Police Station died by suffocation as a result of overcrowding.[122]

High Court's Advocate, Mr Rweyongeza, told the FIDH delegation of a case he was handling in 1988 involving ten accused who were all sent to prison on remand. When the trial started 10 years later, six had died in prison.

Most of these deaths in custody are attributed to diseases such as cholera, diarrhoea, dysentery, malaria and HIV/AIDS, but there is no doubt that the overcrowding of prisons make them ideal places for contagious diseases.

There are also reportedly problems with the availability of clean and safe water, a problem in most prisons of the mainland, according to the Commission's report, and in Zanzibar, as expressed by human rights activist, Ally Saleh during the FIDH visit on the island.

Prison buildings are old and are not repaired frequently, again resulting in unhealthy conditions. Although there is a health care service, the level of care is poor and depends on the funds available, which are usually non-existent.

In the prison visited by the FIDH in Zanzibar, a detainee on remand said that the pharmacy of the prison had been empty for days, and that they had only received new tablets before the visit of the FIDH delegates. A detainee on remand had been left without medical care for hours despite visible health problems. As stipulated in the Prison Regulations[123], only indigent unconvicted detainees are provided for clothing, bedding and food. This further aggravates the situation.

In addition, the refusal of Prison authorities to address the issue of HIV/AIDS in prisons is resulting in devastating consequences on the prison population. To control the transmission of HIV among inmates, some NGOs called on the government to allow them to distribute condoms in jails. The government rejected such a call. The Morogoro Region Prison Assistant Commissioner, Ally Mgalla, responded by saying that despite the good intentions of the organisations in efforts to control the spread of HIV/AIDS, supplying prisoners with condoms would suggest to society that prisoners are engaging in sexual activity among themselves. He stated, "*doing so is equivalent to justifying things which do not exist in prisons*".[124]

However, reports from prisons seem to contradict the government's position on sexual activity in prisons. For example, a young remand prisoner in Dar es Salaam's Segerea Prison asked Magistrate David Asajile of Ilala District Court in Dar es Salaam to transfer him to another jail because his fellow inmates sodomised him every night.[125] In Musoma, another minor informed the court that the foreman had once beaten him seriously, allegedly because he had refused to clean the floor. The minor later said that the truth was that "*he wanted to sleep with me but I refused. They sleep with us by force, risking our lives with AIDS*".[126]

On the regional level, Article 16 of the African Charter provides that "states parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.", and the African Commission held that "the responsibility of the government is heightened in cases where an individual is in its custody and therefore someone whose integrity and well-being is completely dependent on the actions of the authorities".[127]

The African Commission on Human and Peoples' Rights adopted a Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (2002). The Resolution requires the States to ensure that acts, which fall within the definition of torture based on Article 1 of the UN Convention Against Torture, are offences within their national legal systems.

Tanzania does not comply with those international and regional obligations. The Prison Act 1967 is silent on the subject of mistreatment of prisoners, although it contains in thorough Part XIV on Offence in relation to prisons and prisoners and penalties for specific offences. Likewise, the Penal Code does not mention torture as such in its provisions.[128]

At the end of the investigation stage, the accused of a murder case is presented to a judge (a Resident Magistrate) for a preliminary inquiry, after when the magistrate will decide whether to confirm the case and assign it to the High Court for trial.

2. The trial stage

In Tanzania, legal representation for an accused person is both a constitutional and a statutory right. The Constitution guarantees the right to a fair hearing in Article 13 (6) (a)[129], and the High Court has ruled that this provision guarantees the right to legal representation.[130]

Section 310 of Criminal Procedure Act 1985 provides that "any person accused before a criminal court, other than a Primary Court may as of right be defended by an Advocate of the High Court".

Section 3 of the Legal Aid Act 1969 provides that "where in any proceedings it appears to the certifying authority that it is desirable, in the interests of justice, that an accused should have legal aid in the preparation and conduct of his defence or appeal, as the case may be, and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have such legal aid and upon such certificate being issued the registrar shall, where it is practicable to do so, assign to the accused an advocate for the purpose of the preparation and conduct of his defence or appeal, as the case may be."

Legal representation should be provided as early as possible, at the point of arrest or at least during police interrogations. The Criminal Procedure Act provides such assistance under section 54(1) that provides: "subject to sub-section (2), a police officer shall, upon request by a person who is under restraint cause reasonable facilities to be provided to enable the person to communicate with a lawyer, a relative or friend of his choice".[131]

However, in practice, it seems that the police officers in charge often refuse to permit communication with the outside world, including lawyers. A prisoner on remand met in Zanzibar prison said that after a week in detention he had not been able to contact anyone. This was also the case with most of the prisoners met by the FIDH. When prisoners Emmanuel and Geredje appeared for the first time in front of a judge, they were not legally represented.

There are even cases of accused convicted of murder and sentenced to death by a High Court judge although they were not defended by legal counsel. This is a blatant violation of domestic legislation and regional and international standards. For instance, among the prisoners met by the FIDH in Zanzibar, two of them, Mr Emmanuel and Mr Geredje, were lodging an appeal against their conviction without the assistance of legal counsel. At the time of the FIDH visit, they were drafting their appeal briefs with the help of their prison guards, a situation that seems to be common, as explained by Mr Mahadi Juma Maalim, Deputy Chairman of Zanzibar Law Society. This practice is supposed to induce the judges to show some leniency when they will hear the cases.

Mr Emmanuel had hired a lawyer at the beginning of his trial, but the lawyer left him without legal advice after the conviction. This is a consequence of the fact that the State does not provide a defence counsel when accused are not indigent. However, a problem arises when the accused becomes indigent at a later stage of the procedure. In any case, someone as Mr Emmanuel is eligible to legal representation in view of the charge he is facing. He was eventually sentenced to death, and in the interest of justice he should benefit from an appropriate legal assistance to appeal against his conviction.[132]

The FIDH recalls that Paragraph 5 of the UN Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty which recalls "the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings". Article 14 of the ICCPR also enshrines the right to legal counsel.

The Guidelines on the Right to a Fair Trial and Legal Assistance in Africa state that "any person arrested or detained shall have prompt access to a lawyer and, unless the person has waived this right in writing, shall not be obliged to answer any questions or participate in any interrogation without his or her lawyer being present". Section N (2) (a) adds that "this right applies during all stages of any criminal prosecution, including preliminary investigations in which evidence is taken, period of administrative detention, trial and appeal proceedings".

a. The quality of the legal representation provided to indigents accused of murder in Tanzania

Justice Mwalusanya clearly stated in his reasoning in Mbushuu "the risk [of executing an innocent] assumes greater proportion when one considers the fact that most poor persons do not obtain good legal representation as they

get lawyers on dock briefs who are paid only 500 Tsh. As result of such poor remuneration, the defence counsels do not exert enough effort in such cases".[133]

When the FIDH asked the Chairman of the Tanzania Law Reform Commission, Justice Bahati, if the Commission had planned to make recommendations on the matter, he answered that there was no official request from the lawyers to date, so the Commission could not inquire on it. The FIDH believes that the Commission should reconsider its position on the subject.

According to Professor Shaidi, an advocate, a proper defence in a case involving a murder charge costs about 3,000,000 Tsh.[134] However, the legal aid limit is 100,000 Tsh for the entire case.

Initially, the amount was fixed to a miserable 500 Tsh in the Legal Aid Act 1969, and it stayed at this low level until very recently, when it was updated by a Written Laws Act (Miscellaneous Amendments) of May 2003 to 100,000 Tsh.[135]

Although this represents a notable effort from the Government, it is still far from narrowing the gap between legal aid and the right to legal representation.

Usually younger and less experienced lawyers will be assigned to these cases, and some might fail to continue to advise their clients after conviction, as it occurred in relation to Mr Geredje in Zanzibar.

Article 5 of UN Safeguards makes reference to 'adequate legal assistance'[136], and Article 14 of the ICCPR also enshrines that right among the fair trial guarantees. In *Reid v.* Jamaica the Human Rights Committee considered that "this system, in its current form, does not appear to operate in ways that would enable legal representation working on legal aid assignments to discharge themselves of their duties and responsibilities as effectively as the interests of justice warrant. The committee considers that in cases involving capital punishment, in particular, legal aid should enable counsel to prepare his client's defence in circumstances that can ensure justice. This does include provision for adequate remuneration for legal aid".

Section H (e) of the Guidelines on the Right to a Fair Trial and Legal Aid Assistance in Africa states that "when legal assistance is provided by a judicial body, the lawyer appointed shall ... (2) have the necessary training and experience corresponding to the nature and seriousness of the matter,... (5) be sufficiently compensated to provide an incentive to accord the accused adequate and effective representation".

An increase in the remuneration of legal aid would certainly improve the quality of legal representation provided to these accused and, as a result, the likelihood that the accused had a fair trial.

b. Burden of proof and evidence accepted by the Courts

Conviction of an accused is based on the production of evidence at trial. To be found guilty, it must be established beyond reasonable doubt that the accused committed the offence charged.[137]

The evidences adduced at trial are regulated by the Evidence Act 1967. They can take the form of oral evidence (Section 61), documentary evidence (Section 63), banker's books (section 76) and public documents (Section 83).

Circumstantial evidence (i.e. evidence established by way of circumstances without proving the fact in issue) is used in courts to determine the guilt of a person, including persons accused of murder. Pursuant to section 122 of the Evidence Act, "a court may infer the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case". These presumptions are hard to rebut, as section 5 of the Evidence Act 1967 provides that " wherever it is provided by this Act or any other written law that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved". Those provisions may therefore lead to a death sentence without clearly established evidence.

The two Russians prisoners that the FIDH delegation met in Zanzibar raised serious doubts as to the evidence provided against them, citing the fact that the only eyewitness provided by the Prosecution appeared more than six months after the relevant facts, and it was a child aged 12. Additionally, although some doubts as to the cause of the death of the victim, no proper examination of the body had been carried out, the investigator forming his opinion by looking at the body, without further forensic investigation. Not even a picture of the body was taken to be filed as evidence and presented in court.

It was stated to the FIDH delegates by high-level authorities including Mr Mapunda, Assistant Commissioner of Police or

Mr Werema, former Prosecutor that they were not aware of an innocent being convicted by a Tanzanian High Court. However, this affirmation raises serious doubts.

Recalling the words of Justice Mwalusanya, "*the risk of executing the innocent is great under the present system*", since problems plague the proceedings at every stage.

In addition, the exclusion of evidence illegally obtained is not automatic, as the Criminal Procedure Act states that "the court shall, in its absolute discretion, not admit the evidence unless it is on the balance of probabilities, satisfied that the admission of the evidence would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person".[138]

Judges are advised to have regard to "the seriousness of the offence in the course of the investigation of which the provision was contravened, with the urgency and difficulty of detecting the offender and the urgency to preserve evidence of the fact"[139], which could lead to the possibility of the admission of confessions received under violence or even torture, when the public interest requires it.

It is additionally provided under section 29 of the Evidence Act that "no confession which is tendered in evidence shall be rejected on the ground that promise or a threat has been held out to the person confessing unless the Court is of the opinion that the inducement was made in such circumstances and was of such a nature as was likely to cause an untrue admission of guilt to be made".

These provisions are nothing but an official recognition of the production of evidence "by any means necessary", leaving space for abuses in the gathering of evidence.

This clearly contravenes the United Nations Convention Against Torture (not yet ratified by Tanzania), of which Article 12 obliges States parties to conduct inquiries into any allegations of torture, and Article 15 obliges them to make sure that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings".

In addition, General Comment 13 of the United Nations Human Rights Committee (on Article 14 of the ICCPR) states that the law should provide that "evidence provided by means of such methods or any other form of compulsion is wholly unacceptable" (paragraph 14). General Comment 20 relating to Article 7 of the ICCPR also provides that it is important that "the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment" (paragraph 12).

Moreover, at regional level, the same principles are provided by the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa, adopted by the African Commission on Human and Peoples' Rights in October 2002. The States should in fact "ensure that rules of evidence properly reflect the difficulties of substantiating allegations of ill-treatment in custody" (paragraph 16). Finally, the States should "ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings" (paragraph 29).

The Directives and Principles on the Right to a Fair Trial and to Legal Aid in Africa adopted by the Commission in March 2003 provide that "evidence obtained by illegal means which constitute a serious violation of internationally recognised human rights cannot be used as prosecution evidence against the defendant or against any other person implicated in a proceedings, except for pursuing those who carried out the violations" (paragraph F (6)(g)).

c. Corruption

Corruption is rampant in the police and the judiciary[140] and seriously hinders the due process of law[141] even in cases where the death penalty is at stake. Imposition of the death penalty can consequently follow an unfair trial.

Pursuant to Article 6 (2) of the ICCPR, the death penalty can only imposed in accordance with law "not contrary to the provisions of the present covenant", including the right to a fair trial.

In *Reid v. Jamaica*, the UN Human Rights Committee added that 'in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant is even more imperative'.[142]

In 1996, President Benjamin Mpaka was quoted as saying "what counts is money - those with money will always have judgments in their favour".[143] A similar statement was recently issued by another member of the Tanzanian Government, the Minister of Justice and Constitutional Affairs who said that corruption was one of the problems hindering the fair administration of the justice in the country.[144]

A shortage of judges is another serious problem, as it causes delays in the hearings. The trials of Emmanuel and Geredje commenced in 2001 and they were convicted in June 2004. The two Russian prisoners met by the FIDH delegation had to wait for one year after their conviction before the sentence was delivered.

Under Article 14 (3)(c) of the ICCPR, is that any person charged with a criminal offence has the right "to be tried without undue delay". The Human Rights Committee stated in its General Comment 13 (21) that 'in particular in capital cases, the accused is entitled to trial and appeal proceedings without undue delay, whatever the outcome of these judicial proceedings may turn out to be".

In addition, the FIDH is surprised that three judges decide over Basic Rights cases while a single one can pass down the death. The requirement of three judges in the Enforcement of Basic Rights and Duties Act 1994, considering the acute shortage of judges, appears as an ingenious tactic: it might have been more useful to deploy these few judges in other courts or on other pending cases.

The Tanzanian authorities should promptly consider the matter and increase the number of judges in the High Court or/and Court of Appeal and criminal cases particularly murder cases should not be adjudicated by fewer than three judges. More generally, the budget for the criminal justice system should be increased.

According to information received by the FIDH, delays before the civil chambers of the High Courts are much shorter than in criminal proceedings, which might show that more than a problem of funding, there is a deliberate neglect of criminal justice matters.

Once the judge is satisfied that it has been established beyond reasonable doubt that the accused is guilty of killing with malice aforethought, he or she convicts the accused of murder and pronounces a sentence of death[145].

When the accused is sentenced to death, the Court informs him of the period within which any appeal must be lodged. The possibility to appeal against a death sentence is provided for but review is not automatic. If no appeal is lodged by the accused or his counsel, the conviction is deemed definitive.

Paragraph 6 of the UN Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty states that "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". The Tanzanian legislation should consequently be brought in conformity with that requirement.

3. Appeal and the Presidential pardon

The prisoners and prison officials frequently expressed their concerns to the investigators of the Tanzania Commission for Human Rights and Good Governance that the right to appeal is often undermined, due to mainly three reasons: (i) courts delay in giving prisoners their judgments, thereby hindering the appeal processes; sometimes they never get the judgments; (ii) courts do not fix dates for appeal hearings;(iii) prisoners are not given updated information on the current developments in their appeal.[146]

We are recalling the case of Mr Emmanuel and Mr Geredje, prisoners in Zanzibar, who are now handling their appeal by themselves, in violation of the criminal procedures (Section 310 of the Criminal Procedure Act stipulates that "any Person accused before any criminal court, other than a primary may of right be defended by an advocate of the High Court").

The Parliament has also amended the Criminal Procedure Act of 1985 so that "nothing in this section shall be deemed to preclude the High Court converting a finding of acquittal into one of conviction where it deems necessary so to in the interests of justice", contradicting the established jurisprudence that "a superior court cannot convert an acquittal to a conviction in the exercise of its revisional powers".[147]

This was the case for the two Russians met by the FIDH (see above). They were convicted of manslaughter by the High Court, and sentenced to 15 years of imprisonment, yet on appeal, the Court of Appeal convicted them of murder, and pronounced a sentence of death.

When the conviction has been upheld by the Court of Appeal, the Presiding Judge forwards to the President of Tanzania a copy of the notes of evidence taken during the trial with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.[148]

To give effect to the said decision, the President shall issue a death warrant. He may also issue an order for the sentence to death to be commuted, or pardon, under his hand and the seal of the United Republic.[149]

Both President Mpaka for the mainland Tanzania and President Karume have refused to issue death warrant in the past ten years, and have commuted death sentences to life imprisonment on several occasions.[150]

Under President Nyerere's rule, the official figure given by all the people met by the FIDH except one is that he signed two death warrants. However, according to Mr Chipaka's statement, many more death sentences have been carried out under Nyerere's presidency. Mr Chipaka, incarcerated from 1969 to 1980, was in charge of tending the gallows of the prison, and was so able to witness more than two hangings, although he cannot recall how many took place during those years. He is the only person challenging the official line on Nyerere's policy regarding death sentence, but because of his access to first-hand information at that time, his declarations challenge this consensus with force.

The second President reportedly issued more death warrants. Although the agreed estimates seems to be "many" without more accurate precision, Judge Bahati, Acting Judge of the High Court under Mwinyi's regime, gave the FIDH delegates an estimate in the range of 50 to 100 executions under the presidency. The Advocate Rweyongeza told the FIDH that several convicts had been executed in 1994 prior to *Mbushuu's* trial[151], as the government was uncertain of what the verdict would be.

No death warrant has been issued by Benjamin Mkapa, and he seems to abide by this rule. However, several human rights activists are disappointed that after ten years the legislation has not been amended in order to restrict the number of offences punishable by the death penalty, in spite of the fact that President Mkapa seemed in favour of a change when he became President in 1995.

It must also be recalled that under Tanzanian law, the Presidential commutation or pardon is a privilege and not a right of prisoners on the death row. They cannot apply for such a pardon or commutation, as the President is the only one to decide to take such a decision from which they cannot appeal. The UN Safeguards enshrine the right of anyone sentenced to the death penalty "to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment." In addition, the Guidelines for a Fair Trial in Africa stipulate that "every person convicted of a crime has a right to seek pardon or commutation of the sentence. Clemency, commutation of sentences, amnesty or pardon may be granted in all cases of capital punishment" (Section N (10)(d)).

The FIDH consequently considers that the Tanzanian legislation should be revised in order to allow persons sentenced to death to apply for presidential pardon.

Justice Mwalusanya has held that this law is arbitrary in that it does not provide effective controls against abuse of power by the President. "He is not bound by the recommendation of the convicting judge or that of the Advisory Committee. There are no checks or controls whatsoever in the exercise of that power and the decision depends on the President's whim and his idiosyncrasies".[152]

It has to be added that once the sentences have been turned to life imprisonment, they are excluded from the ambit of the Parole Boards Act 1994 which provides for a ministerial mechanism and procedure for releasing prisoners who qualify under the Act to be released before their terms of imprisonment come to an end.[153]

After conviction and sentencing, the convict is taken in prison in a separate section, where he will wait for the execution or a commutation.

4. The post conviction stage

A long and uncertain wait

Under Section 72 of the Prisons Act 1967, a prisoner under sentence of death shall be confined from other prisoners in a special cell or ward. He receives a distinct uniform and waits for the day of his execution to come.

As of April 2003, there were 370 persons (359 males and 11 females) awaiting execution in the prisons of mainland Tanzania.[154]

In Zanzibar during October 2004, there were two convicts condemned to death, although they both have appeals pending.[155]

The FIDH has been refused access to the prison of mainland Tanzania by the prison authorities in Dar es Salaam, who said that "the prisons authorities are not the relevant quarters to discuss and campaign against the Death Penalty, obviously because they are implementing agency in accordance with the law".[156]

When the FIDH delegates asked if they could meet some death row inmates, the answer of Mr N.P. Banzi, Principal Commissioner of Prisons, was that "it is my opinion that such

an exercise is not relevant to the mission's objective. There are many ideal quarters to effectively direct campaign against the Death Penalty than inside prisons".[157]

Despite several visits to the headquarters of the prison in Dar es Salaam, the FIDH mission was unable to meet officials to discuss the issue. The FIDH deeply regrets what it considers to be a lack of cooperation by the Tanzanian authorities.

These prisons had been visited by the Tanzanian Commission for Human Rights and Good Governance in 2002/2003. The report 2002/2003 mention 360 detainees, while as of 1 April 2003, they were 371 according to the official statistics, showing that Tanzanian High Courts still routinely sentence people to death in murder cases.

In the leading case on death penalty, *Republic v. Mbushuu & Sangula*, Justice Mwalusanya included a frightening description of the detention conditions for the convicts awaiting execution: "From the time the person is sentenced to death, he is immediately installed on the death row in a blue uniform. He is kept in virtual solitary confinement in an individual cell which is so small that he can touch both walls with his arms outstretched...The reading material, if any, is the Bible or other religious tract. Every night all his clothes are taken away and he is kept naked in his cell until the next morning. The light in his cell is never turned off and he is kept under surveillance by the guards. Some guards take delight in taunting the prisoners, constantly reminding them of their impending fate and telling them gruesome stories of executions which have gone wrong".[158]

Concerning medical facilities, he explained that they are available to the prisoners only if the Prison Department has enough funds to pay for their treatment, as government hospitals demand payment for treatment of prisoners. It goes without saying that these funds are often lacking.

He concluded by saying that "in short, the prisoners on death row are treated as non-persons whose rights are subject to the whim of the supervising administration at the prison concerned." We need to state here that the conditions witnessed by the FIDH mission in Kilimani Central Prison in Zanzibar were completely different. The death row was located in a separate area of the prison. The gallows are the first room before a corridor. There were only two death row inmates (Emmanuel and Geredje), while the row can hold six people in separate cells. The cells were spacious, clean, had a mattress and sheets, but no other furniture. There was no light in the cells, only in the corridor. The detainees told the FIDH delegation that they had three light meals a day, consisting of ugali and beans, and that they had access to medical care, although the supplies were poor as the pharmacy was often empty.

It seems that Zanzibar is not experiencing the overcrowding of mainland Tanzania, which leads to the less than desirable result of sending convicts to Zanzibar, making it difficult for their family to visit them, as few can afford to pay for the ferry to cross from the mainland.

However, concerning the terrible conditions in the death cells described in the *Mbushuu* judgement, all the State Attorney, Mr Mwambe, said to the FIDH was that the prisoners were treated in accordance with what the Tanzanian economy could afford.

This argument has been rejected by the UN Human Rights Committee, which considers it as irrelevant. Indeed, the Committee has cited the Standard Minimum Rules for the Treatment of Prisoners[159] as a benchmark for the application of Article 10 of the ICCPR.

For the Committee, 'these are minimum requirements which the Committee considered should always be observed, even if economic or budgetary conditions may make compliance with these obligations difficult".[160]

The FIDH considers that Tanzania should formalise its *de facto* moratorium on executions by adopting a *de jure* moratorium, thereby putting an end to the uncertainty of death row prisoners about their fate. This should be considered as a first step towards abolition, which must remain the ultimate objective.

According to Mr Francis Stolla, Chairman of the Human Rights Committee of the Tanganyika Law Society, convicts can expect a commutation by the President of Tanzania after five years of detention on death row. But there are no clear and public rules. Even so, this long detention combined with the uncertainty of death row prisoners about their fate might amount to an inhuman treatment, in violation of Article 7 of the ICCPR as well as the Article 13 (6)(e) of the Tanzanian Constitution.

The convicts met by the FIDH were effectively living in anguish concerning their fate. The two Russians confessed to be afraid to start any further legal action, as they feared that the commutation might be cancelled and their death sentence confirmed. Death row inmates of the Maweni Prison made

similar statements to the investigators of the Human Rights Commission, confessing that they were undergoing psychological torture by being held on death row for long periods without knowing when, or if, they will be executed[161].

Generally speaking, all the detainees met by the FIDH, either the death row inmates or the detainee in remand met in Kilimani central Prison, expressed a constant fear about their fate.

They live in complete isolation without knowing what will happen to them and how their case is progressing. There is no local NGO that is authorised to visit the prisoners, no legal advice given from any law society, leaving them in a frightening situation.

Everybody appears to agree on the fact that the situation in Tanzanian prisons is difficult, but the will and the funds to remedy this situation are lacking.

The execution itself

Although executions are not carried out at present in the Tanzanian prisons, the provisions remain in the regulations. Under section 25 of the Penal Code, "the following punishments may be inflicted by a court: (1) Death; (2) Imprisonment; (3) Corporal punishment; ..." It is provided under section 26 that "when any person is sentenced to death, the sentence shall direct that he shall suffer death by hanging".

Justice Mwalusanya gave a terrifying description of the executions carried out in the past: "The prisoner is dropped through a trapdoor, to eight and a half feet with a rope around his neck. The intention is to break his neck so that he dies quickly. The length of the drop is determined on the basic of such factors as body weight and muscularity or fatness of the prisoner's neck. If the hangman gets it wrong and the prisoner is dropped too far, the prisoner's head can be decapitated or his face can be torn away. If the drop is too short then the neck will not be broken but instead the prisoner will die of strangulation. There are many documented cases of botched hangings in various countries including Tanzania. There are a few cases in which the hangings have been messed up and the prison guards have had to pull on the prisoner's legs to speed up his death or use of a hammer to hit his head. The shock to the system causes the prisoner to lose control over his bowels and he will soil himself. In short, the whole process is sordid and debasing".[162]

Mr Chipaka gave to the FIDH delegates his insight into the process: he recalled how, in the morning, the detainee was taken to the officer in charge, who was announcing the sentence, he was then handcuffed and taken to a rest room, where he stayed for the night. He was executed in the morning of the next day, at 7.30 am. He said that everybody knew that an execution was carried out in the prison, as officers in charge were assisted by prisoners, and on those days, "a dark cloud" was arising above the prison.

The norm prohibiting torture and inhuman treatment also applies to the method of execution. In General Comment 20 (44), the Human Rights Committee noted: "when the death penalty is applied by a State party for the most serious crimes, it must not only be limited in accordance with Article 6 but it must be carried out in such a way as to cause the least possible physical and mental suffering". The same provision is also included in the UN Safeguards Protecting the Rights of those facing death penalty, section 9 that provides 'where capital punishment occurs, it shall be carried out as to inflict the minimum possible suffering'.

Justice Mwalusanya stated that the process of execution by hanging is particularly gruesome, generally sordid, debasing and generally brutalising, and it offends Article 13 (6)(e) of the Constitution of the United Republic of Tanzania.[163]

78. Republic v Mbushuu alias Dominic Mnyaroje and Kalai Sangula (1994) TLR 154.
79. Chart No. 11 from the Speech of the Minister of Home Affairs, Omar Ramadhan Mapuri (MP), presented before the Parliament for 2003/2004 budget estimates at page 52.
80. Tanzania Human Rights Report 2003, page 11.
81. See Policing to Protect Human Rights, A Survey of Police Practice in Countries of Southern African Development Community, 1997-2002, Amnesty International Publications, 2002 (AFR 03/004/2002): "arbitrary arrest and illegal detention are abuses common to almost the whole region. Police often arrest people before they have built up any evidence. They evade obligations under national laws to bring detainees before a court of law within a specified period of time".
82. See The Law Reform Commission of Tanzania, *Discussion paper on the Flow of Justice*, 2003.
83. Tanzania Commission for Human Rights and Good Governance *Special Report on Tanzania Mainland Prisons Inspection* (2002/2003) p29

"Detaining a relative of the suspect as the 'security'.
84. Executive Secretary of Zanzibar Human Rights Association
85. Chama cha democrasia na Maendeleo (CHADEMA), opposition party which is represented at the Parliament and in the House of Representatives in Zanzibar.
86. Tanzania Human Rights, 2003, Legal and Human Rights Center (LHRC). No action has been taken against the perpetrators of the beatings because the District Commissioner of the area had ordered the police not to follow up the incidents.
87. Tanzania Human Rights, 2003, Legal and Human Rights Center (LHRC), page 13. A report released on 31 January 2003 on the Mbeya's deaths, confirmed that the Government was grossly negligent in the handling of remand prisoners. The report stated that the law enforcement organs, including the judiciary, the Office of the Attorney General, the police and the prison authorities, had not taken decisive action to address the problems of reward facilities. The Prison Department was held responsible because it violated its own professional ethics by overcrowding remand prison cells. The Report reprimanded the Court for what it termed as arrogance for refusing to be questioned by the probe committee. This is one of the first official reports referring to the complicity of the judiciary in mishandling suspects by failing to take reasonable care to protect them from abuse, cruelty or torture. However, despite the clear responsibility of the four authorities charged with the care of the prisoners, no official from these offices has been investigated or prosecuted. Only low level prison officers were charged in relation to the incident. See *Tanzania Human Rights report 2003*, Legal and Human Rights Centre (LHRC).
88. Usually the detainees are taken to the court on the date fixed for the mention or hearing of their case and they are sent back to their place of detention until the next hearing.
89. " Sakata la Mgomo wa mahabusu mahakama sasa yasalimu amri " (The detainees demonstration saga, the Court has now surrender), Majira, 2 July 2003.
90. UN Basic Principles for the Treatment of Prisoners (United Nations General Assembly Resolution. 45/111 of 14 December 1990),
- UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (United Nations General Assembly Resolution. 43/173 of 9 December 1988),
- Standard Minimum Rules for the Treatment of Prisoners (ECOSOC Resolution. 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977).
91. *Communications 137/94, 139/94, 154/96 and 161/97 International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v.Nigeria*, paragraph. 103.
92. 'Police gun down suspected killer of police officers, nab two others ', The Guardian, 2 June 2003.
93. And leads to many retractions in Court, as related to the FIDH by Mr Francis Stolla of the Tanganyika Law Society.
94. Zanzibar police authorities showed us more concern on the matter, acknowledging that some problems had to be addressed.
95. New year's greeting of the President of the United Republic of Tanzania, Benjamin William Mpaka to the citizens on 31 December 2003.
96. With the help of both international (UNDP and Danish Centre for Human Rights) and local (the Legal and Human Rights Centre participated in the elaboration of the Human rights training manual used in police schools) organisations.
97. Article 7: "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment..."
Article 10 paragraph 1. "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."
98. See Sunday News (Tanzania), 25th May, 1986.
99. These offences include: cattle theft, highway robbery, fraud, theft of food or clothes, alcohol related offences, fraternising with ostracised villagers, quarrels and insults, blowing whistle in false alarm... The penalties depend on the graveness of the offence: payment of chicken, cattle, money, corporal punishment, expulsion or banishment from the village.
100. High Court of Tanzania at Mwanza, Criminal Appeal no. 72 of 1987. In support of his ruling he added that "their defence that they were in the normal course of their duties as peace officers and that they were implementing a government and Party directive was snubbed in the bud...And those who advocate to operate outside the Rule of law and in particular the District Commissioners who are commanders of the traditional armies in their districts would do well to remember this historical fact".
101. See "Mwanza holds anti-crime demonstrations", The Citizen, 15 October 2004.
102. "Mauaji ya kutisha Lushoto"(horrible killings at Lushoto), Mwananchi, 10 January 2003.
103. "Three Tanga residents killed in mob justice " The African, 17 November 2003.
104. "Angry mobs kill seven robbers in Dar", The Guardian, 23 December 2003.
105. Subsection 148. (5). A police officer in charge of a police station, or a court before whom an accused person is brought or appears, shall not admit bail if: a) that person is accused of murder or treason; b) it appears that the accused person has previously been sentenced to imprisonment for a term exceeding three years; c) it appears that the accused person has previously been granted bail by a court and failed to comply with the conditions of the bail or absconded; d) the accused person is charged with an offence alleged to have been committed while he was released on bail by a court of law; e) the act or any of the acts consisting the offence with which a person is charged consists of a serious assault on or a threat of violence to another person, or of having or possessing a firearm or an explosive; f) it appears to the court that it is necessary that the accused person be kept in custody for his own protection or safety.
106. "No person charged with a criminal offence shall be treated as guilty of the offence until he proved guilty of that offence"
107. "Every person has the right freedom and to leave as a free person"
108. High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No 80 of 1989 (unreported). The accused was charged with robbery with violence.
109. *D.P.P v. Daudi Pete*, Court of Appeal of Tanzania, Criminal Appeal No 28 of 1990. Reported in 1991 LRC (Const.) 533.
110. D.P.P. *v Anjeline Ojare*, Court of Appeal of Tanzania, 24 March 1997, Criminal Appeal No 31 of 1996.
111. This is a clear illustration of the negative aspects of the Enforcement of Constitutional Basic Rights and Duties Act 1994, critised d by Chris Peter Maria, Human rights in Tanzania, p. 711 and subsequent.
112. Chart n° 11 from the speech of the Minister of Home Affairs, Hon. Omar Ramadhan Mapuri (MP), presented to the Parliament during the Parliament Budget Session 2003/2004, p 52.

113. It is unsurprisingly that in comparison that no accused person of corruption and in detention at that time had spent more than a year in detention, although usually economic crimes require very complex investigations.
114. "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."
115. "A person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority."
116. "Every individual shall have the right to have his cause heard. This comprises: ... (d) The right to be tried within a reasonable time by an impartial court or tribunal."
117. Section N (5) (a): "every person charged with a criminal offence has a right to a trial without undue delay."
118. William Schabas, the abolition of death penalty, page 127. He mentions the case *Everton Morrison v. Jamaica*, in which a delay of eighteen months has not been deemed undue but was described as a 'matter of concern'. In assessing the pre-trial delays, the Committee examines the period from arrest until the beginning of trial.
119. Among the convicts met in Zanzibar, three out of five had spent more than 24 months awaiting trial, and the only two exempted from such a long pre-trail detention were two Russian convicts, who followed a rather unusual procedure, due mainly to their nationality, and the action of the Russian Ambassador at that time, who insisted on the commutation of their sentences.
120. 'One step towards decongesting squalid prisons' accessed at http://allafrica.com/stories/20031220817.html
121. 'Mahabushu 164 wafia generazi Mbeya miaka miwili' (164 detainees have died in prisons in two years), Mwananchi, 23 January 2003.
122. LHRC's Tanzania Human Rights Report, 2002, p. 21.
123. Section 77 (3) If a civil or unconvicted prisoner is unable to receive clothing, bedding or food supplies, or if such food is in the opinion of the officer in charge unsatisfactory the prisoner shall receive the regular prison diet, clothing and bedding. (4) No civil or unconvicted prisoner shall be given or be compelled to wear prison clothing unless (a) the prisoner's dress is insufficient or improper or it is in an unsanitary condition; or (b) the prisoner's dress is required as an exhibit; and (c) he is unable to procure other suitable clothing from any other source.
124. Tanzania Human Rights Report 2003, Legal and Human Rights Centre (LHRC), page 16.
125. 'One step towards decongesting squalid prison' accessed at http://allafrica.com/stories/20031220817.html
126. Ibid.
127. *Communications 137/94, 139/94, 154/96 and 161/97 International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organisation v.Nigeria*, Paragraph 112.
128. Yet across the region torture and ill-treatment are the most frequently reported human rights violations committed by the police according to Amnesty Survey on Police in the South African Region. According to Amnesty International, only South Africa and Lesotho have adequate regulations. See Policing to Protect Human Rights, A Survey of Police practice in Countries of Southern African Development Community, 1997-2002, Amnesty International Publications, 2002 (AFR 03/004/2002).
129. "When the rights and duties of any person are being determined by the court or any other shall agency, that person be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned."
130. Haruna *s/o Saidi v. R.,* High Court of Tanzania at Dodoma, Criminal Appeal No 10 of 1991 (unreported).
131. The second subsection of the provision states that "a police officer may refuse a request under sub-section (1) for the prevision of facilities for communicating with a person being a relative of friend of a person under restraint, if the police officer believes on reasonable grounds that it is necessary to prevent the person under restraint from communicating with the person for the purpose of preventing: (a) the escape of an accomplice of the person under restraint; or (b) the loss, destruction or fabrication of evidence relating to the offence."
132. The Principle and Guidelines on the Right to a Fair Trial and Legal Aid Assistance in Africa states that "the interests of justice should be determined by considering, in criminal matters: (i) the seriousness of the offence, (ii) the severity of the sentence" (Section H (b)). In the view of FIDH, both are of the utmost importance.
133. *Republic v Mbushuu and Sangula*, TLR (1994), at 163.
134. Approximately 260 euros.
135. This Amendment is the result of a decision by the Court of Appeal of Tanzania, in the case *The judge, Arusha High Court & Anor v. N.I.N Munuo Ng'uni,* on 5 March 2002, when the judges ruled that a remuneration of 500 Tsh for defending a serious criminal case such as murder could not be regarded as just or equitable and replaced the amount with a new fee of 100,000 Tsh.
136. "Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court aftera legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."
137. "It seems to us well established on the authorities that the onus and the burden of proof as in all criminal prosecutions lies on the prosecution to establish their case beyond reasonable doubt". *John Nyamhanga Bisare v. The Republic*, Court of Appeal of Tanzania, Criminal Appeal no 29 of 1979. TLR (1980), at 6.
138. Section 169 (1), Criminal Procedure Act 1985.
139. Section 169 (2) (a), Criminal Procedure Act 1985.
140. Christina John, Acting Head of the Tanzania Prevention of Corruption Bureau while making a presentation at the Prevention of Corruption workshop held in Dar es Salaam 2 December 2003, reported that among all government departments, the police have the highest number of corruption allegations compared with the Judiciary and the Central government. "Polisi waongoza Kwa Rushwa", Nipashe 3 December 2003.
141. Corruption is reportedly said to be prevalent in opening case files; setting hearing dates; tracing case files; the use of temporary court injunctions; getting copies of judgments and court proceedings; granting of bail; issuing attachment orders; chamber applications; payment of assessors, and so on.
142. *Reid v. Jamaica* (no. 250/1987), paragraph 12.2
143. Opening Address by the President of the United Republic of Tanzania, His Excellency Benjamin William Mkapa, at the Judges and Magistrates Seminar, Karimjee Hall, Dar Es Salaam, 16 December 1996. We were told as an example the grant of bail to Mrs Anjeline Ojare, wife of a famous

advocate of the High Court, although she was charged with a non-bailable offence, and when this bail was overruled, the Prosecutor entered a nolle prosequi and closed the case.
144. The conclusion was made by the minister of Justice and Constitutional Affairs in a conference on Saturday 9 October 2004, in Dar es Salaam. The conference blamed lack of awareness about basic rights, corruption, donor dependency and political, economic and technological factors as the key challenges to the implementation of public service reforms. See The Citizen, 11 October 2004.
145. Under 314 of the Criminal Procedure Act, if the judge convicts the accused person, or if he pleads guilty, it shall be the duty of the registrar or other officer of the court to ask whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings. It seems that accused are rarely asked whether they have anything to say, as was told to us by the prisoners in Zanzibar.
146. Tanzania Commission for Human Rights and Good Governance *Special Report on Tanzania Mainland Prisons Inspection* (2002/2003), p 28.
147. See Wachira Njenga v. R, (1954), E.A.C.A 398, confirmed in *Selemani Rashid and others v. Republic*, Criminal Appeal no. 117 of 1975, TLR (1981) 252.
148. Section 325 (1), Criminal Procedure Act 1985.
149. Pardon implies complete release, whereas commutation is the substitution of a death sentence with a usually lengthy term of imprisonment.
150. In April 2002, President Mkapa commuted 100 death sentences to life imprisonment. According to Mohamed Seif Katib, Home Affairs Minister, the President did so "to show his concern for Human Rights, especially the right to life". One of the convicts had been waiting on the death row for 18 years. The same year, president Karume commuted the sentence of two Russians sentenced to death by the Court of Appeal, and also of one Tanzanian, all met in Zanzibar's Kilimani Central Prison. Their sentences were commuted to life imprisonment.
151. *Mbushuu* case.
152. TLR (1994), page 172.
153. Parole Boards Act 1994, Section 4: A prisoner who is serving a sentence of imprisonment for a period of eight years or more, shall be eligible for parole if: a) he is not serving a life sentence, b) he is not serving a sentence for the offence of armed robbery, dealing in dangerous drugs or defilement, c) his sentence has not been otherwise commuted.
154. Chart No 10 from the Speech of the Minister of Home Affairs, Omar Ramadhan Mapuri (MP), presented before the Parliament for 2003/2004's budget estimates at p. 51.
155. They are Mr Emmanuel and Mr Geredje.
156. Letter dated 6 October 2004, from A.N. Nanyaro, Principal Commissioner of Prisons.
157. Letter dated 1 October 2004.
158. *Republic v. Mbushuu alias Dominic Mnyaroje and Kalai Sanguila*, High Court of Tanzania, Criminal Sessions Case No 44 of 1981, June 22, 1994, TLR (1994), page 155.
159. ESC Resolution. 663 C (XXIV), 2076 (LXII).
160. *Mukong v. Cameroon* (No. 458/1991), UN Doc. CCPR/C/51/D/458/1991, paragraph 9.3; *Potter v. New Zealand* (No. 632/1995), UN Doc. CCPR/C/60/D/632/1995, paragraph 6.3.
161. Tanzania Commission for Human Rights and Good Governance *Special Report on Tanzania Mainland Prisons Inspection* (2002/2003), p 28.
162. TLR (1994), page 152.
163. TLR (1994), page 146.

VI. The move towards abolition

Ten years after the ruling in the Mbushuu case establishing that death penalty was a cruel and inhuman treatment, and nine years after the first multiparty elections in Tanzania in 1995, which led President Mpaka to power (he always refused to sign a warrant for execution), the FIDH expected to find a country well advanced on the road to abolition. It seems that it is far from being the case.

An overwhelming majority of the people met by the FIDH delegates declared themselves opposed to the implementation of capital punishment. However, the line they take when acting in an official capacity is always the same: we cannot remove this sentence, as the whole country is not ready to do so.

As an example, during a debate organised on the World Day Against Death Penalty (10 October 2004), all the speakers but two were in favour of the abolition of the death penalty. Representatives of the opposition parties, students of various schools and others, all asked for the abolition. However, the next morning, the headline of the Daily Times, in bold letters, was "don't abolish death penalty in haste", quoting a sentence from Justice Kiongozi Amir Manento saying "Tanzanian culture not the same as foreign".[164] Actually, the same Justice Manento had advocated for research to be made before concluding on whether to abolish the death penalty.

It should be noted that research was carried out 13 years ago by the Nyalali Commission. This commission, established in 1991, was under the Chairmanship of the Chief Justice of Tanzania, Honourable. Mr Justice Francis L. Nyalali. It drew members from the ruling party, government and private sector in Tanzania mainland and Zanzibar and it concluded that the death penalty should be abolished. The composition of the Commission was quite representative and they reached the conclusion that the death penalty was a cruel, inhuman and degrading punishment. They also concluded that a number of laws should be abolished (especially the Deportation Act[165] and the Preventive Detention Act), but none of these recommendations have been implemented.

13 years after the Commission made its conclusions public and 10 years after the *Mbushuu* ruling, it would be far from a hasty decision to abolish the death penalty.

Nothing has been done by the authorities to sensitise the public to the question of the abolition of the death penalty in the past ten years. Instead, executions, when they were carried out, were done in secrecy, and no information was released about the actual process, nor on the conditions suffered in detention.

If the members of the Nyalali Commission were in favour of the abolition of capital punishment because of the appalling character of such a sentence, there is no reason to hold that the citizens of the country would react differently. As stated by Justice Mwalusanya, "the government must assume responsibility for ensuring that the citizens are placed in a position under which they are able to base their views about the death penalty on a rational and properly informed assessment".

It is its responsibility towards its citizens, but also a duty under the international instruments ratified by the government: Tanzania must abolish death penalty. As stated in General Comment 20 (44), Article 6 of the ICCPR refers generally to the abolition of the death penalty in terms that strongly suggest that abolition is desirable. It is the duty of the State party to engage itself in the completion of this goal. This was recently reaffirmed in the Resolution 2004/67 of the UN Commission on Human Rights.

The FIDH is convinced that what the people of Tanzania need most is a fair justice system that aims to apprehend, convict and appropriately punish offenders in a human manner. In a free and peaceful society there is no place for the barbary of capital punishment.

164. "Don't abolish death penalty in haste", Daily Times, Tuesday, 12 October 2004.
165. The African Commission recently denounced a similar provision in the Zambian legislation. See Amnesty International v. Zambia, Comm. 212/98. "The court also failed to rule on the alleged reason for the deportation, namely, that his presence was likely "to endanger peace and good order in Zambia...". There was no judicial inquiry on the basis in law and in terms of administrative justice for relying on this 'opinion' of the Minister of Home Affairs for the action taken... To the extent that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (Article 9(1))."

Recommendations

FIDH and LHRC make the following recommendations **to the authorities of Tanzania:**

On the death penalty and corporal punishments

- To adopt a de lege moratorium on capital punishment as a first step towards abolition

- To abolish all forms of corporal punishment

- To make public statistics on corporal punishment and on the number of death sentences each year

- To legislate for a mandatory appeal (or review) of a sentence of death penalty

- To carry out programmes of sensitization of the public on the necessity to abolish the death penalty

General recommendations

- To incorporate international human rights instruments ratified by Tanzania into domestic legislation

- To cooperate with UN treaty bodies by submitting its state reports and by implementing treaty body recommendations

- To issue a standing invitation to the UN special thematic procedures

- To ratify the UN Convention Against Torture

On the administration of criminal justice

- To launch programmes of advocacy and awareness in relation to corruption in the judiciary and set up more efficient mechanisms to eradicate corruption

- To appoint additional judges and increase the number of judges in the High Court or/and Court of Appeal to reduce the judicial backlog

- More generally, the budget for the criminal justice system should be increased.

- To enforce the obligation to present prisoners on remand to a judge within the legal time limit by declaring void any procedure violating that obligation

- To free prisoners on remand when the investigation is not completed in a specified legal time frame

- To increase the fee of lawyers providing free legal aid

- To make sure that in criminal cases, convicted are always assisted by a lawyer and to postpone the hearing if it is not the case and appoint one immediately

- To allow applications for legal aid to be made throughout the legal process, to enable persons who have become indigent by paying legal fees, to access free legal aid.

- To amend legislation to allow for the possibility of bail for all offences

On the conditions of detention

- To bring the conditions of detention in line with relevant international human rights standards, including basic facilities and medical care, by increasing the relevant budget and preventing acts of abuse and violence against detainees

- Health care should be available for all prisoners on remand

- To allow NGOs visits in prison, including death row quarters

- To make public statistics on deaths in custody

FIDH and LHRC also consider that the Law Reform Commission should examine the question of improving the legal aid system.

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VIII. Appendices

1. Persons met by the mission

Tanzania mainland:

Richard Shilamba, National Coordinator of SAHRINGON, The Southern Africa Human Rights NGO network
Ambassador. Mohamed Ramia Abdiwawa, Vice Chairman of The Commission for Human Rights and Good Governance
Professor L.P. Shaidi, Advocate, Criminology and Penology Course Coordinator, University of Dar es Salaam.
Mr Rweyongeza, Advocate (defence counsel in the Mbushuu case)
Ms. Anita Samuel Moshi, Executive Secretary, Tanganyika Law Society
Mr Francis Stolla, Chairman, Human Rights Committee of the Tanganyika Law Society
Mr Islael Magesa, Chairman, Amnesty International, Tanzania section
Mr Francis Machulan, Amnesty International, Tanzania section
Permanent secretary, Amnesty International, Tanzania section
Mr Elias M.Muganda, Inspector of Police, Ministry of Home Affairs
SA Mapunda, Commissioner of Police, Ministry of Home Affairs
Mr Lukula EG, Inspector of Police, Ministry of Home Affairs
Mr Lifa Chipaka, President/Chairman, TADEA (Political Party)
Secretary, TADEA
Judge Bahati, Chairman of the Tanzania Law Reform Commission
Mr. Frederick Werema, Director of Constitutional Affairs and Human Rights, Ministry of Justice & Constitutional Affairs.
Mr Shaidi, Director of Public Prosecution, Ministry of Justice and Constitutional Affairs.
Political representatives present at the debate organised by Amnesty International on World Day against Death Penalty (10 October 2004):
James Mapalala (chausta), Lifa Chipaka (Tadea), Christopher Mtikila (DP), Dr E.J.E. Makaidi (NLD), Amin Rubbea (CUF).

EU Delegation and the British High Commission, Dar es Salaam: phone contacts made, but there was no opportunity to settle a date for a meeting.

The FIDH mission was denied meetings by the Prison authorities of Mainland Tanzania, Dar es Salaam, and by the Prevention of Corruption Bureau, Dar es Salaam, despite several visits to their offices and sending of questions, which remained unanswered.

Zanzibar:

Mr Kinyogo, Senior Assistant of the Commissioner of Police, Zanzibar
Mr Simba, Assistant Commissioner of Police (Public Relations)
Assistant Commissioner of Police (Police Training School)
Assistant Commissioner of Police (investigations)
Mr Omar O. Makungu, Principal Secretary, Constitutional Affairs and Good Governance and Deputy Attorney General, Zanzibar Government
Mr Ally Saleh, BC correspondent in Zanzibar, Executive Secretary of Zanzibar Human Rights Association
Mr A.O. Bai, Assistant Commissioner for Prisons, Zanzibar
Plus 7 other officials representing various offices (health, ...)
Mr Mahadi Juma Maalim, Deputy Chairman of Zanzibar Law Society, Program Analyst (Governance and Civil Society Partnerships), United Nations Development Programme-Zanzibar.
Detainees sentenced to death at the Kilimani Central Prison, Zanzibar: Emmanuel and Gerege (sentenced to death, appeals to the court of appeal of Tanzania, from Zanzibar's High Court are pending) and two Russian convicts (sentences commuted to life imprisonment). Jean (detainee on remand).

2. Tables

Table 1: Number of Murder Remandees in Tanzanian mainland Prisons awaiting Trial and their Time Spent in Prison

Number of Murder Remandees in Tanzanian Mainland Prisons awaiting Trial and their Time Spent in Prison (From Hon. Omar Ramadhan Mapuri (MP), Minister of Home Affairs Speech to the Parliament during the Parliament Budget Session 2003/2004, p 52)			
Time spent in Prison	Male	Female	Total
Less than 2 months	538	33	571
2-6 months	952	93	1045
6 months-2 years	2334	227	2561
2-4 years	1633	143	1776
4-6 years	684	68	752
6-8 years	239	19	258
8-10 years	83	10	93
10 years	31	3	34
Total	6494	596	7090

Table 2: Prisoners awaiting execution in mainland Tanzanian Prisons

Prisoners awaiting execution in Mainland Tanzania Prisons (from *Special Report on Tanzania Mainland Prisons Inspection* (2002/2003), Tanzania Commission for Human Rights and Good Governance		
	Male	Female
Maweni Prison	73	
Butimba Prison	55	4
Isanga Prison	132	6
Morogoro Prison	7	
Uyui Prison	18	
Lilungu Prison	4	
Ukonga	61	
Total	350	10

International Federation for Human Rights

17 passage de la main d'or - 75011 Paris
Tel : (33-1) 43 55 25 18 / Fax : (33-1) 43 55 18 80
E-mail : fidh@fidh.org / Internet site: http://www.fidh.org

The **International Federation for Human Rights (FIDH)** is an international non-governmental organization for the defence of human rights as enshrined in the Universal Declaration of Human Rights of 1948. Created in 1922, the FIDH brings together 141 human rights organisations from 100 countries. FIDH has undertaken over a thousand missions of investigation, trial observations, and training in more than one hundred countries. It provides them with an unparalleled network of expertise and solidarity, as well as guidance to the procedures of international organisations. The FIDH works to:

a) Mobilise the international community
b) Prevent violations, and support civil society
c) Observe and alert
d) Inform, denounce, and protect

The FIDH is historically the first international human rights organisation with a universal mandate to defend all human rights. FIDH enjoys observer status with the United Nations Economic and Social Council, (UNESCO), the Council of Europe's Permanent Committee, the International Labour Organization (ILO), and consultative status with the Africa Commission for Human and Peoples' Rights. FIDH is represented at the United Nations and the European Union through its permanent delegations in Geneva and Brussels.

FIDH facilitates each year the access and use of existing international mechanisms to more than 200 representatives of its member organisations and supports their activities on a daily basis. FIDH also aims to protect human rights defenders.

The Legal & Human Rights Centre [Tanzania]
PO BOX 75254 TULYER HOUSE - OCEAN ROAD DAR ES SALAAM TANZANIE
Tel : 255 022 113 177 or 255 022 117 768 / 118 353
Fax : 255 022 113 117 Email : lhrctz@raha.com

The Legal and Human Rights Centre (LHRC) is a non-profit making, non-partisan, non-governmental organization striving to empower the public as well as promote, reinforce and safeguard human rights and good governance in Tanzania.

The objective of LHRC is to create legal and human rights awareness and empowerment among the general public, the authorities and, in particular, the underprivileged sections of the society. The target groups of LHRC include: the general public, the indigent, community leaders, influential people, politicians, policy makers, legislators, law enforcers, community based organizations, NGO's and various international organizations.

The headquarter of Legal and Human Rights Centre is situated in Dar es Salaam, but the Centre also runs three legal aid clinics; two in Dar es Salaam (Magomeni and Buguruni) and one in Arusha.

Director of the publication: Sidiki Kaba
Editor: Antoine Bernard
Authors of this report: : Eric Mirguet, Arnold Tsunga
Assistant of publication: Céline Ballereau-Tetu
Printing by the FIDH.
Dépot légal April 2005 - Commission paritaire N°0904P11341 - Fichier informatique conforme à la loi du 6 janvier 1978
(Déclaration N° 330 675)