

CHAPTER FIVE

THE PROHIBITION OF CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT AND THE DEATH PENALTY IN AFRICA

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5.1 Introduction

“Cruel” has been defined as “disposed to inflict pain or suffering”, “harsh”; “inhuman” as “failing to conform to basic human needs”, “brutal”; and “degrading” as “tending to degrade”, that is, to lower in status or strip of honour.¹ Death destroys an individual’s status and his or her very existence in an organised society. The extreme severity of a punishment is degrading to the dignity of human beings. Therefore, any punishment that strips human beings of their dignity or denies a person’s humanity is degrading.

“Cruel, inhuman and degrading treatment or punishment” has not been defined in human rights instruments. However, different bodies have laid down the various components of this prohibition. What constitutes the above is subjective, as can be seen from some of the cases of the UN Human Rights Committee.² The European Commission on Human Rights (European Commission) in the *Greek* case, described the concept of “inhuman and degrading treatment” under article 3 in the following words:

The notion of inhuman treatment covers at least such treatment as deliberately causes suffering, mental or physical, which, in the particular situation, is unjustifiable...Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience.³

¹ See Longman Dictionary of English language in *Penguin Hutchinson Reference Library* (1996).

² The cases are discussed below. See also Carlson & Gisvold (2003) 74.

³ Cooper (2003) 3. The European Commission for Human Rights also described “torture” as an aggravating form of inhuman treatment. In other words, the Commission was of the opinion that torture encompasses inhuman and degrading treatment and that inhuman treatment embodies degrading treatment. See European Commission for Human Rights, Opinion of 5 November 1969, YB XXII 186. Extracts from the Opinion are reproduced in the *Digest of Strasbourg Case Law Relating to the European Convention on Human Rights* Vol. 1 (Articles 1-5) 100-101. The European Commission also attempted to lay down the parameters of article 3 in *Ireland v United Kingdom* (1978) 2 EHRR 25). The Commission stated that inhuman treatment and/or punishment will be so classified if ill-treatment causes “intense physical and mental suffering”; and treatment will be deemed to fall within the category of degrading treatment and/or punishment of article 3 (European Convention) violation if it is adjusted as to arouse in a victim the feeling of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical and moral resistance (paras 159 & 167).

In view of the above, and as seen from the jurisprudence examined in this chapter, the death penalty is cruel and inhuman treatment or punishment as it causes mental suffering and arouses the feeling of fear and anguish in a death row inmate, and physical suffering during execution of the sentence.

It should be noted that, cruel punishment is clearly not a static notion; it reflects the evolving standards of decency that mark the progress of a maturing society.⁴ The question that arises then is – what are the indicators of evolving standards of decency? In *Furman v Georgia*, Justice Powell briefly summarised the proffered indicia of contemporary standards of decency in relation to the death penalty, which included the following: First, a worldwide trend towards the disuse of the death penalty; second, the reflection in the scholarly literature of a progressive rejection of capital punishment founded essentially on moral opposition to such treatment; third, the decreasing numbers of executions over the last 40 years and especially over the last decade; fourth, the small number of death sentences rendered in relation to the number of cases in which they might have been imposed; and lastly, the indication of public abhorrence of the penalty reflected in the circumstances that executions are no longer public affairs.⁵

The above implies that if the death penalty was not considered cruel, inhuman or degrading, for example, in the early 1990s, it may be considered so at present. A punishment can be cruel either because it inherently involves so much physical pain and suffering that civilised people cannot tolerate or because it is excessive and serves a legislative purpose that an alternative punishment could still serve. Even if a punishment serves a valid legislative purpose, it can still be unconstitutional because it is harsh, dehumanising or abhorrent to currently existing moral values. On the whole, if the above indicators are positive (which is the case), the death penalty is, therefore, a cruel, inhuman and degrading treatment or punishment.

⁴ Schabas (1996) 21.

⁵ *Furman v Georgia* (1972) 408 U.S. 238 at 434; In this case, the United States (US) Supreme Court held that the imposition and carrying out of the death sentence in the present cases constituted cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments of the United States Constitution. It should be noted that this decision was later overturned in 1976, when the US Supreme Court ruled in *Gregg v Georgia* (1976) 428 U.S. 153 that the punishment of death for murder does not violate the Eighth and Fourteenth Amendments.

A plethora of international human rights instruments and national constitutions, as seen below, prohibit “torture or cruel, inhuman and degrading treatment or punishment”. Although the main focus of this chapter is on “cruel, inhuman or degrading treatment or punishment”, it is important at this point to briefly look at the relation between the “prohibition of torture” and the death penalty, as it is crucial in the context of the death row phenomenon (discussed below) and methods of execution. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention against Torture or CAT)⁶ defines torture to mean

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁷

On the face of it, the death penalty is exempted from the above definition, as the last sentence explicitly excludes “pain or suffering arising only from, inherent in or incidental to lawful sanctions”. Therefore, it is questionable whether the death row phenomenon and executions may invoke a violation of the prohibition of torture. However, as would be seen in the cases discussed in this chapter, it is accepted that a certain amount of mental anguish or suffering is incidental to the imposition of the death penalty. Thus, although the death row phenomenon and executions might not invoke a violation of torture under the UN Convention against Torture, as the death penalty is a lawful punishment, there are elements of torture involved in the imposition of the death penalty, such as “mental pain or suffering” with regard to the death row phenomenon, and “physical pain or suffering” as regards the execution.

⁶ Adopted by the UN General Assembly, resolution 39/46 of 10 December 1984, entered into force on 26 June 1987.

⁷ Article 1(1) of the UN Convention against Torture. It should be noted that unlike “torture”, the “cruel, inhuman or degrading treatment or punishment” is not defined in any of the international human rights instruments or national constitutions referred to in this chapter. As will be seen in the cases discussed in this chapter, distinctions have been drawn between the various components of this prohibition.

This chapter examines the death penalty in Africa in the context of the prohibition against cruel, inhuman and degrading treatment or punishment. The chapter begins by looking at the prohibition of cruel, inhuman or degrading treatment or punishment in international human rights instruments (under the UN and African human rights systems) and in African national constitutions, and their subsequent interpretations. Like in the previous chapter, developments in the European and Inter-American human rights systems are also highlighted, as they are a source of inspiration for the African human rights system.

Further, since the cruelty of the death penalty is manifested in both the time spent under sentence of death and in the execution, the chapter examines the death row phenomenon and methods of execution, which both invoke a violation of the prohibition of cruel, inhuman or degrading treatment or punishment. The jurisprudence of African national courts, including those of other national courts and international instances on the death row phenomenon and methods of execution as cruel, inhuman and degrading, are discussed.

5.2 Prohibition of cruel, inhuman or degrading treatment or punishment under the United Nations human rights system

5.2.1 The Universal Declaration of Human Rights

Article 5 of the UDHR provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Article 5 has not been subjected to interpretation in relation to the death penalty. However, as mentioned in the previous chapter, the UDHR is an abolitionist instrument by virtue of article 3, which envisages abolition.⁸ Moreover, the *travaux préparatoires* to the UDHR reveal that the death penalty was seen as a cruel, inhuman and degrading treatment. During the drafting of the UDHR, Cassin, obviously influenced by earlier discussions on the subject of capital punishment and the need to delete any mention of the death penalty from the draft right to life article, proposed the following provision on the right to life:

⁸ Article 3 of the UDHR guarantees the right to life. See chapter four for an interpretation of this article.

Article 7. Every human being has the right to life and to the respect of his physical inviolability. No person, even if found guilty, may be subjected to torture, cruelty or degrading treatment.⁹

Thus, in addition to considering the death penalty as a necessary evil, one whose existence could not be justified on philosophical or scientific grounds,¹⁰ the above draft provision shows that the death penalty was viewed as cruel, inhuman and degrading treatment. In this regard, the application of the death penalty in Africa is, therefore, a violation of the prohibition of cruel, inhuman or degrading treatment or punishment as guaranteed under article 5 of the UDHR.

5.2.2 The International Covenant on Civil and Political Rights

Article 7 of the ICCPR prohibits cruel, inhuman or degrading treatment or punishment. Just as the right to life is a non-derogable right, the right not to be subjected to cruel, inhuman or degrading treatment or punishment must be protected at all times, as article 4(2) of the ICCPR prohibits any derogation from article 7, even in time of public emergency that threatens the life of the nation. Since article 7 is non-derogable, the UN Human Rights Committee considers reservations to article 7 not to be compatible with the ICCPR's object and purpose. The Committee has, thus, stated that "a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment".¹¹ Similarly, the prohibition against cruel, inhuman and degrading treatment or punishment under

⁹ UN Doc. E/CN.4/AC.1/W.2/Rev.1, also published as Annex D of UN Doc. E/CN.4/21 (see Schabas (2002) 30-31).

¹⁰ Schabas (2002) 42.

¹¹ UN Human Rights Committee, General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 4 November 1994, para 8 (UN Doc. CCPR/C/21/Rev.1/Add.6), hereinafter referred to as CCPR General Comment No. 24. However, it should be noted that two reservations concerning article 7 have been made. The government of Botswana has made a reservation to the effect that it considers itself bound by article 7 to the extent that "torture, cruel, inhuman or degrading treatment" means torture inhuman or degrading punishment or other treatment prohibited by section 7 of the Constitution of the Republic of Botswana (see Heyns (2004) 53). The United States also made a similar reservation (see Schabas (2002) 382).

article 3 of the European Convention¹² and article 5(2) of the American Convention¹³ are non-derogable.

The Human Rights Committee has elaborated on article 7 in its General Comment No. 20, in which it stated that the aim of article 7 is to protect both the dignity and the physical and mental integrity of the individual.¹⁴ Thus, the right to respect one's inherent dignity guaranteed under article 10 of the ICCPR is also of relevance when dealing with article 7. The prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.¹⁵ The Committee also noted that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7.¹⁶ This implies that prolonged (solitary) confinement on death row, as discussed subsequently, constitutes a violation of article 7 of the ICCPR. The Committee found the imposition of the death penalty in some cases to constitute cruel, inhuman and degrading treatment, in violation of article 7 of the ICCPR.¹⁷

¹² Article 15(2) of the European Convention prohibits derogation from article 3, even in time of war or other public emergency threatening the life of the nation. Thus, the prohibition under article 3 is an absolute one, with no acceptable justifications under the Convention or under International law for acts in breach of the provision. It should be noted that in order to strengthen the protection of persons against torture and inhuman or degrading treatment or punishment, the Council of Europe adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted on 26 November 1987, entered into force on 1 February 1989 (E.T.S. 126)). Article 1 of this Convention establishes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which shall examine the treatment of persons with a view to strengthening the protection of their right under article 3 of the European Convention. The CPT has published a set of standards relevant in ensuring protection of persons against torture and inhuman or degrading treatment or punishment (For these standards, see "The CPT Standards" <<http://www.cpt.coe.int/en/docsstandards.htm>> (accessed 17 August 2004))

¹³ Article 27(2) of the American Convention recognises the right to human treatment under article 5 as non-derogable, even in time of war, public danger or other emergency.

¹⁴ UN Human Rights Committee, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (article 7 of the ICCPR), 10 March 1992, para 2, hereinafter referred to as CCPR General Comment No. 20.

¹⁵ CCPR General Comment No. 20, para 5.

¹⁶ CCPR General Comment No. 20, para 6.

¹⁷ See 5.5.2.1 and 5.6.1 below for an examination of the Committee's jurisprudence.

5.2.3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The UN Convention against Torture (or CAT) is examined in this study as it has been ratified by 39 African states, signed by eight and six are still to ratify and sign the Convention.¹⁸ The UN General Assembly's desire to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world saw the adoption of CAT. CAT deals mainly with torture, but obliges state parties to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1.¹⁹ Therefore, as noted earlier, though it is questionable whether the application of the death penalty does amount to torture despite the fact that it has elements of torture, it is prohibited under article 16 of CAT.

5.2.4 Other United Nations standards

Other UN standards prohibiting cruel, inhuman or degrading treatment or punishment are considered as they form part of customary international law. These standards include, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁰ Article 1(1) of this Declaration incorporates the definition of torture in article 1(1) of the UN Convention against Torture. Unlike the Convention against Torture, which focuses mainly on torture, this Declaration focuses both on torture and on cruel, inhuman and degrading treatment or punishment. Article 2 of the Declaration provides:

Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

¹⁸ See "Status of ratifications of the principal international human rights treaties" <<http://www.unhchr.ch/pdf/report.pdf>> (accessed 31 March 2005).

¹⁹ Article 16 of the UN Convention against Torture. See also articles 10, 11, 12 and 13 of the same Convention.

²⁰ Adopted by the UN General Assembly, resolution 3452 (XXX) of 9 December 1975.

Article 3 goes further to prohibit derogation from the above prohibition in time of emergency or other exceptional circumstances. Since, as seen subsequently, the death penalty is cruel, inhuman and degrading, it implies that it has to be condemned and should be abolished as article 3 of the Declaration prohibits states from permitting or tolerating cruel, inhuman or degrading treatment or punishment. Other UN standards relevant to the enforcement of the prohibition of cruel, inhuman or degrading treatment or punishment include, the Standard Minimum Rules for the Treatment of Prisoners²¹ and the Basic Principles for the Treatment of Prisoners.²²

5.3 Prohibition of cruel, inhuman and degrading treatment or punishment in the African human rights system

5.3.1 The African Charter on Human and Peoples' Rights

Article 5 of the African Charter provides that

[e]very individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of ... cruel, inhuman or degrading punishment and treatment shall be prohibited.²³

With regard to the death penalty, the African Commission, as seen below, has had the opportunity to address issues relating to alleged violations of article 5 in one of the cases before it.

²¹ UN Economic and Social Council (ECOSOC) resolution 663 CI (XXIV) of 31 July 1957.

²² UN General Assembly resolution 45/111 of 14 December 1990.

²³ The right to respect of one's dignity is the only right in the African Charter described as "inherent in a human being".

5.3.2 The African Commission on Human and Peoples' Rights

In *Interights et al (on behalf of Bosch) v Botswana*,²⁴ the African Commission had to address, amongst others, the following issues: First, was the sentence of death in the case a disproportionate penalty and hence a violation of article 5 of the African Charter? Second, does the failure to give reasonable notice of the date and time of execution amount to cruel, inhuman and degrading punishment and treatment in breach of article 5 of the African Charter?

With regard to the first issue on whether the sentence of death in the case was a disproportionate penalty, the Commission found no basis for finding a violation of article 5 of the African Charter. This is because, as the Commission noted, it was not established that the Courts in this case failed to consider the full circumstances before imposing the death penalty.²⁵ In dealing with this issue, the Commission erroneously noted that “there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed”.²⁶ As seen in the previous chapters of this study and in the subsequent chapter, article 6 of the ICCPR and other UN standards (such as the ECOSOC safeguards discussed in chapter six), for example, prescribe circumstances under which the death penalty may be imposed.

Unfortunately, the Commission did not deal with the substance of the second issue above - the failure to give reasonable notice of the date and time of the execution. The Commission stated that if it deals with the issue, it would be unfair to the respondent state, as the issue had not been communicated to the state.²⁷ The Commission at this stage gave priority to procedure at the expense of substance. The communication of the issue to the state is a matter of procedure, and as an independent body, the

²⁴ *Interights et al (on behalf of Bosch) v Botswana*, Communication 240/2001, *Seventeenth Annual Activity Report: 2003-2004* (African Commission), hereinafter referred to as *Bosch* (African Commission). See chapter four (4.3.2) for the facts of the case.

²⁵ *Bosch* (African Commission), paras 31 & 37.

²⁶ *Bosch* (African Commission), para 31.

²⁷ *Bosch* (African Commission), para 41.

Commission should give its opinion on substantive issues, which it failed to do in this case.

Nevertheless, it is clear from the Commission's decision that, if the second issue had been considered, it would have found a violation of article 5. This can be deduced from the Commission's statement that "a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best as he can, to face his ultimate ordeal".²⁸ If the issue was considered, it would have been likely for the Commission to find a violation of article 5 because Bosch was executed without given reasonable notice of the date and time of execution or without informing her family.

Although the African Commission did not find a violation of article 5 in the above case, it is worth noting that the Commission has found the following to be cruel, inhuman and degrading treatment, constituting a violation of article 5 of the African Charter: detention (imprisonment) of persons under deplorable conditions, constituting a violation of their physical integrity;²⁹ detention of a person without permitting him to have contact with his family and refusing to inform his family whether the individual is being held and his whereabouts, amounting to inhuman treatment of both the detainee and the family concerned;³⁰ holding prisoners in

²⁸ As above.

²⁹ See *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, Communications 68/92 and 78/92, *Eight Annual Activity Report: 1994-1995*, para 7; *Organisation Mondiale Contre la Torture and Others v Rwanda*, Communications 27/89, 46/91, 49/91 and 99/93, *Tenth Annual Activity Report: 1996-1997*, (2000) AHRLR 282 (ACHPR 1996) paras 26-27; and *Huri-Laws v Nigeria*, Communication 225/98, *Fourteenth Annual Activity Report: 2000-2001*; (2000) AHRLR 273 (ACHPR 2000) para 40.

³⁰ See *Amnesty International and Others v Sudan*, Communications 48/90, 50/91, 52/91 and 89/93, *Thirteenth Annual Activity Report: 1999-2000*; (2000) AHRLR 297 (ACHPR 1999) para 54.

solitary confinement,³¹ and arbitrary detention of a person without him knowing the reason or duration of detention.³²

5.4 Prohibition of cruel, inhuman and degrading treatment or punishment in African national constitutions

As noted in the previous chapter, the constitution is the supreme law of the land in most legal systems. An examination of the above prohibition in national constitutions is necessary to identify what causes obstruction to constitutional challenges to the death penalty in Africa.

Most African national constitutions prohibit cruel, inhuman or degrading treatment or punishment. Some constitutions do not have provisions on cruel, inhuman or degrading treatment or punishment.³³ Therefore, in Madagascar and Morocco, where there is not a provision on the above prohibition (and on the right to life), and in Senegal, where the right to life is unqualified, with no provision on the above prohibition, there is possibility to challenge the death penalty by relying on the above two rights.³⁴ Also, there is possibility to challenge the death penalty on the ground that it is cruel, inhuman and degrading in Liberia and Tunisia, for example, since it is difficult to rely on the qualified right to life provision in their constitutions. However,

³¹ See *Malawi African Association and Others v Mauritania*, Communications 54/91, 61/91, 98/93, 164-196/97 and 210/98, *Thirteenth Annual Activity Report: 1999-2000*; (2000) AHRLR 149 (ACHPR 2000) para 115.

³² See *Huri-Laws v Nigeria*, Communication 225/98, *Fourteenth Annual Activity Report: 2000-2001*; (2000) AHRLR 273 (ACHPR 2000) para 40. In addition, to further the implementation of existing provisions on the prohibition of torture and cruel, inhuman or degrading treatment or punishment, the African Commission adopted the “Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa” (Robben Island Guidelines), which was previously adopted by the “Robben Island Workshop on Torture”. The Commission adopted these guidelines during its Thirty-second Ordinary Session, held in Banjul, The Gambia, from 17-23 October 2002. See “Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment”, available at website <http://www.achpr.org/english/resolutions/resolution66_en.html> (accessed 19 April 2005).

³³ These include the Constitutions of Equatorial Guinea (1991), Liberia (1984), Madagascar (1998), Rwanda (1991), Senegal (2001), Tanzania (1995) and Tunisia (1991). Also, there is no such provision in Somalia, as the Constitution was suspended on 27 January 1991 (see Heyns (2004) 1505) and in Swaziland, as the country presently has no constitution.

³⁴ The right not to be subjected to cruel, inhuman and degrading treatment or punishment and the right to life.

this is restricted in countries where the constitution has a limitation or derogation clause (discussed below).

It should be noted that the constitutions do not use the same terminology. Also, the treaties do not employ uniform terminology. For example, the UDHR, ICCPR and American Convention protect against torture, or cruel, inhuman or degrading treatment or punishment, the European Convention omits the word “cruel”, as it protects against torture or inhuman or degrading treatment or punishment, and the American Declaration (and the Constitution of the United States, Eighth Amendment) protects against cruel (infamous) and unusual punishment.

In African national constitutions, while most constitutions employ the words “treatment” and “punishment” together, the Constitution of Cameroon 1996, for example, uses just the word “treatment”. So the question that comes to mind is: Are punishments that are cruel, inhuman or degrading allowed in Cameroon? Cameroon has signed and ratified other human rights instruments that prohibit cruel, inhuman or degrading punishment. Therefore, though the national constitutions (and treaties) do not employ uniform terminology, the underlying concept, which is to prohibit cruel, inhuman or degrading treatment or punishment, is the same. Since the underlying concepts are the same, a proper interpretation and application of the word “treatment” in the Constitution of Cameroon would include the word “punishment”.³⁵ In this regard, Hudson has pointed out that

[w]hile the terminology is different, it is submitted that the underlying concept is the same. Each clause, in each national and international instrument, was adopted to protect persons from unnecessary and undue suffering. [Therefore,] it is the interpretation and application which is important.³⁶

Similar to the right to life provisions in African national constitutions, as discussed in the previous chapter, the prohibition of cruel, inhuman or degrading treatment is

³⁵ It should be noted that in the absence of the Constitutional Council, a body with full jurisdiction in all matters pertaining to the interpretation and application of the Constitution, the enforceability and justiciability of the rights guaranteed in the Constitution of Cameroon remains untested.

³⁶ Hudson (2000) 817.

either qualified or unqualified. This prohibition is qualified either by subjecting the provision to the law or exempting the death penalty from the provision. Examples of constitutions subjecting the above provision to the law include the following:

Article 7 of the Constitution of Botswana 1999:

- (1) No person shall be subjected to ... inhuman or degrading punishment or other treatment
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the former Protectorate of Bechuanaland immediately before the coming into operation of the Constitution.

In the same way, article 74 of the Constitution of Kenya 1999 states:

- (1) No person shall be subject to ... inhuman or degrading punishment or other treatment.
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment that was lawful in Kenya on 11 December 1963.

Similar provisions are contained in the Constitutions of Lesotho (article 8(1) and (2)) and Sierra Leone (article 20(1) and (2)). The Constitution of Zimbabwe 2000 is the only African constitution that explicitly exempts the method of execution and delay in the execution of the death sentence from the prohibition of inhuman and degrading treatment or punishment. Article 15(1), (4) and (5) provides:

- (1) No person shall be subjected to ... inhuman or degrading punishment or other such treatment.
- (4) The execution of a person who has been sentenced to death by a competent court in respect of a criminal offence of which he has been convicted shall not be held to be in contravention of subsection (1) solely on the ground that the execution is carried out in the manner prescribed in section 315(2) of the Criminal Procedure Evidence Act [Chapter 59] as that section existed on 1 October 1990.
- (5) Delay in the execution of a sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be in contravention of subsection (1).

Article 15(6) goes further to prohibit a stay, alteration or remission of any sentence on the ground that, since the sentence was imposed, there has been a contravention of subsection (1), prohibiting inhuman or degrading punishment or treatment. The formulation of the above articles presents an obstruction to challenges to the death penalty in Zimbabwe, with regard to the constitutionality of the death penalty or method of execution, based on the prohibition of cruel, inhuman and degrading treatment or punishment. It is worth noting that article 15(4) and (5) was drafted in this manner due to some of the (successful) challenges to the death penalty, in which the challenge was based on article 15(1) of the Constitution of Zimbabwe.³⁷

Furthermore, as stated earlier, some national constitutions prohibit cruel, inhuman or degrading treatment in clearly unqualified terms, thus making it possible to rely on the provisions to challenge the death penalty.³⁸ Reliance on the prohibition of cruel, inhuman or degrading treatment or punishment is restricted by the presence of a limitation or derogation clause in some national constitutions. For example, article 24 of the Constitution of Uganda provides in clearly unqualified terms that no person shall be subjected to any form of cruel, inhuman or degrading treatment or punishment. Article 44(a) further provides that notwithstanding anything in this Constitution there shall be no derogation from the enjoyment of the freedom from cruel, inhuman or degrading treatment or punishment. Conversely, article 43 provides for the limitation of fundamental rights and freedoms in the public interest.³⁹ This

³⁷ In *Chileya v S* (1990) SC 64/90 (unreported), the Supreme Court of Zimbabwe had to decide on whether execution by hanging contravened section 15(1) of The Zimbabwean Constitution, providing that “no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment”. The government pre-empted this by amending section 15 of the Constitution, specifically upholding the constitutionality of executions by hanging (See *Republic v Mbushuu and Another* (1994) 2 LRC 335, 345; and *Hatchard & Coldham* (1996) 170). Also, in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others* 1993 (1) ZLR 242 (discussed below), the Supreme Court of Zimbabwe found delay in carrying out executions to be unconstitutional, thus requiring the commutation of the death sentences of the applicants to life imprisonment. The government again amended the Constitution by the passing of the Constitution of Zimbabwe Amendment (No 13) Act 1993 which retrospectively exempted the death penalty from the scope of section 15(1).

³⁸ See, for example, the Constitutions of Algeria (1996, article 34); Benin (1990, article 18); Cameroon (1996, preamble); Chad (1996, article 18), Congo (2001, article 9); Libya (1977, article 31(c)); Mali (1993, article 3); and Togo (1992, article 21).

³⁹ With regard to limitations of (restrictions on), and derogations from, rights, see also the Constitutions of Burundi (2001, article 50); Eritrea (1997, articles 26 & 27); The Gambia (2001, articles 17(2) & 35); Ghana (1996, article 31(10)); Guinea (1990, article 22); Malawi (2001, article 44); and Nigeria (1999, article 45).

appears to place a restriction on relying on article 24 to challenge the constitutionality of the death penalty in Uganda.

Nevertheless, the Supreme Court of Uganda, acting as a Constitutional Court of Appeal in *Attorney General v Abuki*, unanimously held that the right to dignity and the right not to be subjected to inhuman treatment or punishment, when read with article 44(a), is “absolute and unqualified”.⁴⁰ The Supreme Court was, therefore, of the opinion that there were no conceivable circumstances that would justify a derogation from the above right.

Based on the above and other decisions in which article 44(a) has been interpreted, there is currently (at the time of writing) a case before the Constitutional Court of Uganda, in which 417 persons on death row are challenging the constitutionality of the death penalty on the ground that it is cruel, inhuman and degrading treatment or punishment.⁴¹ It would be interesting to see if the Court will arrive at the same conclusion as that in the *Abuki* case.

Also, the Constitution of Tanzania 1995, has an unqualified provision on cruel, inhuman or degrading treatment but has a limitation clause, which restricts any challenges to the death penalty on the ground that it is cruel, inhuman or degrading. Article 30(2) of the Constitution of Tanzania allows derogation from basic rights of the individual in public interest. In the case of *Republic v Mbushuu and Another*, the constitutionality of the death penalty was raised with regard to the right to life, right to

⁴⁰ *Attorney General v Abuki* (2001) 1 LRC 63, 88.

⁴¹ *Susan Kigula and Others v The Attorney General*, The legal challenge to capital punishment in Uganda: 1st draft of submissions on the proposed issues framed for determination before the Constitutional Court of Uganda, prepared by M/s Katende, Ssempebwa & Co. Advocates. The petition seeks to challenge the death penalty on the following grounds: First, first, the imposition of the death penalty on the petitioners is inconsistent with and in contravention of articles 20, 24 and 44(a) of the Ugandan Constitution, read together. Second, in the alternative and without prejudice to the foregoing, mandatory death sentences are unconstitutional because they are inconsistent with and in contravention of articles 20, 21, 22, 24, 28 and 44 of the Ugandan Constitution. Third, without prejudice to the above, death by hanging, which is the legally prescribed method of execution in Uganda is contrary to articles 24 and 44(a) of the Ugandan Constitution. Fourth, without prejudice to the above, the lengthy intervening period between the Conviction and execution that has been endured by the majority of the petitioners on death row, makes what might have previously and otherwise been a lawful punishment, now exceedingly cruel, degrading and inhuman, and therefore unconstitutional.

dignity and right not to be subjected to cruel, inhuman and degrading punishment.⁴² The High Court found the death penalty to be inherently cruel, inhuman and degrading and also that it offends the right to dignity in the course of executing the sentence.⁴³

Based on the High Court's interpretation of article 30(2), it found the death penalty not to be in the public interest and, therefore, unconstitutional.⁴⁴ Since concepts like cruel inhuman and degrading are subject to evolving standards of decency, the High Court based its finding on factors such as: the possibility of erroneous convictions, including the fact that most poor defendants did not receive adequate legal representation; the fact that the sentences of life imprisonment provided protection against violent crime no less effective than the death sentence; and the mode of execution, the inhumane conditions on death row and delays.⁴⁵

On appeal, the Court of Appeal agreed to these standards of decency and that the death penalty was inherently inhuman, cruel and degrading punishment,⁴⁶ but declared it constitutional as it was saved by article 30(2) of the Constitution.⁴⁷ The Court noted that whether or not a legislation, which derogates from a basic right of an individual is in the public interest depends on first, its lawfulness (it should not be arbitrary) and second, the limitation imposed should not be more than reasonably necessary.⁴⁸ The Court found the law prescribing the death penalty not to be

⁴² *Republic v Mbushuu and Another* (1994) 2 LRC 335, 340, hereinafter referred to as *Mbushuu* (1994).

⁴³ *Mbushuu* (1994) 351. The Court noted that it is not just the final act of stringing up the prisoner that is an ugly matter but also the protracted torment to which he is subjected before execution.

⁴⁴ *Mbushuu* (1994) 358.

⁴⁵ *Mbushuu* (1994) 342-351.

⁴⁶ *Mbushuu and Another v Republic* (1995) 1 LRC 216, 228, hereinafter referred to as *Mbushuu* (1995).

⁴⁷ *Mbushuu* (1995) 232.

⁴⁸ *Mbushuu* (1995) 229.

arbitrary;⁴⁹ and whether it is reasonably necessary is for society to decide, and since the society favours the death penalty, it is thus saved by article 30(2).⁵⁰

The Tanzanian case illustrates the restriction placed on challenges to the death penalty by limitation or derogation clauses. However, the extent to which a limitation clause will affect a constitutional challenge to the death penalty would depend largely on the way the courts interpret and apply the limitation provision.⁵¹ It is important for courts, when interpreting limitation or derogation clauses, to have in mind the underlying object of the provision guaranteeing the right in question, as it was adopted to protect against a violation of the particular right. The fact that the prohibition of cruel, inhuman or degrading treatment or punishment is seen in most jurisdictions as non-derogable should also be borne in mind.

5.5 The death row phenomenon

The unique horror of the death penalty is that from the moment the sentence is pronounced, the prisoner is forced to contemplate the prospect of being taken away to be put to death at an appointed time.⁵² Some writers have expressed concern regarding the character of life on death row, where condemned prisoners await the outcome of their legal appeals or execution.⁵³ Some prisoners in African countries endure a hard life on death row, suffering under difficult conditions often for decades.⁵⁴ Under such circumstances, prolonged confinement on death row subjects them to treatment that

⁴⁹ *Mbushuu* (1995) 230

⁵⁰ *Mbushuu* (1995) 232. As mentioned in the previous chapter, Justice Chaskalson has expressed his disagreement with the above decision, noting the court's duty is to interpret the constitution and uphold its values; thus it is for the court and not society or parliament to decide whether the death penalty is justifiable under a limitation clause or whether it is reasonably necessary in order to protect life (*S v Makwanyane* 1995 (3) SA 391 (CC), para 115).

⁵¹ See, for example, the case of *S v Makwanyane*, discussed in 5.5.4.2 below.

⁵² Amnesty International (1989) 61.

⁵³ For example, see Johnson (1990) ix.

⁵⁴ Amnesty International "Africa: Report gives mixed review of Africa's death penalty record" <http://www.oneworld.org/amnesty/press/18apr_africa.html> (accessed 10 July 2003).

does not respect their human dignity, amounting to cruel, inhuman and degrading treatment or punishment.

Hudson has defined the death row phenomenon as “prolonged delay under the harsh conditions of death row”.⁵⁵ It is clear from the above definition that “long delays” alone or “harsh conditions” are insufficient to constitute the death row phenomenon. The “long delays” must be accompanied with harsh conditions or vice versa for it to constitute the death row phenomenon. Hudson is of the view that harsh conditions alone are not sufficient as they can be justified for security reasons; and delay alone is insufficient to constitute the death row phenomenon, as there is the complication of defining the appropriate period of delay.⁵⁶ Thus both have to go together.

However, it should be noted that prolonged delay, taken together with other factors (irrespective of harsh conditions) would constitute the death row phenomenon. Prolonged delay, taken together with uncertainty for example, could constitute the death row phenomenon, because if a prisoner is uncertain about when he would be executed, even if the conditions on death row are not harsh, the prisoner still agonises and deteriorates, leading to mental pain or torture. In other words, the uncertainty can lead to mental deterioration or suffering.

The UN Special Rapporteur on torture observed, with regard to prolonged delays, in his 1988 report to the UNCHR that “if persons who have been sentenced to death have to wait for long periods before they know whether the sentence will be carried out or not” and if the uncertainty lasts several years, the psychological effect may be equated with severe suffering, often resulting in serious physical complaints.⁵⁷ Thus, the accompanying factor of prolonged delay is not just harsh conditions, but could also be other factors, such as, the factor of uncertainty leading to severe mental suffering or mental imbalance.

⁵⁵ Hudson (2000) 836.

⁵⁶ Hudson (2000) 836.

⁵⁷ Amnesty International (1989) 62-63.

Schmidt refers to the death row phenomenon as “the situation and treatment of individuals sentenced to death and awaiting execution for many years under particularly harsh conditions of detention”.⁵⁸ This definition appears broader, as, in my view, other compelling factors could be read into “the situation and treatment of individuals sentenced to death”.

Since the concept of the death row phenomenon is still developing, the definitions of the concept are contradictory in the available jurisprudence. However, the jurisprudence on the death row phenomenon discussed below show that prolonged delay together with further compelling factors or prolonged delay and harsh conditions would constitute the death row phenomenon. The jurisprudence and above definitions identify two main elements of the death row phenomenon - prolonged delay and conditions on death row. The death row phenomenon has, thus, occupied both the highest appellate judicial bodies of many countries and a number of international instances in recent years.

Some countries have withdrawn from international human rights instruments because of endless challenges regarding the death row phenomenon in their countries. For example, Jamaica decided to withdraw from the Optional Protocol to the ICCPR⁵⁹ since it was facing numerous challenges with the UN Human Rights Committee in relation to the death row phenomenon. Jamaica announced on 23 October 1997, during the examination of its second periodic report under article 40 of the ICCPR by the Human Rights Committee, that it would denounce the Optional Protocol to the ICCPR.⁶⁰ Jamaica’s denunciation came after the Human Rights Committee concluded

⁵⁸ Schmidt (2000) 47-48.

⁵⁹ Jamaica denounced the Protocol on 23 October 1997 alleging that the hearing of complaints pending against Jamaica by the HRC (set up under the ICCPR) is time consuming and the process prevents the carrying out of executions – the government of Jamaica was of the view that there was a real possibility that all death sentences will be commuted. See Heyns & Viljoen (2002) 353 – 354. See also Nowak (1999) 80.

⁶⁰ Schmidt (2000) 70. Article 40 of the ICCPR requires state parties to the ICCPR to submit reports on the measures they have taken which give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of those rights. The Human Rights Committee then studies the reports and transmits its reports, and such general comments as it may consider appropriate, to the state parties. These comments, along with copies of the state parties’ reports are also transmitted to the Economic and Social Council.

from a series of cases submitted to it by those on death row in Jamaica that the rights of those sentenced to death is not respected.⁶¹

Similarly, the government of Trinidad and Tobago submitted to the UN Secretary-General, on 26 May 1998, a note relating to the denunciation of the Optional Protocol to the ICCPR.⁶² But by a second note on the same day, Trinidad and Tobago re-acceded to the Optional Protocol. Its instrument of accession included a reservation excluding the competence of the Human Rights Committee to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, detention, trial, conviction and sentence, or the carrying out of the death sentence on him and any matter connected therewith.⁶³ The governments of Denmark, Norway, The Netherlands, Germany, Sweden, Ireland, Spain, France and Italy have expressed their disapproval of the above reservation, as it appears to be unquestionably incompatible with the object and purpose of the Optional Protocol.⁶⁴

The subsequent paragraphs examine first, the main elements of the death row phenomenon, which are prolonged delay and the conditions on death row. Then the jurisprudence on the death row phenomenon of international instances and national courts are examined, which show that the death row phenomenon has been explicitly recognised as a violation of human rights. The jurisprudence of the UN Human Rights Committee, the European Court, African and other national courts are discussed.

⁶¹ Jamaica's withdrawal came into effect on 23 January 1998, See "AI Report 1999: Jamaica" <<http://www.amnesty.org/ailib/aireport/ar99/amr38.htm>> (accessed 10 July 2003).

⁶² Schmidt (2000) 71.

⁶³ Schabas (2002) 389. The above reservation was entered despite the Human Rights Committee's General Comment No 24, in which it stated that reservations that offend peremptory norms would not be compatible with the object and purpose of the ICCPR or the Optional Protocol (para 8). The Committee also stated that the object and purpose of the Optional Protocol is to recognise the competence of the Human Rights Committee to receive and consider communications from individuals who claim to be victims of a violation of the rights in the ICCPR. The Committee stated further that because of this object, a reservation that seeks to preclude this would be contrary to the object and purpose of the Optional Protocol, even if not of the ICCPR (para 13).

⁶⁴ Schabas (2002) 390-394.

5.5.1 Main elements of the death row phenomenon

5.5.1.1 Prolonged delay

The death penalty, when preceded by long confinement and administered bureaucratically, dehumanises both the agents and recipients of this punishment and amounts to a form of torture.⁶⁵ Waiting to be executed or wondering for a long period of time whether or not one will be successful in avoiding execution undoubtedly causes stress. Delays between the time of sentencing and the time of execution have steadily increased in length, and more often than not are measured in years.⁶⁶ In some African states, people have spent over 10 years on death row.⁶⁷

The factors that cause these delays include, firstly, the development of national and international procedures of appeal, and the proliferation in laws that protect the prisoner's rights. Appeals to human rights tribunals, for instance the UN Human Rights Committee, have expanded thus lengthening the time needed to dispose of a case. Unfortunately, the multiplication of such laws and appeals has a negative outcome. It has led to the withdrawal of some countries from international human rights treaties. For example, as mentioned above, Jamaica has withdrawn from the Optional Protocol to the ICCPR. Trinidad and Tobago has also withdrawn from the American Convention on Human Rights.⁶⁸

Secondly, the prisoner's willingness to accept delay is a factor for delay. Prisoners accept delay, even if it constitutes cruelty, because they are hoping that they might be successful in avoiding execution. Delay in judicial proceedings that have been

⁶⁵ Hood (2002) 109.

⁶⁶ Hudson (2000) 834. For example, the average length of time between sentence and execution in the United States has steadily increased from 51 months in 1977 to 133 months in 1997. See Bureau of Justice Statistics on capital punishment "Time under sentence of death and execution 1977 – 1997 (1997) 20, table 12, referred to in Hudson (2000) 834.

⁶⁷ For examples, see chapter three (2.4.3) of this thesis.

⁶⁸ Trinidad and Tobago notified the Secretary General of the Organisation of American States of its denunciation of the American Convention on 26 May 1998. In accordance with article 78(1) of the American Convention, the denunciation came into effect one year from the date of notification (see *Basic documents pertaining to human rights in the Inter-American system*, OEA/Ser.L/V/I.4 Rev.9, 31 January 2003 at 69).

attributable to the prisoners has been held to be the responsibility of the state or the appellate system, and not that of the prisoner. In *Pratt and Morgan v Attorney General of Jamaica et al*, Lord Griffith observed as follows:

A State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of the human condition that a condemned man will have every opportunity to save his life through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delays and not to the prisoner who takes advantage of it.⁶⁹

In *Barret and Sutcliffe v Jamaica*, Chanet, in a dissenting opinion, argued that

[a] very long period [of detention] on death row, even if partially due to the failure of the condemned prisoner to exercise a remedy, cannot exonerate the State party from its obligations under article 7 of the [ICCPR].⁷⁰

Thirdly, the decreasing support for the death penalty is a factor for delay. State officials grant stays of execution or remand a case for further review if they do not want to bear the responsibility for executing a prisoner. In Africa, as noted in chapter two, the clemency process in itself, which is automatic, for example, in common law systems, takes a very long time in most cases. It takes a considerable length of time for execution warrants to be signed.

The reasons for the long clemency process are political, procedural and religious. States are sensitive to public opinion and more cautious in their approaches to execution. For example, it has been reported that the Zambian president's refusal to sign execution orders is because he is a Christian.⁷¹ Thus, because of the president's

⁶⁹ *Pratt and Morgan v Attorney General of Jamaica et al*, Privy Council Appeal No. 10 of 1993, judgment delivered on 2 November 1993 (Judicial Committee of the Privy Council) at 20, hereinafter referred to as *Pratt and Morgan* (Privy Council).

⁷⁰ *Barret and Sutcliffe v Jamaica*, Communications 270/1988 and 271/1988, UN Doc. A/47/40, views adopted on 30 March 1992. See *Official records of the Human Rights Committee* 1991/92, Vol. II (1995) 388-390, para 8.4, hereinafter referred to as *Barret and Sutcliffe* (Human Rights Committee).

⁷¹ *Legalbrief News Diary*, 23 May 2003 <<http://www.legalbrief.co.za>> (accessed 10 July 2003).

religious beliefs, those who are under sentence of death, will continue to be on death row, until such time that their sentences are commuted, or the death penalty is abolished in Zambia, or the president changes his beliefs, or a new president comes to power.

Despite the above factors, prolonged delay adds to the cruelty of the death sentence. As noted above, the UN Special Rapporteur on torture observed, with regard to prolonged delays, in his 1988 report to the UNCHR that “if persons who have been sentenced to death have to wait for long periods before they know whether the sentence will be carried out or not” and “if the uncertainty ... lasts several years...the psychological effect may be equated with severe suffering, often resulting in serious physical complaints”.⁷²

5.5.1.2 Conditions on death row

The conditions in which condemned prisoners are kept exacerbate the inherently cruel, inhuman and degrading experience of being under sentence of death awaiting execution. As noted in chapter two, the section in the prison where condemned prisoners are kept is, in most jurisdictions, referred to as death row. Some African states, like Cameroon, do not have a death row section in some of its prisons. For example, in the Bamenda Central Prison in Cameroon, condemned prisoners are kept in the waiting trial section together with those awaiting trial.⁷³

Those sentenced to death, as noted above and in chapter two, spend years on death row, which is often in close proximity to the instrument of death (that is, the execution chamber or gallows). Thus, it is in the death chamber that the condemned and their executions make capital punishment a social reality. While on death row, the

⁷² Amnesty International (1989) 62-63.

⁷³ The author is from Cameroon and during a visit to the prison in April 2004, was informed of this by Mr Sone Ngole Bome, the superintendent in charge of the prison. Previously, the condemned prisoners were kept separately, but after some escaped from prison, the rest were then moved to the waiting trial cells. Thus security reasons, as advanced by the superintendent, requires that they be kept with those awaiting trial, so that they can be easily monitored in case anyone tries to escape.

prisoners may be subjected to prolonged isolation and enforced idleness, which adds to the torment of waiting to be executed.

In some African countries, the prisoner undergoes harsh conditions coupled with overcrowdings.⁷⁴ For example, in Zambia, some of the cells in the Lusaka prison are approximately three metres by two metres, holding up to six persons, and the uniforms of the prisoners in some cases consisted of rags of material crudely stitched together.⁷⁵ Some prisoners were suffering from tuberculosis, with no access to medical treatment.⁷⁶

In some prisons, like in Cameroon, although most of the prisoners are poor, they are required to pay for medical treatment. Moreover, despite the absence of a death row section in the Bamenda Central Prison, the conditions in which the condemned prisoners are kept are deplorable. For example, their legs are chained together (the chains are never removed even when they are doing sports), they are not allowed to use beds, so they have to sleep on the bare floor or use a mat or mattress if they can afford it, and are given one meal per day, usually served between 1:00 – 2:00 pm.⁷⁷

In Uganda, in the petition challenging the death penalty currently before the Constitutional Court of Uganda, death row inmates in their affidavits describe their living conditions as follows:⁷⁸ For example, Ogwang, who has been in the condemned section of the Luzira Upper Prison for over 20 years, states the following in his affidavit:

⁷⁴ With regard to overcrowdings and harsh conditions under which condemned prisoners are kept in, for example, Zimbabwe, Nigeria and the Mukobeko maximum-security prison in Zambia, see chapter two (2.4.3) of this thesis.

⁷⁵ Hood (2002) 110-111.

⁷⁶ Hood (2002) 111.

⁷⁷ During my visit to the Bamenda Central Prison in April 2004, I had the opportunity to speak with two condemned prisoners, Chi Cyprain, convicted of armed robbery, and Fonge Franklin, convicted of murder, who informed me of their conditions of detention. They were both tried in the Military Tribunal, sitting in Bamenda and composed of military judges, and were sentenced to death.

⁷⁸ *Susan Kigula and Others v The Attorney General*, The legal challenge to capital punishment in Uganda: 1st draft of submissions on the proposed issues framed for determination before the Constitutional Court of Uganda, prepared by M/s Katende, Ssempebwa & Co. Advocates.

*I believe that the death penalty is a cruel, degrading and inhuman form of punishment in the following ways ... Every single day, I and my fellow death row inmates live in imminent fear of execution ... From the time a condemned prisoner arrives at Luzira Upper Prison, he is isolated from all other prisoners and confined in the Condemned section, living only with fellow death row inmates ... This adds to our personal anxiety, and reminds us all the time of our impending execution by hanging. The Condemned Section of the Luzira Prison is an extremely intimidating structure. The walls are high and all around us. They are painted a dull, harsh white colour. I and my fellow death row inmates have a very limited area for movement both within the cells and outside. *The gallows and death chambers where inmates are hanged are just above the cells in which some of us live, and act as a constant reminder of our respective fates ... The living conditions are extremely depressing ... The lights in the cells are left all night, making it difficult for us to sleep properly ... in our over-crowded cells, there is barely enough room to move around...The cells in Luzira have no toilet facilities ... our urination and defecation happens in open chamber pots ... The meals are often inadequate and poorly prepared ... At all times, I and my fellow death row inmates therefore do not know when they are coming for us. This practice of being left in suspense adds to our constant daily fear, mental anguish and torture.*⁷⁹*

Therefore, the prisoner is ensnared in a dehumanising environment from the moment he enters the cell. The above conditions could irrefutably lead to physical and mental deterioration. It is clear that the conditions are inhumane, as the prisoner is not treated with humanity and with respect for his inherent dignity as stipulated in article 10 of the ICCPR, and other human rights instruments and national constitutions.⁸⁰

5.5.2 Jurisprudence of the United Nations Human Rights Committee

The Optional Protocol to the ICCPR gives death row inmates the right to petition the UN Human Rights Committee with alleged violations. The Human Rights Committee is one of the first international instances to address the death row phenomenon. Death row phenomenon claims are brought under article 7 (prohibition of torture, or cruel,

⁷⁹ Emphasis added. See Affidavit of Ben Ogwang in support of the death penalty petition in Uganda. The affidavits of Edward Mary Mpagi, who spent eighteen years on death row before receiving a presidential pardon, Mugerwa Nyansio, who has been on death row since 1990, and those of other condemned prisoners at the Luzira Prison, state similar living conditions. The interviews were conducted in 2003 in Uganda by M/s Katende, Ssempebwa & Co. Advocates.

⁸⁰ Conditions of detention, similar to those discussed above, have been found to constitute cruel, inhuman and degrading treatment. In addition to the cases discussed in this chapter, see *Aitken v Jamaica*, Case 12.275, Report No. 58/02, 21 October 2002, para 137 (Inter-American Commission).

inhuman or degrading treatment or punishment) and article 10 (right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person) of the ICCPR.

The Committee's position on the death row phenomenon was clearly stated in 1989 in *Pratt and Morgan v Jamaica* in the following terms:⁸¹

In principle, prolonged judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment even if they can be a source of mental strain to the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and an assessment of the circumstances of each case would be necessary.⁸²

The Committee concluded that article 7 of the ICCPR has not been violated as the applicants had not sufficiently substantiated their claim that delay in judicial proceedings constituted for them cruel, inhuman and degrading treatment under article 7.⁸³ The Human Rights Committee was again faced with the death row phenomenon in *Barret and Sutcliffe v Jamaica*.⁸⁴ The Committee maintained its position in *Pratt and Morgan*, by reiterating that “prolonged judicial proceedings do not *per se* constitute cruel, inhuman and degrading treatment, even if they may be a source of mental strain and tension for detained persons”.⁸⁵ However, in a dissenting

⁸¹ *Pratt and Morgan v Jamaica*, Communications 210/1986 and 225/1987, UN Doc. A/44/40, views adopted on 6 April 1989. See *Official records of the Human Rights Committee* 1988/99, Vol. II (1995) 491-423, hereinafter referred to as *Pratt and Morgan* (Human Rights Committee). This case concerned two Jamaican citizens, Earl Pratt and Ivan Morgan, who were arrested in October 1977 for murder, and sentenced to death on 15 January 1979 (paras 1-2.4). In their complaint, they claimed, *inter alia*, that the length of their detention on death row constituted cruel, inhuman and degrading treatment contrary to article 7 of the ICCPR (para 4).

⁸² *Pratt and Morgan* (Human Rights Committee) para 13.6.

⁸³ As above.

⁸⁴ *Barret and Sutcliffe* (Human Rights Committee). The applicants, Randolph Barret and Clyde Sutcliffe, were found guilty of murder and sentenced to death on 27 July 1978. While awaiting execution, they submitted their complaint, alleging that the time spent on death row, over 13 years, amounts to cruel, inhuman and degrading treatment within the meaning of article 7 of the ICCPR. The applicants also complained about their conditions of detention (paras 1-2.3 & 3.4-3.5).

⁸⁵ *Barret and Sutcliffe* (Human Rights Committee) para 8.4. The Committee found a violation of articles 7 and 10(1) of the ICCPR in respect of the conditions of detention of Mr Sutcliffe (paras 8.6 & 9).

opinion dissociating herself from the majority, Chanet endorsed the European Court's decision in *Soering v United Kingdom* (discussed below). She stated that

[i]n my view it is difficult for the criteria formulated by the Committee to assess the reasonableness of the duration of proceedings to be applied without qualification to the execution of a death sentence. The conduct of the person concerned with regard to the exercise of remedies ought to be measured against the stakes involved. Without being at all cynical, I consider that the author cannot be expected to hurry up in making appeals so that he can be executed more rapidly. On this point, I share the position taken by the European Court of Human Rights in its judgment of 7 July 1989 on the *Soering* case ... my opinion is that, in this type of case, the elements involved in determining the time factor cannot be assessed in the same way if they are attributable to the State party as if they can be ascribed to the condemned person. *A very long period on death row, even if partially due to the failure of the condemned prisoner to exercise a remedy, cannot exonerate the State party from its obligations under article 7 of the Covenant.*⁸⁶

The Human Rights Committee's position changed in 1995, in *Simms v Jamaica*,⁸⁷ where it conceded that recent developments in national jurisdictions had admitted that prolonged detention on death row may constitute cruel and inhuman treatment. The Committee had in mind here the decision of the Judicial Committee of the Privy Council in *Pratt and Morgan v Attorney General of Jamaica*, which is discussed below. The Committee then stated that its jurisprudence remains that "detention for any specific period would not be a violation of article 7 of the Covenant in the absence of some further compelling circumstances".⁸⁸

⁸⁶ Emphasis added. Individual opinion of Ms. Christine Chanet in *Barret and Sutcliffe* (Human Rights Committee).

⁸⁷ *Simms v Jamaica*, Communication 541/1993, Inadmissibility decision of 3 April 1995, UN Doc. CCPR/C/53/D/541/1993, 4 April 1995, para 6.5, hereinafter referred to as *Simms* (Human Rights Committee). The applicant, Errol Simms, was charged with murder on 12 April 1987, and was convicted and sentenced to death on 16 November 1988 (para 2.1). It was argued that the time spent on death row constitutes cruel, inhuman and degrading treatment (para 3.7). The communication was declared inadmissible (para 7).

⁸⁸ *Simms* (Human Rights Committee) para 6.5.

Subsequently, in *Francis v Jamaica*,⁸⁹ the Human Rights Committee found a violation of article 7 of the ICCPR. The Committee reaffirmed its position that delay in itself will not suffice or constitute a violation of article 7; “further compelling circumstances” have to be present.⁹⁰ The compelling circumstance in this case leading to the Committee’s finding of a violation was that over a period of detention on death row that had exceeded 12 years, the complainant had developed apparent signs of severe mental imbalance.⁹¹ Three factors were considered in this case in assessing whether there has been a violation of article 7: First, the extent to which delay was due to the state; second, the conditions on death row; and third, the mental condition of the prisoner, which had considerably and seriously deteriorated during his detention.⁹²

Therefore, the Committee will not find a violation in cases in which there are no “further compelling circumstances”. This was the case in *Stephens v Jamaica* and *Johnson v Jamaica*. In *Stephens v Jamaica*,⁹³ the Committee stated that in the absence of special circumstances, it reaffirms its jurisprudence that prolonged detention on death row cannot be generally considered as cruel, inhuman and degrading treatment. In *Johnson v Jamaica*,⁹⁴ in which the period on death row was over 11 years, the Committee stated three reasons for holding that delay in itself will not constitute a violation: First, the Committee held that allowing delay to constitute a violation

⁸⁹ *Francis v Jamaica*, Communication 606/1994, UN Doc. CCPR/C/54/D/606/1994, 25 July 1995, para 9.2, hereinafter referred to as *Francis* (Human Rights Committee). The applicant, Clement Francis, was convicted of murder and sentenced to death on 26 January 1981 (para 3.1). In alleging a violation of article 7, it was submitted that the mere fact that the applicant will no longer be executed does not nullify the mental anguish of the twelve years spent on death row, facing the prospect of being hanged (para 4.4).

⁹⁰ *Francis* (Human Rights Committee) para 9.1.

⁹¹ *Francis* (Human Rights Committee) para 9.2.

⁹² *Francis* (Human Rights Committee) para 9.1.

⁹³ *Stephens v Jamaica*, Communication 373/1989, UN Doc. CCPR/C/55/D/373/1989, 18 October 1995, para 9.4 hereinafter referred to as *Stephens* (Human Rights Committee). The length of detention on death row in this case had been eight years and 10 months (para 9.3).

⁹⁴ *Johnson v Jamaica*, Communication 588/1994, UN Doc. CCPR/C/56/D/588/1994, 22 March 1996, hereinafter referred to as *Johnson* (Human Rights Committee). The Committee held in that there were no compelling circumstances, over and above the length of detention on death row, which would turn Mr Johnson’s detention into a violation of articles 7 and 10 (para 8.6).

would be inconsistent with the object and purpose of the ICCPR.⁹⁵ Second, holding delay to be a violation would be conveying a message to state parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it has been imposed.⁹⁶ Third, other circumstances connected with detention on death row may turn that detention into cruel, inhuman and degrading treatment or punishment.⁹⁷

In subsequent cases, some Committee members in their individual opinions have argued that long periods of detention on death row were *per se* sufficient to warrant a finding of a violation of article 7.⁹⁸ Furthermore, the Human Rights Committee has found delay to constitute a violation in the case of an individual sentenced to death for crimes committed while he was below eighteen years of age, and who has been on death row for eight years. The Committee held that since the death sentence was imposed in violation of article 6(5) of the ICCPR, the detention on death row constituted a violation of article 7 of the ICCPR.⁹⁹ Although the finding of a violation depends on a number of considerations, it is clear from the above jurisprudence that

⁹⁵ *Johnson* (Human Rights Committee) para 8.3.

⁹⁶ *Johnson* (Human Rights Committee) para 8.4.

⁹⁷ *Johnson* (Human Rights Committee) para 8.5.

⁹⁸ See, for example, *LaVende v Trinidad and Tobago*, Communication 554/1993, UN Doc. CCPR/C/61/D/554/1993, 17 November 1997. In addition to the cases discussed above, the Human Rights Committee has found a violation of article 7 in death row cases where detention under harsh conditions is extremely protracted (See *Edwards v Jamaica*, Communication 529/1993, UN Doc. CCPR/C/60/D/529/1993, 19 January 1993, para 8.3), where detention is accompanied by serious medical consequences (See for example, *Henry and Douglas v Jamaica*, Communication 571/1994, UN Doc. CCPR/C/57/D/571/1994, 25 July 1996, para 9.5; *Brown v Jamaica*, Communication 775/1997, UN Doc. CCPR/C/65/D/775/1997, 11 May 1999, para 6.13; and *Whyte v Jamaica*, Communication 732/1997, UN doc. CCPR/C/63/D/732/1997, 27 July 1998, para 9.4), or lack of psychiatric treatment (*Williams v Jamaica*, Communication 609/1995, UN Doc. CCPR/C/61/D/609/1995, 4 November 1997, para 6.5), or where there is evidence of beatings and destruction of belongings by jailers (See for example, *Collins v Jamaica*, Communication 240/1987, UN Doc. A/47/40, 1 November 1991, paras 8.6-8.7; *Bailey v Jamaica*, Communication 334/1988, UN Doc. A/48/40, 31 March 1993, para 9.3; *Hylton v Jamaica*, Communication 407/1990, UN Doc. A/49/40, 8 July 1994, para 9.3; and *Leslie v Jamaica*, Communication 564/1993, UN Doc. CCPR/C/63/D/564/1993, 7 August 1998, para 9.2).

⁹⁹ *Johnson v Jamaica*, Communication 592/1994, UN Doc. CCPR/C/64/D/592/1994, 25 November 1998, para 10.4. The Committee thus adopted a similar position to that of the European Court of Human Rights in *Soering's* case, discussed below. Similarly, the Inter-American Commission has interpreted article XXVI of the American Declaration, which guarantees every person accused of an offence the right not to receive cruel, infamous or unusual punishment, as though it prohibited the execution of minors (see Inter-American Commission on Human Rights resolution No. 3/87, *Case 9647 v United States*, 22 September 1987).

the death row phenomenon constitutes cruel, inhuman and degrading treatment or punishment.¹⁰⁰

5.5.3 Comparative jurisprudence: The European Court of Human Rights

The European Court of Human Rights (European Court) addressed the death row phenomenon in the landmark case of *Soering v United Kingdom*.¹⁰¹ The applicant, Soering (a German national), was sought for two murders committed in Virginia.¹⁰² At the time of the commission of the crime, the applicant was 18 years old, and he later fled to England where he was arrested in connection with cheque fraud.¹⁰³ Soon after, the United States sought his extradition under the 1972 extradition treaty with the United Kingdom.¹⁰⁴ The United Kingdom sought assurances from the United States that in the event of Soering being surrendered and being convicted of the crimes for which he has been indicted, the death penalty, if imposed, would not be carried out.¹⁰⁵ Germany, which had abolished the death penalty, also sought his extradition, since, as Soering is a German national, it had jurisdiction to try him for the murders pursuant to section 7(2) of the German Criminal Code.¹⁰⁶

The United States did not provide the assurances but instead, sent an affidavit stating that it will convey the United Kingdom's wishes to the judge at the time of

¹⁰⁰ The approach of the Human Rights Committee has been described as “global”, as it hasn't generally drawn a distinction between cruel, inhuman and degrading treatment or punishment. In some cases, the Committee states that the acts have amounted to a cruel, inhuman and degrading treatment or punishment; and in others, the Committee simply expressed the view that there has been a violation of article 7 of the ICCPR without specifying if the acts in question were cruel, inhuman and degrading. Unlike the Human Rights Committee, the European Court of Human Rights, as seen above, has expressly attempted to draw clear distinctions between the different types of prohibited acts. For more on this, see Keightley (1995) 386-388. See also, Bojosi (2004) 321-326.

¹⁰¹ *Soering v United Kingdom*, Series A, No. 161 (1989), European Court of Human Rights, hereinafter referred to as *Soering* (1989).

¹⁰² *Soering* (1989) para 11.

¹⁰³ *Soering* (1989) para 12.

¹⁰⁴ *Soering* (1989) para 14.

¹⁰⁵ *Soering* (1989) para 15.

¹⁰⁶ *Soering* (1989) para 16.

sentencing.¹⁰⁷ After unsuccessful appeals against his extradition, the Secretary of State signed a warrant ordering that Soering be surrendered to the United States authorities.¹⁰⁸ Soering then appealed to the European Commission, contending that his extradition to the United States would amount to a violation of article 3 of the European Convention by the United Kingdom.¹⁰⁹ The European Commission narrowly decided that the death row phenomenon did not rise to a level of seriousness that violated article 3 of the European Convention.

The European Commission then referred the case to the European Court, which agreed with the Commission on the majority of issues but arrived at a different conclusion. Firstly, the Court agreed that a state's decision to extradite may constitute a violation of article 3 if there is a substantial risk that the fugitive would be subjected to inhuman or degrading treatment or punishment in the requesting state.¹¹⁰ Secondly, it agreed that there was a substantial risk that Soering would be sentenced to death, despite the United Kingdom's claims otherwise.¹¹¹ Lastly, the Court agreed that the death penalty was not in itself a violation of article 3.¹¹²

In arriving at its conclusion on whether in the circumstances the risk of exposure to the "death row phenomenon" would make the extradition a breach of article 3 of the European Convention, the Court considered the following: First, the length of detention prior to execution; second, the impact of the conditions on death row at Mecklenburg State Prison; third, how Soering's age and mental state would affect him if he were subjected to the death row phenomenon; and lastly, the fact that Germany was willing to extradite and try Soering without the risk of suffering on death row.

¹⁰⁷ *Soering* (1989) para 20.

¹⁰⁸ *Soering* (1989) para 24.

¹⁰⁹ *Soering* (1989) paras 76-78.

¹¹⁰ *Soering* (1989) para 88-91.

¹¹¹ *Soering* (1989) para 93-99.

¹¹² *Soering* (1989) para 101-103.

With regard to the first issue, the length of detention prior to execution, the Court was unanimously of the view that delay caused by the prisoner could constitute cruel and inhuman punishment.¹¹³ On the second issue, the conditions on death row, the Court noted the risk of homosexual abuse and physical attack undergone by prisoners on death row, and concluded that the severity of a special regime such as that operated on death row in Mecklenburg Correctional Centre, is compounded by the length of detention, lasting on average six to eight years.¹¹⁴ Concerning Soering's age and mental state, the Court stated that

the applicant's youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3.¹¹⁵

Similarly, as noted above, the Human Rights Committee has considered an applicant's youth at the time of commission of the offence, to bring his detention on death row for eight years within the terms of article 7 of the ICCPR.¹¹⁶ Regarding the last issue, the possibility of extradition to Germany, where there is no risk of suffering on death row, the Court noted that it was a circumstance of relevance for the overall assessment under article 3 of the European Convention.¹¹⁷ After considering the above factors, the Court unanimously concluded that there is a real risk of Soering being sentenced to death in Bedford County, Virginia; and that if he is surrendered, it would constitute a violation of article 3 of the European Convention by the United Kingdom. The Court stated in its final conclusion that

in the Court's view, having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the United States would

¹¹³ *Soering* (1989) para 106.

¹¹⁴ *Soering* (1989) para 107.

¹¹⁵ As above.

¹¹⁶ See *Johnson v Jamaica*, Communication 592/1994, UN Doc.CCPR/C/64/D/592/1994, 25 November 1998.

¹¹⁷ *Soering* (1989) para 110.

expose him to real risk of treatment going beyond the threshold set by Article 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration. Accordingly, the Secretary of State's decision to extradite the applicant to the United States would, if implemented, give rise to a breach of Article 3.¹¹⁸

The above case provides the basis for other courts to embrace the death row phenomenon. A vast majority of death row phenomenon cases cite this judgment, a tangible proof of its strong relevance in international law. For example, some national courts in Africa, such as the Supreme Court of Zimbabwe, have cited this judgment when dealing with the death row phenomenon. Furthermore, the European Court has found the imposition of the death sentence following an unfair trial to be inhuman treatment in *Öcalan v Turkey*,¹¹⁹ which was later upheld by the Grand Chamber in its judgment in the same case. Although the case did not deal specifically with the death row phenomenon, in finding a violation of article 3 of the European Convention, the Court made reference to its decision in *Soering* above and to factors such as the fear, uncertainty and human anguish (also present in the death row phenomenon) resulting from the imposition of the death penalty.¹²⁰ The Court stated as follows:

[T]o impose a death sentence after an unfair trial is to subject that person wrongfully to the fear that he will be executed. The fear and uncertainty as to the future generated by a sentence of death, in circumstances where there is a real possibility that the sentence will be enforced, must give rise to a significant degree of human anguish. Such anguish cannot be dissociated from the unfairness of the proceedings underlying the sentence which, given that human life is at stake, becomes unlawful under the Covenant ... [T]he imposition of a capital sentence in such circumstances must be considered, in itself, to amount to a form of inhuman treatment.¹²¹

¹¹⁸ *Soering* (1989) para 111.

¹¹⁹ *Öcalan v Turkey*, Application No. 46221/99 (2003) ECHR 125, judgment of 12 March 2003, hereinafter referred to as *Öcalan* (2003); (2003) 7 *Amicus Journal* 24. This case concerned Abdullah Öcalan, a Turkish national, who had fled to Syria but was later expelled; and then he ended up in Kenya. He was arrested by Kenyan and Turkish authorities, and subsequently transferred to Turkey to stand trial for terrorism. The applicant was later sentenced to death. The applicant argued that it would infringe article 2 to implement a death sentence that had been imposed following a procedure, which did not conform to articles 5 and 6 of the European Convention (see para 178).

¹²⁰ As above, para 200 & 207.

¹²¹ As above, para 207.

Since death sentences in most African states are imposed after unfair trials, as mentioned in chapter six, the above decision is, therefore, instructive in challenging the death penalty in *de facto* abolitionist and retentionist African states.

5.5.4 Jurisprudence of African national courts

5.5.4.1 The Supreme Court of Zimbabwe

In one of the earliest reported cases in Zimbabwe (then Rhodesia), *Dhlamini and Others v Carter NO and Another*,¹²² three appellants who had been sentenced to death, two having been on death row for two years and nine months, and the third for one month short of two years, sought to interdict the first respondent from carrying out the death sentences. They argued, *inter alia*, that the delay between their imposition and the decision to confirm them was so inordinate as to constitute inhuman or degrading punishment, in violation of section 60(1) of the Constitution (of the then Rhodesia).¹²³ Beadle CJ, in rejecting the argument on the basis that the original punishment cannot, itself, become tainted with the inhumanity of the treatment, stated as follows:

The inhuman treatment complained of in this case is the delay in carrying out the sentence. If, as I have already found, ‘treatment’ is distinct from ‘punishment’, and if the inhumanity of the treatment cannot taint the lawfulness of an otherwise lawful punishment, then the only remedy the accused, who has been sentenced to death, has under s 60(1) is to ask for an order that the delay should stop, something which no person sentenced to death is ever likely to do. Even if, therefore, in certain circumstances, delay may be considered as inhuman treatment, the remedy given an accused who is under sentence of death under s 60(1) is not one which is likely to be of much value to him, as it gives him no more than the right to ask for the delay to cease.¹²⁴

¹²² *Dhlamini and Others v Carter NO and Another* (1968) 1 RLR 136. The case was dealt with by the Appellate Division of the High Court of Rhodesia and is relevant with regard to the attitude of the courts in Zimbabwe to delay in executing the death sentence. The case is referred to in Catholic Commission (1993) 256-257.

¹²³ As above.

¹²⁴ As above, at 157A-C.

It appears from the above judgment that the Court, in acknowledging that a condemned prisoner is not stripped of his rights, meant that the prisoner has the right to apply to have his execution expedited. The Court, therefore, saw its powers as limited to stopping inhuman treatment or punishment and not interfering with a lawful punishment.

The above decision has been criticised and held to be wrongly decided by Gubbay CJ in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others* on the following grounds:¹²⁵ Firstly, the approach adopted by the court is flawed, as it was sitting as a constitutional court and not an appellate court, and so was not restricted, as it believed itself to be, to those powers properly exercised by an appellate court. Secondly, it is irrelevant to the prisoners' assertion that the alternative to delay may be expeditious execution. Lastly, the judgment was given 20 years ago, thus, out of step with more enlightened thinking.

The Supreme Court of Zimbabwe was faced with a similar matter in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others*, in which it handed down a significant judgment addressing the death row phenomenon.¹²⁶ The Supreme Court had to consider whether the dehumanising factor of prolonged delay, considered in conjunction with the harsh and degrading conditions in the condemned section of the holding prison meant that the executions themselves would have constituted inhuman and degrading treatment contrary to section 15(1) of the Constitution of Zimbabwe.¹²⁷

Gubbay CJ began by considering the physical conditions endured daily by the four condemned prisoners and their mental anguish; and then proceeded by providing an exhaustive comparative analysis of the jurisprudence on the death row phenomenon in

¹²⁵ *Catholic Commission* (1993) 257-258.

¹²⁶ *Catholic Commission* (1993). The case concerned four Zimbabwean citizens who had been sentenced to death in 1987 and 1988 respectively, after being convicted of the crime of murder. They approached the Supreme Court after being served with warrants for their execution in 1993.

¹²⁷ *Catholic Commission* (1993) 245. Section 15(1) provided that, "no person shall be subjected to torture or to inhuman or degrading punishment or other such treatment". As the Supreme Court of Zimbabwe emphasised, the case concerned neither the constitutionality of the death sentence itself nor the manner of execution.

several jurisdictions, including India,¹²⁸ the United States of America,¹²⁹ the West Indies¹³⁰ and Canada.¹³¹ He analysed the jurisprudence in international human rights instances, dealing at great length with the judgment of the European Court of Human Rights in *Soering v United Kingdom*¹³² and the views of the UN Human Rights Committee in *Barret and Sutcliffe v Jamaica*.¹³³ The Court noted that no matter the magnitude of their crime, prisoners retain all basic rights, except those necessarily removed from them by law.¹³⁴ In dealing with the factor of delay, the Court preferred the opinion of the minority to that of the majority of the Judicial Committee of the Privy Council in *Riley and Others v Attorney General of Jamaica and Another* (discussed below).¹³⁵ The Supreme Court adopted the dissenting view of Lords Scarman and Brightman in the *Riley* case, stating the following:

It is no exaggeration, therefore, to say that the jurisprudence of the civilized world, much of which is derived from the common law principles and the prohibition against cruel and unusual punishments in the English Bill of Rights, has recognised and acknowledged that prolonged delay in executing a sentence of death can make the punishment when it comes inhuman and degrading. As the Supreme Court of California commented in *People v Anderson* it is cruel and has dehumanising effects. Sentence of death is one thing: sentence of death followed by lengthy imprisonment prior to execution is another.¹³⁶

After its comparative analysis and exhaustive review of applicable constitutional provisions and criminal law, the Supreme Court concluded, on the issue whether the delay constituted a breach of section 15(1) of the Constitution of Zimbabwe (prohibiting torture or inhuman or degrading punishment or other such treatment), that

¹²⁸ *Catholic Commission* (1993) 258-261.

¹²⁹ *Catholic Commission* (1993) 261-266.

¹³⁰ *Catholic Commission* (1993) 266-268.

¹³¹ *Catholic Commission* (1993) 273-274.

¹³² *Catholic Commission* (1993) 270-273.

¹³³ *Catholic Commission* (1993) 274-275.

¹³⁴ *Catholic Commission* (1993) 251.

¹³⁵ *Riley and Others v Attorney General of Jamaica and Another* (1982) 3 All ER 469.

¹³⁶ *Catholic Commission* (1993) 269.

the periods of detention on death row that the applicants had encountered justified the commutation of their sentences to life imprisonment.¹³⁷ In other words, the Court was of the view that keeping a prisoner facing the agony of execution for a long extended period of time is an inhuman act, entitling the prisoner to a remedy, which in this case, is the commutation of the death sentence.

The above decision brought about highly critical response from the government, which stated that the court was seizing the functions of the executive. Consequently, the Constitution of Zimbabwe Amendment Act (No 13) 1993 was passed which retrospectively exempted the death penalty from the scope of section 15(1). Thus, this amendment overturned the decision above.¹³⁸ Nevertheless, the above decision serves as authority with regard to the abolition of the death penalty in Africa, and has received support from the Court of Appeal of Tanzania and the Constitutional Court of South Africa.¹³⁹ Taking into consideration the number of people on death row in African states, the above decision could have a substantial effect if other jurisdictions follow the example of the Supreme Court of Zimbabwe.

5.5.4.2 The Constitutional Court of South Africa

The Constitutional Court of South Africa in *S v Makwanyane*, had to decide whether the death penalty was cruel, inhuman and degrading within the meaning of section 11(2) of the Interim Constitution Act 200 of 1993.¹⁴⁰ Ten of the eleven judges considered the death penalty as cruel, inhuman and degrading punishment.

Since the case concerned the death penalty in general and not specifically the death row phenomenon, several judges of the Constitutional Court linked the issue of the

¹³⁷ *Catholic Commission* (1993) 282.

¹³⁸ Similarly, as noted above, in *Chileya v S* (1990) SC 64/90 (unreported); the Supreme Court of Zimbabwe had to decide on whether execution by hanging contravened section 15(1) of the Zimbabwean Constitution. But, the government pre-empted this by amending section 15(1), specifically upholding the constitutionality of executions by hanging.

¹³⁹ See *Mbushuu* (1995) and *S v Makwanyane* 1995 (3) SA 391 (CC), hereinafter referred to as *Makwanyane* (1995).

¹⁴⁰ *Makwanyane* (1995) para 26. For the facts of the case, see chapter four (4.4.1.4) of this thesis.

death row phenomenon to that of capital punishment generally. Although the case did not deal directly with the death row phenomenon, the views of some of the judges on the subject could have a profound effect in other jurisdictions that are willing to deal with the issue. The subsequent paragraphs discuss the views of some of the judges on the death penalty as cruel, inhuman and degrading and on the death row phenomenon, where the judge in question makes reference to it.

Justice Chaskalson, in delivering the lead judgment, begins by clarifying the issue to be considered. He pointed out that the question in this case was not whether the death sentence was cruel, inhuman or degrading in the ordinary meaning of these words but whether it was a cruel, inhuman or degrading punishment within the meaning of section 11(2) of the South African Interim Constitution.¹⁴¹

In addressing the above question, Justice Chaskalson provides an exhaustive analysis of international and comparative law sources, commenting on the case law of international instances, such as the UN Human Rights Committee and the European Court,¹⁴² and national instances, for instance, the courts of the United States,¹⁴³ Canada,¹⁴⁴ India,¹⁴⁵ Hungary¹⁴⁶ and Tanzania.¹⁴⁷ In arriving at the conclusion that the death penalty is inconsistent with section 11(2) of the Interim Constitution, prohibiting cruel, inhuman or degrading punishment, he stated:

Death is a cruel penalty and the legal processes, which necessarily involve waiting in the uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also and inhuman punishment for it ... involves, by its very nature, a denial of the executed person's

¹⁴¹ *Makwanyane* (1995) para 26.

¹⁴² *Makwanyane* (1995) paras 63-69.

¹⁴³ *Makwanyane* (1995) paras 40-42 & 55-56.

¹⁴⁴ *Makwanyane* (1995) paras 60-62 & 05-107.

¹⁴⁵ *Makwanyane* (1995) paras 70-79.

¹⁴⁶ *Makwanyane* (1995) para 38.

¹⁴⁷ *Makwanyane* (1995) paras 113-115.

humanity', and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the State.¹⁴⁸

Ackermann J placed greater emphasis on the inevitably arbitrary nature of the decision involved in the imposition of the death penalty, in supporting his conclusion that as a form of punishment, the death penalty constitutes cruel, inhuman and degrading punishment within the meaning of section 11(2) of the Interim Constitution of South Africa.¹⁴⁹ Didcott J, in agreeing with the above conclusion, links the issue of the death row phenomenon to the death penalty in his conclusion. First, he states as a ground for believing the death penalty to be unconstitutional, the fact that capital punishment contravenes the prohibition against cruel, inhuman or degrading punishment.¹⁵⁰ Then, with regard to the death row phenomenon (specifically lengthy imprisonment prior to execution), he cites the Californian case of *The People v Anderson*, in which Wright CJ stated:

The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanising effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalising to the human spirit as to constitute psychological torture.¹⁵¹

Didcott J also refers to the judgments of Liacos J in *District Attorney for the Suffolk District v Watson* and Gubbay CJ in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others*, with regard to the time between sentence and execution, in arriving at the conclusion that “every sentence of death must be stamped, for the purposes of [section] 11(2), as an intrinsically cruel, inhuman and degrading punishment”.¹⁵²

¹⁴⁸ *Makwanyane* (1995) para 26.

¹⁴⁹ *Makwanyane* (1995) para 153.

¹⁵⁰ *Makwanyane* (1995) para 174.

¹⁵¹ *Makwanyane* (1995) para 178.

¹⁵² *Makwanyane* (1995) paras 178-179.

Furthermore, Kentridge J, with regard to the uniquely cruel and inhuman nature of the death penalty, after referring to American case law, stated the following:

The ‘death row’ phenomenon as a factor in the cruelty of capital punishment has been eloquently described by Lord Griffiths in *Pratt v Johnson* [1994] 2 AC 1 and by Gubbay CJ in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General, Zimbabwe, and Others* 1993 (4) SA 239 (ZS). Those were cases of inordinately extended delay in the carrying out of the death sentence, but the mental agony of the criminal, in its alteration of fear, hope and despair, must be present even when the time between sentence and execution is measured in months or weeks rather than years.¹⁵³

Previous case law on the death row phenomenon measured delays in execution in terms of years, but Kentridge J has gone further by measuring it in months or weeks. It should be noted that this remains an isolated assessment and must be seen against the background of the Constitutional Court’s emphasis on the arbitrary nature of the imposition of capital punishment.¹⁵⁴

Langa J also makes reference to the death row phenomenon. He was of the opinion that the death sentence violates the right not to be subjected to cruel, inhuman and degrading punishment by stating that, “as a ‘punishment’ the death penalty ... is cruel, inhuman and degrading. It is a severe affront to human dignity”.¹⁵⁵ Furthermore, he sees the death row phenomenon as merely aggravating the cruel, inhuman and degrading nature of the death penalty.¹⁵⁶

Similarly, Madala J in his decision, in which he found the death penalty to be cruel, inhuman and degrading, links the issue of the death row phenomenon to that of the death penalty, by analysing the *Catholic Commission* and *Soering* cases.¹⁵⁷ It can be

¹⁵³ *Makwanyane* (1995) para 196.

¹⁵⁴ Schmidt (2002) 59.

¹⁵⁵ *Makwanyane* (1995) paras 216 & 234

¹⁵⁶ *Makwanyane* (1995) para 234

¹⁵⁷ *Makwanyane* (1995) paras 246-249.

deduced from his judgment that he had to consider the death row phenomenon, as this accords, in his view, with the concept of *ubuntu*.¹⁵⁸

The decision of the South African Constitutional Court in *S v Makwanyane* is one of the most widely known and justifiably influential court opinions to address the death penalty. Although the case did not deal specifically with the death row phenomenon, the Court acknowledged it as not only falling within, but also constituting a violation of, the prohibition of cruel, inhuman and degrading treatment or punishment. Since in Africa, as noted in chapter two, executions are delayed in most cases than not, abolishing the death penalty will be the only solution to the death row phenomenon, as even where those sentenced to death are executed without delay, it is most of the time, done so after unfair trials or the convicted person is denied the right to appeal.¹⁵⁹ It is therefore submitted that abolishing the death penalty in Africa will curb the violation of a prisoner's rights, as the death row phenomenon renders the death penalty a cruel, inhuman or degrading punishment.

5.5.5 Jurisprudence of other national courts and their relevance to Africa

5.5.5.1 The Judicial Committee of the Privy Council

The jurisprudence of the Judicial Committee of the Privy Council (Privy Council) is considered because, in addition to the fact that African courts make reference to them, the Privy Council is an appellate court for some Commonwealth African states, such as Mauritius. The Privy Council has had numerous opportunities to address the death row phenomenon. Unlike the Human Rights Committee, the Privy Council allows delay to be the predominant, if not the sole, factor in its analysis as is evidenced from its jurisprudence on the death row phenomenon.

¹⁵⁸ *Makwanyane* (1995) para 250. *Ubuntu* has been translated as “humanness”, or in its most fundamental sense as “personhood” and “morality” (see judgment of Mokgoro J, para 308). For other definitions of *ubuntu*, see the judgments of Langa J (para 224), Madala J (para 244) and Mohamed J (para 263).

¹⁵⁹ See chapter six of this thesis.

Initially, the Privy Council did not find delay to constitute cruel punishment. The first case that the Privy Council dealt with was *De Freitas v Benny*, in which Lord Diplock found excessive delay caused by the prisoner pursuing appeals not to constitute cruel punishment.¹⁶⁰ This approach was maintained in the case of *Abbott v Attorney General of Trinidad and Tobago*, in which a contention that a delay of eight months was so inordinate as to invoke a contravention of the appellant's constitutional rights was dismissed as invalid.¹⁶¹ However, Lord Diplock did accept that

it is possible to imagine cases in which time allowed by the authorities to elapse between the pronouncement of a death sentence and a notification to the condemned man that it was to be carried out was so prolonged as to arouse in [the prisoner] a reasonable belief that his death sentence must have been commuted to a life sentence.¹⁶²

Furthermore, in *Riley and Others v Attorney General of Jamaica and Another*, the appellants contended that the prolonged delay in the execution of their sentences, which was substantially due to factors outside their control, had caused them sustained mental anguish, thereby rendering the punishment inhuman and degrading.¹⁶³ The Privy Council held that whatever the reasons for, or length of, delay in the execution of a death sentence lawfully imposed, such a delay could not be seen as a violation of section 17 of the Jamaican Constitution.¹⁶⁴

Ten years later, the decision in the above case was overturned in *Pratt and Morgan v Attorney General of Jamaica et al*, in which the Privy Council concluded as follows:

¹⁶⁰ *De Freitas v Benny* (1976) AC 239; (1975) 3 WLR 388.

¹⁶¹ *Abbott v Attorney General of Trinidad and Tobago* (1979) 1 WLR 1342.

¹⁶² As above, at 1348.

¹⁶³ *Riley and Others v Attorney General of Jamaica and Another* (1982) 2 All ER 469, 471, hereinafter referred to as *Riley* (Privy Council).

¹⁶⁴ *Riley* (Privy Council) 473. Section 17 prohibited torture or inhuman or degrading punishment or other treatment in qualified terms.

[I]n any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute “inhuman or degrading punishment or other treatment”.¹⁶⁵

The appellants in the above case submitted that to hang them after they have been held in prison under sentence of death for so many years would be inhuman punishment or other treatment in breach of section 17(1) of the Jamaican Constitution.¹⁶⁶ Section 17 provides:

(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.

In preferring a narrower construction of section 17(2), the Privy Council held that section 17(2) was confined to authorising descriptions of punishment for which the court may pass sentence and does not prevent the appellant from arguing that the circumstances in which it is to be carried out is in breach of section 17(1).¹⁶⁷ After acknowledging the protections available to a prisoner after he has been sentenced to death, the Privy Council then turned to the issue of delay – whether delay was sufficient to constitute cruel or inhuman punishment? In this regard, it stated:

There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing agony of execution over a long extended period of time.¹⁶⁸

¹⁶⁵ *Pratt and Morgan* (Privy Council) 26. The appellants, Earl Pratt and Ivan Morgan, who had been on death row for 14 years, were convicted of murder and sentenced to death on 15 January 1979.

¹⁶⁶ *Pratt and Morgan* (Privy Council) 15.

¹⁶⁷ *Pratt and Morgan* (Privy Council) 18.

¹⁶⁸ *Pratt and Morgan* (Privy Council) 19.

It is clear from the above that the Privy Council was adopting the view that the death row phenomenon was a violation of human rights – the right not to be subjected to cruel, inhuman or degrading treatment or punishment. Further, in deciding on whether the delay constituted inhuman or degrading punishment or other treatment within the meaning of section 17(1), the Privy Council identified three types of delay that could occur during a prisoner's time on death row: First, delay entirely due to the fault of the prisoner; second, delay caused by the prisoner's legitimate appeals; and third, delay caused by the state.¹⁶⁹

With regard to the second type of delay, whether a prisoner could rely on delay, which he caused by pursuing appeals, the Privy Council stated as follows:

In their Lordships' view a State that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. It is part of human condition that a condemned man will take every opportunity to save his through use of the appellate procedure. If the appellate procedure enables the prisoner to prolong the appellate hearings over a period of years, the fault is to be attributed to the appellate system that permits such delay and not to the prisoner who takes advantage of it. *Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.*¹⁷⁰

The Privy Council then concluded that to execute the appellants now, after holding them in custody in an agony of suspense for so many years, would be inhuman punishment within the meaning of section 17(1).¹⁷¹ The Privy Council in basing its acceptance of the death row phenomenon on delay, it departed from the UN Human Rights Committee and the European Court, who based their acceptance of the doctrine on factors in addition to delay as seen above. However, it could be argued that the delay in the above case was so prolonged that the Privy Council did not consider it necessary to examine other factors.¹⁷²

¹⁶⁹ As above.

¹⁷⁰ Emphasis added. *Pratt and Morgan* (Privy Council) 23.

¹⁷¹ As above.

¹⁷² Hudson (2000) 849.

The consequences of the above judgment were the commutation of 40 death sentences in Trinidad and Tobago in late December 1993 and early 1994; the commutation of numerous death sentences in the course of 1995 in Jamaica; and unfortunately, the execution of Ashby, who had been confined to death row for four years and over 11 months in Trinidad and Tobago on 13 July 1994.¹⁷³

Apparently, the Privy Council realised the potential danger in setting a rigid time frame of five years of delay constituting strong grounds for a violation, that it took the opportunity to qualify its conclusions in *Pratt and Morgan v Attorney General of Jamaica et al.* In *Guerra v Baptiste*, the Privy Council stated that the period of five years enunciated in *Pratt and Morgan v Attorney General of Jamaica et al*¹⁷⁴ was not intended to provide a limit or a yardstick, by reference to which individual cases should be considered in constitutional proceedings. Concerning the present case, the Privy Council held:

Bearing in mind that the unjustified period of delay runs into period of years, and has led to a lapse of time since sentence of death was imposed far in excess of the target periods of 12 months and two years and indeed close to the period (five years) from which it may be inferred, without detailed examination of the particular case, that there has been such delay as will render the condemned man's execution thereafter unlawful, their Lordships have no doubt that to execute the appellant after such a lapse of time [four years and ten months between sentence and completion of the entire domestic appellate process] would constitute cruel and unusual punishment contrary to his rights under [the Constitution of the Republic of Trinidad and Tobago].¹⁷⁵

The Privy Council therefore saw the delay in the above case as unacceptable and constituting an act of injustice.¹⁷⁶ Months later, in *Reckley v The Minister of Public*

¹⁷³ Schmidt (2000) 62.

¹⁷⁴ *Guerra v Baptiste*, Privy Council Appeal No. 11 of 1995, judgment delivered on 6 November 1995 (Judicial Committee of the Privy Council) at 15, hereinafter referred to as *Guerra* (Privy Council). In this case, the appellant was served with a warrant for his execution after he had been on death row for four years and 10 months, just short of the five-year guideline.

¹⁷⁵ *Guerra* (Privy Council) 16.

¹⁷⁶ With regard to the question of delay, see also, the judgments of the Privy Council in *Henfield v Attorney General of the Commonwealth of the Bahamas* (1996) 3 WLR 1079; and *Fisher v Minister of Public Safety and Immigration* (1998) 3 WLR 201.

Safety and Immigration and Others, the Privy Council treated the five-year time frame as the length of time which needed to be reached before a violation could occur.¹⁷⁷ In sum, the jurisprudence of the Privy Council shows that the death penalty is cruel, inhuman and degrading punishment owing to the death row phenomenon.

5.5.5.2 The Supreme Court of India

Although the Constitution of India has no provision prohibiting cruel, inhuman and degrading treatment or punishment, the Supreme Court of India has filled the void by interpreting the Bill of Rights in the Constitution in the light of international norms (particularly article 7 of the ICCPR and article 3 of the European Convention). The Supreme Court, in *Francis Coralie Mullin v The Administrator, Union Territory of Delhi*, interpreted article 21 of the Indian Constitution guaranteeing the right to live with basic human dignity, as embodying the right not to be subjected to inhuman or degrading treatment or punishment.¹⁷⁸ This interpretation can serve as persuasive authority for African states (mentioned above) that do not have any constitutional provision proscribing cruel, inhuman and degrading treatment or punishment. The above case provided the base for considering the question of delay in the carrying out of the death sentence in *Vatheeswaran v State of Tamil Nadu*, in which the appellants claimed that to take their lives after they had been left for eight years in illegal solitary confinement was a gross violation of their fundamental right under article 21 of the Constitution.¹⁷⁹ The Court, quoting from the minority opinion in *Riley and Others v Attorney General of Jamaica and Another*, conceded that

a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the time necessary for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading.¹⁸⁰

¹⁷⁷ *Reckley v The Minister of Public Safety and Immigration and Others* (1996) 2 WLR 281.

¹⁷⁸ *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* AIR 1983 SC 746.

¹⁷⁹ *Vatheeswaran v State of Tamil Nadu* AIR 1983 SC 361, hereinafter referred to as *Vatheeswaran* (1983).

¹⁸⁰ *Vatheeswaran* (1983) 363.

The Supreme Court of India went further than the Privy Council in finding the cause of delay to be immaterial when the sentence of death is concerned, and held in an *obiter dictum* that delay exceeding a period of two years in the execution of a sentence should be sufficient to entitle a person under sentence of death to demand the quashing of his sentence on the ground that it offended article 21 of the Constitution of India.¹⁸¹

The *obiter dictum* in the above case was overturned in *Sher Singh and Others v The State of Punjab*, in which the Court held that it was normal for appeals to take over two years, and to impose a strict time limit of two years would enable a prisoner to defeat the ends of justice by pursuing a series of frivolous and untenable proceedings.¹⁸² As a result, the petition was adjourned in order for the Governor of Punjab to explain why the petitioners had not been executed for more than eight months since the dismissal of their appeals.¹⁸³

The Supreme Court has in later cases, substituted the sentence of death with life imprisonment of a prisoner who had been awaiting execution for two years and nine months,¹⁸⁴ and a prisoner who had been waiting his mercy petition for over eight years on the ground that he suffered mental agony of living under the shadow of death for far too long.¹⁸⁵ It is clear from the above cases that the Supreme Court of India does not dispute the fact that delay in carrying out the death sentence could give rise to a violation of the rights of the condemned prisoner.

¹⁸¹ *Vatheeswaran* (1983) 367. Accordingly, the appeal was allowed and the death sentence commuted to life imprisonment (Schmidt (2000) 56).

¹⁸² *Sher Singh and Others v The State of Punjab* (1983) 2 SCR 583, 596A-B.

¹⁸³ Stated in *Catholic Commission* (1993) 260. With regard to the question of delay, see also, *Treveniben v State of Gujarat* (1989) 1 SCJ 383.

¹⁸⁴ *Ahmed v State of Maharashtra* AIR 1985 SC 231.

¹⁸⁵ *Madhu Mehta v Union of India* (1989) 3 SCR 775.

5.5.5.3 The position in the United States of America

Although the Supreme Court of the United States has not yet addressed the death row phenomenon, some United States courts have dealt with the issue of delay in carrying out the death sentence. The decisions of two state supreme courts, which point to the relevance of delays in the execution of a death sentence, including prolonged detention on death row, as a relevant ground for constitutional challenges to the death penalty are considered in this section.

In *The People v Anderson*,¹⁸⁶ the Supreme Court of California had to determine whether the death penalty violated article 6 of the California State Constitution, prohibiting cruel and unusual punishment. In finding a violation of article 6, the Court emphasised the torturousness of delay in carrying out the death penalty and stated as follows:

The cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanising effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due process of law are carried out.¹⁸⁷

The Court further held that an appellant's insistence on receiving the benefits of appellate review of the judgment condemning him to death does not render the lengthy period of impeding execution any less torturous or exempt such cruelty from constitutional proscription.¹⁸⁸ Similar to the Zimbabwean government's reaction to the decision in the *Catholic Commission* case, the Californian State Constitution was amended in a manner that overruled the above decision, by exempting the death penalty from the prohibition against cruel or unusual punishment. Nonetheless, the decision has received support from the South African Constitutional Court, the Supreme Court of Zimbabwe and the Privy Council.

¹⁸⁶ *The People v Anderson* (1972) 493 P 2d 880.

¹⁸⁷ As above, at 894-895.

¹⁸⁸ As above.

A similar decision was arrived at in *District Attorney for the Suffolk District v Watson*, in which the Supreme Judicial Court of Massachusetts held the death penalty to constitute a violation of the State Constitution of Massachusetts that prohibits cruel punishment.¹⁸⁹ An important part of the Court's *ratio decidendi*, as expressed in the opinion of the Chief Justice, was the delay and mental anguish experienced while awaiting the execution. He stated:

The mental agony is, simply and beyond question, a horror...we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and actual infliction of death.¹⁹⁰

As seen above, both the Supreme Court of California and the Supreme Judicial Court of Massachusetts have shown an appreciation of the relevance of delay in itself as a ground for challenging the constitutionality of the death penalty.

5.6 Methods of execution as cruel and inhuman

As discussed in chapter two, the methods of execution in Africa include hanging, firing squad and stoning. It is generally argued that the execution of a person, who has been convicted to death in conformity with the relevant provisions of human rights that limit but at the same time explicitly authorise capital punishment, as such, cannot be considered as cruel, inhuman or degrading punishment.¹⁹¹ However, as discussed above, execution after prolonged delay under harsh conditions of death row constitutes cruel, inhuman or degrading punishment. Thus, developing more "humane" methods of execution cannot relieve the death row phenomenon.

The UN Human Rights Committee, as seen below, has avowed that methods of execution may themselves be cruel, inhuman and degrading. Moreover, since there is no method of execution that guarantees an immediate and painless death, some

¹⁸⁹ *District Attorney for the Suffolk District v Watson* (1980) 411 NE 2d 1274 (Mass.).

¹⁹⁰ As above, at 1283.

¹⁹¹ Nowak (2000) 34.

writers have described the execution process as distinctively mechanical, impersonal, and ultimately dehumanising, and which can never be mundane.¹⁹² The subsequent paragraphs examine the jurisprudence of the UN Human Rights Committee, African and other national courts on the method of execution as cruel, inhuman and degrading treatment, which reveal that methods of execution used in Africa, such as stoning and hanging have been found to be cruel, inhuman and degrading.

5.6.1 The United Nations Human Rights Committee

The UN Human Rights Committee has applied the prohibition of cruel, inhuman or degrading treatment to the methods of execution. The Committee, in General Comment No. 20, stated that when the death penalty is applied by a state party for the most serious crimes, it must not only be strictly limited in accordance with article 6 of the ICCPR but it must be carried out in such a way as to cause the least possible suffering.¹⁹³ The Human Rights Committee has had the opportunity to apply the above standard in the case of *Ng v Canada*,¹⁹⁴ in which the Committee had to consider whether execution by gas asphyxiation violated article 7 of the ICCPR, prohibiting cruel, inhuman and degrading treatment or punishment. The Committee held that execution by gas asphyxiation as practiced in California violated article 7 of the ICCPR, as it would not meet the test of “least possible physical and mental suffering”.¹⁹⁵ The Committee stated as follows:

The Committee is aware that, by definition, every execution of a sentence may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the Covenant; on

¹⁹² See, for example, Johnson (1990) ix-x.

¹⁹³ CCPR General Comment No. 20, para 6. Similarly, the UN Economic and Social Council has also stated that where capital punishment is occurs, it shall be carried out so as to inflict the minimum possible suffering. See Safeguard No. 9, UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN ECOSOC resolution 1984/50 of 25 May 1984, endorsed by the UN General Assembly in resolution 39/118, adopted without a vote on 14 December 1984 (hereinafter referred to as ECOSOC safeguards).

¹⁹⁴ *Ng v Canada*, Communication 469/1991, UN Doc. CCPR/C/49/D/469/1991, 7 January 1994. The case concerned Charles Chitat Ng, a British national, who had been extradited to the United States to stand trial on 19 criminal counts, including kidnapping and 12 murders, where if convicted, he could face the death penalty (para 1-2.1).

¹⁹⁵ As above, para 16.4.

the other hand, article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes. Nonetheless, the Committee reaffirms, as it did in its General Comment 20[44] on article 7 of the Covenant (CCPR/C/21/Add.3, paragraph 6) that, when imposing capital punishment, the execution of the sentence "... must be carried out in such a way as to cause the least possible physical and mental suffering". In the present case, the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does not result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes ... the Committee concludes that execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of "least possible physical and mental suffering", and constitutes cruel and inhuman treatment, in violation of article 7 of the Covenant.¹⁹⁶

In noting that gas asphyxiation may take more than ten minutes, the Committee appears to have adopted the criterion of instantaneity for finding a violation of article 7. Some Committee members disagreed with the above conclusion. Mavrommatis and Sadi uttered their dissenting opinion in the following words:

Every method of judicial execution in use today, including execution by lethal injection, has come under criticism for causing prolong pain or the necessity to have the process repeated. We do not believe that the Committee should look into such details in respect pf execution such as whether acute pain or limited duration or less pain of longer duration is preferable and could be a criterion for a finding of violation of the Covenant.¹⁹⁷

Mavrommatis and Sadi did not dispute that executions could be cruel and inhuman, but disagreed with the criterion used in arriving at the conclusion. They added that "a method of execution such as death by stoning, which is intended to and actually inflicts prolonged pain and suffering, is contrary to article 7".¹⁹⁸ Bearing this in mind, African states, such as Nigeria and Sudan that employ this method of execution, are therefore failing to comply with their obligations under the ICCPR, as the use of stoning as a method of execution amounts to cruel and inhuman treatment in violation of article 7 of the ICCPR.

¹⁹⁶ As above, para 16.2-16.4.

¹⁹⁷ Dissenting opinion of Messrs. Andreas Mavrommatis and Waleed Sadi in *Ng v Canada*.

¹⁹⁸ As above.

Herndl expressed a similar opinion, while stating that in his view, there is no “agreed or scientifically proven standard to determine that judicial execution by gas asphyxiation is more cruel and inhuman than other methods of judicial execution”.¹⁹⁹ He was in fact acknowledging that other methods of execution are cruel and inhuman. Ando, in a dissent, also disagreed with using swiftness of death as a criterion in finding a violation, while stating that “article 7 prohibits any method of execution which is intended for prolonging suffering of the executed or causing unnecessary pain to him or her”.²⁰⁰

In addition, other Committee members held that the extradition of Mr Ng by Canada, which has abolished the death penalty, constituted a violation of the right to life in article 6 of the ICCPR, which automatically implied a violation of article 7 as well, regardless of the way the execution may be carried out.²⁰¹ Thus, as can be deduced from the above case, methods of executions are generally considered cruel and inhuman. Therefore, it is submitted that the above implies that the death penalty be abolished as there is no method of execution that can be used that would not have some degree of cruelty or inhumanity since by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the ICCPR.

5.6.2 The High Court and Court of Appeal of Tanzania

Similar to the position of the US Supreme Court (discussed below), the High Court and Court of Appeal of Tanzania have described, briefly, execution by hanging as cruel, inhuman and degrading form of punishment. In *Republic v Mbushuu and Another*, the process of hanging was described in the following words:

One leading doctor described the process as ‘slow, dirty, horrible, brutal, uncivilised and unspeakably barbaric’. The prisoner is dropped through a trapdoor eight to eight and a half

¹⁹⁹ Dissenting opinion of Mr Kurt Herndl in *Ng v Canada*, para 18.

²⁰⁰ Dissenting opinion of Mr Nisuke Ando in *Ng v Canada*.

²⁰¹ See individual opinions of Fausto Pocar (partly dissenting and partly concurring), Rajsoomer Lallah (dissenting) and Christine Chanet (dissenting) in *Ng v Canada*.

feet with a rope around his neck. The intention is to break his neck so that he dies quickly ... If the hangman gets [the length of the drop 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 a few cases in which 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 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.²⁰²

In the light of the above, Mwalusanya J concluded that “not only is the process generally sordid and debasing, but also it is generally brutalising and thus defeats the very purpose it claims to be pursuing”.²⁰³ Accordingly, Mwalusanya J held that the death penalty was cruel, inhuman and degrading punishment and also offends the right to dignity in the course of the execution.²⁰⁴ The Court of Appeal in *Mbushuu and Another v Republic* agreed with the above finding on hanging as a method of execution, stating that

[t]he execution of the death penalty too, that is hanging, is inhuman and degrading. We do not agree with the trial judge that hangings being conducted in private indicate the guilty conscience of the state. We are, however, of the opinion that the privacy surrounding executions is recognition that hangings are inhuman and degrading ... So, we agree, with the trial judge that the death penalty is inherently inhuman, cruel and degrading punishment and that is also so in its execution and that it offends [the right to dignity and the prohibition of inhuman or degrading treatment].²⁰⁵

The Tanzanian decision above reveals that hanging, as a method of execution, is cruel, inhuman and degrading. Therefore, bearing in mind that there is no humane method of execution, African states that employ hanging as a method of execution (including African states that use other methods, such as shooting and stoning) should consider abolishing the death penalty, in order to uphold human rights, particularly, the right not to be subjected to cruel, inhuman and degrading treatment or

²⁰² *Mbushuu* (1994) 343.

²⁰³ As above.

²⁰⁴ *Mbushuu* (1994) 351.

²⁰⁵ *Mbushuu* (1995) 228.

punishment. However, it should be noted that the Court found the death penalty to be constitutional, as it was saved under section 30(2) of the Tanzanian Constitution.²⁰⁶

5.6.3 The Supreme Court of the United States of America

The US Supreme Court has dealt with the constitutionality of hanging, a method of execution commonly used in Africa, in the case of *Campbell v Wood*, in which one of the questions presented was whether execution by hanging violates the Eighth Amendment of the US Constitution, prohibiting “cruel and unusual punishment”.²⁰⁷ The minority decision, which has been cited with approval in many jurisdictions, is very instructive. It states the following with regard to the process of hanging:

[H]anging is a savage and barbaric method of terminating life. We are convinced that judicial hanging is an ugly vestige of earlier, less civilised times when science had not yet developed medically-appropriate methods of bringing human life to an end. Hanging is a crude, rough, and wanton procedure, the purpose of which is to tear apart the spine. It is needlessly violent and intrusive, deliberately degrading and dehumanising. It causes grievous fear beyond that of death itself and the attendant consequences are often humiliating and disgusting.²⁰⁸

After considering the hanging process in detail and the pain associated with it, the Court then concluded that hanging was, without the slightest doubt, “cruel and unusual” in layman’s terms and in the constitutional sense, thus in violation of the Eighth Amendment of the United States Constitution.²⁰⁹ The minority put forward two reasons for finding execution by hanging unconstitutional: first, almost every state had rejected hanging as a form of punishment, which compels the conclusion that hanging fails to comport with evolving standards of decency; and second, the practice of judicial hanging was demonstrably incompatible with the respect for human dignity that is the mark of a civilised society.²¹⁰ It should be noted that the

²⁰⁶ Discussed above (see 5.4).

²⁰⁷ *Campbell v Wood* (1994) 18 F.3d 662 at 670.

²⁰⁸ As above, at 701.

²⁰⁹ As above, at 716-717.

²¹⁰ As above, at 700.

minority considered the majority decision, which did not consider hanging to be cruel and unusual,²¹¹ as flawed, while stating that

there is simply no justification for the majority's failure to conduct an inquiry into whether society's "evolving standards of decency" prohibit hanging ... were the majority to follow precedent and consider whether hanging violates our evolving standards of decency, it would be bound to conclude that it is a form of execution that has been unequivocally rejected as contrary to contemporary standards, and that the reason for its rejection is that this atavistic practice simply fails to provide the respect for human dignity that civilized society demands.²¹²

5.7 Conclusion

The calculated killing of a human being by the state involves by its very nature, a denial of the executed person's humanity, thus is uniquely degrading to human dignity. Although the UN Human Rights Committee and the European Court are of the view that the death penalty, in itself, cannot be deemed cruel, the High Court and Court of Appeal of Tanzania have held, as mentioned above, that the death penalty is inherently cruel, inhuman and degrading.²¹³ In addition, despite the above view of the Human Rights Committee, it has found the death penalty to be cruel, inhuman and degrading both in relation to the death row phenomenon and methods of execution. The Committee stressed that, by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment. The jurisprudence on the death row phenomenon discussed in this chapter shows that the death row phenomenon renders the death penalty and subsequent execution cruel, inhuman and degrading. It is clear from the jurisprudence that for some courts, delay in itself could constitute a human rights violation, while for other courts additional elements are required.

²¹¹ As above, at 683.

²¹² As above, at 708.

²¹³ Despite this, the Court of Appeal of Tanzania, as discussed in 5.4 above, still found it justifiable.

Abolishing the death penalty in Africa is desirable when one takes into consideration the jurisprudence discussed in this chapter, and the fact that the cruelty of the death penalty extends beyond the prisoner to the prisoner's family, to the prison guards and to the officials who have to carry out the execution. With regard to the impact of executions on the executioner, information shows that the role of the executioner can be very disturbing, even traumatic. Judges, prosecutors and other officials may also experience difficult moral dilemmas if the roles they are required to play in administering the death penalty conflicts with their own ethical views.

The cruelty of the death penalty on others has been evidenced, for example, in Uganda. Etima, the Commissioner General of Prisons in Uganda, in an affidavit stated as follows:

In my capacity as Commissioner, I am entitled to attend executions. In that capacity I attended one execution and I found it to be a very cruel and inhuman punishment. It had such a traumatic, horrifying, debasing and dehumanising effect on me that I vowed never to attend any other execution again, and I have never attended any other since. After witnessing that execution: I did not sleep for two days; I could not sleep properly for a long time and I had nightmares, which keep re-occurring up to today; the images of this execution haunt me to date and I am now convinced that they shall haunt me until the end of my days. Although I have not attended any subsequent executions, whenever executions are carried out, they have had the effect of making me feel dehumanised with the guilty feeling of one who has killed. It is particularly unnerving in my position having regard to the fact that through the chain of command, I command officers to carry out the execution yet my conscience tells me that killing is wrong...the implementation of the death penalty has adversely affected the public view of the prison department and its staff. Some segments of the public view the prison staff as killers and "butchers".²¹⁴

The above explains the difficulty in getting staff to work in sections of the prison that requires one to take part in execution due to the effect of executions on the officers. It further explains why some prison authorities advocate for abolition. In addition, Byabashaija, the Ugandan Deputy Commissioner-General of Prisons, pointed out in an affidavit that "the death penalty is a cruel, inhuman and degrading punishment not

²¹⁴ See affidavit of Joseph Etima, Commissioner General of Prisons, in support of the death penalty petition in Uganda. The interview was conducted in 2003 in Uganda by M/s Katende, Ssempebwa & Co. Advocates.

only to the condemned prisoners, but also to the prison staff²¹⁵. The situation is exacerbated by the fact that there is no training of any kind that prepares the prison officials to deal with the trauma they endure as a result of participating in, or witnessing, executions.²¹⁶ Judges have also expressed their experience of the cruelty of the death penalty. A Cameroonian judge, during a lecture in 1998 at the University of Buea, Cameroon, described the sleepless nights and mental torture he underwent when he had to pronounce a death sentence and after he witnessed the execution.²¹⁷ Also, a former prison warder in South Africa, Chris, is an emotional wreck today and suffers from severe post-traumatic stress, although it is years since he witnessed an execution.²¹⁸

Based on the aforementioned, it is clear that the death penalty in Africa is a cruel, inhuman and degrading punishment. Although this chapter reveals that the formulation of limitation and derogation clauses in some jurisdictions are obstacles to challenges to the death penalty in some jurisdictions, some courts in Africa have reached important decisions to the effect that the death penalty is cruel, inhuman and degrading. Other jurisdictions that still retain the death penalty could use these decisions as persuasive authority.²¹⁹

²¹⁵ See affidavit of Johnson Byabashaija, Deputy Commissioner-General of Prisons, in support of the death penalty petition in Uganda. The affidavits of Moses Kakungulu Wagabaza, David Nsalasatta, and Tom Ochen, all Assistant Commissioners of Prisons, and that of Vincent Oluka, a prison officer at Luzira Prison, also demonstrate the cruelty of the death penalty on others. The interviews were conducted in 2003 in Uganda by M/s Katende, Ssempebwa & Co. Advocates.

²¹⁶ As above.

²¹⁷ The author of this thesis was present at this lecture.

²¹⁸ Chris witnessed only a few hangings but they were enough to unhinge him. He assaults his wife as a result of his constant nightmares and stress. Also, former prison warder, Johan Steynberg has stated that the images of execution would never leave him. Chris and Steynberg stated their views during a discussion on “Death and democracy”, broadcasted on Special Assignment, SABC 3 at 21h30 on 9 March 2004 (South Africa). For further information on the discussion on “death and democracy”, see <<http://www.sabcnews.com/specialassignment/deathdemoc.html>> (accessed 4 April 2004).

²¹⁹ In addition to the jurisprudence discussed, see also, the decision of the South African Constitutional Court in *Mohamed v President of the Republic of South Africa and Others* 2001 (7) BCLR 685 (CC), in which it found the handing over of Mohamed to United States agents to face criminal charges in respect of which he could, if convicted, be sentenced to death, without seeking an assurance that the death penalty would not be imposed, to constitute a violation of his right not to be treated or punished in a cruel, inhuman or degrading way.

Cruel, inhuman and degrading treatment or punishment represents the most basic denial of human dignity that lies at the heart of the concept of human rights. The delay inherent in the judicial process as discussed in chapter two and the subsequent chapter compounds the problem in Africa, necessitating African states to consider abolishing the death penalty, in order to uphold respect for human rights. Abolition is possible since, as Nowak rightly points out, if the death penalty is considered cruel, inhuman and degrading punishment in South Africa, it is difficult to uphold that these words have a totally different meaning in other societies that consider themselves to belong to the so-called “civilized world”.²²⁰

²²⁰ Nowak (2000) 44.