

**AN ANALYSIS OF CAPITAL PUNISHMENT IN UGANDA IN  
LIGHT OF INTERNATIONAL STANDARDS AND  
COMPARABLE CASE LAW**

**Submitted in partial fulfilment of the requirements for the degree LLM (Human Rights and  
Democratisation in Africa)**

By

**Rose Karugonjo**

Prepared under the supervision of:

**Professor Nico Steytler**

at the

Faculty of Law, University of the Western Cape

**31 October 2003**

## **DECLARATION**

I declare that *An Analysis of Capital Punishment in Uganda in Light of International Standards and Comparable Case law* is my own work. It has not been submitted for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

**Rose Karugonjo**

31 October 2003

## **DEDICATION**

To those who genuinely fight for justice and human dignity.

## **ACKNOWLEDGMENTS**

I am greatly indebted to the Centre for Human Rights, University of Pretoria and its partners for giving me the scholarship. I thank the Centre for Human Rights, University of Pretoria and the Community Law Centre, University of the Western Cape where I spent the first and second semesters respectively.

I highly appreciate the invaluable guidance, constructive criticism and comments from my supervisor Professor Nico Steytler, Director of the Community Law Centre, University of the Western Cape.

I thank my classmates, particularly Terence Machawira, Leda Limann, Waruguru Kaguongo, Benson Olugbuo, Priscilla Ankut, Nima Othman and Mianko Ramarason, for giving me information and briefing me on the situation of the death penalty in their countries. I thank Gina Snyman for giving me every scrap of information in her possession that she thought was relevant to this study. I also would like to thank Jill Classen and Tina Roussouw for being the best librarians in the world.

Finally yet importantly, I am grateful to my fiancé, Moses Segawa, for his love, inspiration, support and encouragement during my pursuit of the LLM in Human Rights and Democratization in Africa.

## LIST OF ABBREVIATIONS

ACHR	American Convention on Human Rights
CAT	United Nations Convention Against Torture
CCPR	International Covenant on Civil and Political Rights
CESCR	International Covenant on Economic, Social and Cultural Rights
CPC	Criminal Procedure Code
CRC	United Nations Convention on the Rights of the Child
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
HRC	Human Rights Committee
NRA	National Resistance Army
PCA	Penal Code Act
TID	Trial on Indictments Decree
UDHR	Universal Declaration on Human Rights
UPDF	Uganda Peoples' Defence Force

## TABLE OF CONTENTS

<i>Declaration</i>	<i>ii</i>
<i>Dedication</i>	<i>iii</i>
<i>Acknowledgements</i>	<i>iv</i>
<i>List of abbreviations</i>	<i>v</i>
<b>1. Introduction</b>	<b>1</b>
1.1 Introduction	1
1.2 Hypothesis	3
1.3 Importance of the study	3
1.4 Literature survey	3
1.5 Methodology	5
1.6 Limitations of study	5
<b>2. International and regional standards on the death Penalty</b>	<b>6</b>
2.1 Introduction	6
2.2 International human rights law	6
2.3 Universal Declaration of Human Rights	6
2.4 International Covenant on Civil and Political Rights	7
2.5 Second Optional Protocol to the ICCPR	13
2.6 Regional human rights systems	14
2.6.1 The European human rights system	14
2.6.2 The American human rights system	16
2.6.3 The African human rights system	16
2.6.4 The Arab Charter of Human Rights	18
2.7 International humanitarian law	19
2.8 International criminal law	20
2.9 Conclusion	20
<b>3. The death penalty in Africa: constitutional challenges</b>	<b>22</b>
3.1 Introduction	22
3.2 Abolitionist countries	22
3.2.1 South Africa	22
3.3 Retentionist Countries	25
3.3.1 Tanzania	25
3.3.2 Nigeria	27
3.3.3 Zimbabwe	29
3.4 Conclusion	31
<b>4. The death penalty in Uganda</b>	<b>32</b>
4.1 Introduction	32
4.2 Offences for which the death penalty is imposed	32
4.3 Violations of the rights to fair trial, appeal, amnesty, pardon or commutation of sentence	34
4.4 Torture or cruel inhuman degrading treatment of prisoners on death row	37
4.5 Conclusion	38

<b>5. Strategies to challenge the death penalty in Uganda</b>	<b>40</b>
5.1 Introduction	40
5.2 Repeal of national legislation	40
5.3 Constitutional challenge	41
5.4 African Commission on Human and Peoples' Rights	42
5.5 Human Rights Committee	43
5.6 Conclusion	44
<b>Bibliography</b>	<b>45</b>

## CHAPTER 1

### 1. INTRODUCTION

#### 1.1 Introduction

Capital punishment (the death penalty) has been a subject of academic discussion for a long time. Arguments in favour of capital punishment include deterrence, retribution and prevention. Those against it argue that it does not deter, it violates human dignity and amounts to torture, cruel or inhuman degrading treatment and that due to judicial errors a number of innocent people are killed yet the punishment is irreversible. It may appear as if the subject is worn out and almost irrelevant following the current global trend towards the abolition of the death penalty. Indeed many countries have abolished the death penalty while some of those that retain it do not carry out executions frequently. According to Amnesty International 113 countries have abolished the death penalty in law or practice while only 83 countries retain it.<sup>1</sup> Schabas argues that the day when abolition of the death penalty becomes a universal norm entrenched by both convention and custom and qualified, as a peremptory rule of *jus cogens* is undeniably foreseeable.<sup>2</sup> Some may wonder why more intellectual energy and time should be devoted to the subject in an era of a clear emerging consensus that the death penalty is not justice. Nevertheless, the death penalty is still central in Africa. Only forty percent of the countries in Africa are abolitionist in law or practice. Only twenty percent have legally abolished the death penalty.<sup>3</sup> The fact that the death penalty is predominantly legislated and carried out in Africa presents a human rights challenge warranting an analysis of the sentence.

Uganda like many other African countries retains the death penalty. It is provided for in the constitution.<sup>4</sup> Ugandans are currently debating on abolishing it but a large percentage of the population want the death penalty retained.<sup>5</sup> There have been quite a number of executions carried out in the recent past. Executions last took place on the 3 March 2003. The execution was of members of the Uganda People's Defence Force (UPDF), Privates Richard Wigiri, Kambacho

---

<sup>1</sup> Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (1 January 2003) < <http://www.amnesty.org> > (accessed on 31 October 2003).

<sup>2</sup> See generally WA Schabas *The abolition of the death penalty in international law* (2002).

<sup>3</sup> See n 1 above.

<sup>4</sup> Article 22, 1995 Constitution of the Republic of Uganda. Uganda is party to the CCPR and the First Optional Protocol but not party to the Second Optional Protocol abolishing the death penalty.

<sup>5</sup> See CK Karusoke, 'The case for partial abolition' in 'Debate on controversial issues in the Constitution' (2003) *Your Rights* vol. VI, No. 1 Waliggo, 'How the Constitutional process dealt with the death sentence' (1999) in 'Death Penalty in Uganda: Yes or No?' *Your Rights* vol.11, No.6.

Ssenyonjo and Alfred Okech, who were accused and convicted of murder. Corporal James Omedio and Private Abdallah Mohammed who were also accused of murder were executed on 25 March 2002. In all these cases, the Court Martial tried the soldiers and promptly executed them in public by firing squad without giving them the opportunity to appeal against the death sentence.<sup>6</sup> The execution before this was of 28 civilians, which occurred on April 28, and 29th of 1999, when 28 prisoners were put to death over the two-day period.<sup>7</sup> These were accused of having murdered President Yoweri Museveni's supporters during the guerrilla war. There are currently petitions before the Constitutional Court of Uganda challenging the constitutionality of the death penalty.

There are two sets of international standards regarding the death penalty. There are basic human rights standards laid out in the Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (CCPR) which are binding on all states by virtue of their membership in the community of nations and by ratification respectively. These standards do not completely prohibit the death penalty. Instead, they make considerable restrictions on its use. These restrictions are that, for example, capital punishment may only be used in connection with the most serious crimes, and even then not if the offender in question is under 18 years of age. They also set out minimum standards that should be observed for those on the death row like the right to fair trial, right to appeal to a higher jurisdiction, right to seek clemency, among others. These standards have been adopted by some regional human rights systems like the African Charter on Human and Peoples' Rights (African Charter) and the Arab Charter on Human Rights (Arab Charter). A state that delays executions or does not conform to the minimum international standards may be held to be violating the right to protection against torture, cruel, inhuman degrading punishment as will be discussed in the following chapter. It is possible that these ramifications will force states to modify their procedures or abandon the death penalty.

There are also optional standards to which states can ratify or accede committing themselves to abolishing the death penalty laid out in the second optional protocol to the CCPR and some regional instruments. The regional instruments include protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the protocol to the American Convention on Human Rights. These treaties are only binding on those countries that have ratified them. As such, countries that have not ratified the optional protocols can still use capital punishment within the confines of the restrictions.

---

<sup>6</sup> Amnesty International, 'Uganda: soldiers executed after unfair trial' < <http://web.amnesty.org/library/Index/ENGAFR590042003?open&of=ENG-UGA>> (accessed on 5 May 2003).

<sup>7</sup> BBC News, 'Uganda hangs 28' < <http://news.bbc.co.uk/1/hi/world/africa/332613.stm>> (accessed on 5 May 2003).

## 1.2 Hypothesis

The study, considering international law and comparable case law on the subject in Africa, argues that Uganda does not comply with international standards in the use of the death penalty for countries that retain it. It considers the various ways in which the death penalty in Uganda can be challenged. It is argued that it may not be easy to challenge the death penalty in Uganda as unconstitutional but it can certainly be confronted based on the failure to comply with procedural safeguards for those on death row at the domestic, regional and international level.

## 1.3 Importance of the study

The death penalty is currently a subject of debate in Uganda by both the public and the Constitutional Court. The fact that Uganda retains the death penalty and that the recent executions were carried out in the most horrendous manner is worrying. There is concern that this might be an emerging trend, which warrants an analysis of the legality of the punishment and its operation in Uganda. Furthermore, the death penalty is still carried out in most parts of Africa yet there is not much written on the subject. Most of the writings on the subject of the death penalty focus on the USA. This study will contribute to the sparse research on the subject in Africa. The value of this research is that it indicates ways that can be used to confront the death penalty that may work not only in Uganda but also in other parts of Africa.

## 1.4 Literature survey

The death penalty has been the subject of many writings. Many books, journal articles and websites have information on the arguments for and against the death penalty, as mentioned earlier, mostly on the USA.<sup>8</sup> According to Bedau, more has been published about the death penalty in the USA than in the rest of the world combined.<sup>9</sup> However, there are a few books that have been written on the subject from a worldwide perspective.

Schabas<sup>10</sup> argues that since 1948 there has been a progressive move towards the abolition of the death penalty in international law. This he argues is shown by the increasing limit to the offences for which the death penalty may be imposed. International law is setting higher and higher standards for procedural requirements that are essential to any trial in which the death penalty may be imposed subject to law. These norms have been entrenched in conventions but it can be demonstrated that they are also customary in nature. These developments, he contends, are a

---

<sup>8</sup> See HA Bedau *The death penalty in America* (1997), T Sellin (ed.) *Capital punishment* (1967), P Conrad *The death penalty: a debate* (1983), KC Haas & JA Inciardi (eds.) *Challenging capital punishment legal and social science approaches* (1988) etc.

<sup>9</sup> Quoted in P Hodgkinson and A Rutherford (eds.) *Capital punishment, global issues and prospects* (1996) 12.

<sup>10</sup> Schabas (n 2 above).

form of partial abolition of the death penalty. He submits that this progressive restriction has been crowned in recent years by the emergence of a norm that effectively abolishes the death penalty. He states that although the abolition of the death penalty is still far from enjoying universal acceptance, its very existence testifies to its significance. He argues that the abolition of the death penalty in international human rights law has developed and will continue to develop. He discusses the standards laid out in the UDHR, CCPR and the Second Optional Protocol, the European human rights system, the Inter-American human rights system and the African human rights system. This study is similar but distinct. Apart from international law, this study considers national legislation and case law of some African countries and carries out a specific case study of the extent to which Uganda complies with international standards on the death penalty.

Hood,<sup>11</sup> studies the question of the death penalty and new contributions of the criminal sciences in the matter, prepared in pursuance of resolutions 1986/10 and 1989/64. He documents the changes in the attitudes of many countries and societies towards the question of the death penalty since 1989. He makes use of the report of the Secretary General of the United Nations entitled 'Capital punishment and implementation of safe guards guaranteeing the protection of the rights of those facing the death penalty', which was submitted, to the Council at its substantive session in 1995 and 2001. This study is different from Hood's work in the sense that it goes further into a more in-depth analysis of whether there are any changes in Africa, particularly in Uganda.

With regard to analysis of the death penalty in Uganda, not much has been written. Makubuya,<sup>12</sup> through comparative jurisprudential analysis argues that the death penalty offends the concept and the law on human rights and that it is inconsistent with the contemporary trend of international law. He contends that the death penalty is a violation of the right to life and that it amounts to cruel, inhuman and degrading treatment, which is unacceptable under international law and domestic legislation. He rebuts the arguments for the death penalty and contends that the death penalty in the Ugandan Constitution contradicts and negates the inalienable fundamental rights therein. He argues for the abolition of the death penalty in Uganda. This study is similar to Makubuya's in the sense that they both examine the death penalty in Uganda through comparison with international and comparative jurisprudence. However, Makubuya largely concentrates on rebutting the arguments for the death penalty and depicting it as violation of the right to life and as cruel, inhuman and degrading treatment. His discussion on the procedural aspects of the death penalty is very brief. This study develops arguments on the procedural aspects in application of the death penalty in Uganda in light of the international standards for countries that retain it.

---

<sup>11</sup> R Hood *The death penalty, a worldwide perspective* (2002).

<sup>12</sup> AN Makubuya, 'The constitutionality of the death penalty in Uganda: A critical inquiry' (2000) 6 (2) *East African Journal of Peace and Human Rights* 222.

Agostoni,<sup>13</sup> from a religious perspective challenges the power of the state to kill and decries the unfairness of the death sentence. He argues fervently for abolition of the death penalty particularly in Uganda. He contends that hanging human beings is a violation of a God-given inherent right to life. He quotes the Bible, Constitution and international human rights instruments. This study will be different from Agostoni's work, which is mainly from a religious perspective rather than legal. Agostoni does not mention the plight of members of the UPDF who are sentenced to death by the Court Martial that is different from those sentenced by ordinary courts of law that this study will expose.

### **1.5 Methodology adopted**

Research was carried out and literature on the subject was perused. The literature perused included; treaties, conventions, resolutions, declarations, constitutions, case law, textbooks, journal articles, newsletters, internet and any other relevant literature.

### **1.6 Limitations of the study**

The study does not make much effort to renew or repeat the pros and cons of the death penalty, which have been discussed in great lengths by most of the literature on the subject.<sup>14</sup> The study, which is from a legal perspective, discusses the extent to which Uganda complies with the international standards. It starts of by establishing the international standards on the death penalty, followed by a discussion of these norms in comparative case law particularly in Africa before assessing the situation of the death penalty in Uganda and discussing the various ways in which the death penalty can be confronted.

---

<sup>13</sup> See T Agostoni *May the State Kill?* (2002).

<sup>14</sup> E.g., see n 8 above.

## CHAPTER 2

### 2. INTERNATIONAL AND REGIONAL STANDARDS ON THE DEATH PENALTY

#### 2.1 Introduction

The right to life is the most basic and fundamental human right without which all other rights lose their significance. International law recognises its importance which explains the trend towards the abolition of the death penalty.<sup>15</sup> This is clearly manifest in international human rights law, international criminal law, international humanitarian law, regional human rights instruments and domestic law. This chapter discusses the standards and obligations for state parties in the various international and regional instruments on the subject.

#### 2.2 International human rights law

International human rights law has evolved over time from demands for more humane treatment of fellow human beings, which have been developed, by religious leaders, philosophers and jurists over the centuries. Human rights today form an important part of international law. The United Nations has played an important role in this development. Through negotiations human rights norms have been crystallized into specific and detailed directives of international law in covenants and treaties, which can also be enforced in domestic courts of law. The International Bill of Rights is composed of the UDHR, CCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR) which have been extensively elaborated through the adoption of numerous conventions and declarations by both the United Nations and the specialised agencies and at the regional level. These instruments form a wide-ranging but interrelated, normative system. Below is a discussion of some of the instruments relevant to the subject of the death penalty.

#### 2.3 The Universal Declaration of Human Rights

The UDHR<sup>16</sup> is the foundation of contemporary human rights law and provides 'a common understanding' of the human rights and fundamental freedoms referred to in the United Nations Charter. Its provisions are regarded as customary international law because of the extent to which

---

<sup>15</sup> See Y Dinstein, 'The right to life, physical integrity and liberty', in L Henkin (ed.), *The international bill of rights – The International Covenant on Civil and Political Rights* (1981) 115, R Lillich, 'Civil Rights' in T Meron (ed.) *Human rights in international law: legal and policy issues* (1984) 121.

<sup>16</sup> Although it is not a legally binding document it was adopted by the United Nations General Assembly on 10 December 1948 as a common standard for the achievement for all peoples and all nations and has been affirmed as such by the Vienna Declaration and Plan of Action UN Doc.A/CONF.157/24.

States have followed it in practice.<sup>17</sup> Acts such as genocide, slavery, murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized rights are considered violations of customary international law. It has been suggested that the UDHR represents codification of customary norms<sup>18</sup> and that it has become a part of 'the constitutional structure of the world community.'<sup>19</sup>

The UDHR states; 'Everyone has the right to life, liberty and security of the person.'<sup>20</sup> It provides for the right to life without particularly providing for either abolition or retention of the death penalty. The report of the Secretariat of the United Nations in a summary analysis of the death penalty debate describes this article as being 'neutral'.<sup>21</sup> However, it has been argued that the silence on the issue of the death penalty envisages the abolition of capital punishment. This view is strengthened by several important resolutions of the General Assembly and the Economic and Social Council which, when dealing with the limitation and ultimate abolition of capital punishment, cite article 3 of the UDHR in their preambles implying that it is in fact favourable to abolition.<sup>22</sup> Furthermore, the Secretary-General's report of 1973 on capital punishment asserts that article 3 of the UDHR implies limitation and abolition of the death penalty.<sup>23</sup> Therefore, this can be taken as the most likely interpretation of article 3 of the UDHR because it has maintained its pertinence with the CCPR and its second optional protocol and various specialised and regional instruments.<sup>24</sup>

## 2.4 International Covenant on Civil and Political Rights

The CCPR, which stems from the UDHR, treats the death penalty as an exception to the right to life. According to Rodley, had this not been the case, issues relating to the prohibition of torture or other cruel, inhuman degrading treatment or punishment would have arisen.<sup>25</sup> Indeed the death

---

<sup>17</sup> T Buergenthal, *International human rights law in a nutshell* (1988) 31-32.

<sup>18</sup> JP Humphrey, 'The Universal Declaration of Human Rights: Its history, impact and judicial character' in BG Ramcharan, (ed.) *Human rights: thirty years after the Universal Declaration* (1984).

<sup>19</sup> LB Sohn, 'The new international law: protection of the rights of individuals rather than states' (1982) 32 *American University Law Review* 1, 16-17.

<sup>20</sup> Article 3 UDHR.

<sup>21</sup> UN Doc.A/CONF.87/9.

<sup>22</sup> GA Res. 2393 (XXIII); GA Res. 2857 (XXVI); GA Res.32/61; GARes.44/128; ESC Res.1745 (LIV); ESC Res.1930 (LVIII).

<sup>23</sup> UN Doc.E/5242, Para 11.

<sup>24</sup> Schabas (n 2 above) 24.

<sup>25</sup> NS Rodley *The treatment of prisoners under international law* (1999) 206.

penalty has been described as cruel, inhuman or degrading punishment in a Secretariat statement to the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders.<sup>26</sup>

The CCPR clearly approves of a country's choice to abolish the death penalty but it does not require a country to eliminate the use of capital punishment to be party to the Covenant. Article 6 of the CCPR provides:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious of crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorise any State Party to the present Covenant to derogate in anyway from any provision assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Any one sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

This article, which cannot be derogated from,<sup>27</sup> can be interpreted in two ways. It can be interpreted as permissive and cognisant of the fact that the death penalty is beyond the scope of the right to life or as being restrictive, admitting the existence of the death penalty as a regrettable and temporary compromise, but viewing it as ultimately incompatible with the right to life in its most pure expression.<sup>28</sup> The Human Rights Committee (HRC), which is responsible for hearing state reports, individual complaints and interpretation of the CCPR, has commented that this article strongly suggests that abolition is desirable.<sup>29</sup>

The death penalty can only be carried out when various conditions are satisfied; a serious crime, accordance with the law at the time of commission of the crime, not contrary to other provisions of the ICCPR and the Convention on the Prevention and Punishment of the Crime of Genocide, pursuant to a final judgement rendered by a competent court, accused should be given a chance to have amnesty, pardon or commutation of sentence, it should not be on a person below the age of eighteen or a pregnant woman. These conditions are reiterated in 'The Safeguards Guaranteeing

---

<sup>26</sup> UN Doc. A/CONF.87/9, para 98.

<sup>27</sup> Article 4 CCPR.

<sup>28</sup> See Schabas (n 2 above) 95.

<sup>29</sup> See General Comment 6 (16). Also, see UN Doc.CCPR/C/SR, 264&22 and UN Doc.CCPR/C/SR Add.1 382-383.

the Protection of those Facing the Death Penalty' (the safeguards)<sup>30</sup> which emphasise humane treatment for those on the death row.

**a) Serious crime**

It is not clear what crimes fit in the category of 'serious' or 'most serious'. The HRC has pointed out that this clause should be 'read restrictively' to imply that the death penalty should be a 'quite exceptional measure.'<sup>31</sup> The safeguards declare that the ambit of the term 'most serious crimes' should not go beyond intentional crimes, with lethal or other extremely grave consequences.<sup>32</sup> According to the Secretary-General, the phrase means that 'the offences should be life threatening in the sense that it is a very likely consequence of the action.'<sup>33</sup> The Commission on Human Rights has reiterated the views of the Special *Rapporteur* on extrajudicial, summary or arbitrary executions<sup>34</sup> urging states not to impose the death penalty for non-violent financial crimes or for non-violent religious practice or expression of conscience.

The Secretary-General has distinguished between three categories of 'most serious offences': ordinary offences, offences against the state, and military and wartime offences.<sup>35</sup> Offences aimed at the domination of a social class or at overthrowing the basic economic and social orders, theft in aggravated circumstances, sexual intercourse with a female relative under 15 or arousing of religious and sectarian feelings or propagation of Zionist ideas may not stand the test of a 'most serious crime' in the sense of article 6 of the Covenant.<sup>36</sup>

The HRC has mentioned a number of individual offences that do not meet the standard of 'most serious crime' and these are apostasy,<sup>37</sup> abetting suicide,<sup>38</sup> homosexual acts,<sup>39</sup> illicit sex,<sup>40</sup>

---

<sup>30</sup> ESC Res.1984/50; GA Res. 39/118. These were adopted by the Economic and Social Council in 1984 and subsequently endorsed by the General Assembly.

<sup>31</sup> See Report of the Human Rights Committee, GAOR, 37<sup>th</sup> session, Suppl.40 (A/37/40) p 94.

<sup>32</sup> ESC Res.1984/50; GA Res. 39/118.

<sup>33</sup> UN Doc.E/2000/3, para 79.

<sup>34</sup> UN Doc.E/CN.4/1999/39, para 63.

<sup>35</sup> UN Doc. E/1995/78, paras 53-60.

<sup>36</sup> UN Doc.E/1990/38 para 41.

<sup>37</sup> Concluding Observations, Sudan UN Doc.CCPR/C/79 Add.85, para 8.

<sup>38</sup> Concluding Observations, Sri Lanka, UN Doc.CCPR/C/79 Add.56, para 14.

<sup>39</sup> Concluding Observations, Sudan UN Doc.CCPR/C/79 Add.85, para 8.

<sup>40</sup> Second Periodic Report of Sudan; Annual Report of the Human Rights Committee, 1998, UN Doc.53/40 para 119.

espionage,<sup>41</sup> evasion of military responsibility<sup>42</sup> to mention but a few. State Parties that impose the death penalty for political offences,<sup>43</sup> conspiracy between civil servants and soldiers,<sup>44</sup> misappropriation of state or public property,<sup>45</sup> treason,<sup>46</sup> espionage<sup>47</sup> and refusal to divulge previous political activities<sup>48</sup> have been criticised. The Committee has further advocated for the reduction of the number of crimes that are punishable by the death penalty.<sup>49</sup>

The 'most serious crimes' appears to be confined to murder. In the case of *Cox v Canada*<sup>50</sup>, the HRC noted that the applicant was to be tried for complicity in two murders, which were said to be 'undoubtedly very serious crimes'. The Committee has commented that the imposition of the death penalty for crimes that do not result in loss of human life is contrary to the Covenant.<sup>51</sup> In *Lubuto v Zambia* where the offender had received a mandatory sentence of death for armed robbery, the Committee stated that:

Considering that in this case the use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2, of the covenant.<sup>52</sup>

**b) Accordance with the law at the time of commission of the crime**

This means that the law providing for capital punishment should not be retrospective expressing the principle *nullum crimen, nulla poena sine lege* in article 15 of the CCPR. This has been argued to also imply that should capital punishment be abolished after the commission of the crime, the

---

<sup>41</sup> Concluding Observations, Cameroon, UN Doc.CCPR/C/79 Add.116, para 14.

<sup>42</sup> Fourth Periodic Report of Iraq; Concluding Observations, para 11.

<sup>43</sup> UN Doc.CCPR/C/SR.200, 19 (1980).

<sup>44</sup> E.g. Initial Report of Mali UN Doc.CCPR/C/1/Add.49.

<sup>45</sup> E.g. Initial Report of Mongolia, UN Doc.CCPR/C/1/Add.38; UN Doc.CCPR/C/SR.197, para 6 (Janca); UN Doc.CCPR/C/SR.198, para 21 (Koulishev); UN Doc.CCPR/C/SR.198, para 32 (Sadi).

<sup>46</sup> UN Doc.CCPR/C/SR.258, para.10 (Tomuschat).

<sup>47</sup> See n 41 above.

<sup>48</sup> UN Doc.CCPR/C/SR.200, para.42 (Prado Vallejo).

<sup>49</sup> E.g. Initial Report of Madagascar, UN Doc. CCPR/C/1 Add.14 and Initial Democratic Report of Yemen, UN Doc.CCPR/C/50/Add.2.

<sup>50</sup> *Cox v Canada* 539/1993, para 16.2.

<sup>51</sup> See Second Periodic Report of Iran, UN Doc. CCPR/C/79 Add.25 para.8.

<sup>52</sup> See *Lubuto v Zambia* (No.390/1990), UN Doc. CCPR/C/55/D/390/1990/Rev.1& 7.2.

offender ought to benefit from it and be sentenced to a lighter penalty as provided for in general terms in article 15 of the CCPR.<sup>53</sup>

**c) Not contrary to other provisions of the CCPR and the Convention on the Prevention of the Crime of Genocide**

It is unlawful to enact a law, which makes exercise of rights protected under the CCPR a capital offence. It implies that there must be no discrimination in imposing capital punishment on the basis of race, religion or other grounds provided for under the CCPR. The reference to the Genocide Convention emphasises that massive use of capital punishment could result into a disguised genocide, which is unlawful.<sup>54</sup>

**d) Pursuant to a final judgement rendered by a competent court**

This refers to the procedural guarantees of a fair trial, as enshrined in article 14 of the CCPR. This means that even in times of emergency the death penalty can only be carried out pursuant to a final judgement being the result of a fair trial, even though article 14 is not included in the list of non-derogable articles in article 4 of the CPPR.<sup>55</sup> In *Reid v Jamaica* the HRC referred to its General Comment 6 (16) by reiterating that the procedural guarantees prescribed in the CCPR must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal. It further added that in capital punishment cases, the duty of States parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the Covenant is even more imperative.<sup>56</sup>

**e) Amnesty, pardon or commutation of sentence**

Before the death penalty is carried out, the accused has the right to amnesty, pardon or commutation of sentence. Providing the right to amnesty, pardon or commutation of sentence for persons sentenced to death in this clause is for purposes of mitigating the death penalty in countries where it is still imposed. This implies that every effort should be made to avoid capital punishment. The person sentenced to death may not necessarily be given amnesty or pardon but they have a right to have their request for pardon considered.

---

<sup>53</sup> See CK Boyle, 'The concept of arbitrary deprivation of life' in BG Ramachran (ed.) *The right to life in international law* (1985) 231-244.

<sup>54</sup> See GAOR, 12<sup>th</sup> session, annexes, agenda item 33, UN Doc.A/3764 and Add. 1, 36 para 116.

<sup>55</sup> See Summary of Arbitrary Executions, Report by S Wako, Special Rapporteur of the Commission on Human Rights, E/CN.4/1983/16 P.14, para.59.

<sup>56</sup> *Reid v Jamaica* (No.250/1987). Also, see *Monguya Mbenge et al v Zaire* (16/1977), Report of the HRC, GAOR, 38<sup>th</sup> Session, Supplement No.40, Annex X.

**f) Not on a person below the age of eighteen or a pregnant woman or an insane person**

The CCPR prohibits imposition of the death penalty on people below the age of eighteen. The UN Convention on the Rights of the Child (CRC) provides that the death penalty cannot be imposed on a person who commits a crime while under the age of 18.<sup>57</sup> This text has been interpreted to mean that even if the offender was convicted when over the age of 18, he or she cannot be sentenced to death because he or she had not yet come of age.<sup>58</sup> The United States made reservations on this prohibition but the HRC has expressed the view that such reservation is invalid because it is contrary to international customary law to execute pregnant women or children. Furthermore, that any reservation to this effect would be inconsistent with the object and purpose of the Covenant.<sup>59</sup>

The provision on pregnant women is not clear on whether the prohibition of the death penalty still holds even after the baby is delivered or if there is a miscarriage or abortion. If the rationale for precluding pregnant women from the death penalty is to prevent the killing of an innocent child then the woman can be executed after the child is born or when the pregnancy has been terminated by abortion or miscarriage.<sup>60</sup> However if the reasoning is that a woman having dependent children must be kept alive to bring them up then the woman should not be executed.<sup>61</sup> The HRC commented, on Morocco's initial report, where it was reported that pregnant women were not executed until forty days after delivery<sup>62</sup> that it was cruel to execute a woman after delivering a child.<sup>63</sup> This is in line with paragraph 3 of the safeguards, which not only prohibit execution of pregnant women but also new mothers. The safeguards also prohibit the execution of children and those who have become insane.

**g) Humane treatment**

There is no doubt that the death penalty induces mental torture and involves the denial of the convict's dignity and humanity.<sup>64</sup> Therefore, attempts are made by international law to reduce the effects of the death penalty as much as possible. The HRC has stated that the death penalty must

---

<sup>57</sup> Article 7 CRC.

<sup>58</sup> R Sapienza, 'International legal standards on capital punishment' in Ramcharan (n 53 above) 288.

<sup>59</sup> General Comment 24 (51) Para 8.

<sup>60</sup> See Dinstein (n 15 above) 117.

<sup>61</sup> See Boyle (n 53 above). Also see article 76 para.3 of Additional Protocol No.1 to the Geneva Convention of 1949 on International Humanitarian Law and article 6 para.4 of Additional Protocol No.2.

<sup>62</sup> Initial Report of Morocco, UN Doc. CCPR/C/10/Add.10.

<sup>63</sup> UN Doc.CCPR/C/SR.327, paras 8 & 29; UN Doc.CCPR/C/SR.328, para 22 (Evans).

<sup>64</sup> See *Furman v Georgia* 408 U.S.238,92 S.Ct.2726, 33 L.Ed.2d 346 (1972); *S v Makwanyane & Mchunu* 1995 (3) SA 391 (CC).

be carried out in such a way as to cause the least possible physical and mental suffering.<sup>65</sup> The safeguards also require the penalty to be carried out in such a manner that inflicts the minimum possible suffering.<sup>66</sup> In considering these principles, the Committee has been cautious and has refused to consider the time element itself as a factor bringing the case within article 7 of the CCPR, which prohibits torture, cruel or inhuman degrading punishment or treatment.<sup>67</sup> In *Johnson v Jamaica*, the majority of the HRC stated that to impose a time limit explicitly or implicitly would indicate to a state that the penalty should be carried out before the limit expires. It was contended that this would thus discourage initiatives such as moratoria or simply executive reluctance to order executions when abolition is not politically feasible and thereby possibly encouraging the use of executions.<sup>68</sup> This is relevant if it is only the time factor being considered in the absence of other conditions that can turn such detention into torture or cruel, inhuman degrading treatment or punishment.<sup>69</sup> It was found that a 51 month delay between conviction and appeal violated articles 14(3) (c), 14 (5) and article 6 of the CCPR.

The Committee has found that poor conditions on death row violate article 10(1), 14 (3) (c) and (d) and 5 and article 6 of the CCPR.<sup>70</sup> It has also found that a delay close to 20 hours, that is waiting until 45 minutes before the scheduled execution before communicating a reprieve to the accused violated article 7 of the CCPR which required, in their view, commutation of the sentence. It also found violations of article 14 (3) and (5). With regard to the method of execution, the Committee has held that gas asphyxiation<sup>71</sup> is a violation of article 7 of the CCPR while a lethal injection is not. It is likely that stoning would be held as a violation because it intends and indeed inflicts prolonged pain and suffering.<sup>72</sup>

## 2.5 The second Optional Protocol to the ICCPR

The Second Optional Protocol refers to abolition of the death penalty as desirable and the preamble states that all measures of abolition should be considered as progress in the enjoyment of the right to life. It provides that no one within the jurisdiction of a State Party shall be executed.

---

<sup>65</sup> General Comment 20 (44), Report of the HRC, UN Doc.A/47/40 (1992), Annex VI A, para 6.

<sup>66</sup> See para 9, the safeguards.

<sup>67</sup> E.g. *Cox v Canada* (539/1993), UN Doc.CCPR/C/57/WP.1 (1996).

<sup>68</sup> *Johnson v Jamaica* (558/1994), UN Doc. CCPR/C/56/D/588/1994 (1996), paras 8.2-8.4.

<sup>69</sup> See n 68 above Para 8.5.

<sup>70</sup> See *Kelly v Jamaica* (253/1987), Report of the HRC, GAOR, 46<sup>th</sup> Session Supplement No.40 (1991), Annex XI D, paras.3.8, 5.7 and 6.

<sup>71</sup> *Ng v Canada* (469/1991), Report of the HRC, Vol.II GAOR, 49<sup>th</sup> Session, Supplement No.40 (1994), Annex IX CC, Paras 2.1 & 16.4.

<sup>72</sup> See n 71 above, Appendix A: Herndl (Austria); Sadi (Jordan).

Article 2 permits reservation of the application of the death penalty in time of war; pursuant to a conviction for a most serious crime of a military nature committed during wartime. The term in 'time of war' is not quite clear. It could mean internal armed conflict or civil war or international armed conflict. The European Protocol with similar provisions has been interpreted to mean international armed conflicts rather than civil war.<sup>73</sup> The term state of war has been interpreted to include imminent threat of war.<sup>74</sup> Under article 3 of the Second Protocol State parties are required to report about their progress on the abolition of the death penalty and according to articles 4 and 5, if a State Party has already accepted the Inter-State and Individual Communications Procedure for the Covenant, these are also applicable to the Second Optional Protocol. However, a State may declare otherwise at the time of ratification or accession. Article 6 describes the provisions of the Second Optional Protocol as additional provisions to the CCPR. It emphasises that the requirements of due process, provided by article 14 of the CCPR, apply to cases of the Military death penalty as well as the relevant provisions of humanitarian law by the effect of article 5 (2) of the CCPR which provides for non-derogation.

## 2.6 Regional human rights systems

Various developments have been made in human rights protection in regional systems. The Council of Europe's ECHR<sup>75</sup> was the first international regional human rights treaty. It was followed by the Organisation of American States' ACHR<sup>76</sup> then by the Organisation of African Unity's (now African Union) African Charter<sup>77</sup> and more recently the Arab Charter.<sup>78</sup> A discussion of their provisions on the death penalty follows below.

### 2.6.1 European human rights system

The ECHR<sup>79</sup> is the longest established regional human rights treaty. The Preamble clearly states that the purpose of the ECHR is 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.' Article 2 provides:

---

<sup>73</sup> Rodley *The Treatment of Prisoners* quoted in Schabas (n 2 above) 183.

<sup>74</sup> UN Doc.E/CN.4/Sub.2/1987/20 Para 168.

<sup>75</sup> It came into force on 3 September 1953.

<sup>76</sup> It was adopted in 1969 and came into force in 1978.

<sup>77</sup> The Organisation of African Unity (now African Union) adopted it on 27 June 1981 in Nairobi, Kenya. It entered into force on 21 October 1986.

<sup>78</sup> Adopted on 15 September 1994.

<sup>79</sup> It entered into force Sept. 3, 1953.

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of court following his conviction of a crime for which this penalty is provided by law.

This article provides for the death penalty as an exception to the right to life. It does not provide for safeguards or limitations on its use save for the sentence being passed by court<sup>80</sup> and for a crime for which the penalty is provided by law. However, the European Court of Human Rights in the case of *McCann et al v United Kingdom*<sup>81</sup> held that article 3 of the Convention must be interpreted and applied so as to make its safeguards practical and effective. It further held that article 2 not only safeguards the right to life but also sets out the circumstances when the deprivation of life may be justified and that the article ranks as one of the most fundamental provisions in the Convention, which in peacetime admits of no derogation under article 15. That together with article 3 of the Convention, which provides for the right against torture it enshrines one of the basic values of the democratic societies making up the Council of Europe.

The Court also left open the possibility that the limitations in other instruments, such as the prohibition of execution for crimes committed while under the age of 18, are implicit in the wording of article 2 of the Convention.<sup>82</sup> It could therefore be argued that the limits on the use of the death penalty and the safe guards are implicit in the article.

In *Kirkwood v United Kingdom*,<sup>83</sup> the European Commission considered the possibility that the death penalty, although ostensibly permitted by the Convention raises issues under article 3 which prohibits torture. However, Kirkwood's application was declared inadmissible on grounds that he had failed to demonstrate that detention on death row was inhuman and degrading treatment.

Developments led to the adoption and coming into force of the Sixth Optional Protocol to the ECHR in 1985, which abolishes the death penalty in peacetime. It provides that a State may make provisions in its law for the death penalty in respect of acts committed in time of war or imminent threat of war. War in this case means international armed conflict and the conditions for carrying out the death sentence laid out in article 2 apply.<sup>84</sup>

---

<sup>80</sup> See *De Wilde, Ooms and Versyp v Belgium*, 18 June 1971, Series A, vol.12, *Ringelsen v Austria*, 16 July Series A, vol.84.

<sup>81</sup> *McCann et al V United Kingdom*, 27 September 1995, Series A, vol.324.

<sup>82</sup> *Soering v United Kingdom and Germany* (App.No.14038/88) 108.

<sup>83</sup> *Kirkwood v United Kingdom* (App. No.10308/83), (1985) 37 DR 158, 184.

<sup>84</sup> Sapienza (n 58 above) 292.

Further developments at the European Conference of Ministers<sup>85</sup> called for the complete abolition of the death penalty and more respect for fundamental freedoms and especially the right to life.<sup>86</sup> The Conference passed a resolution, which completely abolishes the death penalty in times of war as well as in times of peace. The European Council meeting in Nice in December 2000 together with the European Parliament and the Commission jointly issued the first Charter of Fundamental Rights. The Charter provides for the right to life in article 2 and particularly that no one shall be condemned to the death penalty or executed. Capital punishment is almost completely wiped out in Europe because the abolition of the death penalty has become a requisite for full participation in such organisations as the Council of Europe and the European Union.

### **2.6.2 American human rights system**

The American human rights system has been said to be the pioneer in the abolition of the death penalty.<sup>87</sup> It began like the UN with a declaration<sup>88</sup> in 1948 and completed this with a convention.<sup>89</sup> The American Declaration, although textually silent on the death penalty, is a norm that prevents arbitrary use of capital punishment. The American Convention on Human Rights (ACHR) in article 4 is quite similar to the CCPR but goes further in providing for safeguards and limitations on the death penalty, excluding its use for political crimes and the elderly. It particularly provides that once a State has abolished the death penalty it cannot be reinstated.

The Additional Protocol, like the Optional Protocol and Protocol No. 6, which came into force in 1993 is a more restrictive agreement than its original Convention. Under the Additional Protocol, no ratifying country may impose the death penalty on any person within its jurisdiction. In addition, ratifying parties cannot make any reservations to the Additional Protocol.

### **2.6.3 African human rights system**

The African Charter on Human and Peoples' Rights provides:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.<sup>90</sup>

---

<sup>85</sup> This was held in conjunction with the 50<sup>th</sup> Anniversary of the ECHR on 4 November 2000.

<sup>86</sup> Amnesty International, 'Death Penalty News' 2000  
<[http://web2.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/ACT530012001ENGLISH/\\$File/ACT5300101.pdf](http://web2.amnesty.org/aidoc/aidoc_pdf.nsf/Index/ACT530012001ENGLISH/$File/ACT5300101.pdf)>  
(accessed on 5 May 2003).

<sup>87</sup> Schabas (n 2 above) 14.

<sup>88</sup> American Declaration of the Rights and Duties of Man.

<sup>89</sup> American Convention on Human Rights. The United States is not party to this convention.

<sup>90</sup> Article 4 African Charter.

This provision could probably have been derived from article 6 of the CCPR. It makes no mention of the death penalty. Heyns<sup>91</sup> has stated that the article does not favour any side of the death penalty debate but the provision has also been interpreted to mean that the African Charter permits the death penalty provided it is imposed in accordance with the law.<sup>92</sup> The African Commission, which is responsible for interpretation of the Charter and receiving communications of violations of the Charter,<sup>93</sup> has held that arbitrary and brutal executions constitute violations of article 4.<sup>94</sup> In its 'Resolution Urging States to envisage a Moratorium on the Death Penalty',<sup>95</sup> the African Commission stated as follows:

The Commission:

1. Urges all States Parties to the African Charter on Human and Peoples' Rights that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter.
2. Calls upon State parties that still maintain the death penalty to;
  - (a) limit the imposition of the death penalty to the most serious of crimes;
  - (b) consider establishing a moratorium on executions, especially in cases where there may not have been full compliance with international standards for a fair trial;
  - (c) reflect on the possibility of abolishing the death penalty.

The African Commission in the resolution interprets the African Charter in line with the CCPR. The resolution acknowledges the use of the death penalty but restricts it to the 'most serious of offences' and urges compliance with the guarantees in the Charter and international standards for a fair trial in carrying out the sentence. Asking State Parties to reflect on the possibility of abolishing the death penalty implies that the African Commission considers abolition of the death penalty as a desirable end.

Those sentenced to death are entitled to the right to fair trial provided for in article 7 of the African Charter. The article is not as detailed as the one in the CCPR and has been described as inadequate.<sup>96</sup> Many of the crucial aspects of the right to a fair trial are not provided for like the right to a public hearing, the right to interpretation, the right against self-incrimination and the right against jeopardy. However, the African Commission has interpreted the African Charter to include

---

<sup>91</sup> C Heyns, 'Civil and Political rights in the African Charter' in M Evans and R Murray (eds.) in *The African Charter on Human and People's Rights: The system in practice 1986-2000* (2002) 149.

<sup>92</sup> K Mbaya, 'Les droits de l'homme en Afrique' (1992) 197 quoted in Schabas (n 2 above), Makubuya, (n 12 above) 222, 237.

<sup>93</sup> Article 45 (3) African Charter.

<sup>94</sup> Communications 54/91, 61/91, 98/93, 164/97 and 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, Thirteenth Activity Report 1999-2000.

<sup>95</sup> Adopted at the 26<sup>th</sup> Ordinary Session of the African Commission on Human and People's Rights, Kigali, Rwanda, 1-15 November 1999, DOC/OS (XXVI) INF.19.

<sup>96</sup> Heyns (n 91 above) 155.

some of these elements in its 'Resolution on the Recourse Procedure and Fair Trial'<sup>97</sup> and in various communications.<sup>98</sup> Furthermore, the African Commission can draw inspiration from international law principles.<sup>99</sup> The Commission has condemned states that carry out the death penalty without according the accused procedural guarantees.<sup>100</sup>

Like the CCPR and the CRC, the recent African Charter on the Rights and Welfare of the Child<sup>101</sup> provides that the death penalty cannot be imposed for crimes committed by children. A child is defined as one below the age of 18.<sup>102</sup> It has been interpreted to mean that even if the person was convicted when over the age of 18, he or she cannot be sentenced to death because he or she had not yet come of age at the time of commission of the crime.<sup>103</sup>

On the execution of women, the more recent, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa,<sup>104</sup> provides for the right to life and particularly that in those countries where the death penalty exists the death sentence should not be carried out on pregnant or nursing women. This is a positive development towards the abolition of the death penalty in the African human rights system.

#### 2.6.4 Arab Charter of Human Rights

The Arab Charter, which was adopted on 15 September 1994 but has not yet come into force, provides for the right to life<sup>105</sup> but recognises the legitimacy of the death penalty for the 'most serious crimes' and anyone sentenced has the right to seek pardon or commutation of the sentence.<sup>106</sup> It prohibits the death penalty for political crimes<sup>107</sup> and excludes capital punishment

---

<sup>97</sup> Resolution on the Right to Recourse Procedure and Fair Trial, Fifth Annual Activity Report of the ' African Commission on Human and Peoples' Rights, 1991 – 1992.

<sup>98</sup> See (n 94 above); Communication 206/97, *Centre for Free Speech v Nigeria*, Thirteenth Activity Report 1999-2000 and Communication 215/98, *Rights International v Nigeria*, Thirteenth Activity Report 1999-2000.

<sup>99</sup> See articles 60 & 61 of the African Charter.

<sup>100</sup> See Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria*, Twelfth Activity Report 1998-1999 Annex 5, Para 104.

<sup>101</sup> This entered into force on 29 November 1999.

<sup>102</sup> Article 5 (3) African Children's Charter.

<sup>103</sup> F Viljoen, 'The African Charter on the rights and welfare of the Child' in CJ Davel (ed.) *Introduction to child law in South Africa* (2000) 220.

<sup>104</sup> Adopted on 28 March 2003 but has not yet come into force.

<sup>105</sup> Article 5.

<sup>106</sup> Articles 10.

<sup>107</sup> Article 11.

for crimes committed while under the age of eighteen and for pregnant women and nursing mothers for a period of up to two years following childbirth.<sup>108</sup>

## **2.7 International humanitarian law**

International Humanitarian law is the law applicable in times of war and armed conflicts. Several norms on the subject of the death penalty have evolved in international humanitarian law. Article 3 common to the four Geneva Conventions prohibits the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees, which are recognised as indispensable by civilised peoples. Provision is made that no prisoner of war may be tried or sentenced for an act that is not forbidden by the detaining power or by International law in force at the time the same act was committed.<sup>109</sup> It is further provided that prisoners of war and protecting powers shall be informed, as soon as possible, of the offences, which are punishable by the death sentence under the laws of the detaining power.<sup>110</sup> Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the power upon which the prisoners of war depend.

Civilians are protected against unlawful use of capital punishment by provision contained in the Fourth Geneva Convention relative to the protection of civilians in time of war. Under article 70, they are protected against arrest, prosecution or conviction for acts committed or opinions expressed before the occupation. The occupying power can only impose the death penalty on a protected person only in cases where the person is guilty of espionage, serious acts of sabotage against the military installations of the occupying power or international offences, which have caused the death of one or more persons. This is particularly where such offences were punishable by death under the law of the occupied territory in force before the occupation began. Furthermore, the Geneva conventions have provisions on the right to a fair trial in articles 99, 100 and 105 of the Third Convention and articles 71 and following of the Fourth Convention.

International Humanitarian Law, which has clearly been influenced by international human rights law prohibits execution of pregnant women or who have infants,<sup>111</sup> and is restricted to the most serious of crimes<sup>112</sup> thus contributing to a minimum standard of protection of individuals.

---

<sup>108</sup> Article 12.

<sup>109</sup> Article 99 of the Third Geneva Convention.

<sup>110</sup> Article 100 of the Third Geneva Convention.

<sup>111</sup> Article 76 (3) Additional Protocol 1, II.

<sup>112</sup> Article 68 of Geneva Convention IV.

## 2.8 International criminal law

For a long time, the death penalty has been considered as an appropriate punishment under international criminal law.<sup>113</sup> The Charter of the International Military Tribunal authorised the Nuremberg court to impose upon a convicted war criminal 'death or such other punishment as shall be determined to be just.'<sup>114</sup> The sentencing provisions of the Charter of the International Military Tribunal for the Far East (the Tokyo Tribunal) had similar provisions.

The Genocide Convention adopted in 1948 was in favour of a general pronouncement pointing to a yet-to be created international criminal court that and in practice gave primary responsibility for genocide prosecutions to the State where the crime took place.<sup>115</sup> It required States parties to establish 'effective' penalties for Genocide within their domestic legal systems.<sup>116</sup> Later instruments indicate the emerging trend of abolition of the death penalty. The International Criminal Tribunals for Rwanda and Yugoslavia provide that sentences should be limited to imprisonment and that they be established taking into account the criminal courts in Rwanda and the former Yugoslavia as the case maybe.<sup>117</sup> More recently, the Rome Statute of the International Criminal Court<sup>118</sup> has excluded the death penalty. According to Schabas, this is a significant benchmark in an unquestionable trend towards abolition of the death penalty.<sup>119</sup> The Secretary-General of the United Nations<sup>120</sup> and the European Union<sup>121</sup> have expressed similar views.

## 2.9 Conclusion

It is clear that the emerging customary norm is abolition of the death penalty at both the international and regional levels. The norms of the American Convention on the death penalty are more advanced than the European and United Nations systems. The African human rights system is moving towards that norm albeit at a much slower rate but it will eventually get there. The future of the Arab human rights system is uncertain but the Arab Charter is a good beginning. It is

---

<sup>113</sup> 'Punishment of Criminals', (1948) 25 LRTWC 200 quoted in Schabas (n 2 above) 235.

<sup>114</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishment of the Charter of the Military Tribunal (IMT), (1951) 82 UNTS 279, art.27.

<sup>115</sup> Convention for the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277 VI. See WA Schabas, *Genocide in International Law* (2000).

<sup>116</sup> See article V of the Convention.

<sup>117</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art.25 and Statute of the International Criminal Tribunal for Rwanda, art.24.

<sup>118</sup> Adopted on 17 July 1998.

<sup>119</sup> Schabas (n 2 above) 258.

<sup>120</sup> See Report of the Secretary-General on Capital Punishment, UN Doc.E/2000/3, Para 66.

<sup>121</sup> 'EU Memorandum on the Death Penalty' *European Union Annual Report on Human Rights* 11317/00, 81.

imperative for countries that have not yet abolished the death penalty to enforce safeguards and limitations. Analysis of these trends in national legislation, particularly in Africa will be discussed in the next chapter.

## CHAPTER 3

### 3. THE DEATH PENALTY IN AFRICA: CONSTITUTIONAL CHALLENGES

#### 3.1 Introduction

As mentioned earlier most African countries retain the death penalty. Although there have been moves to abolish the death penalty in some parts of Africa, support for the death penalty is still strong and is rooted in law, customs, culture and religion, which allow it for crimes such as murder, armed robbery, apostasy, adultery and fornication, among others. Countries that have not carried out executions in the last ten years, and thus are abolitionists in practice (*de facto*) include Burkina Faso, Central African Republic, Congo (Republic), Eritrea, The Gambia, Madagascar, Mali, Mauritania, Niger, Senegal, Togo, Tunisia and Swaziland, among others.<sup>122</sup> However, such countries can always resort to it when the 'need' arises.<sup>123</sup> Those that have abolished the death penalty by law (*de jure*) are Angola, Cape Verde, Côte d'Ivoire, Djibouti, Guinea-Bissau, Mauritius, Mozambique, Namibia, São Tomé and Príncipe and Seychelles.<sup>124</sup> South Africa did so through a Constitutional Court decision. Below is a discussion of the case law in abolitionist and retentionist countries.

#### 3.2 Abolitionist countries in Africa

As mentioned earlier, Angola, Cape Verde, Côte d'Ivoire, Djibouti, Guinea-Bissau, Mauritius, Mozambique, Namibia, São Tomé and Príncipe, Seychelles and South Africa legally abolished the death penalty. Apart from South Africa, the rest did so through repeal of legislation. Since South Africa is the first and only country so far in Africa to abolish the death penalty through a decision of the Constitutional Court, only its case law is analysed in this section.

##### 3.2.1 South Africa

South Africa, a country that was renowned for its extensive use of the death penalty particularly in the apartheid era, abolished it in 1995 through a constitutional court decision. In a landmark

---

<sup>122</sup> Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (1 January 2003), n 1 above.

<sup>123</sup> For example, Algeria and Libya resumed the death penalty in 1977 and 1992 after twenty and ten years respectively of not using the death penalty in practice.

<sup>124</sup> Hood (n 11 above) 38-42.

decision of *S v Makwanyane and Mchunu*,<sup>125</sup> the Constitutional Court decided that capital punishment was incompatible with the prohibition against cruel, inhuman or degrading punishment and with a human rights culture, which made the rights to life and dignity the cornerstone of the South African Constitution. It is important to note that the South African Interim Constitution, which was applicable at the time, provided for the right to life with no mention of whether the death penalty was prohibited or not. The new democratic parliament did not repeal the law providing for the death penalty.

The Constitutional Court in *Makwanyane* described the rights to life and dignity as the most important of all human rights, and the source of all other personal rights in the Bill of Rights of the South African Constitution. That by committing themselves to a society founded on the recognition of human rights they are required to value these two rights above all others.<sup>126</sup> The Court relied on a decision of the Hungarian Constitutional Court, which stresses the absolute nature of the rights to life and dignity. Other rights, the Hungarian Court held, may be limited, and may even be withdrawn and then granted again, but ultimately the absolute limitation of state power is to be found in the preservation of the twin rights of life and dignity.<sup>127</sup> It was pointed out that the right to life requires the state to take the lead in re-establishing respect for human life and dignity in South Africa considering South Africa's history of apartheid, which demeaned the value of life and human dignity.<sup>128</sup> The respect for life and dignity was linked with the African philosophical concept of *Ubuntu*, whose dominant theme is a culture that considers the life of another person as 'at least as valuable as one's own'.<sup>129</sup>

The Court pointed out that the right to life in the South African Constitution is textually unqualified and noted that it differs materially from the constitutions of the United States, Canada, Hungary and India, and from international instruments such as the CCPR and the ECHR.<sup>130</sup> These instruments all qualify the right to life, by providing that it may not be deprived arbitrarily or other than in accordance with a sentence of a court of law. This, it was acknowledged, explains why challenges to the death sentence failed in those jurisdictions.<sup>131</sup> In South African law, the right to life may only be limited in terms of the limitation clause. It was held that the absence of qualification indicated that the drafters of the interim Constitution intended the Constitutional Court and not the

---

<sup>125</sup> *S v Makwanyane & Mchunu* 1995 (3) SA 391 (CC) (hereinafter referred to as *Makwanyane*).

<sup>126</sup> Chaskalson P, paras 144-146 & Sachs J paras 214 & 217.

<sup>127</sup> Decision 23/1990 (X31) AB. Also, see Chaskalson P, paras 83-85.

<sup>128</sup> Langa J, para 217.

<sup>129</sup> Sachs J, para 225 & Mokgoro J, para 308.

<sup>130</sup> Chaskalson P, para 85.

<sup>131</sup> Chaskalson P, para 38.

Parliament to decide the difficult question of whether the death penalty should be retained or not.<sup>132</sup>

Chaskalson, P, who wrote the leading judgement signed by all the other judges, rejected an argument that those convicted of murder have forfeited their right to life and held that constitutional rights vest in every person, including criminals convicted of vile crimes.<sup>133</sup> He held that the death sentence is a form of cruel, inhuman or degrading punishment. A majority of the other members of the Constitutional Court found that the death penalty also violated the right to life.<sup>134</sup> They did not give the right to life a comprehensive definition but most of them agreed that the right must, at least incorporate the right not to be deliberately and systematically killed by the state.<sup>135</sup>

Chaskalson, P, also rejected the argument that the death penalty acts as a deterrent and a preventative effect fulfilling the state's constitutional obligation to protect life. The court held that whether one sees the death sentence as forming part of the state's duty to protect life or not, it remains a form of punishment which needs to conform with the Bill of Rights and in particular, with the prohibition of cruel, inhuman degrading forms of punishment.

Thus, the death penalty was rendered an unconstitutional form of punishment in South Africa and the text on the right to life in the interim Constitution was retained in South Africa's Constitution. In 1997, the Criminal Law Amendment Act removed all references to capital punishment from the statute book. However, the Court did not discuss the issue of the death penalty in time of war. It has been argued that different considerations could apply under a limitation analysis under S.36 of the South African Constitution because no argument was heard on the issue.<sup>136</sup> Nevertheless, even if the death penalty was applicable under such circumstances the procedural guarantees of those facing the death penalty should be observed.

---

<sup>132</sup> Chaskalson P, para 25 and in particular footnote 33. Also see O'Regan J, para 324.

<sup>133</sup> Chaskalson P, para 137.

<sup>134</sup> See Ackermann J, para 166; Didcott J, para 174; Kriegler J, para 208&214; Langa J, para 217& 234; Mohamed J, para 268; Mokgoro J, para 313; O'Regan J, paras 318 & 344 and Sachs J, paras 350&357.

<sup>135</sup> See Mahomed J, para 269; Ackermann J, para 166; Didcott J, para; 176; Kriegler J, para 208; Langa J, para 217 and O'Regan J, para 334.

<sup>136</sup> N Steytler, *Constitutional Criminal Procedure: A commentary on the Constitution of the Republic of South Africa*, 1996 414

### 3.3 Retentionist countries in Africa

There have been attempts to challenge the use of the death penalty in various courts in Africa. The death penalty has been challenged either on grounds of unconstitutionality or on the treatment of those on the death row. The cases analyzed below show these attempts. Case law in Tanzania is chosen because the attempt to abolish the death penalty was almost successful but the decision was not affirmed by the appellate court. A similar attempt was made in Nigeria but the text of the Constitution thwarted it. In Zimbabwe, the case law exposed and challenged the death penalty based on the death row phenomena.

#### 3.3.1 Tanzania

The High Court of Tanzania in 1994, ruled that infliction of capital punishment constituted an unconstitutional deprivation of the right to life, infliction of inhuman or degrading punishment, and denial of human dignity.<sup>137</sup> It stated that each of the rights in question is protected under the Constitution of Tanzania.<sup>138</sup> It held that international human rights instruments and court decisions of other countries provide valuable information and guidance in interpreting the basic human rights in the Tanzanian Constitution.<sup>139</sup> The court agreed with the petitioner's contention that

...the emerging consensus of values in the civilized international community as evidenced by the UN human rights instruments, the decision[s] of other courts and the writings of leading academics is that the death penalty is a cruel, inhuman and degrading punishment.<sup>140</sup>

This was based on the CCPR, the work of the U.N. Commission on Human Rights, Amnesty International, the Council of Europe, the European Court of Human Rights, the examples of other Commonwealth countries abolishing the death penalty, and court decisions from Botswana, Zimbabwe, the United States, and India.<sup>141</sup> The Court affirmed, as was argued by the government, that the views of the Tanzanian people should be central to his assessment but concluded that the cruelties of the death penalty, were they truly to be made known in Tanzania rather than kept

---

<sup>137</sup> *Republic v Mbushuu*, [1994] Tanzanian Law Reports 146, 173 (hereinafter referred to as *Mbushuu*, High Court).

<sup>138</sup> Constitution of the Republic of Tanzania: article 13(6) (d), provides that human dignity shall be protected in the execution of a sentence; article 13(6) (e) provides that no person shall be subjected to torture or inhuman or degrading punishment or treatment and article 14 provides that every person has the right to live and to the protection of his life by the society in accordance with the law.

<sup>139</sup> *Mbushuu*, High Court 151.

<sup>140</sup> *Mbushuu*, High Court 156.

<sup>141</sup> *Mbushuu*, High Court 156-157.

hidden behind a secretive process, would 'move the heart of even the stone- hearted.'<sup>142</sup> The Court concluded, therefore, that capital punishment did constitute cruel, inhuman, and degrading punishment, even by Tanzanian sensibilities.<sup>143</sup> With regard to the right to life, the Court stated that, it is not absolute but is 'subject to law' under the Constitution.<sup>144</sup> However, it found that the state failed to meet its burden to justify the public necessity of the legal limitation on the right to life. It was held that the death penalty is not 'lawful' within the meaning of the Constitution's guarantee of the right to life.<sup>145</sup>

However, the appellate court reversed this ruling.<sup>146</sup> The Court of Appeal compared the Tanzanian Constitution's protection of the right to life with the expression of that right in many other constitutions and several international human rights instruments.<sup>147</sup> It concluded that the right to life, both under the Tanzanian Constitution and as a general principle, is 'inherent and universal' and yet also subject to the possibility of lawful deprivation.<sup>148</sup> It stated that, [t]here can be instances in which the due process of law will deny a person his right to life or its protection.<sup>149</sup> The Court affirmed that the death penalty amounts to torture, inhuman, cruel, and degrading punishment based on CAT, the Declaration on Torture that preceded it, and precedents of the U.S. Supreme Court and the European Court of Human Rights.<sup>150</sup> It cited with approval the U.S. Supreme Court in *Furman v Georgia* where, it was stated that the State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. Furthermore, that members of the human race should not be treated as non-humans, as objects to be toyed with and discarded and that even the vilest criminal remained a human being possessed of common human dignity.<sup>151</sup>

Nevertheless, it disagreed with the High Court in the examination of a 'savings' clause of the Constitution, which it interpreted as permitting derogations from basic human rights in the public interest, provided that the restrictive legislation is not arbitrary and that it is proportional to the need.<sup>152</sup> According to the Court, the state satisfied those conditions.<sup>153</sup> It stated that:

---

<sup>142</sup> *Mbushuu*, High Court 162.

<sup>143</sup> *Mbushuu* High Court 162.

<sup>144</sup> *Mbushuu*, High Court 163-164.

<sup>145</sup> *Mbushuu*, High Court 173.

<sup>146</sup> *Mbushuu v Republic*, [1995] T.L.R. 97, 118 (hereinafter referred to as *Mbushuu*, Appeal).

<sup>147</sup> *Mbushuu*, Appeal 108-109.

<sup>148</sup> *Mbushuu*, Appeal 109.

<sup>149</sup> *Mbushuu*, Appeal 104.

<sup>150</sup> *Mbushuu*, Appeal 110-111.

<sup>151</sup> *Mbushuu*, Appeal 112.

<sup>152</sup> *Mbushuu*, Appeal 113.

[W]hat measures are necessary to deter the commission of capital crimes or to protect society are matters for decision by every individual in society. We agree with the learned Trial Judge . . . that court decisions of other countries provide valuable information and guidance in interpreting the basic human rights in our Constitution. That is what we have done following *Furman v Georgia*, in finding that death penalty is inhuman, cruel and degrading punishment. But when it comes to what is reasonably necessary to protect our society we have to be extra careful with judicial decisions of other jurisdictions. . . . In societies where owning a firearm is almost as simple as owning a penknife, the death penalty might not be necessary to protect the public. But in societies like ours, where people go to the extent of sacrificing dear sleep to join vigilante groups, popularly known as *Sungusungu*, in order to protect life and property, the death penalty may still be reasonably necessary.<sup>154</sup>

The Tanzanian Court of Appeal agreed that capital punishment was ‘cruel, inhuman and degrading’ but section 197 of the Criminal Procedure Code which provides for the death penalty for murder was saved by article 30(2) of the Constitution, which provided for derogation from fundamental rights in the public interest. It was stated that there was no conclusive proof of the effectiveness of the death penalty but it was for society to decide what was reasonably necessary.

### 3.3.2 Nigeria

The death penalty is an exception to the right to life authorized under Section 33(1) of the 1999 Constitution of the Federal Republic of Nigeria, which provides that:

Everyone has a right to life, and no one shall be arbitrarily deprived of his life save in execution of the death sentence of a court, in respect of a criminal offence of which he has been found guilty in Nigeria.

It is important that this text has remained the same despite the various amendments that have been made since the 1979 Constitution. Under the ordinary criminal law applicable throughout the Federation, offences punishable by death include treason,<sup>155</sup> murder<sup>156</sup> and trial by ordeal where death results,<sup>157</sup> among others. The death penalty can only be carried out where there is no pending appeal. Thus, the Nigerian Supreme Court<sup>158</sup> has awarded damages against the Government of Oyo state, for executing a condemned criminal where appeal was pending before

---

<sup>153</sup> *Mbushuu*, Appeal 117.

<sup>154</sup> *Mbushuu*, Appeal 115-116.

<sup>155</sup> Ss 37&38 Nigerian Criminal Procedure Code and ss.410 and 411 of the Nigerian Penal Code.

<sup>156</sup> S 319 Nigerian Criminal Procedure Code & S 221 Nigerian Penal Code.

<sup>157</sup> S 208 Nigerian Criminal Procedure Code & S 214 Nigerian Penal Code.

<sup>158</sup> *Nasiru Bello v Attorney General et al* (1985) 1 NWLR 828.

the Court of Appeal. The Supreme Court held that his constitutional right to an appeal had been infringed. In effect, appeal in such circumstances should operate as a stay of execution.

The Supreme Court of Nigeria addressed the constitutionality of capital punishment in the case of *Kalu v State* and the text of the constitution was held to be a definitive obstacle blocking the Court from following foreign and international norms favouring abolition.<sup>159</sup> The Court heard arguments on international human rights norms and the jurisprudence of South Africa, Tanzania, Canada, Hungary, the United States, Zimbabwe, Namibia, several Caribbean island nations, and the Privy Council. The Attorney General of Nigeria emphasized, that it was only the 1979 Nigerian Constitution, which was relevant for interpretation.<sup>160</sup>

Justice Iguh, who wrote the decision, admitted the appropriateness of giving 'due regard to international jurisprudence,' not limiting the principles of interpretation as narrowly as the Attorney General. However, he stated that he would accord due weight to Nigeria's peculiar circumstances, the generally held norms of society and values, aspirations and local conditions.<sup>161</sup> In analyzing foreign authorities, he concentrated on the formal similarities and differences between various constitutional texts and that of Nigeria. The Court divided the decisions of foreign courts into two groups, according to whether they interpret a 'qualified' right to life (or in some cases a right to be free from cruel, inhuman and degrading treatment), like the Nigerian provision, or an 'unqualified' one. Thus, Justice Iguh found that all the courts of Tanzania, Zimbabwe, India, the United States, and Jamaica have acknowledged that capital punishment is not per se unconstitutional, save for the manner in which it is administered.

It was stated that the phrases 'due process of law' or some comparable language could limit the right to life.<sup>162</sup> By contrast, the South African Constitutional Court in *Makwanyane* and the Hungarian Constitutional Court had before them an unqualified right to life and thus held that the death penalty violated the constitutional right.<sup>163</sup> This distinction, for the Nigerian Court, was conclusive, and the Court therefore found nothing in the foreign jurisprudence to dissuade it from deciding that the death penalty does not violate the Nigerian Constitution. Any attempt by the parties to raise the cruel and degrading character of the death penalty was rejected as irrelevant to the case. As such, the death penalty continues to be used in Nigeria.

---

<sup>159</sup> *Kalu v State*, (1998) 12 SCNJ 1.

<sup>160</sup> *Kalu*, 17-19.

<sup>161</sup> *Kalu*, 23.

<sup>162</sup> *Kalu*, 32-37.

<sup>163</sup> *Kalu*, 32-33, 35.

Islamic law, which is used in the northern provinces of Nigeria, has also led to several death sentences being imposed and executions have been carried out. According to Amnesty International<sup>164</sup> and Human Rights Watch,<sup>165</sup> many death sentences are passed by the Sharia Courts without following due process of the law. Defendants, many of whom came from poor and uneducated backgrounds, were not informed about their rights and often did not have access to legal representation. The crimes for which the death penalty is passed under Sharia law are apostasy, adultery, fornication and armed robbery. Apostasy, adultery and fornication are crimes that do not pass the seriousness test in international law. Amina Lawal, whose case attracted international attention, had her death sentence for fornication quashed by the Supreme Court. This was on grounds that there was not enough evidence to convict her. However, this does not change the status of the death penalty under Sharia law. If Sharia law is not modified, people will continue to be executed for offences that cannot be defined as serious in international law. There are currently cases before Nigerian courts challenging the constitutionality of the application of Sharia law instituted by the Human Rights Law Service (HURILAWS) a non-governmental organization in Nigeria fighting for the abolition of the death penalty in Nigeria. These include *HURILAWS v Attorney General of Zamfara*, *Yunana Shibkai v Attorney General of Zamfara* and another, *Evangelist David Ishaya v Attorney General of Zamfara* and *Dr.Emman Usman Shehu v Attorney General of Zamfara*.<sup>166</sup>

### 3.3.3 Zimbabwe

The right to life is provided for in a qualified manner in Zimbabwe, as is the case in Nigeria. Subsection 1 of section 12 of the Constitution of Zimbabwe provides that:

No person shall be deprived of his right to life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

The Criminal Procedure and Evidence Act provides that the High Court of Zimbabwe shall pass sentence of death upon a person convicted of murder or treason.<sup>167</sup>

An important case in respect of the death penalty in Zimbabwe is *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and others*.<sup>168</sup> The facts of the case were as follows.

---

<sup>164</sup> Amnesty International Report 2003, Nigeria <<http://web.amnesty.org/report2003/nga-summary-eng>> (accessed on 23 October 2003).

<sup>165</sup> Human Rights Watch, *World Report 2003, Nigeria*. <<http://www.hrw.org/wr2k3/africa8.html>> (accessed on 23 October 2003).

<sup>166</sup> See <<http://www.hurilaws.org/>> (accessed on 17 October 2003).

<sup>167</sup> S 337 a) and b) respectively.

The Catholic Commission for Justice and Peace in Zimbabwe, a human rights organisation sought and obtained a provisional order from the Supreme Court interdicting the Attorney General, the Sheriff of Zimbabwe and the Director of Prisons from carrying out the death sentences of four prisoners convicted of murder who had spent between four to six years on the death row. This was done pending determination by that court whether the delay in execution breached section 15 (1) of the Constitution, which provides for the right to protection against cruel, inhuman or degrading punishment or treatment and, if so, whether they should be permanently stayed.

It was argued by the applicant that the death sentences had been rendered unconstitutional due to the prolonged and inordinate delays in carrying them out and the harsh and degrading conditions in which the condemned prisoners were subjected during confinement. The prisoners alleged that they had lived in daily fear of being put to death during their period of incarceration and that they had been regularly taunted by prison officers of their impending hanging. The respondents acknowledged the existence of the 'death row' phenomenon, the acute mental suffering and trauma endured by the prisoners awaiting execution. However, they argued that such stress was an unavoidable consequence of the death penalty. Furthermore, that it was always open to a condemned prisoner to request the court to expedite the execution. Moreover, in any event, the original punishment could not become tainted by post conviction experiences.

The Court held that prisoners did not lose all their constitutional rights upon conviction, only those rights inevitably removed from them by law, either expressly or by implication. As such, a prisoner who was sentenced to death still enjoyed the right to protection against cruel, inhuman degrading treatment. It was held that prolonged delay in executing a death sentence, as was the case before the court, could make the punishment when it came inhuman and degrading and that the reasons for the delay were immaterial. The application was allowed and the death sentences were set aside and substituted with sentences of life imprisonment.

This was a positive development in protection of the rights of those sentenced to death. The Supreme Court, in other cases such as *Nkomo and Another v Attorney-General and others*<sup>169</sup> and *Woods and others v Minister of Justice, Legal and Parliamentary Affairs and others*<sup>170</sup> confirmed this holding. However, these developments were not sustained because the Constitution was amended.<sup>171</sup> Section 15 of the Constitution, which provides for the right to protection against cruel, inhuman or degrading punishment or treatment, was amended by the insertion of *inter alia* subsection (5) which provides:

---

<sup>168</sup> *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and others* 1993(1) ZLR 242 (S).

<sup>169</sup> 1993(2) ZLR 422 (S).

<sup>170</sup> 1993(2) ZLR 443 (S).

<sup>171</sup> Constitutional amendment (Number 13) Act, 1993.

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 a contravention of subsection (1).

### 3.4 Conclusion

It is clear from the case law discussed above that the death penalty is regarded as a cruel, inhuman degrading punishment. *Makwanyane* and *Mbushuu* emphasize this. However, where the right to life is qualified by the Constitution allowing it as an exception, it cannot be effectively denounced as unconstitutional as was held in *Mbushuu(Appeal)* and *Kalu*.<sup>172</sup> However, all the cases upholding the death penalty emphasise implementation of procedural safeguards in administering the death penalty like humane treatment for those on the death row and rights to appeal, amnesty, pardon or commutation of the death sentence, among others. The Nigerian case of *Nasiru Bello* considered the rights to appeal while the *Catholic Commission for Justice and Peace in Zimbabwe* considered the treatment of those on the death row. A discussion of the death penalty in Uganda in light of international law and the case law discussed above follows.

---

<sup>172</sup> Also see *S v Ntesang* 1995 (4) BCLR 426(Botswana) where a qualification by the Botswana Constitution thwarted an attempt to have the death penalty declared unconstitutional.

## CHAPTER 4

### 4. THE DEATH PENALTY IN UGANDA

#### 4.1 Introduction

The death penalty is provided for in the laws of Uganda. Article 22 of the Constitution of the Republic of Uganda provides,

No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court.

There are two parallel systems of criminal justice in Uganda. Generally, everyone in Uganda is subject to the Penal Code Act (PCA), the Trial on Indictments Decree (TID) and the Criminal Procedure Code (CPC), but soldiers and those found guilty of crimes with soldiers are in addition subject to military courts under the National Resistance Army Statute (NRA Statute).<sup>173</sup>

It will be shown that the use of the death penalty in Uganda is contrary to international standards save for the protection of pregnant women and children from execution.<sup>174</sup> Uganda does not meet its international obligations regarding the types of offences for which the death penalty is imposed, it violates the rights to fair trial, appeal, amnesty, pardon or commutation of sentence and those on the death row are subjected to torture or cruel, inhuman degrading treatment and punishment.

#### 4.1 Offences for which the death penalty is imposed

International law only permits the death penalty for the most serious crimes with lethal or other extremely grave consequences. The Human Rights Committee has mentioned that crimes like espionage,<sup>175</sup> evasion of military responsibility,<sup>176</sup> political offences,<sup>177</sup> conspiracy between civil servants and soldiers,<sup>178</sup> misappropriation of state or public property,<sup>179</sup> treason,<sup>180</sup> espionage<sup>181</sup>

---

<sup>173</sup> See S 14 NRA Statute.

<sup>174</sup> Ss 102 and 104 TID.

<sup>175</sup> Concluding Observations, Cameroon, UN Doc.CCPR/C/79 Add.116, Para 14.

<sup>176</sup> Fourth Periodic Report of Iraq; Concluding Observations, Para 11.

<sup>177</sup> UN Doc.CCPR/C/SR.200, 19 (1980).

<sup>178</sup> E.g. Initial Report of Mali UN Doc,CCPR/C/1/Add.49.

and refusal to divulge previous political activities<sup>182</sup> do not meet the standard of most serious crime. The most serious of crimes according to the HRC is murder because it has commented that the imposition of the death penalty for crimes that do not result in loss of human life is contrary to the Covenant.<sup>183</sup>

The High Court of Uganda sentences one to death when one is convicted of any of the offences under the PCA where the punishment prescribed is death. Crimes for which the death penalty is mandatory include the following; treason<sup>184</sup>, murder<sup>185</sup>, aggravated robbery<sup>186</sup>. Crimes for which the death sentence is left at the discretion of the Court include; treasonous offences,<sup>187</sup> kidnapping with intent to murder,<sup>188</sup> rape<sup>189</sup> and defilement.<sup>190</sup> Under military law, the NRA Statute provides for a mandatory death sentence for a variety of offences like treachery,<sup>191</sup> disobedience of a lawful order leading to loss of life,<sup>192</sup> failure to protect or misuse of war materials,<sup>193</sup> offences related to security<sup>194</sup> and offences in relation to convoys, losing stranding or hazarding vessels,<sup>195</sup> murder, treason, mutiny and rape,<sup>196</sup> among others. Other offences like desertion<sup>197</sup> have the death penalty as the maximum penalty.

---

<sup>179</sup> E.g. Initial Report of Mongolia, UN Doc.CCPR/C/1/Add.38; UN Doc.CCPR/C/SR.197, para 6 (Janca); UN Doc.CCPR/C/SR.198, para 21 (Koulishev); UN Doc.CCPR/C/SR.198, para 32 (Sadi).

<sup>180</sup> UN Doc.CCPR/C/SR.258, para.10 (Tomuschat).

<sup>181</sup> See n 40 above.

<sup>182</sup> UN Doc.CCPR/C/SR.200, para.42 (Prado Vallejo).

<sup>183</sup> See Second Periodic Report of Iran.

<sup>184</sup> S 25 (1) and (2) PCA.

<sup>185</sup> S 83 PCA.

<sup>186</sup> Ss 272 & 273 (2) PCA.

<sup>187</sup> S 25 (3) and (4) PCA.

<sup>188</sup> S 235 PCA.

<sup>189</sup> S 118 PCA.

<sup>190</sup> S 123 PCA as amended by Statute 4 of 1990.

<sup>191</sup> S 15 NRA Statute.

<sup>192</sup> S 18 NRA Statute.

<sup>193</sup> S 32 NRA Statute.

<sup>194</sup> S 36 NRA Statute.

<sup>195</sup> S 50 NRA Statute.

<sup>196</sup> S 72 NRA Statute.

<sup>197</sup> S 38 NRA Statute.

The mandatory imposition of the death penalty for treason in Uganda is not in line with international standards. In the case of armed robbery, the mandatory imposition of the death penalty is not proper where the use of arms did not result in loss of human life.<sup>198</sup> It is improper for the law to give the courts the discretion to sentence one to death in Uganda for offences like treasonous offences, kidnapping with intent to murder, rape and defilement because they do not necessarily result in the loss of life. The offences for which the death penalty is mandatory under the NRA Statute, apart from murder and disobedience of a lawful order leading to loss of life, do not stand the test of 'serious' in international law.

Therefore, Uganda breaches its obligations under international law by not restricting the death penalty to offences that are the most serious or life threatening.

#### **4.2 Violations of rights to fair trial, appeal, amnesty, pardon or commutation of sentence**

Under the CCPR, imposition of the death penalty following an unfair trial is a breach not only of procedural norms but also of the right to life itself. According to the Human Rights Committee, the procedural guarantees under article 6 and 14 of the CCPR must be observed.<sup>199</sup> These include the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, right to review by a higher tribunal and the right to amnesty, pardon or commutation of the sentence. The Committee has stated that where article 14 of the CCPR, which provides for the right to fair hearing, is violated during a capital trial, article 6 of the Covenant is also breached.<sup>200</sup> These procedural safeguards are also relevant even under international humanitarian law, which is applicable in times of war and armed conflicts.<sup>201</sup> The African Commission has also stated that the right to life under article 4 of the African Charter is violated where the right to fair trial is violated.<sup>202</sup> It has held that even military courts and tribunals must observe the standards of fair trial.<sup>203</sup> Furthermore, that trials which do not allow any avenue of appeal violate article 7.1 (a) of the African Charter which provides for the right to appeal to

---

<sup>198</sup> See *Lubuto v Zambia* (No.390/1990), UN Doc. CCPR/C/55/D/390/1990/Rev.1 & 7.2.

<sup>199</sup> General Comment 6 (16).

<sup>200</sup> *Reid v Jamaica* (No.250/1987) para 11.5.

<sup>201</sup> Common article 3 of the Geneva Conventions; articles 99, 100 and 105 Third Geneva Convention; articles 71- Fourth Geneva Convention.

<sup>202</sup> Communications 25/89, 47/90, 56/91, 100/83 *Free Legal Assistance Group, Lawyers Committee for Human Rights; Union Inter africaine des Droits de l'homme, Les Témoins de Jehovah v Zaire* Ninth Annual Activity Report: 1995-1996.

<sup>203</sup> Communication 224/98 *Media Rights Agenda v Nigeria* Fourteenth Annual Activity Report 2000-2001.

competent national organs against acts violating fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force.<sup>204</sup>

These procedural guarantees, like the right to fair trial by an independent body, presumption of innocence, adequate time and facilities to prepare one's defence and legal representation among others, as provided by article 6 and 14 of the CCPR are reiterated in article 22, 26 and 28 of the Ugandan Constitution. After the High Court has sentenced one to death, there is an automatic right of appeal to the Supreme Court. If the Supreme Court upholds the sentence, the condemned person writes an appeal for mercy to the President, which goes to the Advisory Committee on the prerogative of mercy, which is appointed by the President. The Advisory Committee on the prerogative of mercy as provided by article 126 of the Constitution, which consists of the Attorney General as the Chairperson and six prominent Ugandans, considers the application and advises the President. The President may, on the advice of the Committee do the following:

- a. grant to any person convicted of an offence, a pardon either free or subject to lawful conditions;
- b. or grant to a person a respite, either indefinite or for a specified period, from the execution of punishment imposed on him or her for an offence;
- c. or substitute a less severe form of punishment for a punishment imposed on a person for an offence;
- d. or remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.

If the President gives the death warrant, the sentence of death is carried out by hanging, in accordance with the Trial on Indictments Decree and the Prisons Act.<sup>205</sup>

However, the safeguards as provided in the Constitution are insufficient because the practice is contrary to the provisions. The Ugandan judiciary is marred by corruption and the accused do not usually have facilities to prepare their defence or to have sufficient legal representation. According to a research done by Katende Ssempebwa and Co. Advocates, a firm currently challenging the constitutionality of the death penalty, the majority of capital offenders in Uganda are usually illiterate and poor.<sup>206</sup> They usually cannot understand English, which is the court language and this affects their ability to defend themselves even if interpretation is done. They also cannot afford to

---

<sup>204</sup> Communication 87/93 *Constitutional Rights Project v Nigeria (in respect of Zamani Lekwot and others)* & Communication 60/91 *Constitutional Rights Project v Nigeria (in respect of Wahab Akamu and others)* Eighth Annual Activity Report: 1994-1995.

<sup>205</sup> Ss 98-101 TID.

<sup>206</sup> S Kibenge 'The death penalty is inhuman, degrading' *New Vision Newspaper* 17 July 2003.

hire lawyers. Although there is a practice in Uganda of handing state briefs to advocates to represent death penalty appellants for a minimal fee, it is insufficient because the advocates are unlikely to work as diligently as they work for clients that pay them adequately.<sup>207</sup> According to Makubuya,<sup>208</sup> it is necessary to increase the number of legal counsel commissioned to handle such defence, who should be advocates of at least 10 years experience, and should be provided with sufficient resources by the state. This would have budgetary implications for the state but would be necessary in order for the state to comply with its obligations under the CCPR, African Charter and the Constitution, which provide for the right to fair trial.

The Court Martials are also open to injustice because the courts are often ad hoc and no legal counsel represents the accused or if there is any, he or she is a member of the army. In such a case, the army is the accuser, prosecutor and the judge. Moreover, following the principle of the chain of command in the army it is highly unlikely that justice is carried out in such trials. Such courts are not competent, independent or impartial. The situation is even more complicated by the fact that article 137 (5) provides, in essence, that no question regarding interpretation of the Constitution arising in any Field Court Martial proceedings can be referred to the Constitutional Court. This is absurd because such proceedings do actually violate the rights to fair trial, appeal, amnesty, pardon or commutation of sentence.

The appeal mechanisms in place are unlikely to have the effect of reducing the application of the death penalty as envisioned by the CCPR. For instance, where the law prescribes the death penalty as a mandatory punishment, it is highly unlikely that an appellate court can quash or set aside the sentence passed. Such a court would only consider whether the conviction was well founded, confirm it, and uphold it. Furthermore, amnesty, pardon or commutation of the death sentence is the prerogative of the President. Although provision is made for the Advisory Committee on the prerogative of mercy, their advice is not necessarily binding on the President. The wording of article 121 (4) of the Constitution does not suggest that their role is anything more than advisory or that their advice is binding. As such, it is really up to the President to decide on who to kill or give amnesty, pardon or whose sentence to commute. This can be abused. It is highly unlikely that the President will pardon political offences such as treason.

Under military law, the NRA Statute provides for military disciplinary measures that are taken through a system of courts ranging from the Unit Court Martial, Martial Division Court, General Court Martial, to Court Martial Appeal Court.<sup>209</sup> It provides for a Field Court Martial that sits

---

<sup>207</sup> See *Makwanyane* paras 49-51.

<sup>208</sup> Makubuya (n 12 above) 251.

<sup>209</sup> Ss 76 – 80 NRA Statute.

whenever it is impracticable for the Unit Disciplinary Committee or Division Court Martial to try the offender.<sup>210</sup> While the Statute provides for appeal from decisions of the General Court Martial to the Court Martial Appeal Court, an appeal from the Field Court Martial is not particularly provided for.<sup>211</sup> The practice has been such that people tried the Field Court Martial are executed immediately, if found guilty. Such offenders are not given a chance to appeal and the death sentences are not confirmed by the highest appellate court contrary to article 22 of the Constitution. Furthermore, the convicts are precluded from benefiting from the exercise of the prerogative of mercy under article 121 (6) of the constitution. This is contrary to international law which emphasises implementation of procedural safeguards even in times of war or armed conflict by military courts.

Therefore, Uganda is in violation of the rights to fair trial, appeal, amnesty, pardon or commutation of sentence as provided by international law and the Constitution because in practice these rights are not enforced, more so in the Field Court Martials.

#### **4.4 Torture, cruel and inhuman degrading treatment of those on the death row**

Torture, cruel and inhuman degrading treatment is prohibited by international law and those on death row are no exception.<sup>212</sup> It has been stated that the aim of prohibiting torture is to protect the dignity, physical and mental integrity of the individual in line with article 10 (1) of the Covenant.<sup>213</sup> The Human Rights Committee has held that conditions of detention like overcrowding, inadequate food and inadequate sanitary facilities, among others amount to inhuman degrading treatment.<sup>214</sup> It has also stated that the death penalty must be carried out in such a way as to cause the least possible physical and mental suffering.<sup>215</sup> The safeguards also require the penalty to be carried out in such a manner that inflicts the minimum possible suffering.<sup>216</sup> The Committee has indicated that public executions constitute inhuman or at least degrading treatment.<sup>217</sup> The Ugandan Constitution also prohibits torture, cruel and inhuman degrading treatment or punishment.

---

<sup>210</sup> S 77 NRA Statute.

<sup>211</sup> S 84 NRA Statute.

<sup>212</sup> Article 7 & 10 CCPR; also see UN Convention Against Torture; article 5 African Charter.

<sup>213</sup> General Comment 20, of the Human Rights Committee.

<sup>214</sup> *Portorreal v Dominican Republic* (188/84); *Mukong v Cameroon* (458/91); *Edwards v Jamaica* (52/93).

<sup>215</sup> General Comment 20 (44), Report of the Human Rights Committee, UN Doc.A/47/40 (1992), Annex VI A, para 6.

<sup>216</sup> Para 9, the safeguards.

<sup>217</sup> Concluding Observations Iran (1993) UN doc.CCPR/C/79/Add.25, para 8.

There are currently four hundred prisoners on death row in Uganda.<sup>218</sup> They are overcrowded because the facilities were intended for two hundred people. They do not have enough space, adequate sanitary facilities, beddings and food. This is actually the situation for most of the prisoners in Uganda.<sup>219</sup> Prisoners on death row usually wait for many years before their sentence is executed. The death sentence is usually carried out in public by hanging and firing squad for ordinary courts and military courts respectively.

The conditions on the death row are incompatible with human dignity and violate the right freedom from torture, cruel or inhuman degrading treatment prohibited by international law and the Constitution. The prolonged delay in execution under such conditions makes the execution when it comes cruel, inhuman and degrading as was held in the case of the *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and others*.<sup>220</sup> Although the Human Rights Committee has not yet considered whether hanging or firing violates the Covenant, it is certain that they cause a lot of physical and mental suffering prohibited by international law which requires that methods of execution should cause the least physical and mental suffering. Moreover, the execution is carried out in public contrary to international law.

Therefore, Uganda is in violation of the right to protection against torture, cruel or inhuman degrading treatment because of the poor conditions of those on the death row and the manner in which the death penalty is carried out.

#### **4.4 Conclusion**

Uganda has legislation that to a limited extent provides for procedural safeguards stipulated in international law like the right to fair trial, amnesty, pardon or commutation of sentence, prohibition of the death sentence on pregnant women or children, among others. Overall, it falters in compliance with international law in respect of the offences for which the death penalty is applied, the failure to ensure the rights to fair trial, appeal, amnesty, pardon and commutation of the sentence. Furthermore, the conditions in which the prisoners are kept do not enhance the dignity of human beings and neither does the mode of execution. The procedural safeguards in Uganda do not necessarily protect the innocent because most of the trials both under ordinary courts and in the military courts are not fair and impartial. This is especially the case in the military courts where

---

<sup>218</sup> Amnesty International, 'Uganda: Summary of human rights concerns, 2003' <<http://web.amnesty.org/library/Index/ENGAFR590112003?open&of=ENG-UGA> > (accessed on 27 October 2003).

<sup>219</sup> See Annual Reports of the Uganda Human Rights Commission, 1997-2001.

<sup>220</sup> Also see D Pannick, *Judicial review of the death penalty* (1982) 162.

there is no provision for effective appeals and clemency proceedings. It is likely that many innocent people have been executed and this will continue to happen as long as the death penalty is retained. An example is given of Eddie Mpagi who spent 19 years on the death row for having murdered a man who turned out to be alive. He was released when his innocence was established.<sup>221</sup>

Uganda therefore does not meet its international obligations for countries that retain the death penalty. There are many discrepancies regarding the death penalty as pointed out above and concerns about these irregularities have led to the current debate on the death penalty through the Constitutional Review Commission and the constitutional petitions before the Constitutional Court seeking to declare the death penalty unconstitutional. Over two hundred inmates on in the Constitutional Court death have instructed Katende, Ssempebwa and Company Advocates to file a petition to eliminate the death penalty from Uganda's laws This petition is based on the argument that the death penalty is a cruel, inhuman degrading treatment. There is also an earlier petition challenging the constitutionality of the death penalty with regard to the executions of sentences passed by the Field Court Martials. It is necessary to find solutions for the situation for the death penalty in Uganda. The next chapter makes recommendations on strategies to challenge the death penalty in Uganda.

---

<sup>221</sup> See <[http://www.thedeathhouse.com/deathhousenewfi\\_319.htm](http://www.thedeathhouse.com/deathhousenewfi_319.htm)> (accessed on 17 October 2003).

## CHAPTER 5

### 5. STRATEGIES TO CHALLENGE THE DEATH PENALTY IN UGANDA

#### 5.1 Introduction

The death penalty can be confronted in various ways. This can be through repeal of national legislation, a Constitutional Court decision or a challenge based on failure to enforce the procedural safeguards for capital offenders provided by international law before the African Commission on Human and Peoples' Rights and the Human Rights Committee. The extent to which each of these strategies can work in Uganda is examined below.

#### 5.2 Repeal of the death penalty by legislation

Many countries have had the death penalty repealed by legislation. Examples have already been given of Angola, Cape Verde, Côte d'Ivoire, Djibouti, Guinea-Bissau, Mauritius, Mozambique, Namibia, São Tomé and Príncipe and Seychelles. However this is not a very easy option where the majority if the public supports the death penalty. This is evident from the situation in South Africa at the time of the *Makwanyane* case. The new democratic parliament adopted the provision on the right to life without any mention of the death penalty. They could have abolished the death penalty but they did not. They rather pushed the burden to the Constitutional Court, which attracted criticism.<sup>222</sup> In *Mbushuu*, (Appeal) the Tanzanian Court contended that the death penalty could not be abolished while there was still such strong support for it.

There is a possibility of abolishing the death penalty in Uganda through repeal of legislation since the Constitutional Review Commission is considering the matter. There are number of people and local non-governmental organisations advocating for the abolition of the death penalty like the Foundation for Human Rights Initiative and Uganda Citizens Rescue. The current Commissioner for Prisons, Joseph Etima is in support of the abolition of the death penalty, which he describes as an act of revenge and a violation of the right to life.<sup>223</sup>

However, it is not certain that the death penalty will actually be abolished because a large percentage of the population supports it. The current President of the Republic of Uganda,

---

<sup>222</sup> See generally, M Seleona *Death penalty: let the people decide* (1996).

<sup>223</sup> M Mazinga 'Abolish death penalty' *New Vision Newspaper*, 1 July 2003.

Mr. Yoweri Museveni, also supports the death penalty. In response to the call by various human rights organisations to abolish the death penalty, he stated that:

I hear some people saying that the death sentence is inhuman. Very sorry. We shall shoot anybody who kills a human being. You are the one who kills, why can't we kill you? When our soldiers make mistakes, we punish them.<sup>224</sup>

Overall, the President's views on the death penalty reflect those of the majority of people in Uganda. It is thus unlikely that the Parliament of Uganda would pass a law abolishing the death penalty now. In view of this fact, the Uganda Human Rights Commission has recommended that priority should be given to sensitisation of the public so that they can understand the need to abolish the death penalty.<sup>225</sup> However, as Agostoni argues, this will take a long time.<sup>226</sup>

### 5.3 Constitutional challenge

As mentioned earlier the death penalty has been challenged and abolished by a decision of a Constitutional Court. This happened in South Africa in the case of *Makwanyane*. There have been attempts, as has been shown in the third chapter of this study, to challenge the death penalty in the Tanzanian and Nigerian Courts. However, the attempts were unsuccessful because the particular constitutional provisions applicable in each case, which permitted the death penalty, blocked them.

With regard to the petitions currently pending before the Ugandan Constitutional Court, contrary to Makubuya's assertion that the death penalty can be struck out as an unconstitutional form of punishment,<sup>227</sup> the chances of success are slim. It is very unlikely that the Constitutional Court would hold the death penalty as unconstitutional considering article 22 of the Constitution, which acknowledges it as an exception to the right to life. The provision is not like the one in the South African Constitution, which provides for the right to life in an unqualified manner. The Court will probably hold that the right to life is not absolute and is permissible by the Constitution, which is similar to the holding by the Nigerian and Tanzanian courts.

What is more likely to be held unconstitutional are the conditions of the prisoners on death row, characterised by the long delays before execution, overcrowding, poor sanitation, inadequate bedding and food, among others, which would amount to torture or cruel, inhuman degrading treatment forbidden by the Constitution and international law. In addition, the failure by the state to

---

<sup>224</sup> J Etyang 'Condemned appeal death row' *New Vision Newspaper* 24 June 2003.

<sup>225</sup> Karusoke (n 5 above).

<sup>226</sup> See Agostoni (n 16 above).

<sup>227</sup> Makubuya (n 15 above) 247.

implement the required procedural safe guards in carrying out the death penalty as provided by article 22 of the Constitution would be held unconstitutional. This article provides for the right to a fair trial by a court of competent jurisdiction for a criminal offence under the law and the right to appeal to the highest appellate court before the death sentence is executed. These rights are especially violated in the military courts, more so in the Field Court Martials. It is hoped that the Court would consider international law in considering the rights of capital offenders in which case it would declare that even those tried by Field Court Martials have the rights to appeal, amnesty, pardon or commutation of sentence. In that case article 121 (6) of the Constitution, which prevents a person from benefiting from the exercise of the prerogative of mercy where the Field Court Martial has passed the conviction or sentence, would have to be amended to allow such offenders to benefit. It would also be important to allow Field Court Martials to stay proceedings pending interpretation of the Constitution, which is prevented by article 137 (5). The article provides, in essence, that no question regarding interpretation of the Constitution arising in any Field Court Martial proceedings can be referred to the Constitutional Court.

If the Constitutional Court does not provide any remedies, particularly to enforce the procedural safeguards provided by the Constitution and in international law, the capital offenders have the option of filing communications to regional and international treaty bodies to hear the matter. The capital offenders can file a communication with the African Commission on Human and Peoples' Rights or the Human Rights Committee.

#### **5.4 African Commission on Human and Peoples Rights**

The petitioners can file a complaint to the African Commission alleging violations of the right to life, right to inherent dignity and freedom from torture, cruel, inhuman or degrading punishment and treatment and right to fair trial as provided by articles 4,5 and 7 of the African Charter, among others. The Commission hears communications submitted by individuals, NGOs and States Parties to the African Charter, alleging violations of human rights by these states. The conditions for a complaint to be admissible under the African Charter, which the petitioners can satisfy, are laid out in article 56. These require that the communication must disclose the identity of the author even if he or she requests anonymity and an address where the author can be contacted.<sup>228</sup> Furthermore that the communication must be compatible with the Organisation of African Unity Charter,<sup>229</sup> based on a violation of the African Charter<sup>230</sup> by a State party.<sup>231</sup> It should not be written in

---

<sup>228</sup> Communication 70/92, *Ibrahim Dioumessi, Sekou Kande, Ousmane Kaba v Guinea*, Seventh Activity Report 1993-1994; Communication 57/91, *Tanko Bariga v Nigeria*, Seventh Activity Report 1993-1994.

<sup>229</sup> Communication 75/92, *Katangese Peoples' Congress v Zaire*, Eighth Activity Report 1994-1995.

<sup>230</sup> Communication 1/88, *Frederick Korvah v Liberia*, Seventh Activity Report 1993-1994.

disparaging or insulting language<sup>232</sup> or based exclusively on news.<sup>233</sup> Local remedies must have been exhausted<sup>234</sup> and the complaint must be submitted within a reasonable time from the time local remedies are exhausted. It should not have been settled already in terms of international law.

Under article 46 of the Charter, the Commission has the power to use any appropriate method of investigation into allegations of human rights abuses. Where the Commission finds that violations have occurred, it makes recommendations to the State(s) concerned; to ensure that the occurrences are investigated, that the victims are compensated (if necessary) and that measures are taken to prevent the recurrence of the violations. However, the Commission's decisions are not legally binding. The Commission's recommendations have to be submitted to the Assembly of Heads of State and Government of the Organisation of African Unity (now African Union) for adoption. A lot more is expected from the African Court on Human and Peoples' Rights when it is established. There is a Protocol to the African Charter establishing the African Court on Human and Peoples' Rights but the required number for ratification has not yet been reached. The Protocol authorises the Court to provide remedies for violations of human rights like compensation and provisional measures.<sup>235</sup>

## 5.5 Human Rights Committee

The requirements for submission of a complaint to the HRC, which the petitioners can satisfy, are similar to those of the African Commission. Under the First Optional Protocol to the International Covenant on Civil and Political Rights (herein after referred to as Optional Protocol), the HRC hears communications submitted by individuals alleging violations of human rights enshrined in the CCPR by states that are party.<sup>236</sup> In order to submit a communication before the HRC, it is required that the complaint should not be anonymous,<sup>237</sup> it should be within reasonable time,<sup>238</sup> the complainant should be the victim,<sup>239</sup> the complaint must comply with territorial and jurisdictional

---

<sup>231</sup> E.g. Communication 7/88, *Committee for the Defence of Political Prisoners v Bahrain*, Seventh Activity Report 1993-1994; Communication 38/90 *Wesley Parish v Indonesia*, Seventh Activity Report 1993 - 1994.

<sup>232</sup> Communication 65/92, *Ligue Camerounaise de Droit de l'Homme v Cameroon*, Tenth Activity Annual Report 1996-1997.

<sup>233</sup> Communications 147/95 & 149/96, *Sir Dawda K. Jawara v The Gambia* Thirteenth Activity Report 1999-2000.

<sup>234</sup> See article 55 African Charter.

<sup>235</sup> Article 27.

<sup>236</sup> Article 1 Optional Protocol.

<sup>237</sup> Article 3 Optional Protocol.

<sup>238</sup> *Adamou et al v Togo* (422/90).

<sup>239</sup> Article 1 Optional Protocol. Also see *Mauritanian Women's Case* (357/78).

limits,<sup>240</sup> it must not be under consideration under international procedure<sup>241</sup> and local remedies must have been exhausted.<sup>242</sup> After hearing the complaint the committee makes known its views to the State party concerned and to the individual.<sup>243</sup>

## 5.6 Conclusion

It has been argued that Uganda breaches its international obligations on the death penalty because it does not adequately observe the procedural safeguards of those accused of capital offences. Furthermore, that although it is currently being debated by the Constitutional Review Commission, the death penalty is unlikely to be abolished because it is widely supported by the public. With regard to the Constitutional petitions, it is likely that the Constitutional Court will make a decision that is similar to the decisions of the Tanzanian case of *Mbuushu* (Appeal) and the Nigerian case of *Kalu* because of the wording of the Constitutional provision. However, it is envisaged that the Constitutional Court will declare that as long as the death penalty is maintained the procedural safeguards have to be observed. If this does not happen, Ugandans have the option of seeking a remedy from the African Commission on Human and Peoples' Rights or the Human Rights Committee. Even though the remedies granted by such bodies cannot easily be legally enforced, it is hoped that the publicity and exposure will make Uganda observe the procedural safeguards or abolish the death penalty.

**Word Count 17, 929**

---

<sup>240</sup> Article 2 (1) CCPR & Article 1 Optional Protocol.

<sup>241</sup> Article 5 (2) (a) Optional Protocol.

<sup>242</sup> Articles 2 & 5 (2) (b) Optional Protocol.

<sup>243</sup> Article 5 (4) Optional Protocol.

## BIBLIOGRAPHY

### BOOKS

- Agostoni, T (2002) *May the State Kill?* Nairobi: Paulines Publications Africa.
- Baird, RM et al (eds.) (1995) *Punishment and the death penalty: the current debate* New York: Prometheus Books.
- Bedau, HA (1997) *The death penalty in America* New York: Oxford University Press.
- Buerghenthal, T (1988) *International human rights law in a nutshell* St Paul Minn: West.
- Conrad, P & Van den Haag, E (1983) *The death penalty: a debate* New York: Plenum Press.
- De Waal, J et al (2000) *The Bill of Rights Handbook*, Lansdowne: Juta & Co. Ltd.
- Evans, M & Murray, R (eds.) *The African Charter on Human and People's Rights: The system in practice 1986-2000* Cambridge: Cambridge University Press.
- Haas, KC & Inciardi, JA (eds.) (1988) *Challenging capital punishment legal and social science approaches* Newbury Park: Sage Publications.
- Henkin, L (ed.) (1981) *The International Bill of Rights: The Covenant on Civil and Political Rights* New York: Columbia University Press.
- Hodgkinson, P and Rutherford, A (eds.) (1996) *Capital punishment, global issues and prospects* Winchester: Waterside Press.
- Hood, R (2002) *The death penalty, a worldwide perspective* Oxford: Clarendon Press.
- Joseph, S et al (2000) *The International Covenant on Civil and Political Rights: cases, materials, and commentary* New York: Oxford University Press.
- Levinson, B (1990) *The hanging machine* Sloane Park: Premier Book Publishers.
- Long, RE (ed.) (1995) *Criminal Sentencing* New York: HW Wilson Company.
- Pannick, D (1982) *Judicial review of the death penalty* London: Duckworth.
- Ramacharan, BG (ed.) *The right to life in international law* Dordrecht: Martinus Nijhoff Publishers.
- Rehman, J (2003) *International Human Rights Law: A practical approach* Essex: Pearson Education Limited.
- Rodley, N.S (1999) *The Treatment of Prisoners in International law* Oxford: Clarendon Press.
- Sarat, A (1999) *The Killing State: Capital Punishment in law, politics and culture* New York: Oxford University Press.
- Steytler, N (1998) *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa* Durban: Butterworths.

Schabas, WA (2002) *The abolition of the death penalty in international law* Cambridge: Cambridge University Press.

Schabas, WA (1996) *The Death Penalty As cruel treatment: Capital punishment challenged in the World's Courts* Boston: North Eastern University Press

Schabas, WA (2000) *Genocide in International Law* Cambridge: Cambridge University Press.

Seleone, M (1996) *Death penalty: let the people decide* Lee Glen: Vivlia Publishers.

Sellin, T (ed.) (1967) *Capital punishment* New York: Harper and Row.

Simmons, JA et al (eds.) ( 1995) *Punishment* Princeton: Princeton University Press.

## CHAPTERS IN BOOKS

Humphrey,JP (1984) 'The Universal Declaration of Human Rights: Its history, impact and judicial character' in Ramcharan, BG *Human rights: thirty years after the Universal Declaration* Dordrecht: Martinus Nijhoff Publishers.

Lillich,R (1984) 'Civil Rights' in Meron,T (ed.) *Human rights in international law: legal and policy issues* Oxford: Clarendon Press.

Viljoen, F 'The African Charter on the rights and welfare of the Child' in CJ Davel (ed.) (2000) *Introduction to child law in South Africa* Lansdowne: Juta Law.

## JOURNAL ARTICLES

Adeyemi, AA ' Death Penalty: Criminological Perspectives. The Nigerian Situation' (1987) 58 *Revue internationale de droit penal* 485.

Angus, L 'Delay Before Execution: Is it Inhuman Degrading Treatment' (1993) 9 *South African Journal of Human Rights* 432.

Bentele, U 'Back to an International perspective on the death penalty as a cruel punishment: the example of South Africa' (1998) 73 *Tulane Law Review* 251

Carozza, PG "My friend is a stranger": The death penalty and the global IUS commune of human rights' (2003) *Texas Law Review* 1031

Haney, C 'Violence and the capital jury: mechanisms of moral disengagement and the impulse to condemn death' (1997) *Stanford Law Review* 1447

Makubuya, AN 'The constitutionality of the death penalty in Uganda: A critical inquiry' (2000) 6 (2) *East African Journal of Peace and Human Rights* 222.

Rosen, S and Journey, S 'Abolition of the death penalty: an emerging norm of international law' (1993) 14 *Hamline Journal of Public Law and Policy* 163

Schabas, WA 'Islam and the death penalty' (2000) 9 (1) *William and Mary Bill of Rights Journal* 223.

Schabas, WA 'International law and the Death Penalty' (1994) 22 *American Journal of Criminal Law* 250.

Schabas, WA 'International law and the Death Penalty: Recent Developments' (1998) 4 *ILSA Journal of International and Comparative law*.

Sohn, LB 'The new international law: protection of the rights of individuals rather than states' 32 (1982) *American University Law Review* 1, 16-17.

## **TABLE OF INTERNATIONAL INSTRUMENTS**

Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty

African Charter on Human and Peoples' Rights

African Charter on the Rights and Welfare of the Child

American Convention on Human Rights

American Declaration on the Rights and Duties of Man

Arab Charter of Human Rights

Charter of Fundamental Rights of the European Union

Charter of the International Military Tribunal

European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols

First Optional Protocol to the International Covenant on Civil and Political Rights

Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War

Geneva Convention of August 12, 1949 Relative to the Protection of civilians

International Covenant on Civil and Political Rights

Protocol to the African Charter establishing the African Court on Human and Peoples' Rights

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Resolution Urging States to envisage a Moratorium on the Death Penalty (African Commission)

Rome Statute of the International Criminal Court

Second Optional Protocol to the International Covenant on Civil and Political Rights Aimed at Abolition of the Death Penalty

Statute of the International Tribunal for the Former Yugoslavia

Statute of the International Tribunal for Rwanda

The Safeguards Guaranteeing the Protection of those Facing the Death Penalty

Universal Declaration of Human Rights

United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment

United Nations Convention on the Rights of the Child

Vienna Declaration and Plan of Action

## **GENERAL COMMENTS OF THE HRC**

General Comment, article 4, Session 13 adopted on 28 July 1981.

General Comment, article 6, Session 16 adopted on 27 July 1982.

General Comment, article 7, Session 16 adopted on 27 July 1982.

General Comment, article 7, Session 44 adopted on 6 April 1992.

General Comment, article 14, Session 21 adopted on 12 April 1984.

## **TABLE OF CASES**

### **Human Rights Committee**

*Adamou et al v Togo* (422/90)

*Cox v Canada* (539/1993)

*Edwards v Jamaica* (52/93)

*Johnson v Jamaica* (558/1994)

*Kelly v Jamaica* (253/1987)

*Lubuto v Zambia* (No.390/1990)

*Mauritanian Women's Case* (357/78).

*Mukong v Cameroon* (458/91)

*Ng v Canada* (469/1991)

*Portorreal v Dominican Republic* (188/84)

*Reid v Jamaica* (No.250/1987)

## **European Commission/Court of Human Rights**

*De Wilde, Ooms and Versyp v Belgium*, 18 June 1971, Series A, vol.12

*Kirkwood v United Kingdom* (App. No.10308/83), (1985) 37 DR 158, 184.

*McCann et al V United Kingdom*, 27 September 1995, Series A, vol.324

*Ringeisen v Austria*, 16 July Series A, vol.84

*Soering v United Kingdom and Germany* (App.No.14038/88) 108

## **African Commission on Human and Peoples' Rights**

Communication 206/97, *Centre for Free Speech v Nigeria*, Thirteenth Activity Report 1999-2000

Communication 60/91 *Constitutional Rights Project v Nigeria (in respect of Wahab Akamu and others)* Eighth Annual Activity Report: 1994-1995

Communication 87/93 *Constitutional Rights Project v Nigeria (in respect of Zamani Lekwot and others)* Eighth Annual Activity Report: 1994-1995

Communication 7/88, *Committee for the Defence of Political Prisoners v Bahrain*, Seventh Activity Report 1993-1994

Communication 1/88, *Frederick Korvah v Liberia*, Seventh Activity Report 1993-1994

Communications 25/89, 47/90, 56/91, 100/83 *Free Legal Assistance Group, Lawyers Committee for Human Rights; Union Interafricaine des Droits de l'homme, Les Témoins de Jehovah v Zaire* Ninth Annual Activity Report: 1995-1996

Communication 70/92, *Ibrahim Dioumessi, Sekou Kande, Ousmane Kaba v Guinea*, Seventh Activity Report 1993-1994

Communication 215/98, *Rights International v Nigeria*, Thirteenth Activity Report 1999-2000

Communications 137/94, 139/94, 154/96 and 161/97, *International Pen, Constitutional Rights Project, Interights on behalf of Ken Saro-Wiwa Jr and Civil Liberties Organisation v Nigeria*, Twelfth Activity Report 1998-1999

Communication 75/92, *Katangese Peoples' Congress v Zaire*, Eighth Activity Report 1994-1995

Communication 65/92, *Ligue Camerounaise de Droit de l'Homme v Cameroon*, Tenth Activity Annual Report 1996-1997

Communications 54/91, 61/91, 98/93, 164/97 and 210/98 *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v Mauritania*, Thirteenth Activity Report 1999-2000

Communication 224/98 *Media Rights Agenda v Nigeria* Fourteenth Annual Activity Report 2000-2001

Communications 147/95 & 149/96, *Sir Dawda K.Jawara v The Gambia* Thirteenth Activity Report 1999-2000

Communication 57/91, *Tanko Bariga v Nigeria*, Seventh Activity Report 1993-1994

Communication 38/90 *Wesley Parish v Indonesia*, Seventh Activity Report 1993 – 1994

### **Domestic case law**

*Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and others* 1993(1) ZLR 242 (S) (Zimbabwe)

*Furman v Georgia* 408 U.S 238, 92 Ct.2726, 33 L.Ed.2d 346 (1972) (USA)

*Kalu v State*, (1998) 12 SCNJ 1(Nigeria)

*Mbushuu v Republic*, [1995] T.L.R. 97, 118 (Tanzania)

*Nasiru Bello v Attorney General et al* (1985) 1 NWLR 828 (Nigeria)

*Republic v Mbushuu*, [1994] TLR 146 (Tanzania)

*S V Makwanyane & Mchunu* 1995 (3) SA 391 (CC) (South Africa)

### **NATIONAL LEGISLATION**

Constitutions of: the Federal Republic of Nigeria, Republic of South Africa, Republic of Tanzania, Republic of Uganda and the Republic of Zimbabwe

Criminal Procedure Codes of Nigeria and Uganda

Criminal Procedure Code and Evidence Act of Zimbabwe

National Resistance Army Statute (Uganda)

Penal Code Acts of Nigeria and Uganda

Trial on Indictments Decree (Uganda)

### **WEBSITES**

< <http://www.amnesty.org> >

<<http://news.bbc.co.uk>>

< <http://www.hrw.org/> >

<<http://www.hurilaws.org/>>

<<http://www.thedeathhouse.com/>>

## **MONTHLY/ANNUAL PUBLICATIONS**

*Your Rights*, published by the Uganda Human Rights Commission  
Annual Reports of the Uganda Human Rights Commission 1997-2002

## **REPORTS**

Raoul Wallenberg Institute, *The abolition of the death penalty in South Africa*, Report No.23 (1997).

Initial Report of Uganda to the Human Rights Committee, 25/02/2003, CCPR/C/UGA/2003/1.

## **NEWSPAPERS ARTICLES**

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

Mazinga, M 'Abolish the Death Penalty' *New Vision Newspaper* 1 July 2003.

Kibenge, S 'The death penalty is inhuman, degrading' *New Vision Newspaper* 17 July 2003.