

CHAPTER SEVEN

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7.1 Introduction

[T]he fight for universal abolition takes on a doubly liberating dimension: the elimination of the death penalty will be conducive to the promotion of human rights and the rule of law, for respect for life is both universal and indivisible. The cause of abolition will progress inexorably until its victory is complete, because it is the necessary cause of humanity.¹

There has been debate on the death penalty worldwide. With the debate on the death penalty in Africa still emerging, in comparison with the international debate, studies on the death penalty in Africa are relevant. This study has contributed to this debate in several ways. It has shown that it is vital for African states to rethink their position with regard to the death penalty. It is clear from the foregoing that the death penalty in Africa is problematic and, accordingly, needs to be put into international perspective.

In the course of social evolution, a consensus forms amongst nations and peoples that certain practices can no longer be tolerated.² There has been a growing trend for the abolition of the death penalty, which can be seen by comparing the dates of abolition, as has been done by Schabas.³ Since one of the research questions of this study is whether it is appropriate for Africa to join the international trend for the abolition of the death penalty, and the death penalty in Africa needs to be put into international perspective, it is important to first consider the background to the current worldwide abolition movement, and the international abolition trends.

This chapter begins by examining the current abolition movement. Developments at the international and national levels, showing that there is a trend towards abolition of the death penalty are then considered. Subsequently, this chapter states the conclusion that can be deduced from the preceding chapters and the necessary recommendations.

¹ Banditer (2004) 11.

² C Dieter, "The death penalty and human rights: U.S. death penalty and international law" <<http://www.deathpenaltyinfo.org/oxfordpaper.pdf>> (accessed 16 May 2004).

³ Schabas (2002) 364-365. See 7.3 below.

7.2 The abolition movement

The current worldwide movement to abolish the death penalty has its roots in the liberal utilitarian and humanistic ideas initiated by the enlightenment in Europe at the end of the eighteenth century.⁴ An example of such ideas is that of Beccaria. In his treatise, *On crimes and punishment*, Beccaria stated that capital punishment was both inhumane and ineffective, and that it was counterproductive if the purpose of law was to impart a moral conception of the duties of citizens to each other.⁵

Although enlightenment saw the emergence of partial abolitionism, and the nineteenth century saw the growth of the abolitionist movement and the abolition of capital punishment by some countries,⁶ abolition experienced a delay in the first decade of the twentieth century before the adoption of the UDHR in 1948. Schabas has pointed out that the influential criminological doctrines that the death penalty was scientifically necessary as a social measure, and the rise of totalitarianism in Europe after the First World War, were some of the reasons for the delay experienced.⁷ Despite the above setback, abolition gained more grounds after the Second World War and the adoption of the UDHR.

It should be noted that there were also a few setbacks in the 1990s. For example, in the African continent, the period of abolition in The Gambia was very short, from 1993 to 1995. By 1994, ten countries, including Burundi, The Comoros and Guinea that were considered *de facto* abolitionist prior to 1994, resumed executions.⁸ However, as discussed in chapter two, the present status of abolition in Africa has improved. Therefore, the case for abolition becomes more compelling as the years go

⁴ Hood (2002) 9.

⁵ As above. Cesare Beccaria convinced statesmen of the uselessness and inhumanity of capital punishment, and his work led to measures abolishing the death penalty in Austria and Tuscany.

⁶ In 1946, Michigan abolished capital punishment permanently. It was the first jurisdiction to abolish capital punishment. This was followed by Venezuela and Portugal, abolishing the death penalty in 1867, the Netherlands in 1870, Costa Rica in 1882, Brazil in 1889, and Ecuador in 1897.

⁷ Schabas (1997) 6.

⁸ See chapter two (2.3.1) for a discussion of the possible reasons why states resume execution after not carrying out executions for more than ten years.

by, as experience shows that executions brutalise those involved in the process.⁹ Moreover, international lawmakers continue to urge the limitation and subsequent abolition of the death penalty¹⁰ as it is a major threat to fundamental human rights.

7.3 International abolition trends

Generally, there has been a growing trend for the abolition of the death penalty, which can be seen by comparing the dates of abolition, or in the case of *de facto* abolition states, the dates of last execution. Schabas has clearly stated this growing trend: during the decade 1948 to 1957, seven countries put an end to the death penalty; during the decade 1958 to 1967, eight countries abolished the death penalty; during the decade 1968 to 1977, nine abolished the death penalty; between 1978 and 1987, twenty-nine countries abolished or ceased to employ the death penalty; and between 1988 and 1996, forty-three countries abolished the death penalty; between 1998 and 2000, thirteen countries joined the list.¹¹ In addition, between 2000 and 2004, with regard to African states, Senegal that was previously *de facto* abolitionist has joined the list of abolitionist states;¹² Ghana, Kenya, Malawi and Tunisia have joined the list of abolitionist in practice states.

Moreover, as seen in the subsequent paragraphs, there have been specific developments in the different human rights systems that show a trend towards abolition of the death penalty.

⁹ Amnesty International (1989) 1.

¹⁰ Schabas (2002) 1 & 20.

¹¹ Schabas (2002) 364-365.

¹² See status of the death penalty in chapter two (2.3.1) of this thesis.

7.3.1 Abolition trends in the United Nations human rights system

7.3.1.1 United Nations human rights instruments

As mentioned in chapter three, article 6 of the ICCPR recognises the death penalty but lists safeguards and restrictions on its implementation. Although the death penalty is allowed under article 6, it is clear from its examination in chapter four that it points to abolition as a human rights objective.

The move towards abolition was evidenced with the adoption of the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, which abolishes the death penalty, providing for its implementation only in wartime. The reservation under article 2 of the Protocol, allowing for the application of the death penalty pursuant to a conviction for a most serious crime of a military nature committed during wartime, can only be made at the time of ratification or accession. The very restrictive nature of any possible reservation supports a trend towards abolition. Also, the Protocol states in its preamble that, “abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights”. The above Protocol thus envisages abolition of the death penalty. Over the years, states have increasingly ratified the Second Optional Protocol.¹³

It is important to note that part of today’s problems regarding the death penalty is simply that the international community failed to completely proscribe the death penalty when, for example, the UN Charter, UDHR and ICCPR were adopted. As seen in chapter three, some retentionist states frequently invoke the vague positions in international instruments to give validity to their own situation. Therefore, given that the death penalty is by and large state-sponsored and all African states are member states of the UN, the adoption of a protocol to the ICCPR, which abolishes the death penalty in all circumstances, will go a long way to persuade African states to embrace the movement towards abolition.

¹³ See “Status of ratifications of the principal international human rights treaties” <<http://www.unhcr.ch/pdf/report.pdf>> (accessed 31 March 2005).

7.3.1.2 United Nations resolutions

Between the 1970s and early 1990s, progressive restriction of capital offences was the UN's main objective. Most UN resolutions, for example, resolution 2857 (XXVI) of 1971, only urged states to restrict the number of offences for which the death penalty is imposed. In resolution 2857 (XXVI), the UN General Assembly stated that the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment is imposed, with a view to the desirability of abolishing this punishment in all countries.¹⁴ Similarly in resolution 32/61, the UN General Assembly saw “progressively restricting the number of offences for which the death penalty may be imposed” as the main objective.¹⁵

Although from mid 1990s, the UNCHR still reiterated the goal of progressive restriction of capital offences in resolutions 1997/12 of 3 April 1997 and resolution 1998/8 of 3 April 1998, the focus has shifted, and more emphasis is being placed on urging states to envisage a moratorium on the death penalty with a view to abolishing it. For example, even though the UNCHR resolution 1998/8 of 3 April 1998 reiterated progressive restriction as a goal, the resolution also called upon states to establish a moratorium on executions with a view to completely abolishing the death penalty. The most recent is UNCHR 1999 resolution, which urged states to establish a moratorium in 2000 to mark the millennium.¹⁶ Furthermore, in 2001, the UNCHR adopted a European Union resolution that calls for states to hold a moratorium on the abolition of the death penalty.¹⁷

¹⁴ UN General Assembly resolution 2857 (XXVI), adopted on 20 December 1971.

¹⁵ UN General Assembly resolution 32/61, adopted on 8 December 1977.

¹⁶ See generally, Fine (1999) 421.

¹⁷ “UN adopts resolution to ban the death penalty” <<http://www.anc.org.za/briefing/nw20010406/38.html>> (accessed 30 December 2003). The resolution has been adopted by 27 of the Human Rights Commissions 53 members. However, 18 voted against and seven abstained. Liberia did not take part in the vote. Libya and Algeria rejected the resolution because of “sovereignty” and “political independence” (As seen in previous chapters, sovereignty has been used by African states to support the retention of the death penalty). Other states that voted against the resolution were Burundi, China, Indonesia, Japan, Kenya, Malaysia, Nigeria, Pakistan, Qatar, Saudi Arabia, South Korea, Swaziland, Syria, Thailand, and Vietnam.

7.3.1.3 United Nations sponsored tribunals

At its first session, the UN General Assembly adopted resolution 95(I) endorsing the principles of the Charter of the Nuremberg Tribunal. This Charter provided for the death penalty in its article 27 as the supreme punishment for war criminals. During the drafting of this Charter, Uruguay objected to the inclusion of the death penalty, but unfortunately was accused of having Nazi sympathies.¹⁸

A sign of changing values, which shows a trend towards abolition of the death penalty can be seen in the statutes of the International Criminal Tribunal for the Former Yugoslavia 1993 (ICTY), the International Criminal Tribunal for Rwanda 1994, the International Criminal Court 1998 (ICC), and the Special Court for Sierra Leone 2002 (SCSL). The Statute of the ICTY states that the maximum sentence shall be life imprisonment.¹⁹ Similarly, the Statutes of the ICTR and ICC also exclude the death penalty.²⁰ The Statute of the SCSL is the most recent development regarding the exclusion of the death penalty for grave international crimes.²¹ The above statutes prove that fundamental human rights are inalienable. They may not be taken away even if a person commits the most atrocious of crimes, as human rights protect everyone – they apply to the worst and best of persons.

7.3.2 Abolition trends in the African human rights system

There is a slow trend towards abolition of the death penalty in Africa. There has been significant progress towards ending the death penalty in southern Africa²² following intense lobbying from human rights activists in the region. There is apparent abolition trend in the countries of the Economic Community of West African States

¹⁸ Schabas (1996) 29.

¹⁹ Article 24 of the ICTY Statute

²⁰ Article 23 of ICTR Statute, and article 77 of the ICC Statute. The ICC statute entered into force on 1 July 2002 (2187 U.N.T.S. 3).

²¹ Article 19 of SCSL Statute.

²² See generally, Hatchard (1994) 923; and D Mavunduse “A new millennium free from death penalty in southern Africa” <<http://www.sardc.net/editorial/sanf/1999/09/30-09-199-nf2.htm>> (accessed 30 January 2004).

(ECOWAS).²³ Between 1975 and 1984, only Cape Verde had abolished the death penalty. Between 1985 and 1994, Mozambique, Namibia and São Tomé and Príncipe, Angola, Guinea Bissau and Seychelles had abolished the death penalty. Between 1995 and 2004, Côte d’Ivoire, Djibouti, Mauritius, South Africa and Senegal abolished the death penalty. Furthermore, a positive trend towards abolition, as seen in previous chapters, is the willingness of the courts to deal with death penalty issues in the constitutional context.

7.3.2.1 African human rights instruments

As seen in previous chapters, the African Charter is silent on the death penalty. It is unclear whether the drafters intentionally omitted reference to the death penalty due to the scarcity of available materials on the drafting history of the Charter.

However, in 1990, a trend towards abolition of the death penalty was evidenced with the adoption of the African Children’s Charter; and in 2003, with the adoption of the African Women’s Protocol. As seen in chapters two and three, both treaties restrict the application of the death penalty.²⁴ Therefore, article 4 of the African Charter has to be read in conjunction with the above two instruments, in relation to the application of the death penalty on children and women. Their adoption is a commendable step towards abolition, with regard to the death penalty in Africa.

7.3.2.2 African Commission on Human and Peoples’ Rights policies

Prior to 1999, the African Commission had not paid much attention to the death penalty or addressed the issue of the death penalty in any of its resolutions. However, the situation changed in November 1999 when the Commission passed a resolution urging states to envisage a moratorium on the death penalty.²⁵ This resolution calls

²³ Amnesty International, “West Africa: Time to abolish the death penalty” AI Index: AFR 05/003/2003, 10 October 2003.

²⁴ See articles 5(3) and 30(e) of the African Children’s Charter and article 4(2)(j) of the African Women’s Protocol.

²⁵ *Thirteenth Annual Activity Report (1999-2000) Annex IV*; See also website <<http://www.achpr.org/html/directoryofresolutions.html>> (accessed 17 May 2003).

upon states to limit the imposition of the death penalty, to consider establishing a moratorium on the death penalty and to reflect on the possibility of abolishing the death penalty. In addition, as noted in the introduction chapter, during the Commission's 36th Ordinary Session (2004), for the first time in the Commission's agenda, the death penalty was one of the issues discussed. The adoption of the above resolution and placing the death penalty in the Commission's agenda, are major steps towards the abolition of the death penalty in Africa.

With regard to the move towards the abolition of the death penalty in Africa, it is worth emphasising at this point that the African Commission's recent decision in *Interights et al (on behalf of Bosch) v Botswana*²⁶ should not be seen as a step backwards. The Commission tactfully concedes that abolition of the death penalty in Africa is desirable, when it encourages African states to take all measures to refrain from using the death penalty.²⁷ The Commission's acknowledgment of the evolution of international law and the trend towards the abolition of the death penalty,²⁸ in keeping with article 60 of the African Charter, is an excellent inroad for international law to help future Commission decisions, especially in death penalty cases. Thus, the decision could have a positive effect with regard to the abolition course in Africa, if African states in general take the Commission's recommendations into consideration. Moreover, the *Bosch* case was finalised at the 34th Ordinary Session (2003) of the African Commission and the debate on the abolition of the death penalty, mentioned above and in chapter one, was initiated at its 36th Ordinary Session (2004). Overall, the *Bosch* decision underscores the need to strengthen the jurisprudence of the Commission and the future African Court of Human and Peoples' Rights by drawing their attention to the jurisprudence of similar bodies, on the abolition of the death penalty.

²⁶ *Interights et al (on behalf of Bosch) v Botswana*, Communication 240/2001, *Seventeenth Annual Activity Report: 2003-2004*. The decision is discussed in chapters four, five and six of this thesis.

²⁷ As above, para 52.

²⁸ As above.

7.3.2.3 Commutation of death sentences and other recent developments

There has been progress towards the commutation of death sentences in the African continent, which could be understood to imply that some countries have recognised the fact that the death penalty is undesirable.²⁹ In addition, there have been other recent developments in some African states that point towards abolition. For instance, a *de facto* moratorium has been in place in Zambia since 1997,³⁰ and as seen in chapter two, the president has promised never to sign execution warrants. On 19 April 2003, Mwanawasa appointed a commission to review the constitution, with one of the specific terms of reference being to advise on the future of the death penalty in Zambia.³¹

In the ongoing process of constitution making, the Kenyan government proposed in its submission on the draft constitution that the death penalty should be done away with.³² Although the proposal was shut down by the representatives of the people who cited that it is still necessary to keep the death penalty in the statute books,³³ on 9 March 2004, the National Constitutional Conference that was reviewing the draft constitution of Kenya, abolished the death penalty for treason and robbery with violence but retained it for murder and rape of minors.³⁴ The matter is yet to be concluded as the process of constitution making is still progressing and at present, there is a *de facto* moratorium on the death penalty in Kenya.³⁵ However, during the examination of the second periodic report of Kenya, UN Human Rights Committee members highlighted the disadvantage of the *de facto* moratorium, specifically “the

²⁹ For examples, see chapter two (2.3.1) of this thesis. Also see 2.4.1.3(b) (chapter two) for a brief discussion on the process of pardon or commutation.

³⁰ Hands Off Cain (2004) 51.

³¹ As above.

³² Second periodic report of Kenya submitted under article 40 of the ICCPR, UN Doc. CCPR/C/KEN/2004/2, 27 September 2004, para 56 (hereinafter referred to as second periodic report of Kenya).

³³ As above.

³⁴ Hands Off Cain (2004) 50.

³⁵ See second periodic report of Kenya, paras 52 & 56.

people who had been pitifully abandoned in the death rows since 1988”.³⁶ The response of Wako, head of the delegation of Kenya, was that the issues of integrating the provisions of the Covenant into the Constitution regarding, *inter alia*, the death penalty would remain the focus of the government’s action plan.³⁷ Later on, during the 61st Session of the UNCHR, Murungi, Minister of Justice and Constitutional Affairs, stated as one of the steps taken thus far by the government to improve the state of human rights in Kenya, a commitment to abolish the death penalty. He stated the following: “We are committed to abolish the death penalty. In the meantime, we are in the process of commuting death penalties to life imprisonment”.³⁸

In Nigeria, the government set up on 13 November 2003, the national study group on the death penalty, which was tasked with preparing an advisory opinion to guide the government on whether or not to abolish the death penalty.³⁹ The study group recommended that an official moratorium on executions be put in place until the Nigerian criminal justice system can ensure fundamental fairness and due process in capital cases and minimise the risk of innocent people being executed.⁴⁰

³⁶ The last execution in Kenya in compliance with the death sentence was in 1988. See second periodic report of Kenya, para 52.

³⁷ See UN press release “Human Rights Committee concludes consideration of Kenya’s report on compliance with the Covenant on Civil and Political Rights”, UN Doc. HR/CT/658, 15 March 2005. The report was considered during the 83rd Session of the Committee. It should be noted that in its concluding observations, the Committee made the following recommendations to Kenya: First, to consider abolishing de jure the death penalty and acceding to the Second Optional Protocol to the ICCPR; second, to remove the death penalty from the statute books for crimes that do not meet the requirements of article 6(2) of the ICCPR; and third, to ensure that the death sentences of all those on death row whose final appeals have been exhausted are commuted. The second recommendation was made because the Committee noted from the report of Kenya that the death penalty applies to crimes not having fatal or similarly grave consequences, such as robbery with violence or attempted robbery with violence, which do not qualify as “most serious crimes” within the meaning of article 6(2) of the ICCPR. See concluding observations of the Human Rights Committee on the second periodic report of Kenya submitted under article 40 of the ICCPR, UN Doc. CCPR/CO/83/KEN, 28 March 2005.

³⁸ See statement by Hon. Kiraitu Murungi, EGH, MP, Minister of Justice and Constitutional Affairs of the Republic of Kenya at the 61st Session of the Commission on Human Rights, Geneva, 16 March 2005. Available at website <<http://www.ohchr.org/english/bodies/chr/sessions/61/highlevel-state.htm>> (accessed 31 March 2005). This recent development shows how international pressure could push states to go one step further with regard to abolition of the death penalty.

³⁹ E Anaba, “Law and human rights: -Death penalty: Options for the government -- Study group” *Vanguard* (Lagos), 5 November 2004.

⁴⁰ As above.

Furthermore, the Truth and Reconciliation Commission of Sierra Leone just concluded its report, in which it recommended, *inter alia*, the abolition of the death penalty and the immediate repeal by parliament of all laws authorising the use of capital punishment.⁴¹ The TRC noted in its report that this recommendation is imperative and should be implemented without delay. It further recommended the introduction of a moratorium on all judicially sanctioned executions and the immediate commutation of existing death sentences.⁴²

The Justice Minister of Algeria, Belaiz, has pledged to restrict the death penalty to terrorism and treason.⁴³ Also, in April 2004, the Ugandan Minister of Justice and Constitutional Affairs, Mukwaya, said the government was considering substituting the death penalty with long jail terms.⁴⁴ In a future session of parliament in the DRC, a proposal for the re-introduction of a moratorium and the concession of a general amnesty will be discussed.⁴⁵ In Mali also, the Konaré government introduced on 16 May 2002, a two-year suspension of executions, in order to provide the opportunity for a discussion on the maintenance or abolition of the death penalty. Traore, a member of the Justice Commission of the National Assembly later announced in February 2004 that parliament was working on a legislation to renew this moratorium.⁴⁶

The commutation of death sentences, the decrease in executions in Africa (as seen in chapter two) and the above developments could be understood to imply that some African states have recognised the undesirability of the death penalty. There is, therefore, a slow trend towards abolition of the death penalty in Africa.

⁴¹ The TRC Report is available at website <<http://www.iss.co.za>> (accessed 30 November 2004)

⁴² As above.

⁴³ Hands Off Cain (2004) 55.

⁴⁴ As above, 56.

⁴⁵ See Hands Off Cain, “Africa: Moratorium on execution with a view to the abolition of the death penalty” December 2004 (Africa anti-death penalty project).

⁴⁶ As above.

7.3.3 Abolition trends in the European human rights system

As noted in chapter three, article 2 of the European Convention recognises the death penalty as an exception to the right to life. A look at article 2 reveals that it does not envisage abolition of the death penalty. Moreover, it makes little provision for safeguards or limitations on the use of the death penalty. Due to the fact that the European Convention and other instruments did not fully endorse the complete abolition of the death penalty, Protocol No. 6 to the European Convention, which deals with abolition of the death penalty in peacetime, was adopted.⁴⁷

A major breakthrough was the adoption of Protocol No. 13 to the European Convention,⁴⁸ which abolishes the death penalty in all circumstances – that is, in both peacetime and wartime.⁴⁹ This Protocol provides in its preamble that “abolition of the death penalty is essential for the protection of [the right to life] and for the full recognition of the inherent dignity of all human beings”. Also, article 2(2) of the Charter of Fundamental Rights of the European Union prohibits the imposition of the death penalty and executions.⁵⁰

In addition, the Council of Europe’s policies reveal an unmistakable abolition trend. Prior to 1994, the death penalty was not related to membership in the Council of Europe. But after 1994, as noted in chapter three, the Council of Europe made it a

⁴⁷ See chapter three of this thesis.

⁴⁸ The adoption of Protocol No. 13 followed a recommendation of the Parliamentary Assembly of the Council of Europe that the Committee of Ministers draw up an additional protocol abolishing the death penalty in both peace- and wartime. The reasons advanced in support of the need for an additional protocol were that: First, the death penalty is inhuman and degrading punishment. Second, its imposition has proved ineffective as a deterrent, and, owing to the fallibility of human justice, also tragic through the execution of the innocent. Third, there was no reason why capital punishment should be inflicted in wartime, when it is not inflicted in peacetime. The Parliamentary Assembly stated that there is lack of legal safeguards and high risk of executing the innocent when applying wartime death sentences (see Parliamentary Assembly of the Council of Europe Recommendation 1246 (1994) on the abolition of the death penalty). The points put forward by the Parliamentary Assembly are also flaws in the application of the death penalty in Africa, as revealed in this study, thus necessitating the need for a protocol on the abolition of the death penalty in Africa. The adoption of a protocol on the abolition of the death penalty in Africa is one of the recommendations made in this study (see 7.5.1 below).

⁴⁹ As above.

⁵⁰ Proclaimed by the European Parliament, the Council and Commission, at Nice on 7 December 2000 (2000/C 364/01).

precondition that any country that wished to become a member of the Council of Europe has to implement an immediate moratorium on the death penalty and make a commitment to abolish it. Also, the PACE has acknowledged the importance of countries that have not yet abolished the death penalty to join the abolition trend.⁵¹

7.3.4 Abolition trends in the Inter-American human rights system

Article 4 of the American Convention, as pointed out in chapter three, does not preclude the death penalty but provides restrictions on its implementation. The American Convention is an abolitionist instrument to the extent that states that abolished the death penalty before ratifying the American Convention are bound as a question of international law not to reintroduce it.⁵²

The trend towards the abolition of the death penalty in the Inter-American human rights system was more evidenced with the adoption of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, prohibiting the application of the death penalty but allowing for its use in wartime.⁵³ Similar to the Second Optional Protocol to the ICCPR, the very restrictive nature of any possible reservation to use the death penalty in wartime supports a trend towards abolition.⁵⁴

⁵¹ See Parliamentary Assembly of the Council of Europe resolution 1044 (1994), adopted on 4 October 1994.

⁵² Article 4(3) prevents states that have abolished the death penalty from reintroducing it.

⁵³ The extension of the application of the death penalty in some states and proposals from Uruguay and other states on the abolition of the death penalty, prompted the Inter-American Commission on Human Rights to raise the idea of an additional protocol to the American Convention on Human Rights. The Inter-American Commission justified the need for a protocol on the basis that, when the American Convention was adopted, prevailing conditions would not have permitted abolition, but that there had been an evolution since then (see Schabas (2002) 350-351).

⁵⁴ In addition, the Inter-American and UN approaches have been seen by Schabas as more fully abolitionist than the European approach in Protocol No. 6 (Schabas (2002) 352). This is because the latter applies only in time of peace, whereas the former applies at all times, except a state entered a reservation under article 2. A point worth noting is the fact that, article 2 of the Protocol to the American Convention makes reference to international law, which the Second Optional Protocol does not. The reference to international law implies that, when applying the death penalty in wartime, the restrictions on the application of the death penalty contained in other international law instruments applicable in wartime have to be respected.

7.4 Conclusion

Most African states still retain the death penalty despite the fact that they are parties to major international human rights instruments and in the face of a growing international trend towards its abolition. Generally, this study has revealed that African states fall short of their obligations under international law. Non-domestication of the standards in human rights instruments has been a problem, as it prevents the standards from being invoked in courts at the domestic level.⁵⁵

Nonetheless, the human rights standards at the international level are engraved in national law. Despite this, as revealed in this study, the current operation of the death penalty in many African states conflicts with human rights in several ways. First, the death penalty is in itself a violation of the right to life as it allows for the taking of life and rejects the value of the convicted person's life. Second, it violates the right not to be subjected to cruel, inhuman and degrading treatment, both in the context of the death row phenomenon and methods of execution. Moreover, the cruelty of the death penalty extends beyond the condemned prisoner, to the prisoner's family, judges, prison guards and other officials who have to carry out the execution.⁵⁶ Lastly, the death penalty in Africa also conflicts with fair trial rights.⁵⁷ An argument to ensure fair trial standards may be construed as a conditional validation of the death penalty, that is, if the fair trial standards are in place, the death penalty may be imposed. However, because other factors (for instance, the lack of resources, the personal disposition of a judge and the manner in which a case is conducted) affect the outcome of trials, and it is difficult or almost certainly not possible to design a system that avoids arbitrariness, judicial error and delays in carrying out the death sentence,

⁵⁵ As noted in chapter six (6.2.2), not all African states that have ratified the ICCPR, for example, have incorporated it into their domestic laws. In Botswana, no human rights treaties, including the ICCPR, have been incorporated into national law. In Eritrea, the ICCPR has not been proclaimed as the law of the state. In Malawi, the ICCPR has not been incorporated into domestic law (see Heyns (2004) 904, 1064 & 1247). Also, the ICCPR has not been domesticated in Kenya (see UN press release "Human Rights Committee concludes consideration of Kenya's report on compliance with the Covenant on Civil and Political Rights", UN Doc. HR/CT/658, 15 March 2005. The report was considered during the 83rd Session of the Committee).

⁵⁶ See chapter five of this thesis.

⁵⁷ See chapter two of this thesis.

the use of the death penalty in Africa remains problematic, despite efforts to improve fair trial standards.

Although the death penalty is a violation of human rights, general interpretations of the right to life and the right not to be subjected to cruel, inhuman and degrading treatment or punishment cannot be imposed on all national systems, as the formulation of the above provisions in the constitutions of African states differs. The formulation of the above provisions in constitutions of African states causes obstruction to challenges to the death penalty in Africa. The existence of a limitation clause in national constitutions exacerbates the situation. However, this study shows that some courts have found a way round qualified provisions and limitation clauses, in finding the death penalty to be unconstitutional.

Furthermore, this study has also revealed that the arguments for the retention of the death penalty in Africa are fundamentally flawed. Therefore, they cannot be used to justify the retention of the death penalty in Africa.⁵⁸ As mentioned in chapter three, even if there are strong arguments to either sides or some of the arguments for the retention of the death penalty are not flawed but not so convincing, the death penalty is so far reaching in its consequences that the onus should be on the defenders of the death penalty to justify its importance.

In view of the fact that the death penalty in Africa conflicts with human rights, the arguments for its retention are fundamentally flawed and defenders of the death penalty have not proven otherwise, this study, therefore, concludes that it is appropriate for African states to join the international trend for the abolition of the death penalty. It is even more appropriate considering that there is an unmistakable international trend towards abolition of the death penalty and a trend towards the abolition of the death penalty in Africa. As abolition of the death penalty is a fundamental theme in the development of human rights, abolishing the death penalty in Africa would not only encourage respect for the right to life, and human rights in general, but will prevent it from being used to eliminate politically “bothersome”

⁵⁸ See chapter three of this thesis.

individuals and could also go a long way to reduce crime, as more attention would be given to the root causes of crime.⁵⁹

The imperfections in the criminal justice system make it impossible to remedy the occasional mistakes, which result in execution of the innocent. To maintain the death penalty in the face of the demonstrable failures of the judicial system to exclude the possibility of error or to guarantee that justice will never miscarry is unacceptable. Since the best case for abolition rests on a commitment to respecting substantive due process,⁶⁰ it is certain that abolition is the only way to ensure that such mistakes do not happen. What is more, the decrease in executions in Africa imply that some African states hang on to capital punishment with clearly little commitment to use it as a means of crime control. This lack of commitment could be understood to mean that the death penalty is undesirable.

However, the abolition of the death penalty cannot be a one-off act. It is not the same as achieving the aim of stopping one human rights abuse. When abolished, a substitute penalty has to be found that suits the crime. Considering the criminological arguments for the retention of the death penalty in Africa, examined in chapter three, it is unquestionable that there is some resistance to alternative sanctions to the death penalty. Kahan has advanced a number of explanations as to what accounts for resistance to alternative sanctions, one of which is the failure of democratic politics.⁶¹ Generally, members of the public are ignorant of the availability and feasibility of alternative sanctions.⁶² In the case of the death penalty, it is clear from the discussions in chapter three that members of the public in Africa are ignorant that other prison sentences can equally serve the purposes of punishment. Life imprisonment, for example, can also serve as a deterrent, a preventative, retributive and rehabilitative measure. There has been no proof that the death penalty in Africa deters more effectively than life imprisonment.

⁵⁹ As noted in chapter three, executions have been seen as symbols of the inability or willingness of governments to tackle the root causes of crime (see Agostoni (2002) 77).

⁶⁰ Sarat (1999) 11.

⁶¹ Kahan (2000) 715.

⁶² As above.

Another explanation for resistance to alternative sanctions relates to their inadequacy along the expressive dimension of punishment.⁶³ Applying Kahan's explanation to the case of the death penalty, alternative sanctions are rejected by the public, not because they perceive that these punishments would not work or are not severe enough, but because they believe they fail to express condemnation as dramatically and unequivocally as the death penalty.⁶⁴ Since the central theoretical premise of the case for alternative sanctions is that all forms of punishment are interchangeable along the dimension of severity,⁶⁵ a long prison sentence or life imprisonment can also express condemnation as dramatically and unequivocally as the death sentence. The fact that some African states have abolished the death penalty completely or for certain offences that were punishable by death, is proof that alternative sanctions exist, that can serve the purpose of punishment - deterrence, retribution, rehabilitation and prevention. Considering the fact that life sentence exist, not one of the purposes of punishment would ever deemed the death sentence as the only proper sentence.⁶⁶ Accordingly, Justice Lartey, a Supreme Court of Ghana nominee, has acknowledged imprisonment as an alternative to the death sentence, stating that instead of passing the death sentence on murderers or those who have committed other offences attracting the death sentence, the offenders should be confined at a condemned place to die naturally.⁶⁷

This study does not adopt any specific proposal for which punishment should replace the death penalty in Africa. The choice of an alternative sanction would depend on a number of factors that affect the operation of the criminal justice system in a state, for instance, the availability of resources and whether the substitute punishment suits the crime. The realistic alternatives to the death penalty in Africa has to be decided at the national level, bearing in mind that any punishment has to be fair, adequate, and more importantly, enforceable. Any alternative sanction should not constitute cruel,

⁶³ As above.

⁶⁴ See chapter three of this thesis.

⁶⁵ Kahan (2000) 715.

⁶⁶ Van Rooyen (1991b) 84.

⁶⁷ K Mensah & I Essel, "Abolish capital punishment says supreme court Nominee" in *Accra Mail* (Accra), 17 September 2004

inhuman and degrading treatment or punishment, and should not contravene criminal justice standards (fair trial standards in general). For example, a mandatory life sentence for murder is not different from a mandatory death penalty, as it does not give the courts the opportunity to consider mitigating circumstances.

7.5 Recommendations

Human rights law, whether in the form of international commitments or domestic protection, proclaims that violations of human rights are prohibited and should be redressed.⁶⁸ Article 2 of the ICCPR enjoins state parties to introduce the necessary steps in accordance with their constitutional processes and with the provisions of the Covenant to give effect to the rights recognised in the Covenant. Therefore, African states have to take certain measures to give effect to the rights that are being violated due to the retention and use of the death penalty in Africa. In this regard, the following recommendations are made, which are geared towards realising the abolition of the death penalty in Africa. The recommendations are directed at the African Union, African Commission, African governments, including the executive, legislature and judiciary, and civil society, including Non-Governmental Organisations (NGOs).

7.5.1 Recommendation to the African Union

The African continent remains the only region with a human rights treaty that is yet to adopt a protocol on the abolition of the death penalty. Article 66 of the African Charter provides: “Special protocols or agreements may, if necessary, supplement the provisions of the present Charter”. As article 4 of the African Charter makes no mention of the death penalty, and considering that one of the principles of the AU is respect for the sanctity of life,⁶⁹ it is recommended that the AU adopt a protocol to the African Charter on the abolition of the death penalty in Africa.

⁶⁸ Orlin (2000) 1.

⁶⁹ Article 4(o) of the Constitutive Act of the African Union, adopted in Lomé, Togo, on 11 July 2000, and entered into force on 26 May 2001(CAB/LEG/23.15).

Considering the few number of ratifications of the Second Optional Protocol, one might pose the question: Should one not encourage African states to ratify the existing protocol instead of seeking the adoption of a new protocol addressing the same issue? The answer is simple. African states have realised that international human rights instruments do not always address the unique problems of the continent.⁷⁰ A protocol to the African Charter would gain more legitimacy, as it will take into consideration the unique problems of the continent. The above explains, in part, why not all the abolitionist and *de facto* abolitionist African states have ratified the Second Optional Protocol.

In addition, the ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people.⁷¹ The adoption of a protocol on the death penalty would definitely make a difference to the lives of people especially those accused of capital offences. A protocol on the abolition of the death penalty in Africa has an important place in the framework of human rights protection in Africa. It would be essential in enhancing human rights protection in Africa and in clarifying the situation of the death penalty in Africa.

It is suggested that experts should be appointed to draft the protocol. The process has to be participatory, through the involvement of various interested parties who use human rights daily, such as, lawyers, NGOs, government officials, academics and civil society. On the content of the protocol, the following recommendations are made.

First, the protocol should abolish the death penalty in peace and wartime, allowing for a reservation at time of accession or ratification to use the death penalty in wartime. As was the case with the Second Optional Protocol to the ICCPR and Protocol No. 6 to the European Convention, the word “peacetime” should not be included in the protocol, so as to avoid drawing attention to the wartime exception. Allowing for the possibility of using the death penalty in wartime will encourage ratification of the protocol by states that are not prepared to renounce the use of the death penalty during

⁷⁰ Nsibirwa (2001) 40.

⁷¹ Heyns (2001) 156.

wartime. Besides, the political priority at the moment is first of all to obtain and ensure observance of a continent-wide moratorium on executions, which could subsequently be consolidated by the complete abolition of the death penalty in Africa.⁷² The first step to achieving this would be the adoption of a protocol that allows for the possibility of the death penalty in wartime.⁷³

Second, the protocol should set a time frame within which, after ratification, the protocol cannot be denounced until the expiry of that time period. For example, a state party could denounce Protocol No. 6 only after the expiry of five years from the date on which it became a party to it and after six months' notice to the Secretary-General of the Council of Europe.⁷⁴ Since the African Charter is silent on denunciation, the protocol would have to set its own time frame for any denunciations. Allowing for a possibility of denunciation would also encourage ratification of the protocol.

Third, the articles abolishing the death penalty and those dealing with reservations or derogations should be regarded as additional articles to the African Charter. A provision of this nature is important, as the protocol would supplement the provisions of the African Charter in ensuring greater protection of human rights in Africa.

Fourth, generally, since some of the provisions of the protocol would be regarded as additional articles to the African Charter, reservations or derogations under the African Charter in respect of the protocol should be prohibited. This will give more force to the provisions of the protocol.

Fifth, the protocol should make reference to international law in the article dealing with reservation to use the death penalty in wartime, thus, following the approach of

⁷² The same argument was used in the European human rights system to justify the abolition of the death penalty in peacetime only, under Protocol No. 6 (see Ravaud (2004) 112)

⁷³ It should be noted that the approach in Protocol No.13 to the European Convention – abolishing the death penalty in all circumstances - cannot be taken in Africa due to the absence of a continent-wide moratorium on executions. It was possible in Europe, as there was a moratorium on executions throughout Europe at the time.

⁷⁴ Article 15 of the European Convention sets down the above conditions for denunciation. Since articles 1 to 5 of Protocol No. 6 are regarded as additional articles to the Convention, article 15 of the Convention applies to the Protocol.

the Inter-American human rights system.⁷⁵ This would afford greater protection of the rights of those facing the death penalty during wartime, because, as noted above, international law treaties applicable in wartime would have to be respected.

Lastly, the protocol on the abolition of the death penalty in Africa should provide that states include in their periodic reports to the African Commission, the measures taken to give effect to the protocol. A provision to this effect would provide a mechanism by which the implementation of the protocol can be monitored.

7.5.2 Recommendations to the African Commission on Human and Peoples' Rights

At present, the African Commission is the supervisory body of the African Charter. Article 45(3) of the African Charter mandates the Commission to “[i]nterpret all provisions of the present Charter at the request of a State Party, an institution of the Organization of African Unity or an African organization recognized by the Organization of African Unity”.

Although the Commission adopted the 1999 resolution and has considered article 4 in individual cases before it, the provision is yet to be interpreted in the context of the death penalty by itself. Therefore, pending the adoption of a protocol to the African Charter on the abolition of the death penalty in Africa, there is need for the African Commission to adopt a resolution in which it explicitly interprets article 4 of the African Charter, thus, going further than the 1999 resolution. As stated in article 60 of the African Charter, such an interpretation has to be done in the light of international law on human and peoples' rights, other instruments adopted by the UN and by African countries in the field of human and peoples' rights.⁷⁶ Abolitionist state parties (including *de facto* abolitionists), institutions of the Organisation of African Unity (now African Union) and African organisations are encouraged to request an

⁷⁵ See 7.3.4 above.

⁷⁶ Chapter two of this thesis has addressed possible interpretations of article 4 of the Charter, geared towards abolition of the death penalty in Africa.

interpretation of article 4 of the African Charter in the light of the abolition of the death penalty in Africa.

Furthermore, as seen in this study, the African Commission is encouraging debate on the question of the death penalty in Africa. However, for a debate on the death penalty in Africa to have more force, it is recommended that the African Commission take a clear stance on the subject, by, for instance, adopting a resolution as recommended above or initiating the adoption of a protocol to the African Charter on the abolition of the death penalty in Africa.⁷⁷ The Commission should also include the death penalty, as one of the issues to be discussed, in the agenda of its subsequent sessions. The Commission should aim at convincing states to put in place a moratorium on the death penalty, as a means to achieving the abolition of the death penalty in Africa. In addition, the African Commission should encourage governments, especially *de facto* abolitionist states, to include in their periodic state reports to the Commission under article 62 of the African Charter, the measures they have taken towards realising the total abolition of the death penalty in their respective countries.

7.5.3 Recommendations to African governments (comprising the executive, judiciary and legislature)

For the recommendations provided in this section to be realised, all three branches of government, the executive, legislature and judiciary have roles to play. The following six recommendations are made: First, it is recommended that an official continent-wide moratorium (legislatively adopted or executive branch imposed moratorium) on the death penalty in Africa be introduced. The call for an official moratorium is borne out of the conviction that the flaws in national criminal justice systems in Africa and the application of the death penalty in general, allow for the possibility of innocent persons to be sentenced to death and subsequently executed. Though a moratorium differs from abolition, as the moratorium could be suspended at any time, it leans in

⁷⁷ Commissioner Chirwa, as seen in chapter one, also urged the Commission to take a clear stance on the death penalty.

the same direction. This explains why the emphasis is on a legislatively adopted or executive branch imposed moratorium and not a judicially imposed moratorium.⁷⁸

The adoption of a moratorium in Africa is achievable because in adopting a moratorium, governments do not have to give up the “power” to kill or concede that it lacks the power to kill. It is a winning strategy politically, with regard to abolition. A moratorium is the surest, soonest way towards abolition of the death penalty.⁷⁹ A moratorium on the death penalty in Africa could lead to abolition in that a moratorium shows that society can do without the death penalty and survive. It also shows that there are alternative sanctions to the death penalty, as during the period of the moratorium, alternative sanctions are being used.

In addition, a moratorium is likely, at the national level, to be accompanied by governmental studies of how the death penalty has been administered in the past, as well as how alternatives to capital punishment can and do work, and if the death penalty is desirable in the present. This provides a forum for the enlightening of those who remain unconvinced that the death penalty violates the right to life in particular (and human rights in general), and the presentation of the case against the death penalty in Africa. Therefore, governments’ establishment of commissions to study the range of questions associated with the death penalty is necessary.

Second, the executive should commute existing death sentences. A moratorium on the death penalty in Africa will be effective if it is followed by the commutation of all existing death sentences. This will accord with the 1999 resolution of the African Commission. Also, considering that, more often than not, executions are not carried out, as can be seen from the decrease in the scale of executions in chapter two, the commutation of existing death sentences is much desired. Therefore, it is recommended that African governments (the executive in particular) put in place

⁷⁸ Although a judicially imposed moratorium would not be as effective as a legislatively adopted or executive branch imposed moratorium, it is definitely a step towards abolition, as it will prevent the passing of death sentences. Therefore, pending the introduction of a legislatively adopted or executive branch imposed moratorium, a judicially imposed moratorium is recommended especially in African states where the death penalty is not mandatory, as a step towards abolition.

⁷⁹ Hands Off Cain (2004) 157.

measures with regard to commuting all existing death sentences and to aim at removing capital punishment from their laws, as this would foster the abolition course in Africa.

Third, it is recommended that abolitionist state parties to the African Charter in order to further the abolition course, should request an amendment of article 4 to specifically exclude the death penalty. Article 68 of the African Charter states as follows:

The present Charter may be amended if a state party makes a written request to that effect to the Secretary-General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the State parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the State parties. It shall come into force for each state which has accepted it in accordance with its constitutional procedure three months after the Secretary-General has received notice of acceptance.

This is a complex route towards abolition of the death penalty in Africa, and is worth embarking upon. This route is referred to as difficult because it might not be feasible at the moment considering the status of abolition in Africa, but would definitely be feasible in the future, with the increase in the number of abolitionist states. The African Children's Charter and the African Women's Protocol amended article 4 of the African Charter, with regard to women and children. Their adoption implies that there is a chance of success with regard to requesting an amendment to article 4 of the African Charter. This study proposes two amendments: First, the deletion of the last sentence of article 4, which reads, "No one may be arbitrarily deprived of this right". Second, rephrasing the last sentence of article 4 of the African Charter to read "No one may be deprived of this right intentionally" and adding a subsection section stating that "A law shall not provide for a sentence of death to be imposed by any court".

Fourth, there is need to improve the national criminal justice systems. This recommendation is a temporary measure, pending the abolition of the death penalty, as it is not possible to design a criminal justice system that is free of error. Thus, the recommendation is geared towards reducing the chances of error in capital trials. As

seen in this study, a number of factors affect the respect for fair trial rights in capital trials in African states, which increases the risk of sentencing to death and executing the innocent.⁸⁰ Therefore, while the abolition of the death penalty in Africa is still pending, it is important for African governments to remedy the shortcomings in their criminal justice systems (as well as human rights complaints mechanisms) that affect their ability to administer justice effectively. Governments should ensure the availability of resources to the police and judiciary for the carrying out of proper and swift investigations. The creation of a legal aid scheme in countries that do not have it would improve the administration of justice in those countries.

Also, judges and lawyers have to be given effective legal training, so that they can apply and use fair trial standards appropriately. They should also be given human rights education, as the lack of rights consciousness among lawyers, judges and the judiciary as a whole affect the respect for fair trial rights. This is important because, as revealed in chapter six, the provisions of human rights instruments such as the ICCPR have not been invoked in national courts in some African states due to the fact that judges, lawyers and court officers have not been trained about the content of the ICCPR. To further ensure the effective functioning of the criminal justice system, states have to adopt legislative and other measures to ensure the conformity of national fair trial standards with those at the international level. In doing the above, states are to have in mind the goal of abolition, as the imperfections inherent in the criminal justice system makes it impossible to design a system that avoids arbitrariness, judicial error and delays in carrying out the death sentence.

Fifth, the legislature needs to revise the laws or constitutions that provide for the death penalty. The realisation of the abolition of the death penalty in Africa lies largely with the legislature, as the legislature is able to change the law. Due to the clash between the legislature and public opinion, it is recommended that the legislature consider the death penalty as a “choice-insensitive” issue (discussed in chapter three), the right answer to which does not depend substantially on what the majority of people might think. This will further the abolition course in Africa, as the legislature will not have

⁸⁰ These factors include the flaws in the criminal justice system such as lack of resources, which hampers the whole trial process, inadequate training of personnel (police officers, lawyers and judges), inadequate legal aid, and understaffed courts (see chapter six of this thesis).

to rely much on public opinion but on other important issues like the death penalty being a violation of human rights, in arriving at a decision to change the law or constitutions that allow for the death penalty.

Lastly, it is recommended that, pending the abolition of the death penalty, African states should show more commitment to human rights instruments that they have ratified by domesticating them. As mentioned in 7.4 above, the domestication of human rights instruments is problematic, making it difficult for them to be invoked in courts at the national level. Therefore, states that have not yet done so, should ensure that human rights instruments that they have ratified be domesticated, and that domestic laws are in conformity with the instruments. The obligations under the various human rights instruments should be fulfilled and mechanisms have to be put in place to monitor progress in the implementation of the human rights standards and the difficulties encountered. Since ratifying conventions is a significant step, states that are still to ratify major human rights treaties are recommended to do so.

7.5.4 Recommendations to civil society (including Non-Governmental Organisations)

Generally, the role of civil society (the media, lawyers, academics and students) and NGOs in particular is crucial with regard to serious human rights violations, for example, the violation of the right to life, which is a fundamental human right. Their role is essential in the implementation of the above recommendations and promotion of the abolition course in the African continent. For example, they have a role to play in the abolition course by lobbying for abolition in general or specifically, for the adoption of a moratorium on the death penalty in Africa, the commutation of death sentences, the adoption of a protocol to the African Charter, and amendment of article 4 of the African Charter. Furthermore, there is the need for academics to engage in additional and continuous research for policy formulation and implementation geared towards abolition, and as a way forward, initiate the establishment of an African Centre for Policy Research on the Death Penalty.

In order to encourage an abolitionist movement in Africa, it is important for the media, in collaboration with lawyers and academics, to educate the public, targeting

constitutional review commissions in particular, on the non-deterrent effect of capital punishment and the flaws in the application of the death penalty in general. States have to be encouraged to domesticate international human rights instruments that they have ratified, so that they could be invoked in courts. In addition, courts have to be reminded of their role to interpret the constitution without fear or favour, bearing in mind the rights of the minority, in deciding whether or not the death penalty is constitutional. The role of civil society in general comes in, with regard to putting pressure on the respective branches of government in achieving the above. The setting up of a project by NGOs, in collaboration with government institutions, designed for the lobbying for abolition of the death penalty in Africa through public awareness campaigns and regional and national conferences is much needed.

Since, as seen in this study, it is difficult to rely on certain constitutional provisions in some countries to challenge the constitutionality of the death penalty, public interest litigations are encouraged. Lawyers should bring cases before courts or other judicial bodies on the conformity between the national constitution with international human rights treaties that have been ratified by the country in question and the respective criminal law providing for the application of the death penalty. This could lead to a recommendation for a moratorium on the death penalty or its total abolition by the court.⁸¹

⁸¹ In this regard, see, for example, the following case: *Re the conformity between the Constitution of the Republic of Belarus, the international treaties of the Republic of Belarus and the provisions of the Criminal Code of the Republic of Belarus stipulating the application of the death penalty as a punishment* (2004) 16 BHRC 135. The Constitution of Belarus guaranteed the right to life but stated the death penalty as an exception to this right with regard to extremely grave crimes (article 24). The right to life had been proclaimed and guaranteed in a number of international treaties, which the Republic of Belarus had ratified. The House of Representatives of the National Assembly of Belarus therefore asked the Constitutional Court to rule on the conformity between the Constitution, the international treaties of the state and the provisions of the Criminal Code stipulating the application of the death penalty as a punishment. The court found that the Criminal Code was at variance to the Constitution because of the absence in the Code of the specification of the temporary character of the death penalty. The Court further held that providing the death penalty as an exception in the Constitution permits the decision to declare a moratorium on the application of the death penalty or complete abolition of capital punishment. However, the court left the latter to be resolved by the Head of State and by parliament.