

CHAPTER SIX

FAIR TRIAL RIGHTS AND THEIR RELATION TO THE DEATH PENALTY IN AFRICA

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6.1 Introduction

A fair trial is a basic element of the notion of the rule of law;¹ and the principles of “due process” and “the rule of law” are fundamental to the protection of human rights.² At the centre of any legal system, therefore, must be a means by which legal rights are asserted and breaches remedied through the process of a fair trial in court, as the law is useless without effective remedies.³ The fairness of the legal process has a particular significance in criminal cases, as it protects against human rights abuses and is the foundation stone for substantive protection against state power. Hence, the protection of human rights in criminal cases begins, but does not end, with fair trial rights.⁴ Fair trial rights are not without restrictions as it is necessary in criminal cases to balance the rights of the individual defendant against a wider interest. Thus, courts are repeatedly faced with decisions as the extent to which the rights of the defendants should be modified or restricted in the wider interest when considering fair trial provisions.⁵ Nevertheless, constitutional due process and elementary justice require that the judicial functions of trial and sentencing be conducted with fundamental fairness, especially where the irreversible sanction of the death penalty is involved.⁶

To a great extent, increased concern about the use of the death penalty in Africa is as a result of the death penalty being imposed after trials that do not conform to international and national fair trial standards. In other words, many capital trials in Africa fall short of standards for a fair trial. For example, as discussed in chapter two, trials are conducted after excessive delay, and in some cases defendants have no access to legal assistance and lack proper defence. Adherence to fair trial (due process) rights in death penalty cases is essential. The UN General Assembly has pointed out in some of its resolutions the importance of respecting fair trial standards

¹ Ovey & White (2002) 139.

² Clayton & Tomlinson (2001) 2.

³ Davis (2003) 146.

⁴ Clayton & Tomlinson (2001) 2.

⁵ Clayton & Tomlinson (2001) 4.

⁶ American Civil Liberty Union “The case against the death penalty”
<<http://www.aclu.org/deathpenalty/deathpenalty.cfm?ID=9082&c=17>> (accessed 20 April 2004).

in death penalty cases by all countries.⁷ Also, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has reiterated that

proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments. All defendants facing the imposition of capital punishment must benefit from the services of a competent defence counsel at every stage of the proceedings. Defendants must be presumed innocent until their guilt has been proved beyond a reasonable doubt, in strict application of the highest standards for the gathering and assessment of evidence. In addition, all mitigating factors must be taken into account.⁸

Some of the issues raised in the above statement, for instance, competent defence counsel are discussed later in this chapter. The statement emphasises the relevance of fair trial standards, and how important it is that they be respected in capital trials in order to ensure a fair trial.⁹ Respect for fair trial rights is imperative, as the non-existence of due process of law within the jurisdiction of a state weakens the efficacy of the remedies provided under domestic law to protect the rights of individuals.¹⁰ In addition, in resolution 1996/15 of 23 July 1996, the UN ECOSOC encouraged UN

⁷ Resolutions 2393 (XXIII) of 26 November 1968 and 35/172 of 15 December 1980.

⁸ Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/1997/60, 24 December 1996, para 81. It should be noted that taking mitigating factors into account, as stated above, would depend on whether the death penalty is mandatory or discretionary. Nevertheless, it is without doubt that there is a possibility of some defendants having an unfair sentencing or not having a fair trial in jurisdictions where the death sentence is mandatory (see chapter two of this thesis).

⁹ The European Court of Human Rights has also emphasised how imperative it is to respect fair trial rights. In *Delcort v Belgium* (1970) 1 EHRR 355, the Court stated that “in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6(1) would not correspond to the aim and purpose of that provision” (para 25). The Court has, in subsequent cases, pointed out the imperative nature of fair trial rights (see for example, *Collozza and Rubinat v Italy* (1985) 7 EHRR 516 and *Zana v Turkey* (1998) 4 BHRC 241 (the right of an accused to be present at and to take part in an oral hearing); *Yagci and Sargin v Turkey* (1995) 20 EHRR 505 (right to a hearing within a reasonable time); *Alenet de Ribemont v France* (1995) 20 EHRR 557 (presumption of innocence); *Öcalan v Turkey* (2003) 7 *Amicus Journal* 24; and *Soering v United Kingdom*, Series A, No. 161 (1989), hereinafter referred to as *Soering* (1989)).

¹⁰ This view was expressed by the Inter-American Commission on Human Rights (see Davidson (1997) 296). Also, the Inter-American Court of Human Rights has indicated that the concept of due process of law is a necessary prerequisite to ensure the adequate protection of persons whose rights and obligations are pending determination before a court or tribunal (see Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, Judicial guarantees in states of emergency, para 29).

member states in which the death penalty has not yet been abolished to ensure that defendants facing a possible death sentence are given all guarantees to ensure a fair trial, bearing in mind the UN standards for a fair trial, discussed below.

Considering the above, it is imperative that fair trial standards for the imposition of the death penalty are met. Failure to respect fair trial standards in capital trials increases the likelihood of innocent defenders being sentenced to death, and subsequently executed. Moreover, it can also lead to abuse of the whole trial process.

This chapter, therefore, examines fair trial rights in relation to the death penalty in Africa. The chapter begins by discussing the fair trial rights in the UN human rights instruments and other UN fair trial standards and how they have been interpreted. This is followed by an examination of fair trial rights in the African human rights system, especially the jurisprudence of the African Commission, as the Commission has had more impact where the issue of the death penalty was raised in the context of the deprivation of fair trial rights. Reference is also made to fair trial rights, in relation to the death penalty, in the Inter-American and European human rights systems, as they are a source of inspiration for the African system. Subsequently, some of the fair trial rights with regard to capital trials in African states are examined, so as to establish if these rights have been respected or not. Finally, consequences of failure to respect fair trial rights in capital trials (the results of unfair capital trials) are discussed.

6.2 Fair trial rights under the United Nations system

6.2.1 The Universal Declaration of Human Rights

The UDHR makes reference to some fair trial rights, though not in detail, in articles 9, 10 and 11. Article 9 prohibits arbitrary arrest and detention. Article 10 guarantees the right of everyone, in the determination of any criminal charge against him, to a “fair and public hearing by an independent and impartial tribunal”. Article 11(1) guarantees the right of everyone charged with a penal offence “to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”. And article 11(2) prohibits retroactive laws. As mentioned

in chapter four, the UDHR is an abolitionist instrument by virtue of article 3, which envisages abolition.¹¹

6.2.2 The International Covenant on Civil and Political Rights

The ICCPR does not only provide for fair trial rights but also provides procedural safeguards to be followed in death penalty cases. The procedural safeguards are provided for in article 6 of the ICCPR. Article 6(2) provides that

[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for *the most serious 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 sentence can only be carried out pursuant to a final judgment rendered by a competent court.¹²

From the above, it is clear that the death penalty has to be restricted to “the most serious crimes”. The UN Human Rights Committee has stated that the expression “the most serious crimes” must be read restrictively to mean that the death penalty should be quite an exceptional measure.¹³ That is, it should be limited to exceptional offences. In addition, article 6(4) and (5) provide for the right of anyone sentenced to death to seek pardon or commutation of the sentence, and prohibit the imposition of the death sentence on anyone one below the age of eighteen or the carrying out of the death sentence on pregnant women, respectively. State parties to the ICCPR are further prohibited from invoking it to delay or prevent the abolition of capital punishment.¹⁴

¹¹ Article 3 of the UDHR guarantees the right to life. See chapter four (4.2.1) for an interpretation of this article.

¹² Emphasis added.

¹³ UN Human Rights Committee, General Comment No. 6: The right to life (article 6 of the ICCPR), 30 April 1982, para 7, (UN Doc HRI\GEN\1\Rev.1 at 6 (1994)), hereinafter referred to as CCPR General Comment No. 6.

¹⁴ Article 6(6) of the ICCPR. To this extent, the ICCPR can be seen as an abolitionist instrument.

It follows from article 6(2) that the provisions of article 14 of the ICCPR (discussed below) are added, by reference to article 6(2) and must be observed.¹⁵ This implies that if article 14 of the ICCPR is violated during a capital trial, article 6 is also breached.¹⁶ The UN Human Rights Committee has also noted that it follows from article 6 that state parties are obliged to limit the use of the death penalty and, accordingly, they have to review their criminal laws in the light of article 6.¹⁷

In restricting the application of the death penalty, state parties should have as their ultimate goal its total abolition, as the Human Rights Committee has acknowledged that article 6 refers generally to abolition in terms which strongly suggest that abolition is desirable.¹⁸ Thus, African state parties have to envisage abolition as a final goal and in accordance with article 2(2) of the ICCPR, have to take the necessary steps to adopt legislative and other measures not only to give effect to the rights in the ICCPR but also to achieve the goal of abolition.¹⁹

Furthermore, article 14 of the ICCPR provides for more general standards for a fair trial, with regard to anyone charged with a criminal offence. These standards include the following: First, equality of all persons before the courts and tribunals. Second, the right of anyone charged with a criminal offence to a fair and public hearing by a

¹⁵ See CCPR General Comment No. 6, para 7.

¹⁶ This interpretation was adopted by the UN Human Rights Committee by consensus, but has subsequently been questioned by one of the Committee members (Mr Wennergren). Despite this, it is the established jurisprudence of the Committee. See Gandhi (2003) 17. In *Reid v Jamaica* (Communication 250/1987, UN Doc. CCPR/C/39/D/250/1978, 21 August 1990), para 11.5), the Committee stated that “the imposition of a sentence of death upon the conclusion of a trial in which the provisions of the Covenant have not been respected constitutes, if no further appeal against the sentence is available, a violation of article 6 of the Covenant”.

¹⁷ CCPR General Comment No. 6, para 6. Likewise, it has been suggested that the use of the word “court” in article 2 of the European Convention, which guarantees the right to life, may implicitly incorporate the procedural guarantees found in article 6 of the Convention, thus implying that in capital cases, state parties would find themselves barred from derogating from article 6 of the Convention. (see Schabas (2002) 268, for further discussion on this).

¹⁸ As above

¹⁹ The ICCPR has been ratified by 47 African states. This looks quite impressive, but the main problem is not ratification but the domestication of these standards. Not all the states that have ratified the ICCPR have incorporated it into their domestic laws. For example, in Botswana, no human rights treaties, including the ICCPR, have been incorporated into national law; in Eritrea, the ICCPR has not been proclaimed as the law of the state; and in Malawi, the ICCPR has not been incorporated into domestic law (Heyns (2004) 904, 1064 & 1247).

competent, independent and impartial tribunal established by law. Third, the right to be presumed innocent until proven guilty according to law. Fourth, the right to be informed promptly and in a detailed language which he understands the nature and cause of the charge against him. Fifth, the right to have adequate time and facilities for the preparation of his defence. Sixth, the right to be tried without undue delay. Seventh, the right to represent himself or to have legal assistance assigned to him if he cannot afford legal assistance and if it is in the interest of justice. Eighth, the right to free assistance of an interpreter. Ninth, the right not to be compelled to testify against himself or to confess guilt. Lastly, the right to have his conviction and sentence reviewed by a higher tribunal.

It should be noted that other provisions in relation to procedural fairness, contained in article 9 of the ICCPR, which guarantees everyone the right to liberty and security of the person, are relevant with regard to the pre-trial phase of a trial. This article prohibits arbitrary arrest and detention.²⁰ It provides for the right of anyone arrested, to be informed at the time of arrest, of the reasons for his arrest and be promptly informed of any charges against him.²¹ The article further guarantees the right of anyone arrested or detained on a criminal charge to be brought promptly before a judge or other officer authorised by law to exercise judicial power, and an entitlement to trial within a reasonable time or to release.²²

The duty of African state parties to the ICCPR to respect strictly procedural safeguards in article 6 and the fair trial rights set forth in article 14 is imperative. It is worth noting that although state parties can derogate from article 14 in time of public emergency that threatens the life of the nation, they cannot derogate from article 6.²³ Nonetheless, according to the UN Human Rights Committee's General Comment No.

²⁰ Article 9(1) of the ICCPR.

²¹ Article 9(2) of the ICCPR.

²² Article 9(3) of the ICCPR.

²³ Article 4(1) of the ICCPR allows state parties to derogate from their obligations under the ICCPR in time of public emergency, which threatens the life of the nation to the extent strictly required by the exigencies of the situation, and the measures taken should not be inconsistent with their other obligations under international law. Article 4(2) prohibits derogation from articles 6, 7, 8(1) & (2), 11, 15, 16 and 18, even in time of public emergency.

29, any measures to derogate from article 14 must be of an exceptional and temporary nature, during a situation of “public emergency which threatens the life of the nation” and the state party must have officially declared a state of emergency.²⁴

Although article 14 is derogable, it would appear that it cannot be derogated from, with regard to capital trials, during a state of emergency. The Human Rights Committee has stated that “as article 6 of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15”.²⁵ This means that, with respect to death penalty cases, article 14 cannot be derogated from. The Committee is, therefore, of the opinion that there is no justification for derogation from fair trial rights during emergency situations, as these rights must be respected during a state of emergency in order to protect non-derogable rights, such as the right to life.²⁶ Thus, if African state parties cannot respect fair trial rights at all times in capital trials, then it is imperative that they consider abolishing the death penalty, as imposition of the death penalty following an unfair trial is a breach not only of procedural standards but also of the right to life.

6.2.3 Other United Nations fair trial standards

Other UN fair trial standards discussed here, though not binding, form part of customary international law. The fair trial standards in the ICCPR have been reiterated and elaborated upon in the ECOSOC safeguards.²⁷ Safeguard Nos. 1 and 2 provide for the imposition of capital punishment only for the “most serious crimes” and only for a crime for which it is prescribed by law at the time of its commission, in

²⁴ UN Human Rights Committee, General Comment No. 29: States of emergency (article 4 of the ICCPR), 31 August 2001, para 2 (UN Doc. CCPR/C/21/Rev.1/Add.11), hereinafter referred to as ICCPR General Comment No. 29.

²⁵ CCPR General Comment No. 29, para 15.

²⁶ CCPR General Comment No. 29, para 16.

²⁷ Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN ECOSOC resolution 1984/50 of 25 May 1984, endorsed by the UN General Assembly in resolution 39/118, adopted without a vote on 14 December 1984 (hereinafter referred to as ECOSOC safeguards).

countries that have not yet abolished it, respectively.²⁸ Safeguard No. 3 prohibits the imposition of the death penalty on persons below eighteen years of age and the carrying out of the death sentence on pregnant women or new mothers. Safeguard Nos. 6, 7 and 8 provide, respectively, for the right to appeal, to seek pardon or commutation of sentence, and prohibit execution where an appeal against the death sentence, or an appeal for pardon or commutation of sentence, is pending.

With regard to trials in general, other fair trial safeguards have been enumerated in UN resolutions, which have to be respected by all states. They incorporate standards in human rights treaties, for example, the ICCPR. These standards are applicable in capital cases, as they relate to trials in general. They include the following: The Code of Conduct for Law Enforcement Officials,²⁹ Basic Principles on the Role of Lawyers,³⁰ UN Basic Principles on the Independence of the Judiciary,³¹ UN Guidelines on the Role of Prosecutors,³² the Principles on the Prevention of Arbitrary Arrest and Detention,³³ the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,³⁴ and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.³⁵

6.2.4 The United Nations Human Rights Committee

As seen above, the UN Human Rights Committee in some of its General Comments has interpreted the procedural safeguards and fair trial provisions in article 6 and 14 of

²⁸ According to safeguard No. 1, the scope of the “most serious crimes” “should not go beyond intentional crimes with lethal or other extremely grave consequences”.

²⁹ UN General Assembly resolution 34/169 of 17 December 1979, UN Doc. A/34/46 (1979).

³⁰ UN General Assembly resolution 45/121 of 14 December 1990, UN Doc. A/CONF.144/28/Rev.1 at 118 (1990).

³¹ UN General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, UN Doc. A/CONF.121/22/Rev.1 at 59 (1985).

³² See UN Doc. A/CONF.144/28/Rev.1 at 189 (1990).

³³ See UN General Assembly resolution 34/169 of 17 December 1979, and Adeyemi (1995) 3.

³⁴ UN General Assembly resolution 40/34 of 29 November 1985, UN Doc. A/40/53 (1985).

³⁵ UN General Assembly resolution 45/121 of 14 December 1990, UN Doc. A/CONF.144/28/Rev.1 at 112 (1990).

the ICCPR respectively. This section, therefore, focuses on the jurisprudence of the Committee with regard to fair trial rights in relation to the death penalty, in which the Committee has also emphasised the imperative nature of fair trial rights.³⁶ The Committee has found a violation of article 14 and consequently article 6 in a number of death penalty cases.

For example, in *Burrel v Jamaica*, the Human Rights Committee found a violation of article 14(3)(b) and consequently article 6 of the ICCPR, because the death penalty was imposed on Mr Burrel after a trial in which the provisions of the ICCPR were not respected.³⁷ The Committee's decision was based on the fact that Mr Burrel was not informed that his legal aid counsel was not going to argue any grounds in support of his appeal and he was not given an opportunity to consider any remaining options open to him.³⁸ The Committee, therefore, considered this to be in violation of the right to have adequate time and facilities for the preparation of one's defence and to communicate with counsel of one's own choosing.³⁹ The remedy in this case entailed the payment of compensation to the family of Mr Burrel, as he had been executed before the Committee could decide on the matter.⁴⁰

The Human Rights Committee has found the imposition of the death sentence in absentia and subsequently no attempts to notify the convicted person to be in violation of the right to a fair trial, specifically articles 14(3)(a), (b), (d) and (e) of the ICCPR.⁴¹ The Committee further noted that the failure of a state party to respect the relevant requirements of article 14(3) leads to a conclusion that any death sentences imposed

³⁶ Some of the Committee's decisions with regard to fair trial rights and the death penalty are also discussed under 6.5.1 below.

³⁷ *Burrel v Jamaica*, Communication 546/1993, UN Doc. CCPR/C/57/D/546/1993, 1 August 1996, para 9.4.

³⁸ As above, para 9.3.

³⁹ Article 14(3)(b) of the ICCPR.

⁴⁰ *Burrel v Jamaica*, para 11. The execution of Mr Burrel before the Committee could decide on the matter is a breach of ECOSOC safeguard No. 8 prohibiting executions where an appeal is pending.

⁴¹ See *Mbenge v Zaire*, Communication 16/1977, UN Doc. CCPR/C/18/D/16/1997, 25 March 1983, para 14.1 & 14.2

are contrary to the provisions of the ICCPR and, thus, in violation of article 6(2).⁴² Further, in *Lubuto v Zambia*, the Human Rights Committee found a violation of article 14(3)(c), the right to be tried without undue delay, because the trial process took eight years.⁴³ The Committee then ordered that the death sentence imposed on Mr Lubuto be commuted.⁴⁴ It is implicit in the Committee's decision that a state party cannot plead lack of economic resources to prevent it from providing all the elements of a fair trial.⁴⁵ It is worth noting that the Human Rights Committee in its jurisprudence has gone out of its way to emphasise the imperative nature of procedural safeguards (fair trial rights) in death penalty cases.⁴⁶ In *Reid v Jamaica*, the Committee stated that "in capital punishment cases, the duty of [s]tate parties to observe rigorously all the guarantees for a fair trial set out in article 14 of the

⁴² As above, para 17.

⁴³ *Lubuto v Zambia*, Communication 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev.1, 31 October 1995, para 7.3. Mr Lubuto was sentenced to death on August 1983 for aggravated robbery committed on 5 February 1980. The Supreme Court of Zambia dismissed his appeal on 10 February 1988 (para 2.1). The Committee also found a violation of article 6(2) of the ICCPR in this case, with regard to the proportionality of the death sentence imposed (see 6.6.1 below). See also, *Chambala v Zambia*, Communication 856/1999, UN Doc. CCPR/C/78/D/856/1999, 30 July 2003, in which the Human Rights Committee found the lengthy detention (22 months) to be arbitrary, constituting a violation of article 9(1) read together with article 2(3) of the ICCPR.

⁴⁴ As above, para 9.

⁴⁵ As above, para 7.3. It should be noted that the Committee normally states an appropriate remedy where fair trial rights have been violated such as release, a retrial or a new appeal where there's some doubt about the guilty verdict itself; commutation of sentence, where article 14(3)(c) has been breached; and compensation to the convicted person where the sentence has already been commuted or to the family of the convicted person where he has already been executed. With regard to release, see the following cases: *Kelly v Jamaica*, Communication 253/1987, UN Doc. A/46/40, 8 April 1991, para 7; *Pinto v Trinidad and Tobago*, Communication 512/1992, UN Doc. CCPR/C/57/D/512/1992, 29 July 1996, para 13.2; *McCordie v Jamaica*, Communication 663/1995, UN Doc. CCPR/C/64/D/633/1995, 25 November 1998, para 10; and *Yasseen and Thomas v Guyana*, Communication 676/1996, UN Doc. CCPR/C/62/D/676/1996, 31 March 1998, para 9. On retrial, see *Simmonds v Jamaica*, Communication 338/1988, UN Doc. CCPR/C/46/D/338/1988, 19 November 1992, para 10. A new appeal was the remedy in *McLeod v Jamaica*, Communication 734/1997, UN Doc. CCPR/C/62/D/734/1997, 3 June 1998, para 8. On commutation, see *Lubuto v Zambia*, Communication 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev.1, 31 October 1995, para 9. With regard to compensation, see *Hylton v Jamaica*, Communication 407/1990, UN Doc. CCPR/C/51/D/407/1990, 15 July 1994, para 11.1; *Johnson v Jamaica*, Communication 653/1995, UN Doc. CCPR/C/64/D/653/1995, 3 December 1998, para 10; and *Burrell v Jamaica*, Communication 546/1993, UN Doc. CCPR/C/57/D/546/1993, 1 August 1996, para 11.

⁴⁶ See, for example, *Koné v Senegal*, Communication 386/1989, UN Doc. CCPR/C/52/D/386/1989, 27 January 1994; *Gridin v Russian Federation*, Communication 770/1997, UN Doc. CCPR/C/69/770, 119, 18 July 2000; *Mansaraj and Others v Sierra Leone*, Communications 839/1998, 840/1998 and 841/1998, UN Doc. CCPR/C/72/D/839/1998, 30 July 2001. However, it should also be noted that the Committee has made it clear in numerous cases that it will not consider issues of fact or evidence arising out of death penalty cases unless it is obvious that the evaluation of the evidence was arbitrary or amounted to a denial of justice (Ghandhi (2003) 17).

Covenant is even more imperative”.⁴⁷ It should also be noted, as mentioned above, that the Committee in holding that a violation of article 14 also constitutes a breach of article 6, has made article 14 non-derogable, at least in death penalty cases. The Inter-American Commission on Human Rights has adopted a similar position with regard to the relationship between fair trial rights and the right to life.⁴⁸ The reference to the “Covenant” in article 6(2) also makes the fair trial rights in article 14 non-derogable.

6.3 Fair trial rights in the African human rights system

6.3.1 The African Charter on Human and Peoples’ Rights

Procedural safeguards for a fair trial have been provided for in article 7 of the African Charter. The due process rights provided for in article 7 are: First, the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force

⁴⁷ *Reid v Jamaica*, Communication 250/1987, UN Doc. CCPR/C/39/D/250/1978, 21 August 1990, para 12.2.

⁴⁸ The Inter-American Commission on Human Rights has adopted a similar view to that of the UNHRC with regard to the relation between the right to life and fair trial rights. It is clear from the Commission’s jurisprudence that since a violation of due process invalidates a conviction and sentence, an execution pursuant to flawed criminal proceedings would amount to an arbitrary deprivation of life, thus a violation of the right to life under article I of the American Declaration (see for example *Graham v United States*, Case 11.193, Report No. 97/03, 29 December 2003). Similarly, the Inter-American Court of Human Rights has adopted the same approach, finding the imposition of capital punishment without respect for due process to constitute an “arbitrary” deprivation of life. The Inter-American Court had to address the consequences, with regard to the ICCPR and persons of foreign nationality, of the imposition and application of the death penalty in the light of failure to give the notification referred to in article 36(1)(b) of the Vienna Convention on Consular Relations (see Inter-American Court of Human Rights, Advisory Opinion OC-16/99 of 1 October 1999, para 125). The right to information on consular assistance is guaranteed under article 36(1)(b) of the Vienna Convention on Consular Relations of 24 April 1963. The Court was of the opinion that the right to information on consular assistance makes it possible for the right to due process of law under article 14 of the ICCPR to have practical effects in tangible cases (paras 122-124). After considering the jurisprudence of the UNHRC and noting that because of the irreversible nature of the death penalty, the strictest and most rigorous enforcement of judicial guarantees is required, the Court held as follows: “[Non-observance] of a detained foreign national’s right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be “arbitrarily” deprived of one’s life, in the terms of the relevant provisions of the human rights treaties (eg the American Convention on Human Rights, Article 4; the International Covenant on Civil and Political Rights, Article 6) with the juridical consequences inherent in a violation of this nature, i.e., those pertaining to the international responsibility of the State and the duty to make reparations” (para 137). Since the African Charter, in article 4, prohibits the arbitrary deprivation of life, drawing inspiration from this opinion in interpreting article 4, implies that article 4 would be violated if the death penalty is imposed under the above circumstances.

(article 7(1)(a)). Second, the right to be presumed innocent until proved guilty by a competent court or tribunal (article 7(1)(b)). Third, the right to defence, including the right to be defended by counsel of his choice (article 7(1)(c)). Lastly, the right to be tried within a reasonable time by an impartial court or tribunal (article 7(1)(d)).

As seen above, the fair trial (due process) rights provided for in article 7 are not as exhaustive as those, for example, in article 14 of the ICCPR. The right to an interpreter, which is an aspect of fair trial, is omitted. However, this has been stated in some of the resolutions on the right to a fair trial of the African Commission on Human and Peoples' Rights, as seen below. Article 6 of the African Charter, which deals with the right to liberty and security of the person, is also of relevance with regard to the pre-trial phase in ensuring a fair trial. It prohibits arbitrary arrests and detentions. However, it should be noted that article 6 has been criticised as not having sufficiently dealt with the pre-trial phase of the criminal process, and article 7 as being incomplete.⁴⁹

6.3.2 The African Commission on Human and Peoples' Rights

The African Commission has dealt with fair trial rights in some of its resolutions and in a number of death penalty cases. The resolutions incorporate and expand on fair trial rights contained in the African Charter. They, therefore, supplement the provisions of the African Charter.⁵⁰ The Commission adopted in 1992, "Resolution on the Right to Recourse and Fair Trial".⁵¹ The Commission's adoption of this resolution was aimed at deepening the understanding of substantive rights guaranteed by the African Charter.⁵² The preamble highlights the imperative nature of fair trial rights in the words, "the right to a fair trial is essential for the protection of fundamental human rights and freedoms". This resolution restates the fair trial rights contained in articles

⁴⁹ Viljoen (2004) 404. Generally, detention and trial, which are often the areas where systematic violations of civil and political rights occur, are not dealt with adequately in the African Charter (see Heyns (2002) 155).

⁵⁰ See article 66 of the African Charter.

⁵¹ "Resolution on the Right to Recourse and Fair Trial", Eleventh Session held in Tunis, Tunisia, 2-9 March 1992 (see Heyns (2004) 526).

⁵² *Fifth Annual Activity Report: 1991-1992*, para 22.

6 and 7, and the right to equality before the law provided for under article 3 of the African Charter. The resolution goes further to provide for fair trial rights that are not contained in the African Charter. For example, the right of individuals to have the free assistance of an interpreter if they cannot speak the language used in court, and the right of individuals to have adequate time and facilities for the preparation of their defence.⁵³

In 1999, the African Commission adopted “Resolution on the Right to a Fair Trial and Legal Assistance in Africa”.⁵⁴ As can be deduced from the preamble of this resolution, its adoption was a means to emphasise the importance of the right to a fair trial and the need to strengthen the provisions of the African Charter relating to this right. This resolution adopts the “Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa”, which states:

The right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right to a fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines.⁵⁵

This goes further to emphasise the imperative nature of fair trial rights. In addition, in 2003, the Commission adopted Principles and Guidelines on the Right to a Fair Trial and Legal Aid in Africa (hereinafter referred to as African Commission’s principles and guidelines).⁵⁶ The general principles include the right to a fair and public hearing by a legally constituted competent, independent and impartial judicial body. The above principles and guidelines identify essential elements of a fair hearing, which include: Equality of all persons before any judicial body; the right to consult and be represented by a legal representative or other qualified persons of one’s choice at all

⁵³ “Resolution on the Right to Recourse and Fair Trial”, para 2(e)(1) & (IV).

⁵⁴ “Resolution on the Right to a fair Trial and Legal Assistance in Africa”, Twenty-sixth Session held in Kigali, Rwanda, 1-15 November 1999 (see Heyns (2004) 584).

⁵⁵ See Heyns (2004) 585.

⁵⁶ Adopted at its 33rd Ordinary Session held in Niamey, Niger in May 2003. See *Final Communiqué* of the Session and *Seventeenth Annual Activity Report: 2003-2004*. The Preamble of the principles and guidelines points out the need for these fair trial standards to become known to everyone in Africa, and urged that these standards be promoted and protected by civil society organisations, judges, lawyers, prosecutors, academics, and be incorporated into domestic legislation by state parties to the African Charter and respected by them.

stages of the proceedings; the right to the assistance of an interpreter if a defender cannot understand the language used; the right to a determination of the defender's rights and obligations without undue delay; and the right to an appeal to a higher judicial body. Thus, the African Commission's principles and guidelines incorporate fair trial standards in the ICCPR and the African Charter and elaborate on them.

In addition to the above resolutions, the African Commission has addressed the issue of fair trial rights in a number of death penalty cases, in which the issue of the death penalty was raised in the context of the deprivation of fair trial rights during the trial process, and found a violation of the rights under article 7 of the African Charter. In these cases, the Commission after finding a violation of article 7(1)(d) consequently found a violation of article 26, which gives state parties the duty to guarantee the independence of the courts. Article 26 is therefore relevant to the right to a fair trial.⁵⁷ The subsequent paragraphs examine the jurisprudence of the African Commission on fair trial rights in death penalty cases.

In *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, the African Commission found a violation of article 7(1)(c), the right to defence, on the ground that that the trial of the Chirwas took place before a Traditional Court consisting of five chiefs who had no legal training, and the Chirwas were tried without being defended by counsel.⁵⁸ The African Commission has subsequently elaborated on the meaning of the right to defence. The right to defence, including the right to be defended by counsel of one's choice guaranteed under article 7(1)(c), as seen in the Commission's decision in *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*, requires that the counsel representing the accused should not be intimidated or harassed during the trial. Intimidation and harassment of counsel to the

⁵⁷ It should be noted that articles 3 and 5 of the African Charter are also relevant to the right to a fair trial. Article 3 guarantees equality before the law and article 5 provides for the right to the respect of the dignity inherent in a human being and to recognition of his legal status.

⁵⁸ *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, Communications 68/92 and 78/92, *Eighth Annual Activity Report: 1994-1995*, para 10. In this case, the Southern Regional Traditional Courts had sentenced Orton and Vera Chirwa to death, after a trial that did not meet fair trial standards. After international protest, the sentences were commuted to life imprisonment. (see paras 1-5).

extent that they withdraw from a case would amount to a violation of this right.⁵⁹ If after such withdrawal, the accused is not given the opportunity to procure the services of another counsel, his right to be represented by counsel of his choice is violated.⁶⁰

Further, the severity of sentence (the death sentence) is a relevant consideration in establishing whether denial of the right to appeal constitutes a violation, as was the Commission's position in *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*.⁶¹ The Commission found a violation of article 7(1)(a) in this case on the ground that special tribunals created in 1984 in Nigeria foreclosed any avenue of appeal to "competent national organs" in criminal cases bearing such penalties.⁶² The Commission further found a violation of article 7(1)(d) due to the fact that an appearance of partiality has been created by the composition of the special tribunals.⁶³

⁵⁹ *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*, Communication 87/93, *Eighth Annual Activity Report: 1994-1995*; (2000) AHRLR 183 (ACHPR 1995), para 12. In this communication, the individuals concerned had been sentenced to death under the Civil Disturbances (Special Tribunal) Decree No. 2 of 1987. The decree does not provide for any judicial appeal against the decisions of the Special tribunals and prohibits the courts from reviewing any aspect of the operation of the tribunal. The Communication also alleged that the accused and their counsels were constantly harassed and intimidated during the trial, ultimately forcing the withdrawal of the defence counsel (see paras 1 & 2).

⁶⁰ As above.

⁶¹ *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*, Communication 60/91, *Eighth Annual Activity Report: 1994-1995*; (2000) AHRLR 180 (ACHPR 1995).

⁶² As above, para 13. The individuals in this communication had been sentenced to death under the Robbery and Firearms (Special Provision) Decree No. 5 of 1984, which created special tribunals, composed of one serving or retired judge, one member of the armed forces and one member of the police force. The Decree does not provide for any appeal of sentences, but merely subjects them to confirmation or disallowance by the Governor of the a state (see para 1).

⁶³ As above, para 12. Similarly, the Inter-American Commission on Human Rights has found the appearance of impartiality to constitute a violation of the right to be tried by an impartial tribunal. In *Andrews v United States* (Case 11.139, Report No. 57/96, 6 December 1996, OEA/Ser.L/V/II.98 Rev. 6, 13 April 1998), the Inter-American Commission had to address, amongst others, the right to an impartial hearing guaranteed under article XXVI of the American Declaration. The Commission noted that the international standard on the issue of "judge and juror impartiality" employs an objective test based on "reasonableness, and the appearance of impartiality" (para 159). After assessing the facts in an objective and reasonable manner, the Commission held that "the evidence indicates that Mr Andrews did not receive an impartial hearing because there was a reasonable appearance of "racial bias" by some members of the jury, and the omission of the trial court to voir dire the jury tainted his trial and resulted in him being convicted, sentenced to death and executed" (para 165). Accordingly, the Commission found the United States in violation of article XXVI(2) of the American Declaration because Mr Andrews had the right to receive an impartial hearing as provided by the above article (para 172). The Commission further reiterated that in capital punishment cases, state parties have an obligation to observe rigorously all the guarantees for an impartial trial (para 172).

The character of the individual members of the tribunal was immaterial in deciding whether the right to be tried by an impartial court or tribunal has been violated.

Similarly, in *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, the Commission found special tribunals with an appearance of partiality to be in violation of article 7(1)(d), and consequently, article 26 of the African Charter, as the government did not guarantee the independence of the judicial bodies in question.⁶⁴ As well, article 7(1)(a) would be violated if accused persons have no possibility of appealing their sentences to competent national organs.⁶⁵ Also, to openly pronounce an accused guilty prior to and during the trial, will constitute a violation of the accused's right to be presumed innocent.⁶⁶

In *Amnesty International and Others v Sudan*, the Commission found a violation of article 7(1)(d), first, as the composition of special courts in Sudan create the impression, or indicates the reality, of lack of impartiality (the courts consisted of “three military officers or other persons of integrity and competence” appointed by the president, his deputies and senior military officers).⁶⁷ Second, on the basis that the government dismissed judges opposed to the formation of these courts. The Commission saw the dismissal as depriving courts of the personnel qualified to ensure that they operate impartially, thus, denying individuals the right to have their case heard by such body.⁶⁸ Further, giving a tribunal the power to veto the choice of

⁶⁴ *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communication 137/94, 139/94, 154/96 and 161/97, *Twelfth Annual Activity Report: 1998-1999*; (2002) AHRLR 212 (ACHPR 1998), paras 90 & 95. The communications concerned the detention and trial of Mr Saro-Wiwa and the human rights violations suffered by him. During detention, he was denied access to a lawyer. His trial, and that of others, took place before a tribunal established under the Civil Disturbances Act. He was later sentenced to death together with his co-defendants. Although the African Commission requested a stay of execution, he was executed together with the others in secret (see paras 1-10).

⁶⁵ As above, para 93.

⁶⁶ As above, para 96.

⁶⁷ *Amnesty International and Others v Sudan*, Communications 48/90, 50/91, 52/91, 89/93, *Thirteenth Annual Activity Report: 1999-2000*; (2000) AHRLR 297 (ACHPR 1999), para 68. In this communication, it was alleged that in Sudan, legal representation is denied at new trials and there is no appeal of a death sentence (see paras 1-20 for a summary of the facts).

⁶⁸ As above, para 69.

counsel of defendants is an unacceptable infringement of the right to freely choose one's counsel under article 7(1)(c), which is essential to the assurance of a fair trial.⁶⁹

The African Commission, in a recent case, did not find a violation of fair trials rights. In *Interights et al (on behalf Bosch) v Botswana*,⁷⁰ one of the issues raised was whether the misdirection of the trial judge with regard to the onus of proof was so fatal as to negate the right to a fair trial in the circumstances of the case, amounting to a violation of article 7(1)(b) of the African Charter.⁷¹ The Commission noted that there is no general rule or international norm to the effect that any misdirection by itself vitiates a verdict of guilt, and that a breach of article 7(1) would only arise if the conviction had resulted from such misdirection.⁷² Drawing inspiration from, *inter alia*, the case law of the European Court on Human Rights, and based on the fact that Bosch's conviction for murder did not result from the misdirection but from the evidence presented, the Commission concluded that there had not been a violation.⁷³

According to the Commission's decision, there could be a basis for finding a violation of articles 4 and 7(1) of the African Charter, if it is shown that the Courts' (the High Court and Court of Appeal of Botswana) evaluation of the facts were manifestly arbitrary or amounted to a denial of justice.⁷⁴ However, this was not the case.

It should be noted that a reversal of the presumption of innocence is a fundamental violation of article 7(1)(b) of the African Charter. The presumption of innocence is essential to ensure a fair trial. Since, as seen from the jurisprudence of the African Commission, the rights under article 7 are mutually dependent, the Commission should have been bold enough in finding a violation of article 7(1), as there was a

⁶⁹ As above, para 64 & 66.

⁷⁰ *Interights et al (on behalf of Bosch) v Botswana*, Communication 240/2001, *Seventeenth Annual Activity Report: 2003-2004* (African Commission), hereinafter referred to as *Bosch* (African Commission). See chapter 4 (4.3.2) for the facts of the case.

⁷¹ Article 7(1)(b) guarantees the right of every individual to be presumed innocent until proved guilty by a competent court or tribunal.

⁷² *Bosch* (African Commission), paras 24 & 26.

⁷³ *Bosch* (African Commission), paras 27 & 28.

⁷⁴ *Bosch* (African Commission), para 29.

clear violation of article 7(1)(b) – presumption of innocence - by placing the burden of proof on Bosch.

Nevertheless, as seen in all the cases discussed above, with the exception of the *Bosch* case, the jurisprudence of the African Commission shows that the mere appearance of partiality alone would suffice to find a violation of the above right. It is also clear from the jurisprudence above that the rights under article 7 are mutually dependent, and where the right to be heard is infringed, other violations may occur, such as an execution becoming arbitrary (thus, a violation of article 4), and violations of article 26, as governments have a duty to provide structures necessary for the exercise of the right to be tried by an independent (and impartial) court. In some of the cases above, the Commission further found a violation of article 4 of the African Charter, guaranteeing the right to life, on the ground that the executions were carried out after a trial that violated article 7 of the Charter, thus rendering the deprivation of life arbitrary.⁷⁵

Thus, the Commission has taken an approach similar to that of the UN Human Rights Committee, with regard to the relation between the right to life and fair trial rights. As discussed above, the Human Rights Committee is of the view that imposition of the death penalty following an unfair trial is a breach not only of procedural standards but also of the right to life. Similarly, the Commission as seen in *Amnesty International and Others v Sudan* and *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, is of the opinion that an execution after an unfair trial also constitutes a breach of article 4 of the African Charter.⁷⁶

The Commission has had more impact where the issue of the death penalty was raised on procedural grounds, than on the right to life. Its decisions on fair trial rights have been progressive, and can be seen as procedural benchmarks in capital cases. The

⁷⁵ See, for example, *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communication 137/94, 139/94, 154/96 and 161/97, *Twelfth Annual Activity Report: 1998-1999*; (2002) AHRLR 212 (ACHPR 1998), para 103 & *Amnesty International and Others v Sudan*, Communications 48/90, 50/91, 52/91, 89/93, *Thirteenth Annual Activity Report: 1999-2000*; (2000) AHRLR 297 (ACHPR 1999), paras 47-52.

⁷⁶ As above.

Commission normally recommends a remedy, which could be that the complainants be released in cases where they have not yet been executed, that the government annuls decrees that lead to the imposition of the death penalty without respect for due process rights, or that the government concerned should put an end to the violations in order to abide by its obligations under the Charter. However, implementation of the decisions of the Commission depends largely on the political will of African states. Nonetheless, since imposition of the death penalty following an unfair trial is a breach of both procedural standards and the right to life, it is imperative for states that cannot respect fair trial standards to consider abolishing the death penalty, as increased concern about its use in Africa is as a result of it being imposed after unfair trials.

6.4 Fair trial rights in African national constitutions

Fair trial rights have been enumerated in the national constitutions of most African states. For example, articles 19 and 20 of the Constitution of Ethiopia 1995; section 32 of the Constitution of the Republic of Sudan 1998; article 13 of the Constitution of Tanzania 1995; article 18 of the Constitution of Zambia 1996; the Preamble of the Constitution of the Republic of Cameroon 1996; sections 35 and 36 of the Constitution of the Federal Republic of Nigeria 1999; section 19 of the Constitution of Ghana 1996; section 28 of the Constitution of Uganda 1995; and section 23 of the Constitution of Sierra Leone 1996.⁷⁷ However, it should be noted that some of these safeguards or standards in national constitutions are not in conformity with the norms and standards of the relevant UN instruments⁷⁸ or those at the regional level. For example, despite the fact that Sierra Leone has ratified the ICCPR and African Charter, accused persons have no right to a lawyer at the appeal stage of the trial.⁷⁹

⁷⁷ Also, see the Constitutions of Central African Republic (articles 1 & 3) and Djibouti (article 10). However, some of the provisions are very inadequate. It should be noted that the Constitution of Morocco 1996 has nothing on fair trial rights. Somalia and Swaziland have no constitution at present. The Constitution of Somalia was suspended on 27 January 1991. For the sections of the various African constitutions that deal with fair trial rights, see Heyns (2004) 854-855.

⁷⁸ Adeyemi (1995) 4.

⁷⁹ Stated in the report of the national coordinator of Sierra Leone, Abdul Tejan-Cole, presented at the "First International Conference on the Application of the Death Penalty in Commonwealth Africa" held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenalty>> (accessed 30 June 2004)).

6.5 Respect for fair trial rights in capital trials in Africa

As long as the reality pertains that the death penalty exists in Africa, it is imperative that the death penalty is imposed only in exceptional circumstances, and that fair trial standards for its imposition are met so as to undo or mitigate the effects of the death penalty such as conviction of the innocent. If such fair trial standards cannot be met, the death penalty should not be imposed, since, as mentioned above, constitutional due process and elementary justice require that the judicial functions of trial and sentencing be conducted with fundamental fairness, especially where the irreversible sanction of the death penalty is involved. Furthermore, as stated above, the UN General Assembly has pointed out in some of its resolutions the importance of respecting fair trial standards in death penalty cases by all countries.⁸⁰

To a great extent, increased concern about the use of the death penalty in Africa is a result of the fact that capital trials in Africa, more often than not, fall short of these standards. For example, trials are conducted after excessive delay, and in some cases defendants have no access to legal assistance and often, lack proper defence. The subsequent paragraphs examine some of the fair trial rights, with the aim of showing that they often are not respected in capital cases in the legal systems of African states.

6.5.1 The right to be tried within a reasonable time

The purpose of the right of an accused to be tried within a reasonable time is to prevent undue and oppressive incarceration prior to trial, to minimise anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend him or herself.⁸¹ In other words, the object of this right is to give effect to the principal right to a substantively fair trial, thus preventing injustice resulting from delays. The right of an accused to be tried within a reasonable time runs through the pre-trial, trial and post trial phases of a trial. That is, this right relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; and all stages must

⁸⁰ Resolution 2393 (XXIII) of 26 November 1968 and Resolution 35/172 of 15 December 1980.

⁸¹ Code (1992) 9. See also, Steytler (1998) 272.

take place “without undue delay” or within a reasonable time.⁸² Therefore, to make the right to be tried within a reasonable time effective, a procedure must be available in order to ensure that the trial will proceed “without undue delay” both in the first instance and on appeal.⁸³

In establishing whether this right has been violated (or whether there has been undue delay), factors such as the nature and complexity of the case, the availability of state resources with regard to the investigation or prosecution of the case, and the kind of prejudice suffered by the accused, have to be considered.⁸⁴ The above factors have to be taken into account as it is difficult to establish undue delay, for example, where there are insufficient resources to carry out investigations, or the case is very complex, or the accused has not suffered any prejudice. For example, a case in which an accused had not been brought to trial two years after his first appearance was held not to constitute a violation of the right to a trial within a reasonable time.⁸⁵

The right to be tried within a reasonable time is a constitutional value of supreme importance that must be interpreted in a broad and creative manner.⁸⁶ Trials held within a reasonable time have an intrinsic value. If innocent, the accused should be acquitted with a minimum disruption to his social and family relationships. If guilty, the accused should be convicted and an appropriate sentence be imposed without unreasonable delay.⁸⁷

⁸² UN Human Rights Committee, General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (article 14 of the ICCPR), 13 April 1984, para 10 (hereinafter referred to as CCPR General Comment No. 13).

⁸³ CCPR General Comment No. 13, para 10.

⁸⁴ The Inter-American Commission on Human Rights has laid down, in a case against Argentina, three criteria to be used to determine what constitute a reasonable time, namely: the duration of imprisonment; the nature of the acts that led to criminal proceedings; and the difficulties or judicial problems encountered when conducting trials (see Davidson (1997) 288). In this case, the Inter-American Commission relying on these criteria, found a pre-trial detention period of four years in this case not to be unjustifiable delay in the administration of justice (*Case 10.037 v Argentina* (1989) IAYHR 52, 100). This goes to show that there is no set period of time to be considered as unreasonable, as this will depend on the circumstances of each case.

⁸⁵ *Sanderson v A-G* [1997] 12 BCLR 1675.

⁸⁶ *Smyth v Uhsewokunze* [1998] 4 LRC 120, 129b.

⁸⁷ *Re Mlambo* (1993) 2 LRC 28 at 34e-f (Supreme Court of Zimbabwe).

Regrettably, as noted in chapter two, most capital trials in Africa take many years, as accused persons are not brought before a court within a reasonable time. In Sierra Leone, for example, the main problem with capital trials is that of massive pre-charge and pre-trial delays, and moreover, suspects are most often, not informed of the reasons for their arrest until they are about to be charged in court, contrary to section 17(2)(a) of the Constitution of Sierra Leone 1996.⁸⁸ In Zambia, trials take very long, often more than three years from the date of arrest.⁸⁹ In Nigeria, the pre-trial time in detention for capital offenders, which is rarely less than five years in some states and in some cases over 10 years, has been a matter of serious concern.⁹⁰ Also in Lesotho, although section 12(1) of the Constitution provides that the accused person be afforded hearing within a reasonable time, the law enforcement agencies more often than not, do not comply with this provision.⁹¹

Trials that take too long can lead to injustice, as it becomes difficult to procure the presence of witnesses due to the long trials. This has been the case in Cameroon where capital trials take very long. Some lawyers in Cameroon have stated that one of the difficulties they face with regard to capital trials is the fact that the trials are lengthy, with many adjournments; and that the consequence of trials not done within a reasonable time is that it makes it difficult to secure the presence of witnesses.⁹² It is difficult to guarantee a fair hearing under such circumstances.

⁸⁸ A person arrested for treason, murder or robbery with aggravation may spend an average between three and six months in police custody despite the fact that section 17(3) of the Constitution of Sierra Leone 1991 specifically states that persons arrested for capital offences have to be brought before a court of law within 10 days from the date of arrest. Stated in the report of the national coordinator of Sierra Leone, Abdul Tejan-Cole, presented at the “First International Conference on the Application of the Death Penalty in Commonwealth Africa” held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenalty>> (accessed 30 June 2004)).

⁸⁹ International Commission of Jurists, “Zambia: Attacks on Justice” <<http://www.icj.org/news>> (accessed 16 May 2004).

⁹⁰ Amnesty International “Nigeria: The death penalty and women under the Nigerian penal systems” AI Index: AFR 44/007/2004, 10 February 2004.

⁹¹ Initial report of Lesotho submitted under article 40 of the ICCPR, UN Doc. CCPR/C/81/Add.14, 16 January 1998, para 101, hereinafter referred to as initial report of Lesotho.

⁹² The author is from Cameroon, and became aware of these difficulties from a discussion with some defence lawyers in April 2004 in Cameroon, in which I asked them of the difficulties they experience in preparing capital cases.

Such delays above are clearly in violation of fair trial rights in the ICCPR, African Charter, national constitutions of the above states, and other UN and African Commission standards for a fair trial. The African Commission held in *Pagnouille (on behalf of Mazou) v Cameroon*⁹³ that two years without any hearing or projected trial date constitutes a violation of article 7(1)(d) of the African Charter dealing with the right to be tried within reasonable time. The Commission's finding was based on the fact that no reason had been given for the delays. Although the case was not related to the death penalty, it sets precedence for capital cases.

As can be deduced from the above case, the burden is on the state to justify lengthy detentions or delays in bringing an accused before a court within reasonable time. Otherwise such detentions will amount to a violation of the right to be tried within a reasonable time. Based on the jurisprudence of the UN Human Rights Committee, in cases against some African states, for example, Senegal and Zambia, these delays also have to be attributable to the accused or to his representative for it to be justifiable.⁹⁴ Some of the delays, as noted in chapter two, are caused by deficiencies in the criminal justice systems of some African states.

In Ghana, for example, the police service is ill equipped and lack adequate training, coupled with corruption impacting negatively on the pre-trial phase of the criminal

⁹³ *Pagnouille (on behalf of Mazou) v Cameroon*, Communication 39/90, *Tenth Annual Activity Report: 1996-1997*; (2000) AHRLR 57 (ACHPR 1997), para 19. See also the following cases: *Birindwa and Tshisekedi v DRC*, Communication 241/1987 (Human Rights Committee), UN Doc. CCPR/C/37/D/241/1987, 29 November 1989, para 13, in which the Human Rights Committee found a violation of article 9(3) of the ICCPR because Tshisekedi was not brought before a judge within a reasonable time, thus not tried within reasonable time. See also *Muteba v DRC*, Communication 124/1982 (Human Rights Committee), UN Doc. CCPR/C/22/D/124/1982, 24 July 1982, in which the committee found a violation of the right to be brought promptly before a judge and to be tried within reasonable time.

⁹⁴ *Koné v Senegal*, Communication 386/1989 (Human Rights Committee), UN Doc. CCPR/C/52/D/386/1989, 27 October 1994, para 8.7. In this communication, the complainant had been kept in custody for four years and four months. The Human Rights Committee found this delay to be incompatible with article 9(3) of the ICCPR due to the absence of special circumstances justifying such delay, such as that there were, or had been, impediments to the investigations attributable to the accused or his representative. Also, in *Chambala v Zambia*, Communication 856/1999 (Human Rights Committee), UN Doc. CCPR/C/78/D/856/1999, 30 July 2003, para 7.2, the complainant was arrested and detained without charge for 22 months. The Human Rights Committee was of the view that since the state has not sought to justify this lengthy detention, it is therefore arbitrary and a violation of article 9(1) read together with article 2(3) of the ICCPR.

justice system.⁹⁵ In Lesotho, delays are as a result of the lack of resources and shortage of qualified staff particularly at the investigative and preparatory stages.⁹⁶ The difficulty with respecting the right to be tried within a reasonable time in Uganda is that

[t]he administration of justice in Uganda is painfully slow. The Judiciary...[is] understaffed and under funded. It cannot effectively respond to the rising rate of crime. Courts of judicature are understaffed ... This problem is compounded by irregular High Court sessions. The Director of Public Prosecutions, which is responsible for prosecuting cases, is inadequately staffed and under funded which has contributed to the delay of [j]justice.⁹⁷

When the human rights of individuals are at stake, deficiencies in the criminal justice system cannot be used to justify violations of such rights. It is clear from the UN Human Rights Committee's decision in *Lubuto v Zambia* that a state cannot use its economic situation to justify violations of minimum human rights standards (including violations of fair trial rights).⁹⁸ It is imperative that accused persons be tried within a reasonable time. Delays must not exceed a few days;⁹⁹ otherwise, it will constitute a violation of the above right. Nonetheless, as long as these deficiencies continue to exist in some African states, it is without doubt that accused persons in such states would not receive a fair trial. Thus, considering the irreversible nature of

⁹⁵ Stated in the report of the national coordinator of Ghana, Kristine Lartey, presented at the "First International Conference on the Application of the Death Penalty in Commonwealth Africa" held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenlty>> (accessed 30 June 2004)).

⁹⁶ Stated in the report of the national coordinator of Lesotho, Moses Owori, presented at the "First International Conference on the Application of the Death Penalty in Commonwealth Africa" held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenlty>> (accessed 30 June 2004)).

⁹⁷ Initial report of Uganda submitted under article 40 of the ICCPR, UN Doc. CCPR/C/UGA/2003/1, 25 February 2003, para 242 (hereinafter referred to as initial report of Uganda).

⁹⁸ *Lubuto v Zambia*, Communication No. 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev.1, 31 October 1995, para 7.3. In this case, the Human Rights Committee found a period of eight years between arrest and final decision of the court to be incompatible with the requirements of article 14(3)(c) of the ICCPR.

⁹⁹ See UN Human Rights Committee, General Comment No. 8: Right to liberty and security of persons (article 9 of the ICCPR), 30 June 1982, paras 2-3 (hereinafter referred to as CCPR General Comment No. 8). The Human Rights Committee is of the opinion that pre-trial detention should be an exception and as short as possible, thus ensuring conformity with the right "to trial within a reasonable time or to release".

the death penalty, it is recommended that these states consider abolishing the death penalty, so as to reduce the risk of convicting innocent defendants as a result of deficiencies in their criminal justice systems.

6.5.2 The right to be presumed innocent until proven guilty by a court of law

In any system of criminal justice, the presumption of innocence is fundamental to the protection of human rights.¹⁰⁰ The right to be presumed innocent until proven guilty by a court of law is directly linked to the right to be tried within a reasonable time, because to give effect to the former, an accused has to be tried within a reasonable time. Respect for the latter right mitigates the tension between the presumption of innocence and the publicity of the trial, thus rendering the criminal justice system more coherent and fair.¹⁰¹ Unfortunately, as seen above, the right to be tried without undue delay has not been respected in some African states, consequently, the presumption of innocence of an accused person is not upheld in such cases.

Generally, the right to be presumed innocent is not respected in some African states, for example, Nigeria, Cameroon and other Commonwealth African states, as suspects are tortured and treated by the police and the society at large as guilty before the trial.¹⁰² Non-respect for the right to be presumed innocent in a country like Morocco could be attributed to the fact that there is no provision on this right in the Constitution or the Code of Criminal Procedure.¹⁰³ The UN Human Rights Committee has expressed concern over this, and recommended that the government adopt appropriate legislation so as to guarantee the presumption of innocence, as required under article 14(2) of the ICCPR.¹⁰⁴

¹⁰⁰ See CCPR General Comment No. 13, para 7.

¹⁰¹ Steytler (1998) 273.

¹⁰² Stated in the country reports presented at the “First International Conference on the Application of the Death Penalty in Commonwealth Africa” held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenlty>> (accessed 30 June 2004)).

¹⁰³ Concluding observations of the Human Rights Committee on the fourth periodic report of Morocco submitted under article 40 of the ICCPR, UN Doc. CCPR/C/79/Add.113, 1 November 1999, para 18.

¹⁰⁴ As above.

Since the burden is generally on the prosecution to prove the guilt of an accused person, a court has to conduct the trial without previously forming an opinion on the guilt or innocence of the accused. It, therefore, follows that the right to be presumed innocent by a court of law requires that the prosecution or respondent state should not make open statements prior to and during the trial in press conferences or public gatherings pronouncing an accused guilty of the crime. In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, the African Commission found the government of Nigeria to be in violation of the right to be presumed innocent under article 7(1)(b) of the African Charter because the government pronounced the accused guilty of the crimes in question at various press conferences and before the UN.¹⁰⁵

6.5.3 The right of an accused to have adequate time for the preparation of his or her defence

The right of an accused to have adequate time for the preparation of his or her defence implies that an accused should have access to materials necessary for the preparation of his or her defence.¹⁰⁶ It should be noted that what is adequate time depends on the circumstances of each case, but the facilities must include access to documents and other evidence that the accused requires to prepare his or her case, as well as the opportunity to engage and communicate with counsel.¹⁰⁷ However, this has not been the case in some African states. In Nigeria, for example, the prosecution is always reluctant to share information with the defence lawyers, and in some cases there have been allegations of the prosecution suppressing information favourable to the accused.¹⁰⁸

¹⁰⁵ *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communication 137/94, 139/94, 154/96 and 161/97, *Twelfth Annual Activity Report: 1998-1999*; (2002) AHRLR 212 (ACHPR 1998), para 96.

¹⁰⁶ See Guideline N(3) of the African Commission's principles and guidelines.

¹⁰⁷ CCPR General Comment No. 13, para 9.

¹⁰⁸ Stated in the report of the national coordinator of Nigeria, Jude Ilo, presented at the "First International Conference on the Application of the Death Penalty in Commonwealth Africa" held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenalty>> (accessed 30 June 2004)).

The right of an accused to have adequate time for the preparation of his or her defence implies that if the accused is going to be tried in absentia, the accused has to be notified of the date and place of the trial. In *Mbenge v Zaïre*, no steps were taken to inform the accused before hand of the proceedings against him, as required under article 14(3)(a) of the ICCPR.¹⁰⁹ It was alleged that the accused learned of the death sentences through the press.¹¹⁰ The Human Rights Committee held that judgment in absentia requires that, despite the absence of the accused, all due notification has to be made to inform the accused of the trial date and place and to request the accused's attendance. Otherwise, it amounts to a violation of article 14(3)(b) of the ICCPR as the accused, in particular, is not given adequate time and facilities for the preparation of his or her defence.¹¹¹

Furthermore, the right of an accused to have adequate time for the preparation of his or her defence is also related to the right to be tried within a reasonable time. The fact that an accused has to be tried without undue delay does not mean that the accused should not be given adequate time to prepare his or her defence or does not preclude the carrying out of a full investigation. In Uganda, in 2002, two soldiers were executed after an Emergency Field Court Martial, which reportedly lasted just two hours and 36 minutes, and did not allow for a full investigation of circumstances surrounding the case.¹¹² It cannot be said that the trial of the soldiers was fair, without a full investigation into the circumstances of the case, which could have revealed information that could have been relevant in deciding the case.

¹⁰⁹ *Mbenge v Zaïre*, Communication No. 16/1977 (Human Rights Committee) UN Doc. CCPR/C/18/D/16/1977, 25 March 1983.

¹¹⁰ As above, para 2.2.

¹¹¹ As above. The HRC also found the above circumstance to be in violation of article 14(3)(d), as the accused cannot defend himself through legal assistance of his choice and article 14(3)(e), as the accused does not have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf.

¹¹² *Amnesty International Report* (2003) 258.

6.5.4 The right to a fair hearing by an independent and impartial court established by law

The right to a fair hearing by an independent and impartial court established by law means that all parties before the court have to be subjected to the same standards of hearing. This will enable everyone before a court to have a fair hearing, without any discrimination. Nevertheless, it should be noted that the true test of fair hearing in a given case is whether from the observation of a reasonable person present at the trial, justice has been done.¹¹³

In order to clarify the above right, provided for under article 7(1)(d) of the African Charter, the African Commission adopted “Resolution on the Respect For and Strengthening of the Independence of the Judiciary”.¹¹⁴ In addition, most jurisdictions in Africa have constitutional provisions that guarantee anyone charged with a criminal offence, the right to a fair hearing by an independent and impartial court established by law.¹¹⁵

However, with regard to military and other special tribunals, it is questionable whether these tribunals can be independent and impartial. The UN Human Rights Committee has noted that the existence of military and special courts that try civilians in many countries could present problems as far as the equitable, impartial and independent administration of justice is concerned.¹¹⁶ Further, the African Commission’s principles and guidelines provides that if such tribunals do not use the

¹¹³ Owoade (1995) 181.

¹¹⁴ “Resolution on the Respect For and Strengthening of the Independence of the Judiciary”, Nineteenth Session held in Ouagadougou, Burkina Faso, 26 March – 4 April 1996 (see also Heyns (2004) 558). See also *Ninth Annual Activity Report: 1995-1996*, Annex V at 5.

¹¹⁵ See, for example, article 4 of the Constitution of Burkina Faso 2000, article 42(2)(f)(i) of the Constitution of Nigeria 1999, article 19 of the Constitution of Togo 1992, & article 18(2) of the Constitution of Zimbabwe 2000.

¹¹⁶ CCPR General Comment No. 13, para 4. The Committee’s doubt about the impartiality and independence of these courts stems from the fact that quite often, the reason for their establishment is to enable exceptional procedures to be applied that do not comply with normal standards of justice.

duly established procedure of the legal process, they shall not be created to displace the jurisdiction of the ordinary judicial bodies.¹¹⁷

Some African states have empowered special or military courts to pass death sentences without affording full fair trial safeguards. In Sudan, Tunisia, Egypt and Eritrea, for example, as discussed below, capital trials have taken place before special courts that could not be seen as competent, independent or impartial, as the presence of military judges or untrained judges in such courts raises doubts regarding their independence, competence, and impartiality.

In Sudan, in 2002, Special Courts in the Darfur region, created in 2001 by presidential decree to try offences related to armed banditry, imposed death sentences after summary trials under military judges where the accused were frequently denied lawyers.¹¹⁸ The fact that the Special Courts were created by presidential decree raises questions regarding their independence. In 2002, a number of people were sentenced to death after unfair trials before military courts that could not be seen as impartial.¹¹⁹ The above raise questions regarding the Sudanese government's commitment to respecting its duties under article 26 of the African Charter, which gives state parties the duty to guarantee the independence of courts.

As discussed above, the African Commission in *Amnesty International and Others v Sudan*, has found such tribunals to be in violation of article 7(1)(d), first, by reason of their composition, and second, on the basis that the government's dismissal of judges opposed to the formation of these courts deprives courts of the personnel qualified to ensure that they operate impartially, thus denying individuals the right to have their case heard by such body.¹²⁰ Similarly, the African Commission has found the

¹¹⁷ Guideline A(4)(e), African Commission's principles and guidelines.

¹¹⁸ *Amnesty International Report* (2003) 233. It should be noted that the imposition of the death sentences by the Special Courts is a violation of article 4 of the African Charter, especially if they are, or were, subsequently executed.

¹¹⁹ As above, 252.

¹²⁰ *Amnesty International and Others v Sudan*, Communications 48/90, 50/91, 52/91, 89/93, *Thirteenth Annual Activity Report: 1999-2000*; (2000) AHRLR 297 (ACHPR 1999), para 68-69.

establishment of military courts and special tribunals in Nigeria, to be in violation of article 7(1)(d) of the African Charter due to their composition.¹²¹

Furthermore, capital trials take place in Egypt before exceptional courts such as state security courts, established under emergency legislation, in which trial procedures fall short of international and regional fair trial standards.¹²² For example, it is not possible for defendants before such courts to have a fair trial as they do not have the right to a full review before a higher tribunal, amounting to a violation of article 14(5) of the ICCPR, which Egypt has ratified.¹²³ The fact that these courts are established by emergency decree casts doubts on their independence. The Human Rights Committee has noted that the independence of military and state security courts in Egypt is not guaranteed.¹²⁴

Generally, the independence of the judiciary is questionable in some African countries. For example, the Human Rights Committee has expressed concern at the judiciary's lack of independence in the Republic of Congo, due to first, the lack of any independent mechanism responsible for the recruitment and discipline of judges, and second, the many pressures and influences, including those of the executive branch, to which judges are subjected.¹²⁵ The Committee found this to be in violation of article 14(1) of the ICCPR and recommended that the government take appropriate steps to

¹²¹ *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*, Communication 87/93, *Eighth Annual Activity Report: 1994-1995*; (2000) AHRLR 183 (ACHPR 1995), para 14; *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* Communication 60/91, *Eighth Annual Activity Report: 1994-1995*; (2000) AHRLR 180 (ACHPR 1995), para 12; *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communication 137/94, 139/94, 154/96 and 161/97, *Twelfth Annual Activity Report: 1998-1999*; (2002) AHRLR 212 (ACHPR 1998), para 90. For further discussion of this right and how it has been addressed by the African Commission and the Inter-American Commission, see Barnidge (2004).

¹²² *Amnesty International Report* (2003) 94.

¹²³ See "Status of ratifications of the principal international human rights treaties" <<http://www.unhchr.ch/pdf/report.pdf>> (accessed 31 March 2005).

¹²⁴ Concluding observations of the Human Rights Committee on the third and fourth periodic reports of Egypt submitted under article 40 of the ICCPR, UN Doc. CCPR/CO/76/EGY, 28 November 2002, para 16(b). Also in Eritrea, trials before Special Courts are unfair, with the accused having no right to defence counsel. It is also unlikely that such special courts could be independent, competent and impartial due to the presence of military judges, which is exacerbated by the fact that they have little or no legal training (See *Amnesty International Report* (2003) 100).

¹²⁵ Concluding observations of the Human Rights Committee on the second periodic report of Congo submitted under article 40 of the ICCPR, UN Doc. CCPR/C/79/Add.118, 27 March 2000, para 14.

ensure the independence of the judiciary, in particular, by amending the rules concerning the composition and operation of the Supreme Council of Justice and its effective establishment.¹²⁶ The Committee has also expressed concern over the independence of the judiciary in Sudan, stating:

The Committee is concerned that in appearance as well as in fact the judiciary is not truly independent, that many judges have not been selected primarily on the basis of their legal qualifications, that judges can be subject to pressure through supervisory authority dominated by the Government ...¹²⁷

Thus, if the independence or impartiality of the judiciary is not guaranteed, it is very unlikely that defendants would receive a fair trial. As a result, it is imperative that retentionist African states consider abolishing the death penalty, as it cannot be guaranteed that defendants facing such serious and irreversible punishment (the death penalty) would receive a fair trial.

6.5.5 The right to be present at the trial

Every accused person has the right to be present at his or her trial. Although the African Charter makes no reference to this right, Guideline N(6)(c) of the African Commission's principles and guidelines provides that in criminal proceedings, the accused has the right to be tried in his or her presence. In most African states, for example in Egypt, Gabon and Sudan, there is provision for an accused to be present at the trial.¹²⁸ Generally, an accused person can be removed from the courtroom during trial, due to misconduct on the part of the accused, and the court can proceed with the

¹²⁶ As above.

¹²⁷ Concluding observations of the Human Rights Committee on the second periodic report of Sudan submitted under article 40 of the ICCPR, UN Doc. CCPR/C/79/Add.85, 19 November 1997, para 21.

¹²⁸ See combined third and fourth periodic reports of Egypt submitted under article 40 of the ICCPR, UN Doc. CCPR/C/EGY/2001/3, 15 April 2002, para 404(d), hereinafter referred to as combined third and fourth periodic reports of Egypt; second periodic report of Gabon submitted under article 40 of the ICCPR, UN Doc. CCPR/C/128/Add.1, 14 June 1999, para 32, hereinafter referred to as second periodic report of Gabon; and second periodic report of Sudan submitted under article 40 of the ICCPR, UN Doc. CCPR/C/75/Add.2, 13 March 1997, para 115(h), hereinafter referred to as second periodic report of Sudan.

trial in his or her absence.¹²⁹ It should be noted that an accused person may voluntarily waive the right to be present at his or her hearing.¹³⁰

An accused person may not be tried in absentia.¹³¹ However, the UN Human Rights Committee has noted that proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his or her right to be present) permissible in the interest of proper administration of justice.¹³² Where an accused person does not waive this right, any trial in absentia would not only be a violation of the right to be tried in his or her presence, but also a violation of the right to have adequate time for the preparation of his or her defence, the right to legal representation, and the right to examine witnesses.

In *Mbenge v Zaire*, as discussed above, no steps were taken to inform the accused before hand of the proceedings against him, as required under article 14(3)(a) of the ICCPR. It was alleged that the accused learned of the death sentences against him through the press, and that the judicial authorities of his country neither summoned him to appear nor allowed him to defend himself or have a lawyer to defend him.¹³³ The Human Rights Committee held:

Judgment in absentia requires that, notwithstanding the absence of the accused, all due notification has to be made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14 (3) (b)), cannot defend himself through legal assistance of his own choosing (art. 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14 (3) (e)) ... In the view of the Committee, therefore, the State

¹²⁹ For example, this is the case in Kenya (see Mutunga (1990) 57).

¹³⁰ Guideline N(6)(c)(3), African Commission's principles and guidelines.

¹³¹ Guideline N(6)(c)(2), African Commission's principles and guidelines.

¹³² *Mbenge v Zaire*, Communication No. 16/1977 (Human Rights Committee) UN Doc. CCPR/C/18/D/16/1977, 25 March 1983, para 14.1.

¹³³ As above, para 2.2.

party has not respected D. Monguya Mbenge's rights under article 14 (3) (a), (b), (d) and (e) of the Covenant.¹³⁴

6.5.6 The right to legal assistance and proper defence

The right to legal assistance (representation) and proper defence is very important, as it is central to the realisation of a fair trial. The right to counsel is a fundamental pillar of the administration of justice.¹³⁵ This right guarantees accused persons three rights: to defend himself or herself in person, to defend themselves through legal assistance of their choice, and on certain conditions, to be given free legal assistance. Generally, free legal assistance is dependent on the interest of justice and insufficient means to procure the services of counsel. However, the term "interest of justice" is vague and there are no generally accepted established criteria to determine if it is in the interest of justice that an accused person be given legal aid; thus, leaving the right to legal assistance open to abuse.

The constitutions of some African states explicitly provide that an accused person be provided with legal representation at state or public expense if he or she cannot afford one. For example, article 20(5) of the Constitution of Ethiopia 1995 provides that if an accused cannot afford legal counsel and miscarriage of justice will result, the accused has to be provided with legal representation at the expense of the state.¹³⁶ Article 24(3)(d) of the Constitution of The Gambia 2001 is more specific as it states that if an accused is charged with a capital offence, the accused shall be entitled to legal representation at the expense of the state.¹³⁷

In addition, the UN Human Rights Committee established under the ICCPR has stated that in capital trials "unavailability of legal aid amounts to a violation of article 6

¹³⁴ As above, paras 14.1-14.2.

¹³⁵ Finkelstein (1988) 1-1.

¹³⁶ See also, article 42 (2)(f)(v) of the Constitution of Malawi 2001.

¹³⁷ Upon ratification of the ICCPR, The Gambia entered a reservation in respect of article 14(3)(d) to the effect that "for financial reasons free legal assistance for accused persons is limited in our constitution to persons charged with capital offences only". See Heyns (2004) 53. Article 28(3)(e) of the Constitution of Uganda 1995 has a similar provision with regard to capital offences.

juncto article 14 of the Covenant”.¹³⁸ Unavailability of legal aid will also amount to a violation of article 7(1)(c) of the African Charter. However, as seen below, capital trials have been conducted in some African states in which the accused had no legal representation, was refused one, or was provided with inadequate defence counsel.

It is undisputable that capital trials are very expensive and that most people charged with capital offences cannot afford the fees of experienced counsel. As a result, they are assigned inexperienced counsel or article clerks who are not well versed with the issues in capital trials. Without effective representation, an accused can hardly be said to have had a fair trial.¹³⁹ For example, in 2003 in Sudan, 24 people were sentenced to death by a Special Court, in which they were tried without adequate legal representation.¹⁴⁰ This constitutes a violation of articles 6 and 14 of the ICCPR and article 7(1)(c) of the African Charter.

The right of an accused to legal assistance requires that the counsel representing the accused should not be intimidated or harassed during the trial. As discussed above, intimidation and harassment of counsel to the extent that they withdraw from a case would amount to a violation of this right.¹⁴¹ If after such withdrawal, the accused is not given the opportunity to procure the services of another counsel, the accused’s right to be represented by counsel of his or her choice is violated.¹⁴²

Furthermore, the right of an accused person to legal assistance entitles the accused to proper defence. The African Commission’s principles and guidelines provide that the lawyer appointed shall be qualified to represent and defend the accused and shall have the necessary training and experience corresponding to the nature and seriousness of

¹³⁸ Concluding observations of the Human Rights Committee on the second periodic report of Jamaica submitted under article 40 of the ICCPR, UN Doc. CCPR/C/79/Add.83, 19 November 1997, para 14.

¹³⁹ Hatchard & Coldham (1996) 164.

¹⁴⁰ Amnesty International, “Sudan: 24 sentenced to death after unfair trial”, AI Index: AFR 54/027/2003, 29 April 2003. Also, in Nigeria, a *Shari’a* court in Bauchi sentenced Jibrin Babaji to death by stoning on 14 September 2003 after a trial in which he was not represented by a lawyer (*Amnesty International Report* (2004) 68).

¹⁴¹ See *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*, Communication 87/93, 8th Annual Activity Report: 1994-1995; (2000) AHRLR 183 (ACHPR 1995), para 12.

¹⁴² As above.

the matter.¹⁴³ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has reiterated that “all defendants facing the imposition of capital punishment have to benefit from the services of a competent defence counsel at every stage of the proceedings”.¹⁴⁴ However, in some African states like Botswana and Malawi, as seen below, inexperienced lawyers have defended capital offenders.

In Botswana, for example, Kobedi, a South African, was sentenced to death and executed in July 2003 after a trial that did not meet the standards for a fair trial.¹⁴⁵ Kobedi was represented, in his original hearing, by a lawyer who was unfamiliar with trying death penalty cases, and who failed to raise important legal and factual issues on his behalf. Due to the fact that his lawyer did not have the necessary training and experience corresponding to his case, Kobedi could, therefore, not be said to have benefited from the services of a competent defence counsel at every stage of the proceedings as required under international human rights law.

Likewise, in Malawi, some defence lawyers are inexperienced, and lack the necessary resources to enable them prepare their cases. By 2002, the Malawi Legal Aid Department had seven lawyers, including three new graduates with no experience in handling capital cases.¹⁴⁶ The lawyers lack up to date law books, have problems with transport, and have neither the time nor budget for tracing and interviewing witnesses.¹⁴⁷ These lawyers cannot be said to be in a position to offer proper defence.

In addition, the remuneration given to some defence lawyers affects their ability and commitment to effectively defend an accused person, thus not fully affording an accused person the right to legal assistance and proper defence. In *Republic v Mbushuu and Another*, it was stated that most poor persons in Tanzania do not obtain

¹⁴³ Guideline H(e)(1) and (2), African Commission’s principles and guidelines.

¹⁴⁴ Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/1997/60, 24 December 1996, para 81.

¹⁴⁵ See *Hands Off Cain* (2004) 37-38. See also, “Botswana rushes another South African to the gallows” <<http://www.mg.co.za/content/13.asp?ao=1761>> (accessed 16 May 2004).

¹⁴⁶ “The quality of justice: Trial observations in Malawi” <http://www.penalreform.org/english/dp_malawi.htm> (accessed 16 May 2004)

¹⁴⁷ As above.

good legal representation, as lawyers on dock briefs who are paid very little defend them. As a result of such poor remuneration, the defence counsel may not exert enough effort in such a case.¹⁴⁸ As a result, it is likely that most poor persons in Tanzania will get the death sentence as the lawyers do not exert enough effort in their cases. In such cases, the defendants' right to legal assistance and proper defence is violated. Similarly, due to resource constraints in Botswana, the amount paid to state-funded lawyers is minimal and often, the result is that lawyers who lack the skills, resources and commitment to handle such serious matters handle most *pro deo* cases.¹⁴⁹

6.5.7 The right to appeal to a higher judicial body

An accused person has the right to appeal against his or her conviction or sentence or both. The right to appeal is provided for in article 7(1)(a) of the African Charter and article 14(5) of the ICCPR. ECOSOC safeguard No. 6 requires that anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals become mandatory. This right is also provided for in the national constitutions of most African states.¹⁵⁰ The right to appeal or review to a higher court at the minimum implies the opportunity to have adequate reappraisal of every case and an informed decision on it.¹⁵¹ Of relevance in deciding whether denial of the right to appeal constitutes a violation of article 7(1)(a) of the African Charter, is the severity of the sentence.¹⁵² Thus, denial of the right to appeal in capital trials will amount to a violation of the above provision due to the severity of the death sentence.

¹⁴⁸ *Republic v Mbushuu and Another* (1994) 2 LRC 349, 353 (hereinafter referred to as *Mbushuu* (1994)).

¹⁴⁹ "Death penalty in Botswana" <<http://www.ditshwanelo.org.bw>>(accessed 16 May 2004).

¹⁵⁰ See, for example, article 17(7) of the Constitution of Eritrea 1997, article 20(6) of the Constitution of Ethiopia 1995, & article 42(2)(f)(VIII) of the Constitution of Malawi 2001.

¹⁵¹ *S v Ntuli* (1996) 1 BCLR 141.

¹⁵² *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*, Communication 60/91, 8th Annual Activity Report: 1994-1995; (2000) AHRLR 180 (ACHPR 1995), para 13.

Despite the above provisions, in some African states, there is no automatic right of appeal, while in others, there is no provision in some cases for a formal appeal with sentences merely being confirmed or otherwise by a higher body.¹⁵³ The African Commission has found the procedure in special tribunals in Nigeria, where sentences are subject to confirmation or disallowance by the governor of a state, with no provision for judicial appeal against the decisions of the tribunals or where courts are prohibited from reviewing any aspect of the operation of such tribunals, to constitute a violation of the African Charter.¹⁵⁴ From the Commission's decision, it is clear that the governor of a state is not a higher judicial body or "competent national organ" (as used in the African Charter). Thus, subjecting sentences to confirmation by such a body or others of similar character cannot be seen as a genuine appeal procedure.

The right to appeal is denied to those convicted of capital offences in other African states. In Burundi, for example, those sentenced to death by Civilian Courts do not have the right to a full appeal.¹⁵⁵ Those who face trial in Egypt before exceptional courts, such as State Security Courts, established under emergency legislation do not have the right to a full review of their sentence before a higher tribunal.¹⁵⁶ In Sierra Leone, people have been tried, convicted and executed after being denied the right to appeal to a higher tribunal, which the African Commission has found to be in breach of article 7(1)(a) of the African Charter.¹⁵⁷ In *Forum of Conscience v Sierra Leone*,¹⁵⁸ the execution of 24 soldiers by a Court Martial without the right to appeal was found to be in violation of article 7(1)(a) of the African Charter, which provides for the right

¹⁵³ Hatchard & Coldham (1996) 168.

¹⁵⁴ See *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*, Communication 60/91, 8th Annual Activity Report: 1994-1995; (2000) AHRLR 180 (ACHPR 1995), para 13; and *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria*, Communication 87/93, 8th Annual Activity Report: 1994-1995; (2000) AHRLR 183 (ACHPR 1995), para 11.

¹⁵⁵ *Amnesty International Report* (2002) 63.

¹⁵⁶ *Amnesty International Report* (2003) 94.

¹⁵⁷ *Forum of Conscience v Sierra Leone*, Communication 223/98, 14th Annual Activity Report: 2000-2001; (2000) AHRLR 293 (ACHPR 2000), para 20.

¹⁵⁸ As above. See also, *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96 and 161/97, 12th Annual Activity Report: 1998-1999; (2002) AHRLR 212 (ACHPR 1998), para 93.

to appeal. Generally, the Commission's decisions emphasise that the right to appeal must be respected in cases involving serious offences.

Furthermore, the death sentence cannot be carried out until the expiration of the time for appeal in some African states, for example, Sierra Leone.¹⁵⁹ In others, despite the existence of a provision for the right to appeal, those convicted of capital offences have been executed without given adequate time to appeal, or despite the fact that they were still trying to appeal, or their appeals were still pending. The above amounts to a violation of the right to appeal.

In *Mansaraj and Others v Sierra Leone*,¹⁶⁰ the Human Rights Committee found a violation of article 14(5) of the ICCPR because the complainants did not have a right to appeal the conviction by a court martial, a fortiori in a capital case. ECOSOC safeguard No. 8 prohibits execution where an appeal against the death sentence is pending or an appeal for pardon or commutation of sentence is pending. Yet, in Chad, for example, four men sentenced to death on 25 October 2003 after a three-day trial, were executed while the defence counsel was trying to appeal the sentence.¹⁶¹ This does not only amount to a denial of the right to appeal, but also a violation of the right to a fair trial.

6.5.8 The right to seek pardon or commutation

The right to seek pardon or commutation is guaranteed under article 6(4) of the ICCPR and ECOSOC safeguard No. 7. Furthermore, the UN Economic and Social Council recommended that UN member states provide for "mandatory appeals or

¹⁵⁹ Stated in the report of the national coordinator of Sierra Leone, Abdul Tejan-Cole, presented at the "First International Conference on the Application of the Death Penalty in Commonwealth Africa" held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenalty>> (accessed 30 June 2004)).

¹⁶⁰ *Mansaraj and Others v Sierra Leone*, Communications 839/1998, 840/1998 & 841/1998, UN Doc. CCPR/C/72/D/839/1998, 30 July 2001, para 5.6.

¹⁶¹ "Chad: First executions by firing squad in more than a decade"
<http://www.irinnews.org/report.asp?ReportID=37687&SelectRegion=West_Africa&SelectCountry=C_HAD> (accessed 16 May 2004).

review with provisions for clemency or pardon in all cases of capital offences”.¹⁶²
This right is also provided for in national constitutions and laws of African states.¹⁶³

Pardon or commutation has been discussed in detail in chapter two. However, it is important to emphasise, as noted in chapter two, that respect for this right ensures that any possible errors in the trial are corrected, thus, reducing the risk of executing the innocent. However, as noted in chapter two, there is very little information as to the extent to which the prerogative is exercised, since the process in most African states is shrouded in secrecy. Such secrecy allows for arbitrariness in the exercise of clemency and disparity in the granting of pardon or clemency. It is possible that innocent persons that are convicted and sentenced to death may not be able to exercise this right to correct such wrong conviction due to the arbitrariness and disparity in the whole process.

6.6 Consequences of failure to respect fair trial rights in capital trials in Africa

As seen above, fair trial rights are not respected in most African states. Proper administration of justice cannot take place in cases in which fair trial rights are not respected. As a result of non-respect for fair trial rights in capital cases, the application of the death sentence becomes discriminatory, disproportionate and arbitrary, the risk of executing the innocent increases, and the death penalty could be used as a tool of political repression.

However, it should be noted that because of other factors that have a bearing on trials (discussed below), some of the consequences above, such as discriminatory and arbitrary use of the death penalty, are still present in some cases where fair trial rights are respected. The subsequent paragraphs examine the above consequences, with the aim of showing that since such consequences are unavoidable due to non-respect for fair trial rights and other factors impacting on trials, it is necessary that retentionist African states consider abolishing the death penalty.

¹⁶² UN Economic and Social Council resolution 1989/64 of 24 May 1989, Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, para 1(b).

¹⁶³ See, for example, section 325(3) of the Tanzanian Criminal Procedures Act of 1985; and article 121(1) of the Constitution of Uganda 1995.

6.6.1 Discriminatory and disproportionate use

One of the consequences of non-respect for fair trial rights in Africa is that the application of the death penalty becomes discriminatory, both economically and racially, and disproportionate. The death penalty has been inflicted mostly on the poor, the mentally disturbed and members of racial, religious or ethnic minorities.¹⁶⁴ It is applied disproportionately to the disadvantaged, that is, those who, for a variety of reasons, are not able to function properly within the criminal justice system. As noted in 6.5.6 above, it is undisputable that capital trials are very expensive and that most people charged with capital offences cannot afford the fees of experienced counsel. As a result, they are assigned inexperienced counsel or article clerks who are not well versed with the issues in capital trials. Thus, it is more likely for the death penalty to be inflicted on a poor, than a rich, person. Consequently, “capital punishment” has been interpreted to mean: “If you do not have the capital, you will get the punishment”.¹⁶⁵

Evidence of racial discrimination in the application of capital punishment has been revealed in South Africa. In pre-abolitionist South Africa, the death penalty was imposed on a racially differential basis particularly in rape cases.¹⁶⁶ Death sentences were imposed disproportionately on black defendants, including those described as “coloureds,” by an almost entirely white judiciary.¹⁶⁷ Dugard observed that

it is impossible to divorce the racial factor from the death penalty in South Africa. Of the 2740 persons executed between 1910 and 1975 less than 100 were white. No white has yet been

¹⁶⁴ Amnesty International (1989) 27. Racial discrimination was one of the grounds on which the US Supreme Court relied in *Furman v Georgia* (1972) 408 U.S. 238 in ruling the death penalty unconstitutional.

¹⁶⁵ By Rev. Joseph Lowery, cited in M Meehan “A dozen reasons to oppose the death penalty” <<http://members.verizon.net/~meehan4/dozen.html>> (accessed 30 December 2003).

¹⁶⁶ Van Oosten (1991) 25.

¹⁶⁷ For studies in this regard, see, for example, Dugard (1978) 127; Devinish (1990) 19; Seleane (1996) 23-24

hanged for the rape of a black and only about six whites have been hanged for the murder of blacks. Furthermore, blacks convicted of murder or rape of whites are usually executed.¹⁶⁸

In addition to the above, most blacks in South Africa were too poor to hire a lawyer, so they were given *pro deo* counsels, who were the most junior members of the bar.¹⁶⁹ The poverty of black defendants thus jeopardises their cases. This was exacerbated by the fact that the burden of proving any extenuating circumstances was on the accused. Inexperienced advocates are likely to be unsuccessful in preparing this aspect of the accused's defence. Furthermore, Justice Chaskalson, in support of the fact that the death penalty discriminates against the poor, stated in *S v Makwanyane* as follows:

Accused persons who have the money to do so are able to retain experienced attorneys and counsel, who are paid to undertake the necessary investigations and research, and as a result they are less likely to be sentenced to death than persons similarly placed who are unable to pay for such services.¹⁷⁰

Evidence of the application of the death penalty disproportionately to the poor has been revealed in Tanzania. In *Republic v Mbushuu and Another*, it was stated that most poor persons in Tanzania do not obtain good legal representation, as lawyers on dock briefs who are paid very little defend them. As a result of such poor remuneration, the defence counsel may not exert enough effort in such a case.¹⁷¹ It is possible that most poor persons in Tanzania will get the death sentence as the lawyers do not exert enough effort in their cases.

Disproportionate use of the death penalty also results from the mandatory nature of the sentence. The mandatory death sentence for the offence of aggravated robbery in Zambia has been seen as disproportionate. In *Lubuto v Zambia*,¹⁷² the Human Rights Committee addressed the issue of the mandatory death penalty for aggravated

¹⁶⁸ Dugard (1978) 127.

¹⁶⁹ For more information on the *pro deo* system, see Devenish (1990) 14 and Mihálik (1991b) 721.

¹⁷⁰ *S v Makwanyane* 1995 (3) SA 391, para 49, hereinafter referred to as *Makwanyane* (1995).

¹⁷¹ *Mbushuu* (1994) 353.

¹⁷² *Lubuto v Zambia*, Communication 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev.1, 31 October 1995.

robbery. Since the death sentence for aggravated robbery was mandatory, the author of the communication was convicted and sentenced to death for aggravated robbery despite the fact that no one was killed or wounded during the robbery.¹⁷³ The Committee found this to be in violation of article 6(2) of the ICCPR.¹⁷⁴ The death sentence in this case was disproportionate, as no one was killed or wounded during the robbery.¹⁷⁵

6.6.2 Arbitrary application of the death penalty

Capital punishment is a source of controversy among judges who have moral reservations about the death penalty and who are legally obliged in certain circumstances to impose it.¹⁷⁶ At every stage of the process, there is an element of chance, as the outcome is dependent upon factors such as the way the police investigate the case, the way the prosecutor presents the case, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge, and if it goes on appeal, the judges who are selected to hear the appeal.¹⁷⁷ Overall, the outcome is dependent on respect for fair trial rights, and the degree of chance can be reduced if fair trial rights are respected.

Factors such as inadequate legal aid and prosecutorial discretion result in some defendants being sentenced to death and executed while others convicted of similar crimes are not.¹⁷⁸ Therefore, if the right to legal assistance is not fully guaranteed, the application of the death penalty becomes arbitrary, as the possibility of escaping the death sentence is higher in cases where accused persons have adequate legal aid, than in those that legal aid is inadequate.

¹⁷³ As above, para 3.1.

¹⁷⁴ As above, para 7.2.

¹⁷⁵ Also, the US Supreme Court has found capital punishment to be an excessive, “disproportionate” penalty for the offence of rape (*Coker v Georgia*, discussed in Hood (2002) 84).

¹⁷⁶ Devenish (1990) 15.

¹⁷⁷ *Makwanyane* (1995) para 48.

¹⁷⁸ Prokosch (2004) 29.

Although respect for fair trial rights reduces the element of chance, it does not eliminate it, as other factors not related to fair trial rights increases the element of chance, leading to arbitrariness in the use of the death penalty. For example, domestic and international pressure influences the imposition of the death penalty. Furthermore, arbitrariness in the use of the death penalty is exacerbated by the fact that the personal disposition of judges influences sentencing. In South Africa, between 1968 and 1988, it was noted that disparity in the use of the death penalty by individual judges must be attributed to the personal disposition of judges.¹⁷⁹ It was pointed out that the personal attitude of the presiding judge affects sentencing practice in death penalty cases.¹⁸⁰ Personal views on penal policy are an important factor in explaining differing sentences.¹⁸¹ Moreover, people have been sentenced to death because of the divergent views judges hold regarding their role in the reprieve process. The problem has been illustrated in Bruck's research:

The Durban judge ... told me that, on occasion, he had even imposed death sentences to frighten local criminals, while fully intending to write to the Ministry of Justice to recommend clemency. He didn't know whether these death sentences had actually been commuted. He felt sure they had been, but he never inquired. (If he had, he might have been surprised. The judge had informed me that the state president commutes about 80 per cent of the death sentences every year, but the actual commutation rate last year was just 15 per cent, less than the a fifth of what he believed).¹⁸²

Similarly, Justice Curlewis, then deputy judge-president of the Transvaal Provincial Division of the Supreme Court of South Africa, stated that only an *ignoramus*, or a person with little regard for the truth, would deny that judicial attitudes towards the death penalty play a material role in imposing or not imposing the death sentence.¹⁸³ He goes further to state that chance determines who will be sentenced to death and

¹⁷⁹ Murray et al (1989) 155.

¹⁸⁰ For further discussion on this, see Murray et al (1989). See also, Olmesdahl (1983) 191.

¹⁸¹ For materials substantiating this point, see J Hogarth *Sentencing as a human process* (1971) chapters 5, 6 & 7; R Hood & R Sparks *Key issues in criminology* (1970) chapter 5; and A Bottomley *Decisions in the penal process* (1973) chapter 4 (referred to in Murray et al (1989) 164-165).

¹⁸² Cited in Murray et al (1989) 167.

¹⁸³ Curlewis ((1991) 229.

who will not.¹⁸⁴ The life of an accused, therefore, depended upon the caprice of fate – whether the accused is tried before an abolitionist judge or one who supports the death penalty.¹⁸⁵ In addition, Van Rooyen has stated that it is humanly impossible to devise guidelines, legislatively or through appellate judgments, which will efficiently bring about substantial uniformity in the imposition of the death sentence.¹⁸⁶

The abovementioned implies that the imposition of the death penalty, even where fair trial rights are respected, is inevitably arbitrary and unequal. In other words, by respecting fair trial rights, arbitrariness can be reduced but not eliminated.¹⁸⁷ In *S v Makwanyane*, Justice Chaskalson attached much importance to the element of arbitrariness, stressing that arbitrariness is present in every trial and not only those carrying the possibility of the death penalty. He acknowledged the fact that such arbitrariness cannot be eliminated completely, as it is difficult or almost certainly not possible to design a system that avoids arbitrariness and delays in carrying out the sentence.¹⁸⁸

Also, in *Republic v Mbushuu and Another*, it was pointed out that what puts the Tanzanian law into disrepute is the fact that the death penalty is arbitrary in that people with mental illness or insane people are also sentenced to death as if they were normal persons when they committed murder.¹⁸⁹ As a result of the arbitrariness in the use of the death penalty in some African states, as was the case in South Africa, of the thousands of persons put on trial for capital offences, only a small percentage are sentenced to death by the trial court, and of the small percentage, a large number have their death sentences quashed or substituted with a term of imprisonment on appeal.¹⁹⁰

¹⁸⁴ Curlewis ((1991) 230.

¹⁸⁵ Bertelsmann (1991) 11-12.

¹⁸⁶ Van Rooyen (1991a) 4.

¹⁸⁷ The exceptionally high standard of procedural fairness set by the United States Courts in attempting to avoid arbitrary decisions have been met with difficulties (see *Makwanyane* (1995) para 56).

¹⁸⁸ *Makwanyane* (1995) paras 54-55.

¹⁸⁹ *Mbushuu* (1994) 355.

¹⁹⁰ *Makwanyane* (1995) para 48.

Generally, arbitrariness cannot be eliminated because the imperfections inherent in criminal trials means that persons similarly placed may not necessarily receive similar punishment.¹⁹¹ Thus, the fact that arbitrariness cannot be eliminated completely, as it is difficult or almost certainly not possible to design a system that avoids arbitrariness and delays in carrying out the death sentence, requires that the death penalty be abolished.

6.6.3 Risk of executing the innocent

As noted in the introduction to this chapter, failure to respect fair trial standards in capital trials increases the likelihood of innocent defenders being sentenced to death, and subsequently executed. This fallibility, which leads to the discriminatory or arbitrary imposition of the death penalty, also makes the execution of some prisoners who have been wrongly convicted inevitable.¹⁹² ECOSOC safeguard No. 4 provides that “capital punishment may be imposed only when the guilt of the person is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts”. Convictions for capital crimes have to be free of error so as to ensure that an innocent person is not sentenced to death.¹⁹³

Respect for fair trial rights mitigates the effects of the death penalty, such as conviction of the innocent. For example, the right to legal representation as discussed above requires that defendants be entitled to proper defence. Poor legal representation, in violation of this right, increases the likelihood of innocent persons being convicted.

¹⁹¹ *Makwanyane* (1995) para 45. With regard to imperfections in criminal trials leading to arbitrariness in the imposition and carrying out of the death sentence, see for example the case of two women in South Africa, Victoria Gwe and Sandra Smith, who were both tried for the same offence, with men as co-accused and sentenced to death. On appeal Victoria Gwe was acquitted on the charge for which the death sentence was imposed while Sandra Smith was executed on 2 June 1989 (see Murray et al (1989) 169).

¹⁹² *Amnesty International* (1989) 31.

¹⁹³ Despite the evolving standards of proof, such as DNA testing, the risk of executing the innocent still exists. Notwithstanding the use of DNA testing in the USA for example, the most influential and troubling aspect of the death penalty is the demonstrable failure of the system to convict and sentence only the guilty (see Bedau (2004) 209).

In *Republic v Mbushuu and Another*, Mwalusanya J pointed out that the risk of executing the innocent “assumes greater proportions when one considers the fact that most poor persons do not obtain good legal representation”; and “the possibility of a judicial error, for whatever reason, assumes ever greater importance because the death penalty is irreversible, [that is] once carried out that is the end of the matter, it cannot be corrected”.¹⁹⁴ With regard to the Tanzanian system, he noted that “the risk of executing the innocent is great under the present system because of the nature of legal representation offered” and that “it is just human nature that it happens so”.¹⁹⁵

As it is the case with arbitrariness in the imposition of the death penalty, the risk of executing the innocent can be mitigated by respecting fair trial rights but cannot be eliminated completely. The possibility of error cannot be excluded from any system of justice because of certain factors, which affect any case that comes before the court, that are almost certainly present to some degree in all court systems. These factors include: the difference that exist between the rich and poor, between good and bad prosecutors, between good and bad defence, between severe and lenient judges, between judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class.¹⁹⁶ As can be deduced from the above, a poorly prepared defence, missing evidence, coerced confessions, the defendant’s previous criminal record and the attitude of the investigators can lead to wrongful convictions.

Therefore, despite the procedural safeguards that have to be followed before the death penalty is imposed, there is still the chance of judicial error, leading to the conviction of innocent persons.¹⁹⁷ The fact that miscarriages of justice have continued to surface means that there is always a risk of executing the innocent. This risk is exacerbated by the fact that the death penalty is irreversible. If an innocent person is unjustly

¹⁹⁴ *Mbushuu* (1994) 353.

¹⁹⁵ *Mbushuu* (1994) 353.

¹⁹⁶ *Makwanyane* (1995) para 54.

¹⁹⁷ For example, notwithstanding the sophisticated legal system of the United Kingdom, the inbuilt checks and balances in the system of criminal procedure, persons have been convicted and executed as a result of judicial error (see Devenish (1990) 13).

imprisoned, he can be released and compensated if it is discovered. Unlike all other criminal punishments, the death penalty is uniquely irrevocable. If an innocent person is killed, the person cannot be brought back to life if it is discovered that the person was unjustly executed. The killing of an innocent person is irreversible, and since there is always the risk of executing the innocent, it is submitted that abolishing the death penalty is the only means of ensuring that a person is not unjustly convicted and subsequently executed.

It is clear from the aforementioned that error cannot be excluded in capital trials. In support of this, Justice Chaskalson, in *S v Makwanyane*, pointed out that “imperfection inherent in the criminal trials means that error cannot be excluded”.¹⁹⁸ He goes further to acknowledge that, “the possibility of error will be present in any system of justice and that there cannot be perfect equality as between accused persons in the conduct and outcome of criminal trials”.¹⁹⁹ Thus, it is not possible to ensure that convictions for capital crimes are free of error.

Furthermore, some supporters of the death penalty, like Van den Haag, have acknowledged the fact that the execution of some innocent persons is inevitable because judges and juries are human and fallible.²⁰⁰ However, he goes further to argue that some innocent persons have to suffer in order that sufficient guilty persons can be convicted to provide the general deterrent effect that he believes executions provide.²⁰¹ In my opinion, Van den Haag, when making his argument, does not take into consideration the rights of the innocent persons who are to suffer and the fact that the death penalty is not more of a deterrent than other punishments like life imprisonment, as discussed in chapter three. If he had done so, it is likely that he would not have made this argument.

¹⁹⁸ *Makwanyane* (1995) para 54.

¹⁹⁹ *Makwanyane* (1995) para 54.

²⁰⁰ Hood (2002) 137.

²⁰¹ Hood (2002) 138

Moreover, there is considerable evidence that many mistakes have been made in sentencing people to death.²⁰² A remarkable number of prisoners on death row have been released after new evidence showed that they were innocent. There have been reports of persons from countries in Africa, for example, Malawi, being released from prison, sometimes after many years in custody, on the grounds of their innocence.²⁰³ Also, persons have been sentenced to death in Uganda and released after many years on grounds of their innocence. For example, Mpagi was on death row for 19 years in Luzira Maximum Security Prison for murder. It later turned out that the man he was accused of murdering was alive. Mpagi said court officials refused to try him in the district where the murder was alleged to have been committed. His conviction was the result of an irresponsible justice system and indifferent investigators.²⁰⁴ Also, in Uganda, a man has been sentenced to death for electrocuting his wife, although he did not have electricity in his house at the time the crime was committed.²⁰⁵

From the abovementioned, it is clear that there is no way to remedy the occasional mistake that results in execution of the innocent. Therefore, to maintain the death penalty in the face of the demonstrable failures of the judicial system to exclude the possibility of error or to guarantee that justice will never miscarry is unacceptable. Heightening fears that the innocent are increasingly being victims of hangmen and execution squads has provoked a debate on the desirability of abolishing the death penalty in Nigeria.²⁰⁶ It is certain that abolition is the only way to ensure that such mistakes do not happen. In a nutshell, since the capital punishment system is unreliable, the risk of executing the innocent precludes the use of the death penalty,

²⁰² Michigan State University and Death Penalty Information Centre, “Arguments for and against the death penalty” (2000) <<http://deathpenaltyinfo.msu.edu>> (accessed 3 October 2003).

²⁰³ Hood (2002) 132.

²⁰⁴ See “Foes of death penalty making gradual gains in Africa” *The New York Times*, 20 October 2004; “African countries slowly turning against the death penalty” <<http://www.taipetimes.com/News/edit/archives/2004/10/23/2003208105>> (accessed 25 October 2004); and W Wairagala “The death penalty in Uganda” <<http://www.thedeathhouse.com>> (accessed 10 July 2003).

²⁰⁵ “African countries slowly turning against the death penalty” <<http://www.taipetimes.com/News/edit/archives/2004/10/23/2003208105>> (accessed 25 October 2004).

²⁰⁶ See E Anaba, “Law and human rights: -Death penalty: Options for the government -- Study group” *Vanguard* (Lagos), 5 November 2004.

especially since nothing can be done to make amends, if a mistake has been made or once a person has been executed.

6.6.4 Using the death penalty as a tool of political repression

Where fair trial rights are fully respected, it is difficult to use the death penalty as a tool of political repression. But where such rights are not respected, it paves the way for the death penalty to be used to repress political opponents. As discussed in chapter two, the laws of some African states make provision for the imposition of the death penalty for political offences.²⁰⁷ Governments in Africa, in an attempt to rid themselves of political opposition, have directed the death penalty at prominent individual political opponents. Among the cases often cited in support of the above are the cases of Tsvangirai of Zimbabwe, the Chirwas of Malawi and that of 76-year-old Mohamed of Sudan. In the cases of the Chirwas and Mohamed, fair trial rights were not respected in imposing the death penalty.²⁰⁸

Tsvangirai, an opposition leader of the Movement for Democratic Change (MDC), together with two others (Ncube, Secretary General of the MDC, and Gasela, Spokesman of the MDC) was accused of treason, an offence that carries the death penalty in Zimbabwe.²⁰⁹ Although Tsvangirai was later acquitted,²¹⁰ the events surrounding the case point to the fact that the charge of treason was a means to intimidate an opposition leader. On 13 June 2003, for example, four prisoners convicted of murder were hanged at the prison complex where Tsvangirai was being held, prompting allegations that Mugabe was seeking to intimidate his political rival.²¹¹

²⁰⁷ See chapter two (2.3.2.2(c)) of this thesis.

²⁰⁸ These cases are discussed in Amnesty International (1989) 48-50.

²⁰⁹ Hands Off Cain (2004) 129.

²¹⁰ The High Court of Zimbabwe acquitted Tsvangirai in October 2004. See “Zimbabwe's Tsvangirai acquitted of treason” <<http://www.afrol.com/articles/14547>> (accessed 30 December 2004). The other two accused had been acquitted on 8 August 2003.

²¹¹ Hands Off Cain (2004) 130.

With regard to the second case, Orton Chirwa, the former Minister of Justice of Malawi, was arrested in December 1981, together with his wife, and brought to trial in July 1982 on charges of having “prepared, endeavoured or conspired to overthrow the Malawi Government by force or other unlawful means”.²¹² The trial took place before a Traditional Court consisting of five chiefs, who had no legal training; the defendants were not allowed to call witnesses; rules on the admissibility of evidence were disregarded; and the defendants were denied the right to legal representation.²¹³ They were convicted and sentenced to death on 5 May 1983; and the National Traditional Court of Appeal later confirmed the sentences on 7 February 1984.²¹⁴ Due to an international appeal urging President Banda not to execute the Chirwas, the sentences were commuted to life imprisonment.²¹⁵ It is clear from this case, and bearing in mind the fact that fair trial rights were not respected during the trial, that the Chirwas were arrested, tried, convicted, and the death sentence imposed solely to repress them. In addition, the African Commission, as discussed above, has found the imposition of the death sentence on the Chirwas to be in violation of fair trial rights.²¹⁶

Concerning the case of Mohamed of Sudan, he was the leader of the Republican Brothers Movement that had engaged in non-violent political activities and supported a new approach to Islam.²¹⁷ On 5 January 1985, Mohamed was arrested along with four other members of the movement, charged with “undermining or subverting the constitution,” which is a capital offence, tried on 7 January, and found guilty of subversion on 8 January and sentenced to death.²¹⁸ The Court of Appeal confirmed

²¹² Amnesty International (1989) 49.

²¹³ As above.

²¹⁴ As above.

²¹⁵ Amnesty International (1989) 50.

²¹⁶ See *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, Communications 68/92 and 78/92, *Eighth Annual Activity Report: 1994-1995*. It should be noted that Orton Chirwa died in prison, while Vera Chirwa was released after international appeals by the UN Commission on Human Rights (UNCHR) and Amnesty International.

²¹⁷ This movement had distributed leaflets calling for the repeal of Islamic laws introduced in 1983, appealing for a peaceful political solution to the conflict in Sudan and advocating an Islamic revival based on the *Sunna*, the teachings of the prophet Mohammed (see Amnesty International (1989) 48).

²¹⁸ Amnesty International (1989) 48.

their sentences on 16 January, ruling that in advocating an unacceptable form of Islam, they were guilty of “heresy”.²¹⁹

The Court of Appeal’s ruling was in violation of fair trial rights, as the five men had not been charged with “heresy”. The Court gave them one month in which to repent or the death sentence will be carried out, which was later reduced to three days.²²⁰ On 18 January, Mohamed was hanged in Kober Prison in Khartoum North, without the three days deadline elapsing to see if he will repent or not.²²¹ Thus, the government of Sudan directed the death penalty at Mohamed, so as to rid itself of him or in the hope of silencing him and the others in the movement. The use of the death penalty as a tool of political repression in this case was possible due to the fact that there was no respect for the due process of law. As can be deduced from the above examples, non-respect for fair trial rights have paved the way for the death penalty to be used as a tool to repress political opponents in some African states. In addition, even with respect for fair trial rights, the imposition of the death penalty in African states for political offences in general is questionable.²²² Amnesty International has noted that “it is difficult, if not impossible, to isolate politically motivated crimes warranting the

²¹⁹ As above.

²²⁰ As above.

²²¹ As above. The other four men repented after they had been forced to watch their leader being hanged, and they were freed.

²²² Other African states in which the death penalty has been used as a tool of political repression include Ghana in 1979 and Liberia in 1980. In Liberia, the situation was exacerbated by the fact that a decree was issued defining the crime of high treason, effective “retroactively” and punishable by death. Liberia issued this decree despite international law prohibitions that existed at the time on applying the death penalty retroactively (see Amnesty International (1989) 51). Furthermore, it is worth mentioning that before the death penalty was abolished, it had previously been used in South Africa as an instrument of political repression. In the 1960s, the Legal Aid Bureaux, registered under the Welfare Organisations Act 1946, received financial grants from the state on the express condition that no defences are provided in “political” matters. A “No bail” law was passed in 1961, which empowered the Attorney-General to issue a certificate that someone who has been accused of a political crime should not be granted bail (See Lazar (1966) 192 & 197). The situation was exacerbated by the fact that a person on a political charge, such as sabotage, was deemed guilty unless he proves his innocence. This created doubt as to whether in political trials justice is actually done. This could be seen as a means used by the state to direct the death penalty at political opponents, who are charged with political offences. Many death sentences were imposed in trials of “unrest-related incidents”. Later, calls were made for the non-use of the death penalty for political crimes. For example, the South African Dutch Reformed Church that had declared in November 1988 that it had always accepted the death penalty, called for an end to executions in “political cases” some months later (Mihálik (1991a) 139-142). See also, Maduna (1996) 194, where DJ Dalling, former South African Member of Parliament, stated that the death penalty has been a tool of repression (and also a racist tool).

death penalty without, in effect, punishing the perpetrators for their political views as well as for their crimes”.²²³ Therefore, since it is difficult or impossible to impose the death penalty on those accused of political crimes without punishing them for their political views, abolition of the death penalty would prevent the use of punishments like the death penalty as a tool of political repression.

6.7 Conclusion

Respect for fair trial rights is crucial in capital trials. As seen in this chapter, fair trial rights have been provided for at the international and national levels. This chapter has examined the fair trial rights at the above levels and how they have been interpreted. The imperative nature of fair trial rights has been emphasised by the UN Human Rights Committee, the European Court, the Inter-American Commission and Court, and the African Commission. The above bodies have also adopted a similar approach with regard to the relation between fair trial rights and the right to life. It is clear from their jurisprudence or advisory opinions that imposition of the death penalty after an unfair trial is a violation of the right to life.

In cases in which the above bodies found a violation of fair trial rights in capital cases, they subsequently found a violation of the right to life. Due to the relation between these two rights, fair trial rights, with regard to death penalty cases, could be seen as non-derogable in time of emergency. During a time of emergency, fair trial rights have to be respected in order to protect non-derogable rights, such as the right to life, which is fundamental to the protection of human rights. It is essential that fair trial rights be respected in death penalty cases. Otherwise, the death penalty should be set aside, as non-respect for these rights undermines all other human rights.

As pointed out in this chapter, increased concern about the use of the death penalty in Africa results from it being imposed after unfair trials. This is compounded by the fact that the current laws and procedures with regard to fair trial in some African states are not in line with their international commitments. For example, although Sierra Leone has ratified the ICCPR and the African Charter, accused persons have no right to a

²²³ Amnesty International (1989) 19.

lawyer at the appeal stage of the trial.²²⁴ It is questionable whether those sentenced to death in Swaziland, for example, can receive a fair trial, as Swaziland has no criminal code, constitution or legal aid scheme.

Factors that affect the respect for fair trial standards in some African states include the lack of rights consciousness among lawyers, the public at large and, in some instances, in the judiciary and the state organs, inadequate training of police officers, lawyers and judges, lack of resources to carry out proper and swift investigations, understaffed and under funded courts, and failure of the legal system as a whole. For capital trials in Africa to be improved, certain strategies have to be taken. African states have to take steps to remedy shortcomings in the administration of justice, not only to ensure full respect for fair trial rights, but also to achieve the goal of abolition. Judges and lawyers have to be given effective legal training, so that they can apply and use fair trial standards appropriately. For example, the Human Rights Committee, noting that the provisions of the ICCPR have not been invoked in any case before the Constitutional Court or ordinary courts in Togo, recommended that training be provided for judges, lawyers and court officers concerning the content of the ICCPR and other human rights instruments.²²⁵ Availability of resources for the conduction of investigations will help prevent delays in capital trials. It is also important that national fair trial standards that are not in conformity with international standards be revised so as to ensure such conformity. Overall, there is the need for empirical research to establish not only the nature and magnitude of the problems but, more importantly, to find solutions based on a thorough research leading to a political decision on the abolition of the death penalty.

Furthermore, due to the imperfections inherent in criminal trials, it is difficult or almost certainly not possible to design a system that avoids arbitrariness, judicial error and delays in carrying out the death sentence. Considering the irreversible nature of

²²⁴ Stated in the report of the national coordinator of Sierra Leone, Abdul Tejan-Cole, presented at the “First International Conference on the Application of the Death Penalty in Commonwealth Africa” held in Entebbe, Uganda from 10 – 11 May 2004 (see <<http://www.biicl.org/deathpenalty>> (accessed 30 June 2004).

²²⁵ Concluding observations of the Human Rights Committee on the third periodic report of Togo submitted under article 40 of the ICCPR, UN Doc. CCPR/CO/76/TGO, 28 November 2002, para 7.

the death penalty, it is of grave concern that the death penalty is continuously being used without respect for fair trial rights, without any guarantee that judicial error or arbitrariness in its imposition can be eliminated.

Respect for fair trial rights is essential in capital trials. However, this cannot be the main solution, as other factors such as lack of resources, the personal disposition of a judge and the manner in which a case is conducted, affect the outcome of trials. Since it is difficult or almost certainly not possible to design a system that avoids arbitrariness, judicial error and delays in carrying out the death sentence, it is imperative, especially against the backdrop of the constraints exposed in many African states, that African states consider abolishing the death penalty, as the main solution to eliminating the risk of executing the innocent.