

TOWARDS THE ABOLITION OF THE DEATH PENALTY IN
AFRICA: A HUMAN RIGHTS PERSPECTIVE

By

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DECLARATION

I hereby declare that this thesis, which I submit for the degree: Doctor of Laws (LLD) at the University of Pretoria, is my own work and has not previously been submitted by me for a degree at another university. Both primary and secondary sources used have been duly acknowledged.

Lilian Manka Chenwi

Date

DEDICATION

In memory of my father

Mr Chenwi Henry Shu

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SUMMARY

The death penalty has been an issue of debate for decades and it is of great relevance at present. Different reasons have emerged that make recourse to the death penalty appear necessary, such as, that it serves as a deterrent, it meets the need for retribution and that public opinion demands its imposition. Conversely, more convincing arguments have been raised for its abolition, amongst which is the argument that it is a violation of human rights.

Africa is seen as one of the “death penalty regions” in the world, as most African states still retain the death penalty despite the growing international human rights standards and trends towards its abolition. Further, the African Charter on Human and Peoples’ Rights makes no mention of the death penalty. The death penalty in Africa is therefore an issue that one has to be particularly concerned about. During the 36th Ordinary Session (2004) of the African Commission on Human and Peoples’ Rights, for the first time, the death penalty was one of the issues discussed by the Commission. Commissioner Chirwa initiated debate about the abolition of the death penalty in Africa, urging the Commission to take a clear position on the subject. In view of this and the international human rights developments and trends on the death penalty, discourses on the abolition of the death penalty in Africa are much needed.

Accordingly, this study examines the death penalty in Africa from a human rights perspective. It seeks to determine why African states retain the death penalty, the ways in which the current operation of the death penalty in African states conflicts with human rights, what causes obstructions to its abolition in Africa, and whether it is appropriate for African states to join the international trend for the abolition of the death penalty.

The current status and operation of the death penalty in Africa is first examined. The historical background to the death penalty in Africa from a traditional and western perspective is also discussed. Subsequently, the main arguments advanced by Africans (including African leaders, writers, priests and government officials) for the retention of the death penalty in Africa are evaluated. The study goes further to examine the death penalty in African states in the light of the right to life, the

prohibition of cruel inhuman and degrading treatment and fair trial rights at both the international and national levels.

After examining the death penalty in African states, the study arrives at the conclusion that it is appropriate for African states to join the international trend for the abolition of the death penalty, considering that the death penalty in Africa conflicts with human rights, the justifications for its retention are fundamentally flawed, and that alternatives to the death penalty in Africa exist. A number of recommendations are then made, which are geared towards the abolition of the death penalty in Africa.

Key words: death penalty, capital punishment, abolition, abolition trends, human rights, right to life, Africa, African Charter, African Commission, fair trial, cruel, inhuman and degrading punishment, torture, life imprisonment, punishment, execution, moratorium, criminal justice, alternative sanctions, retribution, deterrence, public opinion, retentionist, *de facto* abolitionist, mitigating factor, extenuating circumstance.

OPSOMMING

Die doodstraf heers vir dekades lank as debatspunt en is op die oomblik van groot belang. Verskeie redes het aan die lig gekom wat die hertoetrede van die doodstraf noodsaaklik laat blyk, byvoorbeeld: dit dien as afskrikmiddel, dit vervul die behoefte aan retribusie en openbare opinie veries die toepassing daarvan. Teenstellig daarmee, bestaan daar meer oortuigende redenasie vir die afskaffing daarvan, waaronder die redenasie dat dit 'n skending van menseregte is.

Afrika word gesien as een van dié doodstraf gebiede in die wêreld, want meeste Afrika state pas die doodstraf toe ongeag die groeiende internasionale menseregte standarde en tendense vir die afskaffing daarvan. Verder maak die “African Charter on Human and Peoples’ Rights” geen melding van die doodstraf nie. Daarom is die doodstraf in Afrika 'n aangeleentheid wat groot hoofbrekens besorg. Gedurende die 36ste Gewone Sessie (2004) van die Afriko Kommissie vir Menseregte, is die doodstraf vir die eerste keer op die Kommissie se agenda as aangeleentheid bespreek. Kommissaris Chirwa het die leiding geneem met die doodstraf afskaffing in Afrika debat, hy het die Kommissie aangemoedig om 'n beduidende standpunt in te neem. Hierdie in ag geneem en die internasionale menseregte ontwikkelings en tendense van die doodstraf, is bespreking van die afskaffing van die doodstraf in Afrika noodsaaklik.

Gevolgtrek, ondersoek hierdie studie die doodstraf in Afrika vanaf 'n menseregte perspektief. Dit probeer bepaal hoekom Afrika state die doodstraf behou, die maniere waarmee die huidige gebruik van die doodstraf bots met menseregte, watter oorsake lei tot obstruksie van teenvoeters vir die afskaffing in Afrika, en om vas te stel of dit betaamlik is vir Afrika om die internasionale tendens vir die afskaffing van die doodstraf te volg.

Die huidige status en gebruik van die doodstraf in Afrika is eers ondersoek. Die historiese agtergrond na die doodstraf in Afrika vanuit 'n tradisionele en westerse perspektief is ook bespreek. As gevolg daarvan word die hoof argumente wat voorgesit is deur mense uit Afrika (en dit sluit leiers, skrywers, digters en regerings amptenare in) vir die behouding van die doodstraf in Afrika evalueer. Die studie gaan nog verder en ondersoek die doodstraf in Afrika in die lig van die reg tot lewe, die

verhindering van wrede, onmenslike en vernederende behandeling en regverdige verhoor regte op beide internasionale en nasionale vlak.

Na ondersoek na die doodstraf in Afrika, bereik die studie die slotsom dat dit wel betaamlik is vir Afrika om die internasional tendens te volg vir die afskaffing van die doodstraf, in ag geneem dat die doodstraf in Afrika in konflik is met menseregte, die regverdiging vir die behoud van die praktyk is basies verkeerd, en dat alternatiewe vir die doodstraf in Afrika wel bestaan. 'n aantal voorstelle word dan gemaak wat gerig is tot die afskaffing van die doodstraf in Afrika.

LIST OF ABBREVIATIONS

AAR	-	Annual Activity Report
AC	-	Appeal Cases
ACHPR	-	African Commission on Human and Peoples' Rights
ACHR	-	American Convention on Human Rights
ADRDM	-	American Declaration of the Rights and Duties of Man
AHRLR	-	African Human Rights Law Reports
AI	-	Amnesty International
All ER	-	All England Reports
ANC	-	African National Congress
AU	-	African Union
BCLR	-	Butterworths Constitutional Law Reports
BHRC	-	Butterworths Human Rights Cases
CA	-	Court of Appeal
CAT	-	UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CC	-	Constitutional Court
C & F	-	Clark & Finelly's House of Lords Cases
CPT	-	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	-	Convention on the Rights of the Child
DOC	-	Document
DRC	-	Democratic Republic of Congo
ECHR	-	European Court of Human Rights Reports
ECOSOC	-	Economic and Social Council
ECOWAS	-	Economic Community of West African States
EHRR	-	Essex Human Rights Review
ESCOR	-	Economic and Social Council Official Records
ETS	-	European Treaties
F 3d	-	Federal Reporter, Third Series
F SUPP	-	Federal Supplement
GA	-	General Assembly
GAOR	-	General Assembly Official Records

GLR	-	Ghana Law Reports
HC	-	High Court
HRC	-	Human Rights Committee
IAYHR	-	Inter-American Yearbook on Human Rights
ICC	-	International Criminal Court
ICJ	-	International Commission of Jurists
ICCPR	-	International Covenant on Civil and Political Rights
ICTR	-	International Criminal Tribunal for Rwanda
ICTY	-	International Criminal Tribunal for the Former Yugoslavia
ILM	-	International Legal Materials
JCPC	-	Judicial Committee of the Privy Council
LRC	-	Law Reports of the Commonwealth
MDC	-	Movement for Democratic Change
NGO	-	Non-Governmental Organisations
NO	-	Number
NWLR	-	Nigerian Weekly Law Report
OAS	-	Organization of American States
OAU	-	Organisation of African Unity
PACE	-	Parliamentary Assembly of the Council of Europe
PARA	-	Paragraph
PC	-	Privy Council
RLR	-	Rhodesian Law Reports
SA	-	South African Law Reports
SC	-	Supreme Court
SCOR	-	Security Council Records
SCR	-	Supreme Court Reports
SCSL	-	Special Court for Sierra Leone
SCZ	-	Supreme Court of Zambia
SJC	-	Supreme Judicial Court
TLR	-	Tanzanian Law Reports
TRC	-	Truth and Reconciliation Commission
UDHR	-	Universal Declaration of Human Rights
UHRC	-	Ugandan Human Rights Commission
UN	-	United Nations

UNCHR	-	United Nations Commission on Human Rights
UNHRC	-	United Nations Human Rights Committee
UNTS	-	United Nations Treaty Series
USA	-	United States of America
VOL	-	Volume
WL	-	Westlaw Transcripts
WLR	-	Weekly Law Reports
YB	-	Year Books
ZLR	-	Zimbabwe Law Reports

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CHAPTER ONE

INTRODUCTION

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1.1 Background to the study

By committing ourselves to a society founded on the recognition of human rights we are required to value [the right to life and dignity] above all others. And this must be demonstrated by the State in everything that it does, including the way it punishes criminals.¹

Central to this study is the generally accepted view that the death penalty is a major threat to fundamental human rights.² It is one of the most divisive and impassioned human rights issues throughout the world.³ The application of the death penalty cannot be separated from the issue of human rights.⁴ This view has been supported by the United Nations (UN) Commission on Human Rights (UNCHR), which has expressed its conviction that “abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights”.⁵ Therefore, the death penalty is treated in this study as a human rights issue. In support of this, Commissioner Chirwa, at the 36th Ordinary Session (2004) of the African Commission on Human and Peoples’ Rights (African Commission), openly stated that the death penalty was a human rights issue.⁶

Defining the death penalty as a human rights issue has been resisted by some countries that retain and use the death penalty. These countries reject the argument that judicial execution violates basic human rights and regard their criminal justice system as a matter of national sovereignty reflecting their cultural and religious

¹ Justice Chaskalson in *S v Makwanyane* 1995 (3) SA 391 (CC) para 144, hereinafter referred to as *Makwanyane* (1995)). See chapters four and five for a discussion of the case.

² Such as the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment and fair trial rights.

³ Fine (1999) 421.

⁴ Devenish (1990) 17.

⁵ This conviction was expressed in the UNCHR resolution 1997/12 of 3 April 1997 and has been reiterated by the UNCHR in resolution 1998/8 of 3 April 1998. The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, in support of the above conviction, has emphasised that “the abolition of capital punishment is most desirable in order fully to respect the right to life” (see Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/1997/60, 24 December 1996, para 79).

⁶ The above statement made during the session is on file with the author of this thesis.

values.⁷ At the 57th Session of the UNCHR, a representative of Libya stated that “the death penalty concerns the justice system and is not a question of human rights”.⁸ Similarly, Singapore and Trinidad and Tobago have asserted that the death penalty is not a human rights issue.⁹

Nonetheless, as seen in chapters four, five and six of this study, the death penalty has been held to be a violation of human rights – the right to life, the right not to be subjected to cruel, inhuman or degrading treatment or punishment, and conflicts with fair trial rights. It is irreversible, and in certain cases, it is prone to error leading to execution of the innocent. At the international level, a broader understanding of human rights has led to the abolition of the death penalty in some countries.¹⁰ In Africa, human rights has been the basis for the abolition of the death penalty in South Africa, in the landmark judgment passed by the South African Constitutional Court - *S v Makwanyane* - in which it declared the death penalty unconstitutional.¹¹

There is therefore good evidence to support the view that the death penalty is a human rights issue, and that its abolition is linked to the development of, and respect for, human rights.¹² In other words, its abolition is a central theme in the development of international human rights law. In view of the above, the use of the death penalty in Africa and elsewhere is increasingly becoming an obstacle to the realisation of justice and the development of human rights.

⁷ Hood (2002) 18.

⁸ Hood (2004) 17.

⁹ See C Dieter, “The death penalty and human rights: U.S. death penalty and international law” <<http://www.deathpenaltyinfo.org/oxfordpaper.pdf>> (accessed 16 May 2004).

¹⁰ For example, the death penalty was abolished in Switzerland and Spain on human rights grounds. See C Dieter, “The death penalty and human rights: U.S. death penalty and international law” 3 <<http://www.deathpenaltyinfor.org/oxfordpaper.pdf>> (accessed 16 May 2004).

¹¹ *Makwanyane* (1995), discussed in chapters four (4.5.4) and five (5.5.4.2) of this thesis.

¹² Hood (2002) 22.

1.2 Nature and magnitude of the problem to be investigated

Considering that the use of the death penalty in Africa is a threat to fundamental human rights, the topic of this study “Towards the abolition of the death penalty in Africa: A human rights perspective” is crucial. The study seeks to tackle the following questions: Why do most African states retain the death penalty? In what ways does the current operation of the death penalty in African states conflict with human rights? What causes obstruction to challenges to the death penalty in Africa? Is it appropriate for African states to join the international trend for the abolition of the death penalty?

The focus of this study is on Africa because the death penalty in Africa, as rightly stated by Van Zyl Smit, is an issue that one should be particularly concerned about.¹³ First, Africa is seen as one of the death penalty regions in the world, as most African states still retain the death penalty in their statutes.¹⁴ As at 31 March 2005, only twelve African states have abolished the death penalty in law and practice.¹⁵ Out of the 54 countries that have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty, only six are African countries.¹⁶ This raises questions about the commitment of some African states towards human rights standards.

¹³ Van Zyl Smit (2004) 2.

¹⁴ Other death penalty regions in the world include the United States of America (USA) and China.

¹⁵ See chapter two (2.3.1) of this thesis for the countries that have abolished the death penalty.

¹⁶ The Second Optional Protocol was adopted by the UN General Assembly on 15 December 1989, entered into force on 11 July 1991 (G.A. res. 44/128, UN Doc. A/44/49(1989)). The African countries that have ratified this Protocol are Mozambique (21 July 1993), Namibia (28 November 1994), Seychelles (15 December 1994), Cape Verde (19 May 2000), South Africa (28 August 2002), and Djibouti (5 February 2003). It should be noted that São Tomé and Príncipe (6 September 2000), and Guinea-Bissau (12 September 2000) are signatories to the Protocol. See “Status of ratifications of the principal international human rights treaties” <<http://www.unhchr.ch/pdf/report.pdf>> (accessed 31 March 2005).

Second, most African states still retain the death penalty despite the growing international human rights standards in general,¹⁷ and standards on the abolition or limitation of the death penalty in particular. International human rights standards (on the abolition or limitation of the death penalty) have not impacted on most African states. The impact of these norms has been limited partly by the general perception of international law in African states – as a threat to sovereignty. Governments guard their sovereignty closely¹⁸ and retentionist governments view such standards as a threat to their sovereignty, thus hesitant to implement them. A low level of implementation of human rights norms (for example in Egypt and Zambia), in addition to the widespread ignorance of the above standards among lawyers and civil societies (for example in Egypt), limit the impact of international human rights standards at the domestic level.¹⁹

Third, the discrepancies between international law and domestic law, as regards the death penalty, are very apparent and disturbing in some African countries. For example, in Rwanda and Sierra Leone, those charged with the most heinous crimes by national courts can be sentenced to death, while similar persons cannot be sentenced to death under international criminal tribunals. The penalties to be imposed by the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) are limited to imprisonment.²⁰ However, the national courts of both countries can impose the death penalty, as it is retained in their respective penal statutes.²¹ What is more, the death penalty debate in other regions, for example the USA, has been fuelled by the use of new technologies, particularly DNA testing, to

¹⁷ Generally, the above standards are relevant as most African states are parties to major international human rights instruments, some, which aim at limiting the imposition of the death penalty (see chapter three of this thesis). For the status of ratification of international and regional (African) human rights instruments by African states, see Heyns (2004) 48 &106. See also “Status of ratifications of the principal international human rights treaties” <<http://www.unhchr.ch/pdf/report.pdf>> (accessed 31 March 2005).

¹⁸ Heyns & Viljoen (2002) 31.

¹⁹ For factors limiting the impact of UN human rights treaties on the domestic level, see Heyns & Viljoen (2002) 31-32.

²⁰ Article 23 of ICTR Statute and article 19 of SCSL Statute, respectively.

²¹ See Heyns (2004) 60-90 and S Tejan-Sie, “The death penalty: A growing human rights issue” in Concord Times (Freetown), 11 October 2004.

show that innocent persons are undeniably sentenced to death. But these technologies are new to Africa.

Fourth, obstacles to the abolition of the death penalty, such as claims of sovereignty and the formulation of constitutional provisions on the right to life and the prohibition of cruel, inhuman and degrading treatment or punishment, are specifically severe in Africa. As seen above and in subsequent chapters, broader political (non-legal) factors, such as claims of sovereignty against international law and narrow ideas about morals and culture, affect the death penalty situation in Africa.²²

Fifth, the ways of addressing the death penalty and resistance to it are specific to Africa and have to be contextualised. Some countries have shown resistance to abolition or still have the firm intention of retaining the death penalty. For example, resistance to abolition of the death penalty was clear from the statements made by the representatives of Egypt, Sudan and Nigeria, in response to Commissioner Chirwa's statement mentioned above, during the 36th Ordinary Session (2004) of the African

²² On sovereignty, for example, it would be inappropriate to respect the sovereignty of countries where there is a possibility of the death penalty being imposed in the absence of a fair trial. However, since sovereignty affects the death penalty in Africa and an epistemic corpus of extradition policies, which guarantee human rights, is still to be formulated in Africa, the ability of some African governments to provide effective diplomatic protection to their citizens in foreign countries where they face the death penalty or the possibility of it being imposed is questionable. The case of *Kaunda and Others v The President of the Republic of South Africa and Others* (2004) Case CCT/23/04 is illustrative of how some governments give priority to "sovereignty" over the protection of human rights, where the issue of the death penalty is raised. The South African government seems to have departed from the approach adopted by an increasing number of states (as seen in the subsequent chapters), that it is inappropriate for a state to respect the sovereignty of countries over providing effective diplomatic protection to its citizens in foreign countries where they face the death penalty or the possibility of it being imposed. The South African government argued in the *Kaunda* case that it is restricted by its foreign policy from providing consular services to those who land in trouble outside the country's border. One of the constitutional issues in this case raise the question whether the Constitution of South Africa binds the state to take steps to protect the applicants (South African citizens, who were being held in Zimbabwe on charges of conspiring to topple the president of Equatorial Guinea) in relation to, *inter alia*, the possibility of their extradition to Equatorial Guinea to face charges which could result, if they were to be convicted, in their being sentenced to death (para 19). The South African Constitutional Court, in dismissing the claim that the government be directed, as a matter of extreme urgency, to seek an assurance that the death penalty will not be imposed, stated that as long as the proceedings and prescribed punishments are consistent with international law, South Africans who commit offences in foreign countries are liable to be dealt with in accordance with the laws of those countries, and not the requirements of the Constitution of South Africa, and are subject to the penalties prescribed by such laws (paras 100 & 102). The Constitutional Court apparently gave priority to respecting the sovereignty of Equatorial Guinea over protecting the human rights of the applicants. The Court also seems to have departed from its position in *Mohamed v President of the Republic of South Africa and Others*, discussed in chapter four (4.5.4) below.

Commission. For instance, the representative of Egypt stated that abolition of the death penalty is against *Shari'a* and that there is no worldwide consensus on it.²³

Also, in an attempt to achieve justice and reconciliation, the government of Rwanda has signalled its intention to retain the death penalty, when it opposed the UNCHR's resolution in April 1999 in favour of a moratorium on the death penalty.²⁴ It is not surprising that Rwanda opposed the UN resolution as it came at a time when the country was trying to bring the perpetrators of the 1994 genocide to justice, and one of the punishments for such perpetrators was the death penalty.²⁵ The abstention of Cameroon, the Democratic Republic of Congo (DRC), Senegal and Zambia from voting for the abolition of the death penalty during the 58th Session of the UNCHR could be seen as signalling an intention to retain the death penalty in their laws.²⁶ It could be said that the reason for the DRC not voting for abolition was because it was going through a period of political instability due to war and state of emergency. Similarly, Senegal (now an abolitionist state) could not vote for abolition at the time due to political instability, as rebels were fighting in the country. They could not guarantee that they will abide by the law and they saw the death penalty as necessary when those who rebel are to be brought to justice. However, the same cannot be said for Cameroon²⁷ and Zambia.²⁸

²³ Statements made by the various governments are on file with the author of this thesis.

²⁴ "United Nations panel votes for ban on the death penalty", *New York Times*, 29 April 1999. 23 people have been executed in Rwanda between 1996 and 2000 (Hood (2002) 92); and 660 people have been sentenced to death between 1997 and 2001 (*Le Verdict* No. 34, January 2002, at 8).

²⁵ About 10,000 prisoners have so far been sentenced to death for participating in the 1994 genocide (E Nakkazi, "Kagame urged to end death penalty" in *The East African* (Nairobi), 3 January 2005).

²⁶ See J Kamau "Kenya shuns UN vote on the death penalty"
<<http://www.africaonline.com/site/articles/1,3,47286.jsp>> (accessed 10 July 2003).

²⁷ Nevertheless, Cameroon's resistance seems to be lessening, given that in 2004, a new decree was passed, which provides for the commutation of the death sentences of persons originally sentenced to death before the date of signature of the Decree, with the exception of repeat offenders and persons sentenced for, *inter alia*, assault causing the death of a minor, and theft with violence entailing the death of a person. See Article 1 of Decree No. 2004/344 of 29 December 2004 on the commutation and remission of sentences. The Decree was reproduced in *Cameroon Tribune* No. 8258/4457 of 31 December 2004 at 13.

²⁸ It should be noted that, though Zambia abstained, the president, Levy Mwanawasa, is reported to have effectively outlawed capital punishment by refusing to sign executions and has commuted the sentences of over 50 prisoners to life imprisonment. See *Legalbrief News Diary*, Friday 23 May 2003
<<http://www.legalbrief.co.za>> (accessed 10 July 2003).

Sixth, with the current “war” on terrorism in general, and the alarming increase in terrorist activities in Africa, discourses on the death penalty in Africa are becoming even more relevant.²⁹ The “war on terrorism” in some African states has led to an increase in the number of offences punishable by death. For example, following the suicide attacks in Casablanca on 16 May 2003, the parliament of Morocco approved an anti-terror law that broadened the definition of terrorism and increased the number of offences punishable by death.³⁰

Lastly, it is disturbing that the African Commission’s position on the death penalty remains unclear. The Commission has not pronounced itself on the death penalty as such. This could mainly be attributed to the fact that it has not been presented with a direct challenge to the death penalty. However, some Commissioners have openly stated their opposition to the death penalty or that they favour abolition. For example, the late Commissioner Beye, at the Commission’s 12th Session (1992), openly and explicitly identified himself as an abolitionist by stating that he is personally opposed to the death penalty.³¹ Also, former Commissioner, Umozurike, though not explicitly, indicated (at the time he was Commissioner) his interest in the abolition of the death penalty.³² As seen above, Commissioner Chirwa has made it clear that she favours abolition of the death penalty in Africa.

Recently, during the Commission’s 36th Ordinary Session (2004), for the first time in the Commission’s agenda, the death penalty was one of the issues discussed. Commissioner Chirwa initiated debate about the abolition of the death penalty in Africa, urging the Commission to take a clear position on the subject.³³ Furthermore,

²⁹ With regard to terrorism and the death penalty in Africa, see J Yorke “Extradition, terrorism and the death penalty in Africa: Charting through the Labyrinth”, paper 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)).

³⁰ Hands Off Cain (2004) 109.

³¹ *Examination of State Reports*, Vol 3 (1995) 32 & 79

³² Viljoen (2004) 400.

³³ The above statement made during the session is on file with the author of this thesis. Subsequently, the death penalty in Africa has been included in the draft agenda of the 37th Ordinary Session of the African Commission, from 27 April to 11 May 2005, Banjul, The Gambia. See <http://www.achpr.org/english/news/draftagenda_en.html> (accessed 18 April 2005).

the African Commission, in its recent decision in *Interights et al (on behalf of Bosch) v Botswana*,³⁴ acknowledged the evolution of international law and the trend towards abolition of the death penalty.³⁵ The Commission further conceded its support of this trend by its adoption of the 1999 resolution,³⁶ and encouraged all states party to the African Charter on Human and Peoples' Rights (African Charter)³⁷ to take all measures to refrain from exercising the death penalty.³⁸ The above developments point to the fact that discourses on the abolition of the death penalty in Africa are much needed.

1.3 Specific objectives and significance of the study

Abolition of the death penalty is generally considered to be an important element in democratic development for states breaking with a past characterised by terror, injustice and repression.³⁹ This study is, therefore, of particular significance given that Africa is going through a transitional phase, from dictatorship to democracy. Bearing in mind the fact that most African states have experienced a past characterised by injustice and repression, some are still experiencing it today, and some are in the process of democratic development, abolition of the death penalty thus seems to be one of the most important elements that will help these states in the process of democratic development. Therefore, studies like this, which make African states see the abolition of the death penalty as a necessity with regard to the development of, or respect for, human rights, are essential.

³⁴ *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). This case is discussed in chapters four (4.3.2), five (5.3.2) and six (6.3.2).

³⁵ As above, para 52.

³⁶ "Resolution Urging the State to Envisage a Moratorium on the Death Penalty" *Thirteenth Annual Activity Report: 1999-2000*, Annex IV (discussed in chapters four (4.3.1), six (6.3.2) & seven (7.3.2.2)).

³⁷ Adopted on 27 June 1981 and entered into force on 21 October 1986 (OAU Doc. CAB/LEG/67/3 rev.5, (1982) 21 I.L.M 58). The African Charter has been ratified by all 53 African states except Morocco. For the status of ratification of the African Charter, see Heyns (2004) 106

³⁸ *Bosch* (African Commission), para 52.

³⁹ Schabas (2002) 2.

The main objectives of this study include the following: First, to reveal existing standards on the death penalty in Africa. Second, to create awareness of the human rights implications associated with the death penalty. Third, to provide an insight into the death row phenomenon in Africa. Fourth, to appreciate the difficulties regarding challenges to the death penalty in Africa. Fifth, to contribute to the discourse on the importance of abolishing the death penalty in Africa. Lastly, to contribute to the available literature on the death penalty in Africa.

This study is therefore significant as it adds to the limited literature available on the death penalty in Africa. The study contributes to existing knowledge in that it provides the reader, from a comparative dimension, with an insight into the death penalty situation in Africa as a whole and its human rights implications. The study, unlike other studies addressing the death penalty arguments, highlights mainly the views of Africans (heads of state, academics, priests and others) in evaluating the arguments for the retention of the death penalty.

1.4 Work already done in this field

Although the “death penalty in Africa”, with the exception of South Africa, has not been the subject of much academic writing, the “death penalty” as a whole has been the subject of much literature. In view of this, an attempt to review the available literature on the death penalty is a formidable task. This section therefore refers to the main writings on the topic, in highlighting the limitations revealed by the available literature. The current literature on the death penalty reveals the following limitations: First, very little of the available literature focus on Africa,⁴⁰ with some containing only passing references on Africa. More has been published on the death penalty in other parts of the world than in Africa, with some studies using the USA or Europe⁴¹

⁴⁰ See, for example, Van Zyl Smit (2004). However, he does not address the issue of the death penalty from a human rights perspective.

⁴¹ For examples of studies on the death penalty in the USA and Europe, see Lempert (1981); Bedau (1982); Bedau (1999); Bedau (2004); C Dieter “The death penalty and human rights: U.S. death penalty and international law” <<http://www.deathpenaltyinfor.org/oxfordpaper.pdf>> (accessed 10 July 2003); Johnson (1990); Berk et al (1993); Bowers (1993); Carter (1989), Carter (1991), Carter (1993), Carter & Kreitzberg (2004); Streib (1998); Sarat (1999); International Commission of Jurists (2000); Schabas (2002); Hodgkinson (2000); Beschle (2001); and Tabak (2001).

as their main focus. With regard to the mandatory imposition of the death penalty, the focus has largely been on the Commonwealth Caribbean states.⁴² Additionally, some studies have dealt with the death penalty only in specific countries in Africa, mostly South Africa.⁴³

Second, some of the literature does not represent the current status and operation of the death penalty in Africa, as it contains information that has changed or is outdated. Some of the literature on the death penalty in many countries around the world, including Africa, was written in the 1980s, and so, does not represent the current status and operation of the death penalty in Africa.⁴⁴

Third, some studies that have dealt partly with the death penalty in Africa generally have not provided the reader with detailed research on the death row phenomenon in Africa. For example, Schmidt addresses the question whether or not a continued stay on death row constitutes cruel, inhuman or degrading treatment.⁴⁵ But he focuses only on judicial decisions on the death row phenomenon in Africa, without discussing the death row situation in African states generally.

Fourth, some studies have dealt with the current status of the death penalty in the world with reference to Africa but do not provide enough detail on certain aspects of the death penalty in Africa. For example, Hood does not provide enough detail, especially on the death row phenomenon in Africa, as he does for other regions.⁴⁶ He also fails to deal with the issue of alternatives to the death penalty, and to address the question of judicial abolition of the death penalty – whether it guarantees respect for the rule of law and the right to life in enforcing the law.

⁴² See, for example, Harrington (2004) and Lehrfreund (2001).

⁴³ See, for example, Welsh (1969); Murray et al (1989) Devenish (1990); Van Rooyen (1991b); Mihálik (1991a); Angus and Grant (1991); Hatchard (1994); Seleane (1996); Vogelmann (1989); Sarkin (1996); Garland (1996); Carpenter (1996); and Ramolotja (1998).

⁴⁴ See, for example, Amnesty International (1989).

⁴⁵ Schmidt (2000). See also, Agostoni (2002).

⁴⁶ Hood (2002). See also, Schabas (2002), who deals only briefly with the death penalty in the African human rights system as compared to the other regional systems.

Fifth, some studies have dealt with the human rights implications of the death penalty, but do not go further to address the issue whether as a result of these implications the death penalty should be retained or abolished.⁴⁷ In addition, there have not been studies on the death penalty in Africa that mainly address the issue whether it is appropriate or not for the death penalty to be abolished in Africa.

This study therefore attempts to address the limitations in previous literature on the death penalty in Africa.

1.5 Methodology adopted in the study

In examining the death penalty in Africa, this study adopts a legal and human rights perspective.⁴⁸ Although a human rights approach is adopted, other perspectives on the debate cannot be ignored. The death penalty is not solely a human rights issue, but also a legal, political, cultural and moral issue. The study therefore makes reference to, for instance, political and criminological perspectives, but the issues are not addressed from that perspective, as the author is not a political scientist or criminologist.

Political perspectives are mentioned because resistance to the abolition of the death penalty of some African states go to the political sphere, for example, sovereignty and public opinion arguments used by politicians.⁴⁹ Some states see the death penalty as the ultimate measure of sovereignty and the ultimate test of political power.⁵⁰ Reference is largely made to criminological perspectives when analysing the criminological arguments for the retention of the death penalty.⁵¹ However, the issues are not addressed from a criminologist's viewpoint.

⁴⁷ See, for example, Nowak (2000).

⁴⁸ Greater emphasis on the human rights perspective on the death penalty has added greatly to the moral force propelling the abolitionist movement (see Hood (2002) 7). Thus pointing to the relevance of this thesis, with regard to the abolition course in Africa.

⁴⁹ See chapter three for further discussion.

⁵⁰ Sarat (1999) 4.

⁵¹ See chapter three.

Furthermore, the approach adopted in this study is descriptive, analytical, comparative and prescriptive. The descriptive approach is unavoidable because the main research methodology employed is literature review. A prescriptive approach is used mainly in the concluding chapter, as the chapter provides proposals and recommendations geared towards the abolition of the death penalty in Africa and how these can be implemented in practice. The following methodology was therefore used:

1.5.1 Literature review

The materials used were obtained from both primary and secondary sources. The primary sources consist of authoritative records of the law made by law-making authorities, such as international and regional instruments on the death penalty and those relating to rights associated with the death penalty. Legislation (including national constitutions⁵² and penal statutes), judicial decisions (both binding and persuasive authorities), and resolutions of the African Commission on the death penalty, as well as those of the UN, Inter-American and European bodies, were consulted and analysed. State reports to human rights treaty bodies, such as the UNHRC, and the concluding observations on the reports, were also consulted.

Secondary sources comprised of all the materials related to the death penalty in Africa as well as worldwide, published or unpublished. These included books, papers, reports, journal articles, newspaper articles and Internet sources. The Internet was used extensively because substantial materials and statistics on the subject are available on the Web.

1.5.2 Comparative method

Comparative law refers to a method of study and research.⁵³ One of the aims of comparative law is to discover which solution of a problem is the best or the solution that emerges from a proper evaluation of the materials under comparison as being the

⁵² The years of the constitutions referred to in this thesis are the years the constitutions were last amended (see Heyns (2004)).

⁵³ Comparative legal research forms an essential component of legal education (De Cruz (1999) 19).

best.⁵⁴ Thus, from a proper evaluation of the current status and operation of the death penalty in Africa and the validity of the arguments for its retention in Africa, the comparative law method was employed in order to determine whether or not abolition of the death penalty on the African continent emerges as the best solution to the problems regarding the current status and operation of the death penalty in Africa. The comparative method is used where necessary or possible throughout the study, as it encourages one to be more critical or analytical about the rules on the subject and provides a forum for cross-fertilisation of experience and ideas on the death penalty. The comparative law method also assists in informing any efforts aimed at improving the laws relating to the imposition of the death penalty in African states to the benefit of its citizens.

1.5.3 *Modus operandi*

To a limited extent, “survey research”, which is a qualitative research technique, was employed in this study. Survey research is an observational method of data collection, which is suitable for investigating phenomena that can be observed directly by the researcher.⁵⁵ In view of the fact that not all phenomena are accessible to the researcher’s direct observation, the researcher, therefore, relies on information from people who have experienced certain phenomena to reconstruct them for others. The information from those who have experienced certain phenomena was gathered through general discussions with them. The following avenues were explored:

In 2003, I had general discussions with academics such as Professor Peter Fitzpatrick and John Yorke, both from the United Kingdom, on the subject. I further had discussions and “unstructured interviews” with a few lawyers and judges from Ethiopia, Rwanda, Zambia and Zimbabwe. These interviews are referred to as “unstructured” because no pre-specified set of questions was employed, as the respondents are encouraged to relate their experiences. Reference is not made in this study to the specific comments from the above interviews. Instead, the remarks gathered have been absorbed in the findings.

⁵⁴ Zweigert & Kötz (1987) 8.

⁵⁵ Nachmias (1981) 179.

I organised, together with the Italian Institute of Culture in Pretoria, South Africa, a one-day seminar on 10 October 2003, on the death penalty. The seminar was a source of gathering information, as a documentary against the death penalty was screened, followed by the presentation of a paper on the death penalty and then general discussions.

In 2003, I assisted M/s Katende, Ssempebwa & Co. Advocates in sourcing material from South Africa, with regard to the current challenge to the death penalty in Uganda. They conducted a number of interviews with former and current death row inmates, lawyers, prison officials, psychiatrist and priest involved with death row inmates. I was provided with a copy of the affidavits, which has been very useful for this study with regard to, not only the death penalty in Uganda, but also Africa as a whole.

In April 2004, I visited Cameroon, and conducted “unstructured interviews” with two death row inmates, prison officials and a few lawyers and judges. Reference is made to some of the information gathered during this visit in chapters two, five and six of this study.

I attended the “First International Conference on the Application of the Death Penalty in Commonwealth Africa” held in Entebbe, Uganda, from 10 – 11 May 2004, in which I participated at the level of paper presentation. The conference provided a forum for the discussion and gathering of information on the death penalty in the Commonwealth African countries under study – Botswana, Cameroon, Ghana, Kenya, Lesotho, Malawi, Nigeria, Sierra Leone, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. Discussions were also generated on the death penalty in other African states and Africa in general. The papers and country reports presented at the conference were a rich source of information on the subject. I used the conference as an opportunity to have discussions and “unstructured interviews” with lawyers, judges, priests working with death row inmates and other academics working on the subject.

In 2004, I had an insightful discussion session with Justice Michael Kirby of the High Court of Australia, who has addressed the issue of the death penalty in some of his writings. His comments are absorbed in the findings.

I assisted in conducting research and submitted a theme note on fair trial rights in relation to the death penalty in Africa for the Second World Congress Against the Death Penalty, held in Montréal, Canada, from 6 – 9 October 2004. I attended the Congress and participated in the roundtable "The death penalty and the violation of international rules regarding human rights" as a speaker. Through my involvement, I received insightful information on the death penalty as a whole. I had the opportunity to speak to former death row inmates from other countries, and viewed the videos of current death row inmates, thus providing a background for me to compare their situation with that in Africa. I also had discussions and "unstructured interviews" with lawyers, judges and academics working on the subject. The presentations at the congress were a rich source of information on the death penalty.

In 2005, I attended the "Retrospective: Ten Years After Makwanyane" conference, held in Pretoria, South Africa, from 14 – 15 February. The papers presented at the conference were a rich source of information on the *Makwanyane* case and its aftermath.

1.6 Scope of the study

The current status and operation of the death penalty in "Africa"⁵⁶ is examined in this study. It should be noted that there are inherent dangers in generalising about Africa, as Africa is not homogeneous. For instance, generalisation of the issue of public opinion in relation to the death penalty could be problematic, as it has not been reported in every African state. The study thus relies on those that have been reported and are in existing literature, which is then extrapolated to observations about Africa as a whole. Therefore, there is no claim in this study to an exhaustive analysis of the

⁵⁶ The term "Africa" is at the same time "too wide or too general", "too narrow or too specific". As mentioned below, the study draws experience and examples from certain African states as it becomes relevant to substantiate the argument or issue being discussed. These experiences and examples will be extrapolated to observations about Africa as a whole.

death penalty in Africa, as there is a possibility that some of the issues discussed may not be generalised African views and not every part of Africa is covered completely. However, despite the differences in African states, there are some general trends. This study thus highlights the most important issues with regard to the death penalty in Africa, and does not provide a comprehensive analysis of the death penalty situation in Africa.

Accordingly, this study does not embark on a country-by-country analysis of the death penalty. It does not select a few African states in which to analyse the death penalty. Experiences and examples are drawn from a number of African states as it becomes relevant to substantiate the argument or issue being discussed, with the intention of providing a general overview of the current status and operation of the death penalty in Africa and its human rights implications. In other words, the examples or states referred to depends on the issue in question. For example, in discussing the death row phenomenon, experience is drawn from African states that have dealt with the death row phenomenon; and also, in discussing the issue of mandatory death penalty, examples are drawn from African states that still retain mandatory death sentences. Since the study also adopts a human rights approach, drawing experiences and examples from a number of African states is more appropriate as not all African states have addressed the issue of the death penalty in relation to human rights. Therefore, with regard to the death penalty in relation to human rights, reference will be made to African states that have addressed the issue.

Also, due to the fact that this study adopts a comparative approach, the death penalty as a whole, and in relation to the right to life, the prohibition of cruel, inhuman or degrading treatment or punishment and fair trial rights in other regional human rights systems are also considered.⁵⁷ Since one of the objectives of this study, as seen above, is to contribute to the discourse on the importance of abolishing the death penalty in Africa, it is necessary to take notice of other human rights systems (the UN, European and Inter-American systems) and international trends in identifying ways of furthering abolition in Africa.

⁵⁷ In addition, specific African human rights instruments are juxtaposed with their international equivalents (that is, with their equivalents under the UN and other regional human rights systems).

Moreover, it is important to consider the position in other human rights systems, especially their decisions on the subject, as foreign decisions have important persuasive value. The views of the UN Human Rights Committee, regional bodies, and other (non-African) national courts have received support from some African courts, such as the South African Constitutional Court, the Supreme Court of Nigeria, the Supreme Court of Zimbabwe, the Court of Appeal of Botswana and the High Court of Tanzania (as seen in subsequent chapters). Overall, it is important to consider international law, as African states are parties to numerous international treaties. Article 60 of the African Charter also requires that inspiration be drawn from other international law on human and peoples' rights in interpreting the African Charter. Thus, a discussion of how other human rights systems and national courts have dealt with the death penalty is useful, as they act as persuasive authority for African states.⁵⁸

1.7 Clarification of terms

This study makes use of terms such as “capital punishment” / “death penalty”; “mitigating” factor / “extenuating” circumstance; and “abolitionist” / “*de facto* abolitionist” / “retentionist”, that need elucidation.

1.7.1 “Capital punishment” / “death penalty”

“Capital punishment” has been defined as the “imposition of a penalty of death by the state”⁵⁹ or “the penalty of death for the commission of a crime”,⁶⁰ and “death penalty” as “a sentence of punishment by execution”.⁶¹ Duhaime, in defining both terms, sees

⁵⁸ The need to consider other human rights systems and national courts (their decisions and opinions) is also justified by the fact that while the death penalty has been the subject of much discussion and literature in these systems, it has not been the case in Africa. Thus, their experiences that further the abolition course would be very useful for Africa.

⁵⁹ *The Columbia Encyclopaedia* (2001), available at website <<http://www.bartleby.com>> (accessed 2 September 2004).

⁶⁰ *The American Heritage Dictionary of English Language* (2000), available at website <<http://www.bartleby.com>> (accessed 2 September 2004).

⁶¹ *The American Heritage Dictionary of English Language* (2000).

the death penalty as a form of punishment by death, which is also known as capital punishment; and capital punishment is also known as the death penalty.⁶²

As can be deduced from the above definitions, “capital punishment” and “death penalty” are synonymous. The terms are conventionally interchanged, and are therefore used interchangeably in this study.

1.7.2 “Abolitionist” / “*de facto* abolitionist” / “retentionist”

Generally, with regard to the status of the death penalty, states are placed into three categories – abolitionist, *de facto* abolitionist and retentionist states. States that fall under the category “abolitionist” are those that have abolished the death penalty for all crimes (in law and in practice). “*De facto* abolitionist” or abolitionist in practice is used to refer to states that retain the death penalty in law but have not carried out any executions for the past ten years (1994 - 2004) or more, and some have made an international commitment not to do so. States classified as “retentionist” are those that retain and use the death penalty, and have carried out executions in the past ten years.⁶³

It should be noted that this taxonomy, though used in this study, is problematic. Caution has to be taken in classifying a state that retains the death penalty in its law as abolitionist in practice. Some African states are classified as retentionists, though they have not carried out executions in the past ten years.⁶⁴

⁶² *Duhaime's Online Legal Dictionary*, available at website
<<http://www.duhaime.org/dictionary/dict-d.aspx>> (accessed 17 November 2004).

⁶³ As noted in chapter two of this thesis, considerable caution has to be taken in applying the ten years limit, as not all countries that fulfil the ten-year criterion are classified as abolitionist in practice.

⁶⁴ See chapter two (2.3.1) of this thesis for further explanation. The taxonomy of African states has therefore been highlighted as one of the limitations of this study because of its problematic nature.

1.7.3 “Mitigating” factor / “extenuating” circumstance

“Mitigating” has been defined as “make less severe, serious, or painful”,⁶⁵ “extenuating, justifying, diminishing, qualifying”⁶⁶ and “extenuating” as “lessen the seriousness of (guilt or an offence) by reference to mitigating factors”,⁶⁷ “mitigating, lessening, diminishing, justifying”.⁶⁸

Apparently, both terms are synonymous. However, the term “mitigating factor” has a wider connotation than an extenuating circumstance. In criminal law, “an extenuating circumstance is a fact associated with a crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner’s guilt”.⁶⁹ Thus, the circumstance must be related to the crime. The term mitigating factor can include factors unrelated to the crime, such as an accused’s behaviour after the crime has been committed or the fact that he or she has a clean record.⁷⁰

Considering the severe nature of the death penalty, the term “mitigating factor” is preferred in this study, as it has a wider connotation. The term “extenuating circumstances” is used in the study in cases where the legislation of a specific African state under discussion employs the term.

1.8 Overview of chapters

The study comprises seven chapters, with chapters four, five and six focussing mainly on the human rights perspective of the death penalty in Africa.

⁶⁵ *The Concise Oxford Dictionary* (1999) 913.

⁶⁶ *The Oxford Thesaurus* (1991) 274.

⁶⁷ *The Concise Oxford Dictionary* (1999) 503.

⁶⁸ *The Oxford Thesaurus* (1991) 131.

⁶⁹ Claassen (1997) E-74.

⁷⁰ Du Toit et al (1993) 28-11.

Chapter one is the introduction chapter, which sets out the background to the study, including the research questions and objectives of the study, and reviews the existing literature on the subject. It further states the methodology employed, outlines the structure of the study, and specifies the significance and limitations of the study.

Chapter two provides an overview of the history, current status and operation of the death penalty in Africa. It begins by providing a brief global history to the death penalty and then discusses the historical background to the death penalty in Africa from a traditional and western perspective. Then, an analysis of the status and scope of the death penalty in Africa is undertaken. The application of the death penalty in Africa is then discussed. First, the application of the law in capital trials under three headings – pre-trial, trial and post-trial phases - is considered. Second, the death row situation in law and practice of African states that still retain the death penalty, the execution and last, the scale of death sentences and executions are discussed. The chapter, therefore, surveys the trends regarding the death penalty on the African continent, and looks at the reasons for these trends.

Chapter three considers the validity of the main arguments by Africans for the retention of the death penalty in Africa. In addition to the examples and cases from African states to substantiate certain arguments, reference is also made to examples or cases from outside Africa. These arguments are discussed with a view to providing the reader with an understanding of the reasons why most African states retain the death penalty, and also to show how fundamentally flawed the arguments advanced by Africans for the retention of the death penalty are.

Chapter four examines the right to life and its relation to the death penalty in Africa, in the light of the protection afforded by various human rights instruments at the international and national levels. The chapter considers the right to life in the UN human rights system, the African system and highlights the right to life under other regional systems. The right to life in African national constitutions is also discussed, highlighting the obstruction caused by the formulation of right to life provisions, to challenges to the death penalty in Africa. The chapter reveals that the death penalty is a violation of the right to life.

Chapter five analyses the death penalty in Africa in the light of the prohibition of cruel, inhuman and degrading treatment or punishment, both at the international and national levels. Provisions in African national constitutions on the right not to be subjected to cruel, inhuman and degrading treatment or punishment are examined, with a view to establishing the ways in which the death penalty in Africa violates the above right and what causes obstruction to challenges to the death penalty in Africa. The death row phenomenon and methods of execution are then considered, which together with the above, establishes that the death penalty in Africa is cruel, inhuman and degrading.

Chapter six examines fair trial rights and their relation to the death penalty in Africa. In addition to discussing fair trial rights at the UN human rights system, in relation to capital trials, these rights are also discussed in the light of capital trials in Africa. Capital trials are discussed to ascertain if fair trial rights are respected in such trials. Due to the severe nature of the death penalty, non-respect for fair trial rights requires that the death penalty be set aside. The chapter further discusses the consequences of not adhering to fair trial standards such as increase risk of execution of the innocent, disproportionate and arbitrary use of the death penalty, which makes it necessary for African states to consider abolishing the death penalty.

Chapter seven, based on the discussions in the previous chapters, establishes the appropriateness for African states to join the international trend for the abolition of the death penalty. It provides recommendations geared towards the abolition of the death penalty in Africa and how these could be implemented in practice.

1.9 Limitations of the study

1.9.1 Generalisation about Africa

Since this study is directed towards the current trends on the death penalty in Africa as a whole, there is the danger of over-generalisation. Africa is not homogeneous and as a result, general trends are not always representative of country-specific issues. Consequently, this study does not provide an exhaustive analysis of the death penalty in Africa, but highlights the most important issues, which are then extrapolated to

Africa as a whole. In any event, conclusions can still be drawn on the basis of general trends and not only on a totality of complete data.

1.9.2 Inaccessibility of data and materials

The scarcity of, and inaccessibility to, some data and materials, especially that on the number of death sentences passed or executions carried out, has been a limiting factor. It has not been possible to present a completely accurate picture of the death penalty in Africa because of the lack of systematically statistical data on the subject, and because states do not take seriously their obligation to report their practice to the UN as requested, by either failing to report regularly or by giving false information.⁷¹ Accordingly, the study does not provide a country-by-country analysis of the death penalty in Africa, but draws examples from specific African states where relevant.

Furthermore, information on the death penalty in some African states is sometimes not published, which is exacerbated by the fact that there is absence of accurate criminal statistics in some of these states. Access to decisions by African national courts on the death penalty has been a difficult task, as very few law report series are published in African states. In some states where law report series are in fact published, they are usually not kept up to date. Thus, one has to resort to personal contacts in gathering information on the subject. Also, the limited publications on the subject meant that the study had to rely on limited secondary sources.

1.9.3 Analysing criminological arguments

The study may not have analysed the criminological arguments (in chapter three) as would have been addressed by a criminologist or thoroughly from a criminologist's point of view, as the author is not a criminologist. However, an attempt has been

⁷¹ Under the UN system, article 40 of the ICCPR (adopted by the UN General Assembly in 1966, entered into force in 1976) requires states parties to submit reports on the measures they have adopted to give effect to the rights recognised in the Covenant and on the progress made in the enjoyment of those rights. Also, under the African system, article 62 of the African Charter requires each state party to submit every two years a report on the legislative and other measures taken with a view to giving effects to the rights and freedoms recognised and guaranteed by the Charter. For the submission status of initial and periodic reports under the African Charter, see website <http://www.achpr.org/english/_info/status_submission_en.html> (accessed 17 March 2005).

made to do so, focussing on legal and human rights implications rather than presenting an in-depth criminological analysis.

1.9.4 Taxonomy of African states

The categorisation of African states into abolitionist, *de facto* abolitionist and retentionist states might be problematic, as it was based on data known to the author. Since at times statistics on the death penalty are not published, some states might be referred to as, for example, retentionist, that a reader from that country might feel should not be categorised as such, as the reader may have more exact or intimate knowledge or information of a particular case.

1.9.5 Time frame

The time frame for carrying out the research limits the proper evaluation of certain facts that has to be done over a longer time period. It is also worth noting that all data and events are updated as on 31 March 2005, implying that occurrences after the above date may diminish the relevance of aspects of the study. Since deadlines are inevitable and parts of the study will inevitably become outdated soon (for example, the status of the death penalty in Africa may change), the study should be seen as a work in progress, that can be updated by other studies in the future.

1.10 Conclusion

Studies on issues regarding the death penalty in Africa are becoming more important as the death penalty is seen to be a major threat to human rights, specifically the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment. As Hood points out, it seems that there is nothing new to say about the death penalty, as the arguments remain essentially the same.⁷² However, the nature of the debate has moved on. Procedural guarantees to reduce the risk of arbitrariness in legal procedure have been included in the debate. More convincing evidence is being introduced in new studies regarding the shortcomings of the death penalty, which will

⁷² Hood (2002) 7.

help the move towards abolition. Greater emphasis on the human rights perspective on the death penalty, as is done in this thesis, will add greatly to the moral force furthering the abolitionist movement.

CHAPTER TWO

HISTORY, CURRENT STATUS AND OPERATION OF THE DEATH PENALTY IN AFRICA

- 2.1 Introduction
- 2.2 Historical background to the death penalty in Africa
- 2.3 An analysis of the current status and scope of the death penalty
 - 2.3.1 Status of the death penalty
 - 2.3.2 Scope of the death penalty
 - 2.3.2.1 Restrictions on the imposition of the death penalty
 - 2.3.2.2 Offences for which the death penalty is imposed in Africa
- 2.4 Application of the death penalty in African states
 - 2.4.1 The application of the law in capital trials
 - 2.4.1.1 Pre-trial phase
 - a. Investigations
 - b. Bail
 - 2.4.1.2 Trial phase
 - a. Evidence
 - b. Mitigating factors
 - 2.4.1.3 Post-trial phase
 - a. Constitutional challenges
 - b. Pardon or commutation
 - 2.4.2 The question of the mandatory imposition of the death penalty
 - 2.4.3 Death row
 - 2.4.4 Execution
 - 2.4.5 Scale of death sentences and executions between 2000 and 2004
- 2.5 Conclusion

2.1 Introduction

The death penalty has been seen as one of the dramatic symbols of the presence of sovereignty in states where sovereignty is fragile, and the maintenance of the death penalty in such states is a demonstration that sovereignty could reside in the people.¹ Therefore, from a political standpoint, the death penalty is an expression of the absolute power of the state.

The African Charter makes no mention of the death penalty or the need to abolish it.² Nonetheless, it invites recourse to international law on human and peoples' rights, including the Universal Declaration of Human Rights (UDHR)³ and other instruments adopted by the UN.⁴ Although falling short of total abolition, other African human rights instruments at least make reference to the death penalty. The African Charter on the Rights and Welfare of the Child (African Children's Charter)⁵ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)⁶ place restrictions regarding the imposition of the death penalty on certain category of persons - persons below eighteen years of age and expectant mothers or mothers of infants and young children. Notwithstanding the African Charter's silence on the death penalty, it is provided for in the laws of African states that still retain it, for example, Ghana, Lesotho, Nigeria and Swaziland.⁷

¹ Sarat (1999) 5.

² Article 4 prohibits the "arbitrary" deprivation of life, which some could interpret as permitting the death penalty.

³ Adopted on 10 December 1948 (G.A. res. 217A (III), UN Doc. A/810 at 71).

⁴ Article 60 of the African Charter.

⁵ Adopted in July 1990 and entered into force on 19 November 1999 (OAU Doc. CAB/LEG/24.9/49 (1990). See articles 5(3) & 30(e).

⁶ Adopted by the 2nd Ordinary Session of the Assembly of the African Union (AU) in Maputo, 11 July 2003, article 4(2)(j).

⁷ Section 32(a)(vii) of the Sexual Offences Act No. 3 of 2003 of Lesotho; sections 37(2), 38 319(1) & 402(2)(a)(b), of the Criminal Code Act Cap 77 Laws of the Federation of Nigeria 1990 and sections 221, 227 & 515(2) of the Penal Code Act Cap 345 Laws of the Federation of Nigeria 1990; section 296(1) of the Criminal Procedure and Evidence Act No. 67/1938 of Swaziland; and sections 46, 49 & 180 of the Criminal Code Act 29 of 1960 of Ghana.

Furthermore, different reasons have been presented which make recourse to the death penalty appear necessary.⁸ Conversely, more convincing arguments have been raised for the abolition of the death penalty, such as, it is a violation of human rights – the right to life, the right not to be subjected to cruel, inhuman and degrading treatment or punishment and fair trial rights.⁹

Therefore, the retention or use of the death penalty in Africa is a matter of concern, as it contravenes international human rights law standards and defies the international community's efforts to abolish it. International developments, and even developments in Africa, reveal a trend towards abolition of the death penalty.¹⁰ These developments raise serious questions for those countries in Africa that still retain and use the death penalty.

This chapter provides an overview of the history, current status and operation of the death penalty in Africa.¹¹ It begins by providing a brief global history to the death penalty and then discusses the historical background to the death penalty in Africa from a traditional and western perspective. Then, an analysis of the status and scope of the death penalty in Africa is undertaken. The application of the death penalty in African states is then discussed. First, the application of the law in capital trials under three headings – pre-trial, trial and post-trial phases - are considered. Second, the death row situation in law and practice of retentionist African states and last, the methods of execution and scale of death sentences and executions are discussed.

⁸ These reasons are discussed in chapter three of this thesis. They include the arguments by defenders of the death penalty that it serves as a deterrent, it meets the need for retribution, public opinion demands its imposition, major religions allow for its imposition and the prison as a rehabilitative environment is ineffective.

⁹ See chapters four, five & six respectively, for a discussion of the above rights in relation to the death penalty in Africa.

¹⁰ See chapter seven of this thesis.

¹¹ It should be noted that this chapter does not cover all African states, but highlights the main trends. It deals with specific countries and their experiences are extrapolated to observations about Africa as a whole.

2.2 Historical background to the death penalty in Africa

The death penalty has been with mankind since antiquity.¹² Globally, it dates as far back as the fifth century B.C. in the Roman Law of the Twelve Tablets, the seventh century B.C.'s Draconian Code of Athens, and the 14th century B.C.'s Hittite Code.¹³ The death penalty was also part of the Code of King Hammurabi of Babylon (18th century B.C.).¹⁴

The first methods of execution were crucifixion, drowning, beating to death, burning to death and impalement, and later in the 10th century A.D., hanging became the usual method of execution in Britain.¹⁵ In the 16th century, methods of execution were boiling, burning at the stake, hanging, beheading and drawing and quartering.¹⁶ During the 18th century, methods of execution included burning at the stake, the wheel, the guillotine, hanging and the garrote, headman's axe, and later, electrocution, gas chamber, firing squad, hanging and lethal injection.¹⁷

The “death penalty” has, arguably, been used since pre-colonial times in some African societies.¹⁸ The penalty for sorcery or witchcraft, wilful murder, treason and certain types of political offences, was death by shooting, spearing, hanging, drowning or impalement of the convicted person.¹⁹ The above offences were seen in pre-colonial

¹² Schabas (2002) 363.

¹³ As above.

¹⁴ The death penalty was codified for 25 crimes. See “Capital Punishment” <<http://www.heraldez.com/CP.htm>> (accessed 4 July 2004).

¹⁵ See “Capital cases: History of the death penalty” <<http://www.georgetown.edu/users/aaa38/capital.htm>> (accessed 4 July 2004).

¹⁶ As above. Executions were carried out for such capital offences as marrying a Jew, not confessing to a crime, and treason.

¹⁷ Life in prison was also starting to be used as a feasible alternative to the death penalty. See “Capital Punishment” <<http://www.heraldez.com/CP.htm>> (accessed 4 July 2004).

¹⁸ It should be noted that as a result of the limited reliable information on traditional African societies, much of our understanding of notions of crime and punishment in such societies is based on research carried out by anthropologists.

¹⁹ Elias (1956) 260.

African societies as threatening the security of the community, which could not be redressed by the payment of compensation to the victim.²⁰ The penalty of death was used in, for example, pre-colonial Uganda,²¹ Nigeria²² and Sierra Leone.²³ However, death was imposed when the “criminal” was caught in the act and in some cases, the infliction of death was a consequence of practices such as “trials by ordeal” (discussed in chapter three), used to ascertain guilt.²⁴ Further, as seen in the subsequent chapter, there was much reliance on compensation, implying that the “death penalty” existed as an exception not as a law. It was not institutionalised as it is at present. Therefore, considering the current operation of the death penalty in Africa, referring to the taking of life in pre-colonial African societies as “the death penalty” is problematic.²⁵

The colonial period saw the introduction of a range of punishments that were largely unknown to pre-colonial African societies and the adoption of sentencing policies based on principles of retribution and deterrence.²⁶ In some African states, the institutionalised system of the death penalty was introduced by the colonial powers. For example, in South Africa, the death penalty was brought by the colonial powers

²⁰ Hatchard & Coldham (1996) 156.

²¹ In pre-colonial Uganda, for example, the Lango imposed a mandatory “death sentence” for those caught in the act of witchcraft, incest and sexual aberrations. These offences fell under criminal offences, which were considered offences against the society generally and not compoundable. Homicide (accidental or deliberate, immediate or protracted) was classified under civil offences, which are offences against individuals and not the society and therefore compoundable by a compensatory payment (Driberg (1923) 209). The Baganda imposed death for murder and adultery (Elias (1956) 135-136). The Bagisu imposed the death penalty on someone who caused fatal sickness on another and murder, the Basoga on a confirmed thief, and the Bakyiga for murder. Compensation was also an option with regard to the above offences. Among the Basoga, the thief was put to death by being speared, while with the Bakyiga, a murderer was either strangled or buried alive in the grave, and beneath the body, of his victim (see Roscoe (1924) 39-40, 42, 102 & 118).

²² Among the Yoruba of southern Nigeria, death was the penalty for adultery with chief’s wives (Talbot (1926) 629). Death was also imposed for murder in western Nigeria. Also, under Sotho traditional law, notorious stock thieves were sometimes put to death (Duncan (1960) 112).

²³ Death was also a form of punishment (for witchcraft and cannibalism) in pre-colonial Sierra Leone (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)).

²⁴ For example, among the Yoruba-speaking peoples of West Africa, trial by ordeal was used to ascertain guilt. See Ellis (1966) 190.

²⁵ This is further elaborated on in chapter three (3.3.2) of this thesis.

²⁶ Hatchard & Coldham (1996) 157.

that settled and governed at the Cape.²⁷ Crimes that could attract the death penalty included murder, rape, treason, arson, theft, robbery, fraud, sodomy, bestiality and incest.²⁸ In Dutch settlements (for example, in South Africa), the death sentence was used. Judges specified in detail “gruesome modes of execution designed to produce maximum pain and greatest indignity over the longest periods” and executions were carried out in public.²⁹ The reason being that the death penalty was seen as a deterrent to crime.

With the introduction of British rule in some parts of Africa, customary law was recognised by the colonial authorities if it was not repugnant to natural justice, equity and good conscience, and not inconsistent with the written law.³⁰ Throughout most of British colonial Africa, for example, codes of criminal law and procedure of very similar origin were introduced.³¹ The penal codes were based on 19th century English criminal law, and the principles of criminal liability, definition of offences and penalties made no concession to the African context.³² There was a marked reluctance through out most of British colonial Africa to take into consideration customary notions of compensation and restitution.³³

Nevertheless, compensation was still resorted to in some states. In Uganda, for example, homicide was normally settled by a payment of blood-money comprising seven head of cattle to the next-of-kin of the deceased, but in the case of intra-family homicide, the death penalty was exacted as it was considered inappropriate to allow family cattle to be forfeited by one member to another as compensation.³⁴ In Commonwealth African states, the death penalty was mandatory for murder, treason,

²⁷ See Devenish (1990) 4; and Sarkin (1996) 73.

²⁸ Devenish (1990) 4-5.

²⁹ *S v Makwanyane* 1995 (3) SA 391, para 384 (hereinafter referred to as *Makwanyane* (1995)).

³⁰ Coldham (2000) 219.

³¹ Hatchard & Coldham (1996) 156.

³² Read (1965) 7.

³³ Coldham (2000) 220.

³⁴ Elias (1956) 135.

certain forms of piracy, and “black peril” (the rape of a European woman by an African man), with hanging being the usual method of execution.³⁵ The most common method of execution in the first years of colonial rule was shooting, and executions were carried out in public till the 1930s.³⁶

In post-colonial Africa, there were no significant changes in penal policies, as the policies of independent African governments showed a remarkable continuity with those of their colonial predecessors and there was still emphasis on retribution and general deterrence rather than, for example, rehabilitation of the offender.³⁷ In most countries, for example in Nigeria, customary criminal law was abolished and steps were taken to incorporate the customary court’s structure into the penal system.³⁸ The death penalty remained a punishment and some countries even extended its scope.³⁹

2.3 An analysis of the current status and scope of the death penalty in Africa

2.3.1 Status of the death penalty

At the international level, a majority of countries in the world have now abandoned the use of the death penalty. By the end of March 2005, 84 countries had abolished the death penalty for all crimes, 12 had abolished it for all but exceptional crimes such as wartime crimes, and 24 had abolished it in practice (*de facto* abolitionists). This makes a total of 120 countries in the world that have abolished the death penalty in law or practice. 76 other countries retain and use the death penalty (retentionists).⁴⁰

³⁵ Hatchard & Coldham (1996) 157.

³⁶ Although the most common method of execution was shooting, death by beheading continued in Nigeria until 1936. By the 1930s most executions took place in central government prisons (Hatchard & Coldham (1996) 157).

³⁷ Coldham (2000) 223.

³⁸ Hatchard & Coldham (1996) 157.

³⁹ For example, a wide range of economic and political offences was made capital in Nigeria and Ghana during periods of military rule.

⁴⁰ Amnesty International, “Facts and figures on the death penalty” AI Index: ACT 50/006/2005, 5 April 2005.

In Africa, as of the end of March 2005, 12 countries had abolished the death penalty for all crimes, 18 had abolished it in practice⁴¹ and 23 still retain and use the death penalty.⁴² The countries that had abolished the death penalty for all crimes are Cape Verde (1981), Mozambique (1990), Namibia (1990), São Tomé and Príncipe (1990), Angola (1992), Guinea Bissau (1993), Seychelles (1993, abolished the death penalty for ordinary crimes in 1979), Mauritius (1995), Djibouti (1995, only one person had received a death sentence since independence in 1977 and the sentence was commuted), South Africa (1997, abolished the death penalty for ordinary crimes in 1995), Côte d'Ivoire (2000) and Senegal (2004).⁴³

It is interesting to note that among the first African states to abolish the death penalty are five former Portuguese colonies – Angola, Cape Verde, Mozambique, Guinea Bissau and São Tomé and Príncipe. Their abolition of the death penalty could be, to a great extent, attributed to colonial influence. Portugal abolished the death penalty for political offences in 1852, for ordinary crimes in 1867 and for all crimes in 1976.⁴⁴

Accordingly, the death penalty was never introduced into the legislation of Portugal's colonies. For example, in Cape Verde and Guinea Bissau, the death penalty did not exist during the colonial period. When Cape Verde gained independence, it did not include the death penalty in its criminal legislation.⁴⁵ Guinea Bissau introduced the death penalty at independence in 1974, but strong opposition to it in the 1980s

⁴¹ African states that are considered abolitionists in practice are: Benin (1993), Burkina Faso (1988), Central African Republic (1981), Congo (1982), Eritrea (1989), Gabon (1981), Ghana (1993), The Gambia (1981), Kenya (1987), Madagascar (1958), Malawi (1992), Mali (1980), Mauritania (1989), Morocco (1993), Niger (1976), Swaziland (1989), Togo (1979), and Tunisia (1991). The date included is the date of last execution.

⁴² Retentionist African states are: Algeria, Botswana, Burundi, Cameroon, Chad, Comoros, Democratic Republic of Congo, Egypt, Equatorial Guinea, Ethiopia, Guinea, Lesotho, Liberia, Libya, Nigeria, Rwanda, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.

⁴³ The figures referred to above were based on information from Hood (2002); Hands Off Cain (2004); Amnesty International, "Facts and figures on the death penalty" AI Index: ACT 50/006/2005, 5 April 2005; Death Penalty Information Center <<http://www.deathpenaltyinfo.org>> (accessed 31 March 2005); and "Senegal scraps death penalty" <<http://new24.com>> (accessed 14 December 2004).

⁴⁴ See Hood (2002) 250.

⁴⁵ Amnesty International, "West Africa: Time to abolish the death penalty" AI Index: AFR 05/003/2003, 10 October 2003.

culminated in its abolition in 1993.⁴⁶ Therefore, the abolition of the death penalty in former Portuguese colonies could be attributed to the fact that the death penalty was not engraved in the criminal system, as it was not used during the colonial period in these states, and to constitutional reviews leading to abolition in the case of Angola and Guinea Bissau.⁴⁷

As seen in chapter one, states are placed into three main categories – abolitionists, abolitionists in practice and retentionists. It is my view that the projection of some states as abolitionists in practice and others as retentionists is problematic. Those considered abolitionists in practice, still retain the death penalty in their statutes, which raises doubts as to their commitment to the *de facto* abolitionist status. Thus, not all countries that fulfil the ten-year criterion are classified as abolitionists in practice.

Although Amnesty International uses the above taxonomy, it has advised that caution be taken in classifying a state that retains the death penalty in its law as abolitionist in practice.⁴⁸ With regard to African states, considerable caution needs to be taken because, for example, some African states have been previously *de facto* abolitionists for more than ten years, but are now retentionists. Current retentionist African states that have previously been *de facto* abolitionists include the following: Libya was *de facto* abolitionist for 23 years, but resumed executions in 1977; Cameroon had been *de facto* abolitionist for 11 years (1988 – 1997); Comoros had been *de facto* abolitionist for 22 years (1975 – 1997); Guinea had been *de facto* abolitionist for 17 years (1984 – 2001); and lastly, Burundi had been *de facto* abolitionist for 12 years (1981 – 1993).

The question then is why did the governments in these states resume executions? The Tanzanian Court of Appeal has also questioned why Tanzania resumed executions. It

⁴⁶ As above.

⁴⁷ Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997. With regard to what led to abolition in other abolitionist African states, see chapter three (3.7) of this thesis.

⁴⁸ The death penalty: Amnesty International Report (1979) AI Index: ACT 05/03/79.

stated in *Mbushuu and Another v The Republic* - “it is common knowledge that after [the execution] in the early 1970s, there were no more hangings until 1985. Why were executions resumed?” It went further to say that “no research on this has been conducted in Tanzania”.⁴⁹ Also, some current abolitionists in practice had at some point put in place a moratorium on executions, or had not carried out executions for more than ten years, but resumed after this period.⁵⁰

For some of the above states, some of the reasons for the resumption of executions are clear. The resumption of execution in Burundi, for example, is as a result of the October 1993 massacres of Tutsi civilians that followed the assassination of the president.⁵¹ In Comoros, the resumption of execution was justified on the basis that the death penalty is a deterrent. In 1996, the year before the resumption of execution, Taki (then president of Comoros), in ordering the resumption of the death penalty, stated the following: “Someone who is tempted to kill a fellow human being will think twice before carrying out his foul enterprise.”⁵²

In Libya, the resumption of execution could be attributed to political reasons as the first executions after 23 years were for political offences.⁵³ Similarly, the resumption of execution in Chad in 2003, after a period of 12 years (1991-2003), has been attributed to security opportunism (the Chadian authorities used the rising insecurity in the country to justify the resumption of the death penalty) and the settling of scores

⁴⁹ See *Mbushuu and Another v The Republic* [1995] ILRC 216, 232 (hereinafter referred to as *Mbushuu* (1995)).

⁵⁰ These *de facto* abolitionist countries include: Benin, which had stayed for 12 years without carrying out executions, but resumed in 1986. The last execution in Benin was carried out in 1993, and there have been no executions till the present date. The Gambia also had not carried out any executions for 16 years, but resumed in 1981. Since its last execution in 1981, no executions have been carried out till present date. Moreover, The Gambia abolished the death penalty in April 1993 but it was reinstated by the military regime in August 1995.

⁵¹ Amnesty International, “Death penalty / fear of imminent execution / unfair trial” AI Index: AFR 16/07/00, 13 April 2000.

⁵² Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

⁵³ Amnesty International (1989) 168-169.

leading to the manipulation of justice to hide the reality of crime and the identity of the authors.⁵⁴

For other states, it is not clear why they resumed executions after a long while. The reasons for their resumption of executions are not clear, due to a lack of information on the subject, which is as a result of the fact that states do not take seriously their obligations to report their practices on the death penalty to the UN as required under article 40 of the ICCPR.⁵⁵ Moreover, due to the veil of secrecy under which death penalty matters are handled, such reasons are usually regarded, as state secrets as they are not made public. However, it is suggested that, generally, their resumption of executions could be attributed to the arguments advanced for its retention in most African states.⁵⁶ It is also easy for them to resume executions as the death penalty was still in their penal statutes. Their resumption of executions could also be attributed to the symbolic nature of the death penalty or to political reasons. As noted above, the death penalty has been seen as one of the dramatic symbols of the presence of sovereignty, and its maintenance is an illustration that sovereignty could reside in the people.

Considering the aforesaid, two questions come to mind with regard to African states that are currently considered as abolitionists in practice. Firstly, will these states not resume executions since the death penalty is provided for in their constitutions or penal statutes? Secondly, where the death penalty is pronounced in accordance with the law, is there a practice, in respect of *de facto* abolitionist, that demands commutation to prevent executions?

⁵⁴ International Federation of Human Rights, “Death penalty: Ending a moratorium, between security opportunism and settling of scores” September 2004. Report available at <http://www.fidh.org/article.php3?id_article=1976> (accessed 7 March 2005).

⁵⁵ Hood (2002) 3.

⁵⁶ See chapter three of this thesis for a discussion of these arguments.

With regard to the first question, it would appear that the fact that the death penalty is in their statutes signals their intention of resuming executions at any time.⁵⁷ This conclusion is based on the statistics mentioned above of African states that have not carried out executions for more than 10 years, but resumed them later. As long as the death penalty remains in the statutes of *de facto* abolitionist states, there is a possibility of them resuming executions at any time. These states cannot guarantee that they would not resume executions. In this regard, Hood states as follows:

Given the large number of countries that have abolished the death penalty *de jure*, it is less necessary or politically advantageous than hitherto to treat any ten-year abolitionists *de facto* states as if they were a subcategory of the abolitionist group. Rather, *until they have given clear indications of their intention to remove capital punishment from their legislation and to subscribe to international conventions that ban its reintroduction*, it would, in my view, be more accurate and safer to classify countries that have not executed anyone for at least ten years, but still retain capital punishment on their statute books, as a subcategory of retentionists, rather than abolitionists, states.⁵⁸

It is my view, and based on the above, that giving a clear indication of an intention to remove capital punishment only does not suffice as a guarantee that abolitionist in practice states will not resume executions. In addition, these states have to ratify international instruments aiming at the abolition of the death penalty.⁵⁹ The fact that only total abolitionist states in Africa have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), aiming at the abolition of the death penalty, shows that these *de facto* abolitionist states have an intention of resuming executions at any time.⁶⁰ It is therefore recommended that for these states to be seen as true abolitionists in practice, they have to ratify the above

⁵⁷ This has been an issue of concern in Malawi. In the *First Draft of the National Plan of Action for the Promotion and Protection of Human Rights in Malawi*, it was stated that the fact that the death penalty has not been executed over the past years does not guarantee that it cannot be executed in the future. It was further stated that retention of the death penalty in the statutes is worrisome to the right to life.

⁵⁸ Emphasis added. Hood (2002) 13.

⁵⁹ Ratification in itself is not sufficient, as some states have withdrawn from international human rights treaties because they could not fulfil their obligations under such instruments (see the introduction chapter and chapter five of this thesis). Thus, a clear indication has to be followed by ratification of international instruments aiming at the abolition of the death penalty, domestication of the standard in these instruments and total abolition, which will have more force if it is enshrined in the constitution.

⁶⁰ See chapter one of this thesis for a list of the African states that have ratified or signed this Protocol.

Protocol and other human rights instruments geared towards abolition, or restricting the application, of the death penalty. They should have in mind the goal of total abolition of the death penalty.

Concerning the second question, it cannot be said that there is a “practice”⁶¹ that demands a commutation to prevent executions in respect of all *de facto* abolitionist African states. This is so because the commutation of death sentences is not constant and no trend has been established towards commutation of death sentences in these states. Moreover, there are still many people under the sentence of death (on death row) in most *de facto* abolitionist states, implying that the commutation of death sentences has not been ongoing.⁶² The fact that there is no “practice” to commute death sentences in all abolitionists in practice states also goes to show that these states could resume executions at anytime.

Generally, commutation of death sentences has taken place in some African states. For example, death sentences have been commuted in Gabon⁶³ and Lesotho.⁶⁴ In Nigeria, in 2000, amnesty was granted to prisoners under sentence of death.⁶⁵ In October 2001 in Algeria, 115 death sentences were commuted (15 of them to 20 years’ imprisonment and 100 had theirs commuted to life imprisonment).⁶⁶ 100 death sentences were commuted to life imprisonment in 2002 in Tanzania.⁶⁷

⁶¹ “Practice” here refers to an exercise that is constant (unremitting). Under international law, a practice has to constitute constant and uniform usage and can be found in, for example, the decisions of national courts, national legislation, diplomatic correspondence, policy statement by government officers, and opinions of national law advisers (see Dugard (2000) 28).

⁶² For example, in Kenya by the end of 2003, there were 3200 people on death row (see *Amnesty International Report* (2004) 57).

⁶³ Second periodic report of Gabon submitted under article 40 of the ICCPR, UN Doc. CCPR/C/128/Add.1, 14 June 1999, para 15 (hereinafter referred to as second periodic report of Gabon).

⁶⁴ Initial report of Lesotho submitted under article 40 of the ICCPR, UN Doc. CCPR/C/81/Add.14, 16 October 1998, para 61 (hereinafter referred to as initial report of Lesotho).

⁶⁵ “No to the death penalty: International campaign”
<<http://www.santegidio.org/en/pdm/colosseo.htm>> (accessed 20 December 2003).

⁶⁶ Amnesty International *The death penalty worldwide: Developments in 2001* (2002) AI Index: ACT 50/001/2002.

⁶⁷ “Tanzania: Mkapa commutes 100 death sentences to life”
<http://www.santegidio.org/pdm/news2002/18_04_02_d.htm> (accessed 20 December 2003).

In 2003 in Kenya, 195 death sentences were commuted and 28 others (those who had served 15-20 years) were released.⁶⁸ In June 2003 in Ghana, the president granted amnesty to 179 prisoners that had spent at least 10 years on death row.⁶⁹ The president of Zambia, on 27 February 2004, quashed the death sentences imposed on 44 soldiers convicted of treason in 1999 and replaced them with jail terms ranging from 10 to 20 years;⁷⁰ and in May 2004, commuted the death sentences of 15 prisoners and replaced them with sentences ranging from 20 to 50 years' imprisonment.⁷¹ 79 death sentences were also commuted in Malawi on 9 April 2004.⁷² Thus, although it is not yet a “practice” to commute death sentences in all African states that are abolitionists in practice, it should nevertheless be noted that these recent increase in commutations could be understood to imply a move towards non-implementation of the death penalty in these states.

2.3.2 Scope of the death penalty

This section deals with the restrictions on the imposition of the death penalty and range of crimes for which the death penalty may be imposed in Africa. Examples are drawn from some African states, as it is impossible to provide exact and current information for all African states. The death penalty is either mandatory or discretionary depending on the crime. As will be seen below, while some countries have done away with the mandatory death penalty, others still retain it for certain crimes. Also, the range of crimes for which the death penalty is or might be imposed varies from country to country. In some, it is extremely wide, while in others it has contracted or expanded.

⁶⁸ Hands Off Cain (2004) 50.

⁶⁹ See Hands Off Cain, “Africa: Moratorium on execution with a view to the abolition of the death penalty” December 2004 (Africa anti-death penalty project).

⁷⁰ As above.

⁷¹ Amnesty International, “The death penalty worldwide: Developments in 2004” AI Index: ACT 50/001/2005, 5 April 2005.

⁷² As above.

As will be seen below, standards on the death penalty are to the effect that the scope of the death penalty should not be extended but reduced, and prohibit non-retroactive use of the death penalty. Further, the wide scope of the death penalty in some countries is a matter of concern to the international community. For example, the Human Rights Committee, established under the ICCPR, has expressed concern about the wide scope of the death penalty in some African countries, including Algeria, Cameroon, Egypt, Libya, Morocco, Sudan, and Zambia.⁷³

2.3.2.1 Restrictions on the imposition of the death penalty

A number of restrictions have been placed on the imposition of the death penalty. Although the African Charter makes no mention of the death penalty, it can only be imposed if its imposition is not arbitrary. Thus, the limitation placed on its imposition is that it has to be imposed in accordance with the law, that is, substantive and procedural safeguards for its imposition have to be respected.⁷⁴ Similarly, under article 6 of the ICCPR, imposition of the death penalty is subject to respect for procedural safeguards for its imposition. Another restriction on the imposition of the death penalty is with regard to UN sponsored tribunals. The death penalty is excluded in such tribunals for grave international crimes. For example, the International Criminal Tribunal for Rwanda cannot impose the death penalty, as the ultimate penalty it can impose is life imprisonment.⁷⁵

The restrictions discussed in the subsequent paragraphs include reduction in scope, non-extension of scope, non-retroactive use of the death penalty, and non-imposition on certain categories of persons. It is important to note that the reintroduction of the death penalty by states that have already abolished it is a matter of concern. The only instrument that places such a restriction is the American Convention on Human

⁷³ See Hood (2002) 77, and the 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 12. The Committee noted with concern the very large number of offences punishable by death under Egyptian law.

⁷⁴ See chapter six of this thesis for a discussion of the procedural safeguards.

⁷⁵ Article 23(1) ICTR Statute. Similarly, the death penalty is excluded in the statute of the International Criminal Tribunal for the Former Yugoslavia 1993 (ICTY), article 24(1) and the statute of the International Criminal Court 1998 (ICC), article 77.

Rights (ACHR).⁷⁶ Article 4(3) prohibits the reestablishment of the death penalty in states that have abolished it. Such a provision fosters the abolition goal and is much needed in Africa so as to prevent states that have abolished the death penalty, without enshrining it in their national constitutions, from reintroducing it. The Gambia abolished the death penalty completely in 1993, but reintroduced it in August 1995.⁷⁷ If a similar provision existed in the African Charter, it would not have been possible for The Gambia to reintroduce the death penalty, unless, it denounced the African Charter.

One of the limits on the imposition of the death penalty is the emphasis on the reduction in scope, that is, reduction of the number of offences for which it is imposed. The UN General Assembly and UNCHR in a number of resolutions have emphasised the reduction in scope of capital punishment, as this is seen as a step towards its abolition. In resolution 32/61, the UN General Assembly stated that the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty is imposed with a view to the desirability of abolishing this punishment.⁷⁸

Similarly, the UNCHR, in resolution 1998/8, called upon states that still retain and use the death penalty to restrict the number of offences for which it is imposed. In order to effectively reduce the scope of the death penalty, it has to be imposed only for the most serious crimes.⁷⁹ Article 6(2) of the ICCPR provides that the death sentence be imposed only for the “most serious crimes”⁸⁰.

⁷⁶ Adopted in 1969, entered into force in 1978 (reprinted in *Basic documents pertaining to human rights in the Inter-American system*, OEA/Ser.L/V/I.4 Rev.9, 31 January 2003 at 27)

⁷⁷ Hood (2002) 42.

⁷⁸ Resolution 32/61 on “capital punishment”, adopted on 8 December 1977.

⁷⁹ UNCHR resolution 1998/8 on the “question of the death penalty”, adopted on 3 April 1998.

⁸⁰ The ICCPR has been ratified by 48 African states. See “Status of ratifications of the principal international human rights treaties” <<http://www.unhcr.ch/pdf/report.pdf>> (accessed 31 March 2005).

Therefore, African states that have ratified the ICCPR and still retain the death penalty can only impose it for the most serious crimes.⁸¹ The UN Human Rights Committee has interpreted article 6(2) of the ICCPR to mean, “the death penalty should be a quite exceptional measure”.⁸² Subsequently, the UN Economic and Social Council (ECOSOC) elucidated that the scope of the “most serious crimes” “should not go beyond intentional crimes with lethal or other extremely grave consequences”.⁸³

Further, the African Commission in its 1999 resolution called upon state parties that still maintain the death penalty to “limit the imposition of the death penalty only to the most serious crimes”.⁸⁴ Unfortunately, this phrase has been left open-ended, without any indications of what the most serious offences are.⁸⁵ Nonetheless, the death penalty for offences like apostasy, committing third homosexual act, and illicit sex (Sudan); offences relating to external and internal security and terrorism (Egypt); a person whose life endangers or corrupts society (Libya); aggravated robbery in which the use of firearms did not produce death or wounding of a person (Zambia);⁸⁶ and economic crimes and drug-related offences, is incompatible with the ICCPR and the African Commission’s resolution.

A second restriction on the imposition of the death penalty is non-extension of its scope. This is because extension of the scope of the death penalty raises questions

⁸¹ The UNHRC has encouraged some African state parties to the ICCPR to limit the application of the death penalty to the most serious crimes. For example, the Committee, while expressing concern about the vagueness of crimes for which the death penalty is imposed in Togo, recommended that the state party should limit the cases in which the death penalty is imposed to ensure that it is applied on for the most serious crimes. See 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.

⁸² UN Human Rights Committee, General Comment No. 6 on article 6 of the ICCPR, 30 April 1982, para 7, (UN Doc HRI/GEN/1/Rev.1 at 6 (1994)).

⁸³ Safeguard No. 1, UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, UN ECOSOC resolution 1984/50 of 25 May 1984, endorsed by the UN General Assembly in resolution 39/118, adopted without a vote on 14 December 1984 (hereinafter referred to as ECOSOC safeguards).

⁸⁴ *Thirteenth Annual Activity Report (1999-2000)* Annex IV.

⁸⁵ Viljoen (2004) 400.

⁸⁶ Hood (2002) 76 – 77.

regarding the compatibility of the extended scope with article 6 of the ICCPR. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that the scope of the death penalty should never be extended.⁸⁷ The UNCHR has also pointed out that extending the scope of the death penalty runs counter to the international community's expressed desire for the abolition of the death penalty.⁸⁸ Also, increasing the number of offences punishable by death, as was the case in Egypt in 2003, is incompatible with the ICCPR.⁸⁹

A third restriction is non-retroactive use of the death penalty. The principle of *nulla poena sine lege* is a basic principle of criminal law forbidding retroactive laws. This principle is to the effect that a criminal charge has to be based on a criminal offence as found in applicable written law at the time of the offence. As seen in article 6(2) of the ICCPR above, the death penalty can only be imposed for crimes that were capital offences in law at the time of the commission of the crime. This has been reiterated by ECOSOC safeguard No. 2, which goes further to state that if after the commission of the crime, there is provision by the law for the imposition of a lighter sentence, the offender has to benefit from the sentence. However, Burundi, Chad and Guinea have indicated that an offender under sentence will not be eligible to receive a lesser penalty than death as stated in ECOSOC safeguard No.2.⁹⁰ In addition, article 7(2) of the African Charter also prohibits non-retroactive use of the death penalty. It states:

No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed ...

⁸⁷ "Extrajudicial, summary or arbitrary executions" Report by the Special Rapporteur, UN Doc. E/CN.4/1997/60, 24 December 1996, para 78.

⁸⁸ Statement by the High Commissioner for Human Rights, 4 February 1998, UN Press Release. Referred to in Amnesty International, "International standards on the death penalty" AI Index: ACT 50/10/98, 1 December 1998, endnote 16.

⁸⁹ Following the suicide attacks in Casablanca on 16 May 2003, the Parliament of Morocco approved an anti-terror law that broadened the definition of terrorism and increased the number of offences punishable by death (see Hands Off Cain (2004) 109).

⁹⁰ Hood (2002) 78.

Some African states have incorporated similar provisions in their constitutions that prohibit retroactive imposition of the death penalty. For example, the constitutions of Ethiopia, 1994 (article 22); Zambia, 1996 (article 18(4)); and Ghana, 1996 (section 19(5)) prohibit retroactive imposition of the death penalty. Despite the provision in the African Charter, several countries in Africa have introduced the death penalty retroactively. This was the case in Sudan where in 1983, the death penalty was applied retroactively to adultery between married persons and in 1991 to apostasy, and Nigeria where in 1984, the death penalty was extended to apply retroactively to 19 offences including drug offences.⁹¹

However, there have been cases in which the trial court imposed the death sentence retroactively, and the sentence was set aside on appeal. For example, a *Shari'a* court in Gadabawa, Nigeria, sentenced Hussaini to death by stoning on 9 October 2001, for a crime that would never have attracted the death penalty but for the retroactive application of the *Shari'a* penal legislation.⁹² On 25 March 2002, the *Shari'a* Court of Appeal of Sokoto State in Nigeria ordered her acquittal on grounds that the alleged crime had taken place before the entering into force of the *Shari'a* penal legislation in Sokoto State.⁹³

A fourth restriction is the exclusion of the death penalty for certain categories of offenders: juvenile offenders, pregnant women, new mothers, people over 70 years of age, and persons who have become insane. Article 6(5) of the ICCPR excludes the death penalty for crimes committed by persons below eighteen years of age and further provides that the death penalty shall not be carried out on pregnant women.⁹⁴ It should be noted that article 6(5) does not prohibit the imposition of the death penalty on pregnant women as it uses the words “shall not be *carried out* on pregnant

⁹¹ Hood (2002) 77. Two men were executed for drug offences committed prior to the extension.

⁹² Amnesty International, “Nigeria: The death penalty and women under the Nigerian penal systems” AI Index: AFR 44/007/2004, 10 February 2004.

⁹³ As above.

⁹⁴ ECOSOC safeguard No. 3 also provides that persons below eighteen years of age shall not be sentenced to death, nor shall the death penalty be carried out on pregnant women, or new mothers, or on persons who have become insane.

women”.⁹⁵ However, it is clear that it prohibits the execution of such women. This means that if the death sentence is imposed on pregnant women, it can only be carried out after the pregnancy or be commuted. Similar to the ICCPR, the African Women’s Protocol prohibits the carrying out of death sentences on pregnant women.⁹⁶

Concerning juvenile offenders, article 37(a) of the UN Convention on the Rights of the Child (CRC) prohibits the imposition of capital punishment or life imprisonment without possibility of release for offences committed by persons below eighteen years of age.⁹⁷ The CRC has been ratified by all African states, except Somalia that has signed but not yet ratified the instrument.⁹⁸ Likewise, article 5(3) of the African Children’s Charter prohibits the imposition of the death penalty for crimes committed by children below the age of eighteen, and article 30(e) of the same Charter prohibits its imposition on expectant mothers or mothers of infants and young children. The difference between the ICCPR and the African Children’s Charter is that the latter prohibits the imposition of the death penalty on pregnant women, while the former merely prohibits its being carried out on pregnant women. This implies that under the former, the death penalty can be imposed on a pregnant woman, but cannot be carried out while she is pregnant.

With regard to pregnant women, the penal provisions of some African states have adopted the approach in the ICCPR, in which the death sentence if imposed, cannot be carried out, on a pregnant woman. Some states require that the death sentence, if imposed, should be commuted, while others require that it should be carried out after

⁹⁵ Emphasis added.

⁹⁶ Article 4(2)(j) of the African Women’s Protocol.

⁹⁷ Adopted in 1989, entered into force in 1990 (G.A. res. 44/25, UN Doc. A/44/49 (1989)). See also, article 77(5) of the Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 1977 (Protocol I), 1125 U.N.T.S. 3; article 6(4) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-international Armed Conflicts of 1977 (Protocol II), 1125 U.N.T.S. 609; and article 4(5) of the American Convention on Human Rights (ACHR) 1969, entered into force on 18 July 1978 (O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)).

⁹⁸ See “Status of ratifications of the principal international human rights treaties” <<http://www.unhcr.ch/pdf/report.pdf>> (accessed 31 March 2005).

the pregnancy. For example, article 118 of the Ethiopian Penal Code 1957 prohibits the imposition of the death penalty and execution of sick prisoners or pregnant women or nursing mothers. This section goes further than the ICCPR by providing that the death sentence may be commuted to rigorous life imprisonment.

On the other hand, section 33(2) of the Constitution of the Republic of Sudan 1998 prohibits the execution of pregnant or suckling women. It goes further by allowing such an execution to take place two years after lactation.⁹⁹ Unlike the Ethiopian Penal Code, there is no provision for commutation of the sentence. Similar to the provision in the Constitution of Sudan, article 436 of the Code of Criminal Procedure of Libya provides that the death penalty cannot be carried out on a pregnant woman until two months after her delivery.¹⁰⁰ In Libya, the time period after delivery is quite shorter than that in Sudan. Section 22(3) of the Cameroon Penal Code provides that a pregnant woman cannot be executed until after delivery.¹⁰¹ The difference with the situation in Sudan and Libya is that it does not specify the time within which the execution can take place after delivery. Likewise, in Egypt, the execution of the death penalty imposed on a pregnant woman shall be suspended until she has delivered her child.¹⁰²

Other African states have adopted the approach in the African Children's Charter, with regard to non-imposition of the death penalty on pregnant women. For example, section 211 of the Kenyan Penal Code 1985 provides that the death sentence shall not be passed on a woman who is pregnant. It further states that only a sentence of life can be passed. Section 212(3) of the same Code gives the Court of Appeal the power

⁹⁹ See also, section 193(2) of the Criminal Procedure Act of 1991.

¹⁰⁰ Third periodic report of Libya submitted under article 40 of the ICCPR, UN Doc. CCPR/C/102/Add.1, 15 October 1997, para 122 (hereinafter referred to as third periodic report of Libya).

¹⁰¹ The Penal Code was adopted by Law No. 67-LF-1 of 12 June 1967. Similarly, in the Penal Code of Senegal, pregnant women are excluded from the application of the death penalty until they have given birth. Fourth periodic Report of Senegal submitted under article 40 of the ICCPR, UN Doc. CCPR/C/103/Add.1, 22 November 1996, para 45 (hereinafter referred to as fourth periodic report of Senegal).

¹⁰² Article 476 of the Egyptian Code of Criminal Procedures. Cited in the comments by the government of Egypt on the concluding observations of the Human Rights Committee on the third and fourth periodic reports of Egypt, UN Doc. CCPR/CO/76/EGY/Add.1, 4 November 2003, para 11(g).

to quash a death sentence passed on a pregnant woman and substitute it with life imprisonment.

In the same way, in Ghana, section 312(1) of the Criminal Procedure Code Act 30, 1960 provides that a sentence of life imprisonment be passed on a pregnant woman and not the death sentence. Section 215 of the Criminal Procedure Act 1965 of Sierra Leone prohibits the imposition of the death penalty on a pregnant woman, and states that a sentence of life imprisonment be imposed. In Uganda, if a woman convicted of a capital offence is found to be pregnant, the sentence to be passed on her is life imprisonment instead of death.¹⁰³ Also, the death penalty cannot be imposed on a pregnant woman in Zimbabwe.¹⁰⁴ In Nigeria, although the Criminal Procedure Act and Criminal Procedure Code prohibit imposition of the death sentence on a pregnant woman convicted of a capital offence, *Shari'a* penal laws in some states allow for its imposition on such women.¹⁰⁵

With reference to juveniles, Prokosch has pointed out that the exclusion of juvenile offenders is so widely accepted in law and practice that it is approaching the status of a norm of customary international law.¹⁰⁶ In Kenya, it was held in *Turon v R* that a sentence of death should not be pronounced against a person under the age of eighteen

¹⁰³ Section 102 of the Trial on Indictments Decree 1971.

¹⁰⁴ Initial report of Zimbabwe submitted under article 40 of the ICCPR, UN Doc. CCPR/C/74/Add.3, 29 September 1997, para 65 (hereinafter referred to as initial report of Zimbabwe).

¹⁰⁵ In states that do not apply *Shari'a* penal laws, a convicted woman has the right to appeal against the finding of the court that she was not pregnant at the time of the conviction. Amnesty International, "Nigeria: The death penalty and women under the Nigerian penal systems" AI Index: AFR 44/007/2004, 10 February 2004.

¹⁰⁶ Prokosch (2004) 28. As mentioned earlier, the above prohibition has been stated in international human rights instruments. In addition to the UN instruments mentioned above, article 4(5) of the American Convention prohibits the death penalty for persons below eighteen years of age. The US Supreme Court recently abolished the death penalty for persons below 18 years of age at the time of commission of the crime (see *Roper v Simmons*, US Supreme Court judgment of 1 March 2005). Also, the Inter-American Commission on Human Rights has found a violation of the right to life in cases where the death penalty was imposed on persons below eighteen years of age. The Commission in its decisions has noted that international law has evolved, so as to prohibit as a *jus cogens* norm, the execution of persons who were under eighteen years of age at the time of their crimes (see for example, *Graham v United States*, Case 11.193, Report No 97/03, 29 December 2003; *Domingues v United States*, Case 12.285, Report No. 62/02, *Annual Report of the Inter-American Commission on Human Rights* (2001); *Thomas v United States*, Case 12.240, Report No. 100/03, 29 December 2003; and *Beazley v United States*, Case 12.412, Report No. 101/03, 29 December 2003).

years.¹⁰⁷ Consequently, the death sentence that had been imposed on the appellant was quashed and the appellant was ordered to be detained during the president's pleasure.¹⁰⁸ Section 27(2) of the Penal Code of Sudan 1991 prohibits the passing of the death sentence on someone less than eighteen years of age. This section is reiterated in section 33(2) of the Constitution of the Republic of Sudan 1998, prohibiting the death penalty for persons below eighteen years of age. The death penalty is prohibited for persons under the age of eighteen in Egypt.¹⁰⁹ In Libya, if a person below eighteen years of age but over fourteen commits a capital offence, he or she is sentenced to a term of not less than five years' imprisonment, to be served at a place reserved for juveniles.¹¹⁰ The death penalty has therefore been prohibited for juveniles in the penal laws of countries like Ethiopia,¹¹¹ Ghana,¹¹² Nigeria,¹¹³ Sierra Leone,¹¹⁴ Sudan,¹¹⁵ Uganda,¹¹⁶ and Zimbabwe.¹¹⁷

The UN Committee on the Rights of the Child has expressed concern about the applicability of the death penalty for crimes committed by children aged 16 and 17 in

¹⁰⁷ *Turon v R* (1967) E.A 789 (CA), cited in Bwonwong'a (1994) 263.

¹⁰⁸ Bwonwong'a (1994) 263.

¹⁰⁹ Article 11 of the Children's Act No. 12 of 1998.

¹¹⁰ Third periodic report of Libya, para 123.

¹¹¹ Article 118 of the Penal Code 1957.

¹¹² Section 295(1) of the Criminal Procedure Code Act 30, 1960.

¹¹³ Section 39(1) of the Criminal Code Act 1990 and section 363 of the Criminal Procedure Act 1990. These sections prohibit the use of the death penalty for persons below seventeen years of age. This falls short of international standards (for example, the CRC & African Children's Charter), which sets eighteen as the age below which a person should benefit from the special protection of the law and prohibits the death penalty on anyone below eighteen. It should be noted that the death penalty has been used against juvenile offenders in Nigeria. See *Mohammed Garuba and Others v Attorney General of Lagos State and Others* (Suit No. ID/559m/90, High Court of Lagos State, Ikeja Judicial Division; cited in Agbakoba & Obeagu (2002) 11), in which the death sentence was passed on twelve children.

¹¹⁴ Section 216 of the Criminal Procedure Act 1965.

¹¹⁵ Section 27(2) of the Penal Code 1991. See also the second periodic report of Sudan submitted under article 40 of the ICCPR, UN Doc. CCPR/C/75/Add.2, 13 March 1997, para 71 (hereinafter referred to as second periodic report of Sudan).

¹¹⁶ Initial report of Uganda submitted under article 40 of the ICCPR, UN Doc. CCPR/C/UGA/2003/1, 25 February 2003, para 141 (hereinafter referred to as initial report of Uganda).

¹¹⁷ Initial report of Zimbabwe, para 65.

Liberia, and stressed that such a penalty is in violation of article 37(a) of the CRC.¹¹⁸ Therefore, the imposition of the death penalty on persons below eighteen years of age in some African states is a matter of concern.¹¹⁹

The restriction that the death penalty should not be imposed on people over 70 years old¹²⁰ and on those who become insane¹²¹ has not been widely accepted, in law and practice, in Africa as that on juvenile offenders.¹²² Very few penal laws have provisions on persons over 70 years of age and some do not prohibit totally the imposition of the death penalty on such persons. In terms of section 338 of the Criminal Procedure and Evidence Act of Zimbabwe, the imposition of the death sentence on an offender over the age of 70 years is prohibited.¹²³ In Sudan, the death penalty can be imposed on persons above 70 years of age with regard to certain crimes.¹²⁴ However, under section 193(1) of the Criminal Procedure Act of 1991, if the person sentenced to death has reached the age of 70 years, the execution is stopped and the accused is referred to the High Court for an alternative sentence to be imposed. Therefore, even if a person over 70 years of age is sentenced to death in Sudan, it is not possible for the sentence to be carried out.

¹¹⁸ The Committee further urged the government to amend its penal law in order to abolish by law, the imposition of the death penalty on persons less than eighteen years of age and replace existing death sentences on such persons with a sanction in accordance with the CRC. See concluding observations of the Committee on the Rights of the Child on the initial report of Liberia submitted under article 44 of the CRC, UN Doc. CRC/C/15/Add.236, 4 June 2004, para 26.

¹¹⁹ As seen above, the penalty is imposed on persons below eighteen years of age in, for example, Nigeria.

¹²⁰ Article 4(5) of the ACHR.

¹²¹ ECOSOC safeguard No. 3.

¹²² Amnesty International has documented many cases in the United States of America (USA) of prisoners sentenced to death, and sometimes executed, despite their limited mental capacity or the fact that they were mentally ill. See Amnesty International, "Death penalty worldwide: Developments in 2003" AI Index: ACT 50/007/2004, April 2004.

¹²³ Initial report of Zimbabwe, para 65.

¹²⁴ See sections 27(2) & 48 of the Penal Code 1991 and section 33(2) of the Constitution of the Republic of Sudan 1998.

Regarding insanity, it is considered in most jurisdictions as a defence to a criminal charge, for example in Zambia.¹²⁵ In *Joseph Mutaba Tabo v The people*, the appellant was convicted of murder and sentenced to death. On appeal, the Supreme Court of Zambia found him not guilty for reason of insanity.¹²⁶

2.3.2.2 Offences for which the death penalty is imposed in Africa

Murder is the most common offences for which the death penalty is retained. Some countries in Commonwealth Africa have retained the mandatory death penalty for murder.¹²⁷ Hatchard and Coldham¹²⁸ have pointed out that the retention of the mandatory death penalty for murder appears harsh, as the definition of the offence contained in the penal codes of some Commonwealth African countries is considerably broader than its definition in contemporary English law. For example, in Tanzania, the definition of malice aforethought in the Penal Code includes recklessness.¹²⁹ The problem with this is that it provides room for an unintentional homicide amounting to murder under the Penal Code and attracting a mandatory death sentence, thus contrary to ECOSOC safeguard No. 1, which provides that the scope of offences punishable by death should not go beyond intentional crimes.

Other countries have done away with the mandatory death sentence for murder. The sentence is discretionary as it allows for the consideration of extenuating circumstances.¹³⁰ For example, section 201 of the Penal Code, as amended by Act No. 3 of 1990 of Zambia, provides that a person convicted of murder may receive a lesser sentence other than death where extenuating circumstances are present. Therefore, in cases where the death sentence has already been imposed by the trial court despite the

¹²⁵ See 2.4.1.2(b) below for a discussion of insanity (mental incapacity) as an extenuating circumstance to be considered in the imposition of the death penalty.

¹²⁶ *Joseph Mutaba Tobo v The People* (unreported) SCZ Judgment No. 2 of 1991. <<http://zamlil.zamnet.zm/courts/supreme/full/91scz2.htm>> (accessed 1 October 2003).

¹²⁷ Coldham (2000) 230.

¹²⁸ Hatchard & Coldham (1996) 158.

¹²⁹ Hatchard & Coldham (1996) 158.

¹³⁰ See 2.4.1.2 (b) - “mitigating factors”- below for further discussion.

presence of extenuating circumstances, it will be substituted with a lesser sentence on appeal. This was the case in *Lemmy Bwalya Shula v The People*¹³¹ and *Joseph Mwandama v The People*,¹³² in which the death sentences imposed on the appellants for murder were substituted with imprisonment due to the presence of extenuating circumstances. Further, section 38 of the Penal Code of Sudan 1991 provides for exoneration of an offender who has been convicted of murder by the victim or his relatives. In such a case, the offender will not receive the death sentence, or if it has been imposed, it will not be carried out.

In addition to murder, the increase in crimes against property involving the use of arms prompted some governments to introduce a mandatory death sentence for certain offences against property. For example, robbery with violence was not a capital offence in Kenya until 1976, when increased incidences of the same led to the introduction of the death sentence for the above crime, so as to, as reported by the government, act as a deterrent.¹³³ In Cameroon, the Penal Code Amendment Ordinance No. 72/16 of 1972 extended the death sentence to aggravated theft, providing for a mandatory death sentence for persons convicted of aggravated theft. To guarantee the mandatory nature of the death sentence, the above Ordinance prohibited the application of section 91 of the Penal Code to aggravated theft, which is to the effect that the courts have a general power “upon a finding of mitigating circumstances in favour of a person convicted of felony” where the offence is punishable with death, to impose a sentence of not less than ten years’ loss of liberty in the alternative.¹³⁴

However, with the passing of Law No. 90/61 of 19 December 1990, amending certain provisions of the Penal Code, the death penalty for aggravated theft is now

¹³¹ *Lemmy Bwalya Shula v The People* (unreported) SCZ Judgment No. 6 of 1991.
<<http://zamlil.zamnet.zm/courts/supreme/full/96s0507a.htm>> (accessed 1 October 2003).

¹³² *Joseph Mwandama v The People* (unreported) SCZ Appeal No. 127 of 1995
<<http://zamlil.zamnet.zm/courts/supreme/full/96s0507a.htm>> (accessed 1 October 2003).

¹³³ Second periodic report of Kenya submitted under article 40 of the ICCPR, UN Doc. CCPR/C/KEN/2004/2, 27 September 2004, para 48 (hereinafter referred to as second periodic report of Kenya).

¹³⁴ For more on capital theft in Cameroon, see Capstick (1973) 284.

discretionary. The passing of Law No. 90/61 of 19 December 1990 above in Cameroon is a positive development with regard to steps towards abolition of the death penalty. Another positive development worth noting is the adoption of the new Penal Code Act No. 01-079 of 20 August 2001 of Mali, which no longer provides for the death penalty for offences against public property.¹³⁵ The death sentence is imposed for aggravated robbery (armed robbery) in Ethiopia, Ghana, Kenya (where there is loss of life), Malawi, Nigeria, Sudan, Uganda and Zambia.¹³⁶

The death penalty is also imposed for a number of political offences in some African states. This is common in countries suffering from a degree of unrest, as was the case in Nigeria during the Nigerian state of emergency 1966 – 1970, during which a number of political offences were made capital.¹³⁷ In some, the political offences are limited to offences of waging or attempting to wage war against the state. In others, it is much wider comprising treason, attempting to seize power by unconstitutional means, espionage, attempts on the life of the head of state, acts of terrorism (such as hijacking of aircraft, which is a capital offence in Egypt), sabotage, use of firearms and explosives especially but not necessarily if their use results in death (in the Democratic Republic of Congo, Ghana, and Nigeria), and trading illegally in or smuggling, arms (Uganda).¹³⁸

With regard to treason, section 39(1) of the Penal Code Cap. 16 of Tanzania for example, provides for a mandatory death sentence for treason. Other countries in which the death sentence (mandatory or discretionary) is provided for in law as the

¹³⁵ Second periodic report of Mali submitted under article 40 of the ICCPR, UN Doc. CCPR/C/MLI/2003/2, 13 January 2003, page 26 (hereinafter referred to as second periodic report of Mali)

¹³⁶ See article 637(2) of the Penal Code of Ethiopia 1957, section 29692) of the Penal Code of Kenya 1985, section 168(1) of the Penal Code of Sudan 1991, Section 402(2)(a) & (b) of the Criminal Code Act of Nigeria 1990, and section 294(2) of the Penal Code of Zambia 1990. Also stated in the reports of the national coordinators of Ghana, Malawi & Uganda 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)).

¹³⁷ Also, in South Africa in the 1960s, after a number of politically motivated incidents of sabotage together with child stealing and kidnapping, the offences were made capital. Information available on file with the author of this thesis.

¹³⁸ Hood (2002) 78-80.

punishment for treason include Botswana, Cameroon, Ghana, Sierra Leone, Uganda, Zambia, and Zimbabwe.¹³⁹ The Freetown High Court passed ten death sentences in December 2004 against ten men convicted of treason. This has been seen as an extremely regressive step, as it comes only weeks after the Truth and Reconciliation Commission of Sierra Leone (TRC) recommended the complete abolition of the death penalty in Sierra Leone.¹⁴⁰ In Zambia, 59 men were sentenced to death following an attempted *coup* of October 1997, despite the fact that no persons were harmed.¹⁴¹ The imposition of the death sentence in such cases is seen as disproportionate as discussed in chapter six below. In 1993, the Egyptian Penal Code defined too widely the range of acts covered by article 86 on terrorism, which can be punished by the death penalty. This was highly criticised by the UN Human Rights Committee.¹⁴² It should be noted, as stated earlier, that the Human Rights Committee, established under the ICCPR, has noted with concern the very large number of offences punishable by death under Egyptian law.¹⁴³

Economic crimes and drug-related offences have also been made capital in some states. Economic crimes that have been made capital include: embezzlement of public funds or theft of public property (DRC, Mali, Niger, Somalia, Sudan, and Uganda), currency speculation (DRC), economic sabotage and embezzlement (Ghana), economic sabotage (Nigeria) and manufacturing and distributing counterfeit money or securities (Algeria).¹⁴⁴ Hatchard and Coldham attempt to come up with an explanation

¹³⁹ Stated in the reports of the national coordinators of the above countries 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).

¹⁴⁰ “Sierra Leone: Amnesty International expresses dismay at 10 death sentences for treason” AI Index: AFR 51/009/2004, 21 December 2004.

¹⁴¹ Hood (2002) 78.

¹⁴² Hood (2002) 79.

¹⁴³ 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 12. The Committee noted with concern the very large number of offences punishable by death under Egyptian law.

¹⁴⁴ Hood (2002) 82-83. The death penalty is also provided for economic crimes in Burkina Faso, Cameroon, Ethiopia, Libya, Malawi, and Togo.

as to why the death penalty has been extended to certain economic crimes in some Commonwealth African countries, stating the following:

The deterioration in economies of many Commonwealth African countries over the last thirty years has often been accompanied by an increase in corruption, sabotage, smuggling, black-marketeering and the like, and this has frequently led governments to create new offences, to impose harsh penalties.¹⁴⁵

It is clear from the above that it is because of the increase in economic crimes, caused by the deterioration in the economies, that lead governments to make certain economic crimes capital. But the question that arises is: Will making these crimes capital prevent the economy from deteriorating? The answer to this question is in the negative. Making these offences capital will not curb the increase in economic crimes. What will actually curb the increase in economic crimes is improvement in the economy. It is important for governments in countries with high rates of economic crimes to find out the reason why the economy is deteriorating, as solving this will in turn reduce the economic crime rates. Generally, as noted in chapter three, governments turn to focus more on imposing harsh penalties instead of trying to investigate the causes of crime.

Concerning drug-related offences, countries in North Africa have introduced the death penalty for both importation and possession for sale of certain amounts of drugs, or have made the death sentence mandatory for such offences where it was previously optional as a response to international concern about the growth of illicit trafficking in drugs.¹⁴⁶ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that “the death penalty should be eliminated for crimes such as economic crimes and drug-related offences”.¹⁴⁷ It is therefore important to note that applying the death penalty to a wide range of economic crimes and drug-related

¹⁴⁵ Hatchard & Coldham (1996) 159.

¹⁴⁶ Hood (2002) 80-81. Drug-related offences have been made capital in Egypt, Libya, Nigeria, and Sudan.

¹⁴⁷ “Extrajudicial, summary or arbitrary executions” Report by the Special Rapporteur, UN Doc. E/CN.4/1997/60, 24 December 1996, para 91.

offences is incompatible with article 6 of the ICCPR, as some of the offences cannot be characterised as the most serious.

Furthermore, some countries in Africa, especially in North Africa, maintain the death penalty for sexual offences due to the influence of Islamic Law. Capital sexual offences include: adultery - where the offender is married, conviction for homosexuality for the third time, incest or gross indecency that amounts to adultery or homosexuality, abduction combined with rape, aggravated rape or rape of a minor, sodomy, and unlawful sexual intercourse with a prisoner.¹⁴⁸ The death penalty for the offence of rape, especially in cases where it does not lead to death is very disproportionate and excessive, and incompatible with article 6 of the ICCPR, as it cannot be characterised as a “most serious crime”. This has been the position of the US Supreme Court, which found the death sentence for the offence of rape to be excessive and disproportionate.¹⁴⁹

The death sentence for “exercising unnatural behaviour” is also excessive and disproportionate. In February 2001, a court in Puntland in northern Somalia sentenced to death two women, who had a lesbian relationship, for being guilty of “exercising unnatural behaviour”.¹⁵⁰ The death sentence in this case was excessive and disproportionate, as having a lesbian relationship cannot be seen as one of the most serious crimes.

Lastly, the death penalty for religious dissent is common in Muslim countries. Religious dissent in the form of blasphemy or apostasy (Egypt, Libya and Sudan), giving or fabricating false evidence with the intent to cause any person to be convicted of an offence punishable with death and an innocent person is thereby convicted and executed (Nigeria), and kidnapping (Algeria, Egypt and Guinea) have

¹⁴⁸ A number of sexual offences have been made capital in Sudan, Egypt, Lesotho, Malawi, Nigeria, Uganda, Tunisia, Morocco, and Zimbabwe.

¹⁴⁹ This was the position of the United States Supreme Court in *Coker v Georgia* (1977) 433 U.S. 584. However, this decision applied only to the rape of an adult woman as the Louisiana Supreme Court pointed out in *Louisiana v Wilson* 1996 WL 718217 (13 December 1996). The Court held in this case that the death penalty for the rape of a female under the age of twelve years was not unconstitutional.

¹⁵⁰ Reported by BBC News, 23 February 2001. Cited in Hood (2002) 84.

also been made capital offences.¹⁵¹ However, in Sudan, for example, the convicted apostate is given time to repent, and if he does not repent, he will be executed.¹⁵²

2.4 Application of the death penalty in African states

2.4.1 The application of the law in capital trials

As seen above, the application of the death penalty is subject to a number of restrictions. Procedural safeguards (standards for a fair trial) that have to be followed in death penalty cases have been set forth in international human rights instruments and national constitutions.¹⁵³ In imposing the death sentence, the law has to be respected and applied properly. This section, therefore, discusses the application of the law in capital trials. The respect of fair trial rights of those accused of capital offences in capital trials is not discussed here, as it is examined in chapter six. This section does not provide a step-by-step analysis of the whole trial process, but deals with specific issues such as investigations, bail, evidence, consideration of mitigating factors and pardon or clemency process, under the headings pre-trial, trial and post-trial phases.

2.4.1.1 Pre-trial phase

The pre-trial phase in this context covers the criminal proceedings from the time a person is arrested or the magistrate learns of the occurrence of the crime, up to the moment when the actual trial begins, that is, when the hearing on the charges begins in court. The pre-trial phase of the criminal justice system is most vulnerable to abuse, as it is the phase where an accused person is arrested and officially charged.

¹⁵¹ Hood (2002) 85.

¹⁵² See, for example, the case of Mahmoud Mohamed Taha, a 76-year-old, who was found guilty (together with four others) of subversion and sentenced to death. They were previously given one month to repent, which was later reduced to three days. Mohamed was hanged, as he did not repent. The other four repented publicly on television and were freed. See Amnesty International (1989) 38 & 48. The case is discussed in chapter six (6.6.4) of this thesis.

¹⁵³ For further discussion on this, see chapter six of this thesis.

a. Investigations

Pre-trial proceedings usually start with investigations, and the police in most jurisdictions generally carry out this task.¹⁵⁴ In some states like Nigeria, wide powers have been conferred on the police in arresting suspects, which have been subject to abuse.¹⁵⁵ Investigations have to be made swiftly and efficiently but is hampered by lack of resources and training in some jurisdictions. In Kenya, for example, inadequate forensic technology and expertise within the investigative arm of the police, evidence tampering, attitude of law enforcement officers, poor remuneration and working conditions impact negatively on the investigation process.¹⁵⁶ In Ghana, the police service is ill-equipped and lack adequate training, coupled with corruption impacting negatively on the pre-trial phase of the criminal justice system.¹⁵⁷ In Zambia, because of lack of resources, the police do not conduct criminal investigations properly and efficiently.¹⁵⁸

As a result of the factors that hamper investigations, pre-trial detention becomes longer than required by the law. In some African states, such as Egypt, the duration of pre-trial detention is not clear, as the law does not provide a specific time frame.¹⁵⁹ In Cameroon, article 106 of the Code of Criminal Investigation states that the arrested

¹⁵⁴ For example, in Cameroon, Kenya, Lesotho and Nigeria.

¹⁵⁵ 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/deathpenlty>> (accessed 30 June 2004))

¹⁵⁶ Stated in the report of the national coordinator of Kenya, Joy Asiema, 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)).

¹⁵⁷ 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)).

¹⁵⁸ See Skilbeck (2001) 6, and International Commission of Jurists, “Zambia: Attacks on Justice” <<http://www.icj.org/news>> (accessed 16 May 2004).

¹⁵⁹ 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 14.

person must immediately be brought before a competent authority.¹⁶⁰ In practice, persons are held in custody for 24 hours, which can be extended up to three times under article 9 (amended) of the Code of Criminal Investigation.¹⁶¹

In other states, a specific time limit has been set during which accused persons have to be informed in writing of their crime and be brought before a court. In Nigeria, for example, section 35(3) of the 1999 Constitution provides that detained persons have to be informed within 24 hours of their crime. Such persons shall be brought before a court of law within 24 hours if the court is within 40km from the place of detention or 48 hours if more than 40km.¹⁶²

Further, the accused has to be tried within two months from the date of arrest or detention in the case of a person not entitled to bail or within three months in the case of a person entitled to bail.¹⁶³ However, this is not the case in practice especially in cases where a person is suspected to have committed a capital offence.¹⁶⁴ The pre-trial time in detention is rarely less than five years in some states and in some cases over 10 years.¹⁶⁵

In Mali, an arrested person is kept in custody for a maximum of 24 hours, which can be extended by 24 hours on written authorisation of the public prosecutor.¹⁶⁶ Similarly, in Morocco, the length of time a person can be held in the custody is limited to 24 hours, which may be extended on the written permission of the Crown

¹⁶⁰ Third periodic report of Cameroon submitted under article 40 of the ICCPR, UN Doc. CCPR/C/102/Add.2, 1 December 1997, para 30 (hereinafter referred to as third periodic report of Cameroon).

¹⁶¹ As above, paras 31 & 32.

¹⁶² Section 35(5) of the Constitution of Nigeria 1999.

¹⁶³ Section 35(4) of the Constitution of Nigeria 1999.

¹⁶⁴ 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/deathpenlty>> (accessed 30 June 2004)).

¹⁶⁵ Amnesty International, “Nigeria: The death penalty and women under the Nigerian penal systems” AI Index: AFR 44/007/2004, 10 February 2004.

¹⁶⁶ Second periodic report of Mali, page 25.

Procurator.¹⁶⁷ For serious offences, pre-trial detention under article 154 Code of Criminal Procedure of Morocco is an exceptional measure requiring a court order, which may not exceed two months but can be renewed for up to five times.¹⁶⁸ This means that a capital offender ends up spending not less than 10 months in detention.

Inordinate pre-trial delays are, therefore, common in most jurisdictions due to the aforesaid, including the judiciary's lack of resources as a whole. This definitely has a negative bearing on the efficiency of the criminal justice system in dispensing justice. In Uganda, the judiciary cannot effectively respond to the rising rate of crime and the administration of justice is slow because it is understaffed and under funded, compounded by irregular High Court sessions.¹⁶⁹

In Lesotho, the efficiency of the criminal justice system and its ability to dispense justice within a reasonable time is questionable as one of the major problems faced by the criminal justice system is the inordinate delays at the pre-trial stage due to lack of resources and shortage of qualified staff particularly at the investigative and preparatory stages.¹⁷⁰ Similarly, in Zambia, the efficiency of the judiciary is doubtful, as it is understaffed, with less than 15 judges of the High Court serving the entire population of slightly more than ten million people countrywide.¹⁷¹

b. Bail

The issue of bail has not been explicitly mentioned in the ICCPR. Article 9(3) merely states that anyone who is arrested or detained shall be entitled to trial within a

¹⁶⁷ Fourth periodic report of Morocco submitted under article 40 of the ICCPR, UN Doc. CCPR/C/15/Add.1, 15 October 1997, para 74 (hereinafter referred to as fourth periodic report of Morocco). The above time limits are doubled in matters affecting state security.

¹⁶⁸ As above, para 76.

¹⁶⁹ Initial report of Uganda, para 242.

¹⁷⁰ Stated in the report of the national coordinator of Lesotho, Moses Otori, 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)).

¹⁷¹ Amnesty International, "Zambia: Time to abolish the death penalty" AI Index: AFR 63/004/2001, 18 July 2001.

reasonable time or release. It further states that release has to be subject to guarantees to appear for trial. The African Charter is silent on the issue of bail but it is suggested that the entitlement to bail can be read into the right to be tried within reasonable time (article 7(1)(d) of the Charter) and the right to liberty and security of the person (article 6 of the Charter), read together with article 9(3) of the ICCPR. The African Commission has recognised the right to bail in the Principles and Guidelines on the Right to a Fair Trial and Legal Aid in Africa.¹⁷²

The requirement that an accused be released on bail pending trial is very important, as it gives effect to the right of every accused to be presumed innocent until proven guilty according to law.¹⁷³ Yet, the most restriction placed upon a pre-trial defendant is the requirement of bail. In most jurisdictions, the law makes provision for bail and in respect of death penalty cases, it can only be granted by the High Court.¹⁷⁴ It is either discretionary¹⁷⁵ or denied.

In general, it is rare in most jurisdictions for a person accused of a capital offence to get bail. For example, despite provisions for bail, some judges are reluctant to grant bail in capital cases, as is the situation in Cameroon.¹⁷⁶ In Uganda, it is rare for those accused of capital offences to get bail.¹⁷⁷ Section 23(6)(a) of the Ugandan Constitution (1995) dealing with bail uses the word “may”, which implies that bail can be denied. Worse of all, the Ugandan Military Courts do not accord accused persons bail, they are detained until such time that the court is ready to hear the

¹⁷² Adopted at its 33rd Ordinary Session in Niamey, Niger in May 2003. See *Final Communiqué* of the Session and *Seventeenth Annual Activity Report: 2003-2004*. See Guideline M(1)(e) & (f).

¹⁷³ Article 7(1)(b) of the African Charter.

¹⁷⁴ For example, in Cameroon and Ghana.

¹⁷⁵ For example, bail is discretionary in Ethiopia. Under article 19(6) of the Constitution of Ethiopia 1995, bail may be denied in certain circumstances.

¹⁷⁶ This was brought to the author’s attention during a research conducted by the author in April 2004 in Cameroon, when defence lawyers were asked about the position in law regarding the granting of bail to those accused of capital offences. Section 118(1) of the Criminal Procedure Ordinance makes provision for bail in all criminal cases.

¹⁷⁷ Stated in the report of the national coordinator of Uganda, Emmanuel Kasimbazi, 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)).

case.¹⁷⁸ This detention amounts to a violation of the right to liberty of accused persons and their right to be presumed innocent, discussed in chapter six. In Lesotho, bail can be refused where an accused is charged with capital murder, unless the accused adduces evidence that satisfies the court that exceptional circumstances exist, which in the interest of justice permit his or her release.¹⁷⁹ However, it is not clear what is considered to be in the “interest of justice” and the criteria used to determine this.

In Ghana, bail can be refused to persons charged with murder and treason.¹⁸⁰ As seen in the cases below, the courts have been lenient in applying this provision. It would appear that where it can be established that there has been, or would be, unreasonable delay in bringing an accused to trial, or where the applicants allege without any objection from the prosecution, that they did not commit the offence in question, bail could be granted. In *Republic v Arthur*,¹⁸¹ the applicants who had been charged with murder filed for bail pending trial, arguing that there was no likelihood of their case being heard within reasonable time. The Court held that what constituted unreasonable time had to be determined within the particular context, and therefore dismissed the application on the ground that the applicants had failed to show that there had been unreasonable delay in bringing them to trial. Also, in *Prah and Others v The Republic*,¹⁸² the applicants, who had been charged with murder, applied for bail on the ground that they did not commit the offence charged. The Court held that although under section 96(7)(a) bail could not be granted, the applicants could be granted bail, as the prosecution did not oppose the affidavit in which the applicants denied committing the crime.¹⁸³

¹⁷⁸ Initial report of Uganda, para 296.

¹⁷⁹ Criminal Procedure and Evidence Act No. 10 of 2002. Referred to 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/deathpenalty>> (accessed 30 June 2004)).

¹⁸⁰ Section 96(7)(a) of the Criminal Procedure Code of Ghana (Act 30) 1960. Murder and treason are punishable by death under sections 46 & 180 of the Criminal Code of Ghana 1960 respectively. See also article 21(d)(i) of the Constitution of Liberia 1984.

¹⁸¹ *Republic v Arthur* (1982-83) G.L.R. 249.

¹⁸² *Prah and Others v The Republic* (1976) 2 G.L.R. 278.

¹⁸³ As above. See also, *Dogbe v The Republic* (1976) 2 G.L.R. 82, with regard to bail in murder cases.

Furthermore, in some jurisdictions, bail is refused to those charged with capital offences regardless of the fact that the law makes provision for it. For example, despite the provision for bail in section 71 of the Criminal Procedure Act 1965 of Sierra Leone, it has become standard practice not to admit to bail persons accused of treason, murder or aggravated robbery which are capital offences.¹⁸⁴ In Sudan, bail is prohibited for crimes punishable with the death penalty, provided that if the arrest continues for more than six months, the record is submitted to the head of the Judicial Authority, who then makes whatever order is deemed appropriate.¹⁸⁵ This provision is open to abuse, as it does not specify a list of the appropriate measures that could be made.

2.4.1.2 Trial phase

This section discusses two issues - first, consideration of evidence, its admissibility and the weight of such evidence, and second, consideration of mitigating factors. The issue of legal representation is discussed in chapter six of this thesis. However, it is important to note that accused persons have the right to represent themselves or be represented by legal counsel of their choice.¹⁸⁶ Further, the constitutions of most African states explicitly provide that accused persons be provided with legal representation at state or public expense if they 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.¹⁸⁷ Article 24(3)(d) of the Constitution of The Gambia 2001 is more specific as it states that if an accused is

¹⁸⁴ 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)).

¹⁸⁵ Section 106(1) of the Criminal Procedures Act of 1991.

¹⁸⁶ See chapter six of this thesis.

¹⁸⁷ See also, article 42 (2)(f)(v) of the Constitution of Malawi 2001.

charged with a capital offence, he or she shall be entitled to legal representation at the expense of the state.¹⁸⁸

Nevertheless, lack of financial resources impact negatively on the ability of courts to offer an accused person free legal representation. Despite the above provisions, most persons charged with capital offences, who cannot afford the fees of legal counsel, do not benefit from the services of an experienced defence counsel under the state legal aid scheme. This is because the lawyers are mostly young graduates without much experience with capital trials. Even when an experienced lawyer is assigned to an accused, the lawyer might not exert enough effort in the case due to the meagre pay received from the state.¹⁸⁹

a. Evidence

Consideration of evidence, its admissibility, and the weight of such evidence are very crucial in dispensing justice in trials, especially in capital cases. It could lead to injustice if fabricated or coerced evidence is admissible. Given the reported forgery and corrupt practices of some African states that still retain the death penalty, it is possible that a person may be sentenced to death and executed based on false evidence.

In Cameroon, for example, corrupt practices in the criminal justice system is prevalent in investigations, setting hearing dates, granting of bail, presentation of witnesses, tracing case files, court proceedings, and judgments.¹⁹⁰ In Tanzania, the corrupt practices in the criminal justice system have been confirmed by the president in the following words: “What counts is money – those with money will always have

¹⁸⁸ 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 (1998) 11. Article 28(3)(e) of the Constitution of Uganda 1995 has a similar provision with regard to capital offences.

¹⁸⁹ See chapter six for further discussion on legal representation.

¹⁹⁰ The author is from Cameroon and so is aware of these corrupt practices. Forgery and corrupt practices in the criminal justice system in Cameroon and Nigeria for example, were also brought to the author’s attention during general discussions (in 2004) with lawyers from these countries.

judgments in their favour”.¹⁹¹ Corrupt practices in the criminal justice system have also been reported in Ghana and Nigeria.¹⁹²

The general rule with regard to admissibility of confessions is that it must have been made freely and voluntarily without any undue influence. But in most African states, the police obtain confessions through improper methods such as torture.¹⁹³ Due to a number of reports of torture of suspects by the police to extract confessions in Kenya, the Criminal Law Amendment Act No. 5 of 2003 was passed, which precludes the admission in court of evidence extracted through torture or that was not given voluntarily. Also, in Lesotho such evidence is inadmissible. However, if an accused charged with murder for example, after being tortured, points out the murder weapon, the “pointing-out” is admissible in evidence although it forms part of inadmissible evidence.¹⁹⁴ But the pointing out has to be made freely and voluntarily as noted by the Court of Appeal.¹⁹⁵

It is important in capital trials that there should be some balance regarding the weight of evidence in a particular case. Subjecting accused persons in a particular case to different requirements does not provide this balance, and could lead to miscarriage of justice. For example, concerning the weight of evidence in cases of adultery in states in northern Nigeria that apply the *Shari'a* law, men and women are subjected to different requirements. Pregnancy is considered sufficient evidence to convict a woman for adultery (which is a capital offence), while the oath of a man denying sexual intercourse with the woman is considered sufficient proof of his innocence,

¹⁹¹ Opening address of the president of the Republic of Tanzania, His Excellency Benjamin William Mkapa, at the Judges and Magistrates Seminar, Karimjee Hall, Dar es Salaam, 16 December 1996.

¹⁹² See 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)); and Anaba, E “Law and human rights: -Death penalty: Options for the government -- Study group” *Vanguard* (Lagos), 5 November 2004.

¹⁹³ For example, in Cameroon, Kenya, Lesotho, and Nigeria.

¹⁹⁴ Section 229(2) of the Criminal Procedure and Evidence Act of Lesotho. 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)).

¹⁹⁵ See *Mabope v R* (1993-94) LLR & LB 154.

unless four independent and reputable eyewitnesses declare his voluntary involvement in the act.¹⁹⁶ The above can lead to miscarriage of justice, as pregnancy can also occur from non-consensual sexual relations or rape, not just consensual sexual relations.

b. Mitigating factors

The concept of mitigating factors allows for flexibility into sentencing policy.¹⁹⁷ There are a variety of mitigating factors that have to be taken into consideration in capital trials, as they may have an effect on whether the death sentence is imposed or not. It should be noted that the factors that are considered as “mitigating factors” vary from jurisdiction to jurisdiction. Nonetheless, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has pointed out the need to take into consideration mitigating factors in proceedings leading to the imposition of capital punishment.¹⁹⁸ If sentencing is to be considered rational, humane and rendered in accordance with the requirements of due process, a court must have the discretion to take into account the individual circumstances of an individual offender and offence in determining whether the death penalty can and should be imposed.¹⁹⁹ Without consideration of mitigating factors, the non-arbitrary application of the death penalty cannot be guaranteed.²⁰⁰

Mitigating factors include mental incapacity, youth, old age, provocation, self-defence, intoxication or drunkenness, accident, physical compulsion, emotional conflict, and general background of the accused. In determining whether such factors

¹⁹⁶ Amnesty International, “Nigeria: The death penalty and women under the Nigerian penal systems” AI Index: AFR 44/007/2004, 10 February 2004.

¹⁹⁷ Welsh (1969) 398-400.

¹⁹⁸ Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/1997/60, 24 December 1996, para 81. Also in resolution 1996/15, adopted on 23 July 1996, the UN ECOSOC encouraged UN 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.

¹⁹⁹ See *Reyes v The Queen* (2002) AC 235 (Judicial Committee of the Privy Council).

²⁰⁰ The US Supreme Court has emphasised, on numerous occasions, the need to take into consideration mitigating, as well as aggravating, factors to assure the non-arbitrary imposition of the death penalty. See *Carter* (1987) 151-152.

have any considerable bearing on the moral blameworthiness of an accused, they have to be weighed against any aggravating circumstances.²⁰¹

The penal laws of some African states provide that a sentence of death can only be imposed if, after the consideration of mitigating and aggravating factors, the death sentence is the proper sentence under the circumstances.²⁰² Section 91(1) of the Penal Code of Cameroon 1967, provides that upon the finding of mitigating circumstances in favour of any person convicted of a felony, the sentence should be reduced to not less than 10 years' loss of liberty if the offence be punishable by death. In Libya, if the circumstances of the offence warrant leniency, the judge may pass a sentence of life imprisonment instead of death.²⁰³ In Lesotho, section 297 of the Criminal Procedure and Evidence Act states that where an accused person has been convicted of a capital offence, the High Court may impose any sentence other than death where it is of the opinion that there are extenuating circumstances.²⁰⁴ In cases where the High Court did not comply with the above provision, the death sentences were set aside.²⁰⁵ Section 201 of the Tanzanian Penal Code as amended by Act No. 3 of 1990 makes provision for a lesser sentence in capital cases where extenuating circumstances exist. Thus, the Supreme Court has set aside death sentences imposed by the High Court on the ground that there were extenuating circumstances.²⁰⁶

²⁰¹ See, for example, article 84(1) of the Penal Code of Ethiopia 1957, which requires the court to take both extenuating and aggravating circumstances in determining the sentence.

²⁰² Some penal statutes use the term extenuating circumstances. As stated in chapter one, extenuating circumstances has been defined as “any facts, bearing on the commission of the crime, which reduce the moral blameworthiness of the accused, as distinct from his legal culpability” (see *S v Letsolo* 1970 (3) SA 476 (A)).

²⁰³ Third periodic report of Libya, para 124.

²⁰⁴ 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)).

²⁰⁵ See, for example, *Letuka v R* (1991-96) LLB & LB 346 and *Mphasa v R* Criminal Appeal No 5 of 2003 (unreported).

²⁰⁶ This was the situation in the following cases: *Joseph Mutaba Tobo v The People*, Supreme Court of Zambia (SCZ) judgment No 2 of 1991(unreported), *Lemmy Bwalya Shula v The People*, SCZ Appeal No 122 of 1995 (unreported), and *Joseph Mwandama v The People*, SCZ Appeal No 127 of 1995 (unreported).

Youth, old age and mental capacity are some of the extenuating factors to be taken into account. As mentioned above, the death sentence has been prohibited for persons below eighteen and above 70 years of age, and for the mentally ill. This implies that if it is found that a person convicted of a capital offence is below eighteen or above 70 years of age or is mentally ill, the death sentence cannot be imposed as the above factors mitigate the moral blameworthiness of the convicted person.

As regards mental illness, some jurisdictions, such as Tanzania, apply the English law rule in *R v M'Naghten*,²⁰⁷ which is to the effect that a person is presumed sane until the contrary is proven. The burden is, therefore, on the accused to prove his or her mental incapacity, which has proven to be difficult as seen from the cases in which accused persons with mental illness have been sentenced to death in Tanzania.²⁰⁸ The Tanzanian Court of Appeal has acknowledged the harshness of the law on proving insanity on the accused and considered the law unjust and outdated.²⁰⁹ However, in some jurisdictions, the death sentence imposed on mentally ill persons have been set aside. For example in Nigeria, the *Shari'a* Court of appeal in Dutse, in August 2003, dismissed a death sentence by stoning on Baranda, on the grounds that he was suffering from mental illness.²¹⁰

2.4.1.3 Post-trial phase

When a convicted person has been sentenced to death, he or she could appeal against the sentence, mount a constitutional challenge, or seek pardon or commutation. The question of appeal is discussed in chapter six. The subsequent paragraphs discuss the issue of constitutional challenge and pardon or commutation.

²⁰⁷ See *R v M'Naghten* (1843) 10 C & F 200 (Rule 1).

²⁰⁸ For example, in *Said s/o Mwamwindi v Republic* (1972) HCD No 212, the accused was sentenced to death despite that a psychiatrist had testified that he had mental illness. The accused in *Republic v Hauli*, High Court of Tanzania, Criminal Sessions Case No 3 of 1984, Dar es Salaam (unreported), was also sentenced to death despite the testimony of two psychiatrists that he was mentally sick.

²⁰⁹ See *DPP v Nyanje*, Court of Appeal of Tanzania, Criminal Appeal No 68 of 1980 (unreported). The accused in this case was sentenced to death notwithstanding the fact that a psychiatrist had confirmed that he was mentally ill.

²¹⁰ Amnesty International Report (2004) 68.

a. Constitutional challenges

Constitutional challenges with regard to the death penalty centre around two questions – the constitutionality of the death penalty itself and the effect of delay in carrying out the sentence. As seen in chapter four, some African national constitutions specifically provide for the death penalty, while others are not specific but allow for its imposition. Whilst constitutional challenges of the death penalty have been successful in some jurisdictions leading to the setting aside of the death sentences passed, it has not been successful in others. In others such as Zimbabwe, the government, pre-empting such a challenge, has amended the Constitution.²¹¹

Constitutional challenges of the death penalty itself have been brought in Tanzania, South Africa, Botswana and Nigeria.²¹² In Tanzania, in *Republic v Mbushuu and Another*,²¹³ the High Court, faced with a challenge on the constitutionality of the death penalty, found the death penalty to be cruel, inhuman and degrading both inherently and in the manner of its execution. The Court had to further decide whether the law prescribing the death penalty is lawful and in the public interest under article 30(2) of the Tanzanian Constitution. The Court held that the death penalty was not in the public interest and not prescribed by a lawful law.²¹⁴ The Court therefore found the death penalty to be unconstitutional. On appeal against conviction by the accused and against the sentence by the Republic, the Court of Appeal agreed that the death penalty is cruel, inhuman and degrading, but held that it was not unconstitutional.²¹⁵

²¹¹ In *Chileya v S* (SC 64/90, unreported), the Supreme Court of Zimbabwe requested full argument on the constitutionality of executions by hanging under section 15(1) of the Constitution of Zimbabwe, which prohibits torture, inhuman or degrading punishment or other such treatment. Unfortunately, before the hearing, the government amended the Constitution by including a provision specifically upholding the constitutionality of executions by hanging (see Hatchard & Coldham (1996) 170, and article 15(4) of the Constitution of Zimbabwe, 2000).

²¹² It should be noted that there is a current constitutional challenge to the death penalty before the Constitutional Court of Uganda brought by 417 persons on death row (see *Susan Kigula and Others v The Attorney General*, The legal challenge to capital punishment in Uganda: 1st draft of submissions on the proposed issues framed for determination before the Constitutional Court of Uganda, prepared by M/s Katende, Ssempebwa & Co. Advocates), and plans of bringing one in Botswana.

²¹³ *Republic v Mbushuu and Another* (1994) 2 LRC 335 (hereinafter referred to as *Mbushuu* (1994)).

²¹⁴ *Mbushuu* (1994) 358. See chapter four and five for further discussion of the case.

²¹⁵ *Mbushuu* (1995) 228.

The Court's finding was based on the fact that the law providing for the death penalty was not arbitrary hence a lawful law, and that it is reasonably necessary and thus saved by article 30(2) of the Constitution.²¹⁶

The South African Constitutional Court, in 1995, heard a case dealing with the constitutionality of the death penalty – *S v Makwanyane*,²¹⁷ in which it ruled that the death penalty is inconsistent with the country's Constitution, as it constitutes cruel, inhuman and degrading punishment within the meaning of section 11(2) of the Interim Constitution.²¹⁸ Eight of the eleven judges considered the death penalty as a violation of the right to life and ten of the eleven judges considered it as cruel, inhuman or degrading punishment.²¹⁹ The infringement of the right not to be subjected to cruel, inhuman and degrading punishment (and the right to life) was found not to be justifiable under the general limitation clause, section 33 of the Interim Constitution.²²⁰

In *S v Ntesang*, one of the issues the Court of Appeal of Botswana had to decide was whether the imposition of the death sentence was *ultra vires* the Constitution.²²¹ Although the Court found the death penalty to be constitutional, as it is preserved by section 7(2) of the Constitution of Botswana,²²² it nevertheless, took judicial notice of developments at the international level to abolish the death penalty and hoped that it

²¹⁶ *Mbushuu* (1995) 232. See chapters four and five for further discussion of the case.

²¹⁷ *Makwanyane* (1995).

²¹⁸ Section 11(2) of the Interim Constitution Act 200 of 1993 prohibited cruel, inhuman and degrading treatment or punishment

²¹⁹ See chapters four and five for further discussion of the case.

²²⁰ As above. Section 33 allowed for limitations on rights that are reasonable and justifiable in an open and democratic society based on freedom and equality; and such limitation must not negate the essential content of the right in question.

²²¹ *S v Ntesang* (1995) 2 LRC 338, 341 (hereinafter referred to as *Ntesang* (1995)). See chapter four for further discussion of the case.

²²² Section 7(2) saves any law that authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation of the Constitution. The death penalty was seen to be one of such punishment.

will engage the attention of parliament, which has responsibility of effecting changes to the statutes.²²³

Concerning a challenge on the constitutionality of the death penalty, the Supreme Court of Nigeria, in *Kalu v The State*, found the death penalty to be constitutional on the ground that section 30(1) of the 1979 Constitution permits it in the clearest possible terms.²²⁴ The Court could, seemingly, not arrive at a different decision due to the qualified nature of the right to life provision in the Nigerian Constitution.²²⁵

Furthermore, the death penalty has been challenged on the ground of prolonged delay in carrying out the sentence in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others*.²²⁶ The Court had to consider whether the executions themselves would be unconstitutional because of the dehumanising factor of prolonged delay, considered in conjunction with the harsh and degrading conditions in the condemned section of the Harare Central Prison.²²⁷ The Court concluded that the periods of detention on death row that the applicants had encountered justified the commutation of their sentences to life imprisonment.²²⁸

The above decisions of the South African Constitutional Court and the Supreme Court of Zimbabwe could be very insightful to other jurisdictions wanting to challenge the constitutionality of the death penalty. Currently (at the time of writing), there is a case (*Susan Kigula and Others v The Attorney General*) before the Constitutional Court of

²²³ *Ntesang* (1995) 348.

²²⁴ *Kalu v The State* (1998) 13 NWLR 531. Section 30(1) provides that “[e]very person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria”.

²²⁵ See chapter four for further discussion on this.

²²⁶ *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others* 1993 (1) ZLR 242 (S), hereinafter referred to as *Catholic Commission* (1993).

²²⁷ *Catholic Commission* (1993) 245.

²²⁸ *Catholic Commission* (1993) 282. See chapters four and five for further discussion of the case. Unfortunately, the government stated that the court was seizing the functions of the executive and the Constitution of Zimbabwe was amended by the passing of the Constitution of Zimbabwe Amendment Act (No 13) 1993 which retrospectively exempted the death penalty from the scope of section 15(1) (see Hatchard & Coldham (1996) 170).

Uganda, in which 417 persons on death row are challenging the constitutionality of the death penalty.²²⁹

b. Pardon or commutation

Pardon (clemency) or commutation is the last hope for a prisoner under sentence of death. It is, in most states, exercised by the chief executive (the president) of the country in which the death sentence was imposed. In some states, other bodies could be empowered to exercise pardon or commutation. In Zimbabwe, in addition to the president having the power to pardon convicted persons or exercise the prerogative of mercy and commute a death sentence, parliament is empowered to consider a petition for pardon submitted to it by an offender sentenced to death.²³⁰ In Libya, general amnesties are proclaimed by the “General People’s Congress”.²³¹

The president or other body in charge acts on its own initiative or on the presentation of a petition by the convicted person to be considered for pardon or clemency. Through the exercise of clemency, a death sentence can be set aside, which usually takes the form of a decision to commute the sentence to a lesser punishment. Pardon or commutation is important in that it can be used to mitigate the harshness of punishment, correct possible errors in the trial or to compensate for the rigidity of the criminal law by giving consideration to factors relevant to an individual case for which the law makes no allowance.

The right to seek pardon or commutation is provided for under article 6(4) of the ICCPR and ECOSOC safeguard No. 7. The UN ECOSOC has recommended that UN member states provide for “mandatory appeals or review with provisions for clemency or pardon in all cases of capital offences”.²³² In most African states, such as

²²⁹ For further information on the case, see chapter five (5.4) of this thesis.

²³⁰ Initial report of Zimbabwe, para 68-70.

²³¹ Third periodic report of Libya, para 129.

²³² 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).

Congo,²³³ a person sentenced to death may not be executed unless the president has refused to grant a pardon. The national constitutions and laws of most African states have provisions on pardon or clemency. For example, in Tanzania, a person sentenced to death can appeal to the president to commute the sentence under section 325(3) of the Criminal Procedures Act of 1985. The president relies on the judgment and notes of evidence taken during the trial to arrive at a decision.²³⁴

Also, article 121(4) of the Constitution of Uganda 1995, dealing with the prerogative of mercy, gives the president the power, on the advise of the Advisory Committee on the prerogative of mercy, to grant any person convicted of an offence a pardon either free or subject to lawful conditions. Article 121(5) requires that, after a person has been sentenced to death, the trial judge or person presiding over the court or tribunal submits a written report of the case and other relevant information to the Advisory Committee on the prerogative of mercy. This Committee consists of the Attorney General, six prominent citizens of Uganda (not members of parliament) appointed by the president, a member of the Ugandan law society or District Council.²³⁵ The only successful appeal during the past five years is that of Nassur, who had been on death row for twenty years, and was pardoned by the president in 2001.²³⁶ The fact that the Attorney General is part of this Committee, and that the president partly controls the process by appointing the six prominent Ugandans raises a lot of concerns.

The power to grant pardon or commutation is discretionary and the chief executive is not obliged to follow the recommendations of the Advisory Committee or the trial judge. The extent to which this discretion is exercised is questionable. Further, it should be borne in mind that generally, the clemency process varies from country to country. Some apply a more generous standard while others exercise clemency or pardon on very limited grounds. In some African states, the president controls the

²³³ Second periodic report of Congo submitted under article 40 of the ICCPR, UN Doc. CCPR/C/63/Add.5, 5 May 1997, para 19 (hereinafter referred to as second periodic report of Congo).

²³⁴ Third periodic report of Tanzania submitted under article 40 of the ICCPR, UN Doc. CCPR/C/83/Add.2, 7 October 1997, para 49 (hereinafter referred to as third periodic report of Tanzania).

²³⁵ Article 121(1) of the Constitution of Uganda 1995.

²³⁶ Initial report of Uganda, para 139-140.

whole process. In Zambia, the president has total control over the process as he appoints members of the Advisory Committee on the prerogative of mercy, is entitled to preside at its meetings and determine the procedure.²³⁷ In Ghana, Lesotho, Uganda, and Zimbabwe, the president does not have total control over the process, as he acts on the advice of the Advisory Committee.²³⁸ Also in Togo, the granting of pardon by the president is exercised in the light of an opinion given to him by the Supreme Judicial Council.²³⁹

Moreover, in practice, there is very little information as to the extent to which the prerogative is exercised since the process in most African states is covered in secrecy. The secrecy involved in the whole process is a matter of concern and allows for arbitrariness in the exercise of clemency and disparity in the granting of pardon or clemency.²⁴⁰ Reports prepared are confidential in Zimbabwe, Zambia and other countries in southern Africa.²⁴¹ Despite the above, this process is the last hope for a person sentenced to death and is seen as the last means of correcting judicial errors. Amnesty International has noted that “it is an illusion to suppose that the inherent arbitrariness and fallibility of human justice can somehow be made right by a process which itself is arbitrary”.²⁴² There is, therefore, the need for the clemency process to be more accountable.

²³⁷ Hatchard & Coldham (1996) 169. Also in Kenya and Tanzania.

²³⁸ Hatchard & Coldham (1996) 169. See also Initial report of Zimbabwe, para 68-71.

²³⁹ Third periodic report of Togo submitted under article 40 of the ICCPR, UN Doc. CCPR/C/TGO/2001/3, 5 July 2001, para 110 (hereinafter referred to as Third Periodic Report of Togo).

²⁴⁰ In addition, the offenders are not allowed to participate in the mercy process. During the “First International Conference on the Application of the Death Penalty in Commonwealth Africa” held in Entebbe, Uganda from 10 – 11 May 2004, this was one of the issues of concern (the author was present at the conference). The Inter-American Commission on Human Rights has found a violation of the right to life in a case where the applicant was not given an effective and adequate opportunity to participate in the mercy process (see *Aitken v Jamaica*, Case 12.275, Report No. 58/02, 21 October 2002). This decision could be instructive for African states, since the prerogative of mercy process is shrouded in secrecy in most states with defendants not being offered an opportunity to participate in the process.

²⁴¹ Hatchard & Coldham (1996) 169.

²⁴² Amnesty International (1989) 34.

It should be noted that pardons are not only an executive issue, as it can be granted by way of renouncing retribution or pardon from the victim or the victim's family in countries that apply Islamic law. In Libya, renunciation of the right to retribution in return for payment of blood money or for any other reason is equivalent to commutation of the death penalty.²⁴³ In Sudan, the death penalty can be commuted with pardon of the victim or the victim's relative, and such pardon cannot be retracted from if made expressly by consent.²⁴⁴

2.4.2 The question of the mandatory imposition of the death penalty

It is important at this point to consider the question of mandatory death penalty, which is obviously one of the reasons for the ongoing passing of death sentences in African states. As mentioned above, the death penalty is mandatory for certain offences, for example, treason and murder in Kenya,²⁴⁵ murder and treason in Malawi,²⁴⁶ for aggravated robbery in Zambia,²⁴⁷ and murder in Tanzania.²⁴⁸ This is a matter of concern as judges in such countries are under a legal obligation to impose the death sentence once an accused is found guilty, as it is the only punishment the law permits for the criminal offence in question.

The mandatory death penalty in some African states, especially Commonwealth African states, is a colonial legacy. Death was the only sentence that could be pronounced upon a defendant who was convicted of murder, regardless of the nature of the offence or the particular circumstances of the offender, under the common law

²⁴³ Third periodic report of Libya, para 129.

²⁴⁴ Section 38(1) of the Penal Code of Sudan 1991.

²⁴⁵ Stated in the report of the national coordinator of Kenya, Joy Asiema, 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 <www.biicl.org/deathpenalty> (accessed 30 June 2004)).

²⁴⁶ See Internship Report of Aron Rollin <http://www.wmin.ac.uk/ccps/Internships2003_2.htm> (accessed 20 July 2004).

²⁴⁷ *Lubuto v Zambia*, Communication No. 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev.1, 31 October 1995.

²⁴⁸ Section 196 & 197 of the Tanzanian Penal Code (Cap. 16).

of England.²⁴⁹ Britain applied this rule to many of its colonies, and upon independence as noted earlier, the penal policies of most African states showed a remarkable continuity with those of their colonial predecessors. Thus, the mandatory death penalty was retained in former British colonies.

The mandatory nature of the death penalty for certain crimes has not been the main subject of challenges to the death penalty in Africa.²⁵⁰ Nonetheless, the constitutionality of mandatory death sentences has been subject to worldwide judicial scrutiny and consideration, resulting in virtually unanimous condemnation of statutes providing for mandatory death sentences. Mandatory death penalty statutes have been struck down in many jurisdictions on the grounds that they are a violation of the right to life, cruel and inhuman,²⁵¹ and that they are a violation of the right to a fair trial as they are arbitrary, unfair and disproportionate.

The UN Human Rights Committee has found the mandatory death sentence to be in violation of the right to life under article 6 of the ICCPR. The Human Rights Committee addressed the issue of the mandatory death penalty for aggravated robbery in *Lubuto v Zambia*.²⁵² 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. The Human Rights Committee was of the view that the mandatory death penalty under the above circumstances violated article 6(2) of the ICCPR, which allows for the imposition of the death penalty only “for the most serious crimes”.²⁵³ The Committee’s decision was based on the fact that the court could not take into

²⁴⁹ Harrington (2004) 130.

²⁵⁰ In the current legal challenge to the death penalty in Uganda (*Susan Kigula and Others v The Attorney General*), the petitioners are also challenging, in the alternative, the mandatory death penalty in Uganda.

²⁵¹ In *Woodson v North Carolina* (1976) 428 US 280, the United States Supreme Court held that a mandatory death sentence without consideration of the nature of the offence or the circumstances of the offender constitutes cruel and unusual punishment. See also *Roberts v Louisiana* (1977) 431 US 633, *Lockett v Ohio* (1978) 438 US 586, and *Sumner v Shuman* (1987) 483 US 66.

²⁵² *Lubuto v Zambia*, Communication 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev.1, 31 October 1995, para 3.1.

²⁵³ As above, para 7.2.

consideration the fact that the use of firearms “did not produce the death or wounding of any person” in imposing the sentence.²⁵⁴ Also, in *Thompson v Saint Vincent and the Grenadines*,²⁵⁵ the UN Human Rights Committee held that a system of mandatory capital punishment would deprive a person of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The Committee was, therefore, of the view that the carrying out of the death penalty in such a case would constitute an arbitrary deprivation of life in violation of article 6(1) of the ICCPR.²⁵⁶

Recent decisions of the Judicial Committee of the Privy Council (Privy Council)²⁵⁷ that stem from countries of the Commonwealth have found mandatory death penalty to be unconstitutional. For example, the Privy Council held unanimously, in *Reyes v The Queen*,²⁵⁸ that the mandatory death penalty for murder contravened the prohibition on cruel, inhuman and degrading punishment as it was disproportionate, inappropriate, and denies the accused of his basic humanity. In *Roodal v The State of Trinidad and Tobago*,²⁵⁹ the Privy Council squashed the mandatory death sentence for murder, basing its decision on the fact that the death penalty need no longer be read as

²⁵⁴ As above.

²⁵⁵ *Thompson v Saint Vincent and the Grenadines*, Communication 806/1998, UN Doc. CCPR/C/70/D/806/1998, October 2000, para 8.2.

²⁵⁶ As above. See also the recent case of *Rolando v Philippines*, Communication 1110/2002, UN Doc. CCPR/C/82/D/1110/2002, 8 December 2004, para 5.2, in which the Committee found the mandatory imposition of the death penalty to be an arbitrary deprivation of life.

²⁵⁷ The decisions of the Privy Council are particularly instructive to Commonwealth African states, as they inherited their legal systems from the United Kingdom. The decisions also serve as a source of reference to other African states. The decisions of the Privy Council have led to the abolition of mandatory death sentences in many jurisdictions. For example, it led to the abolition of mandatory death penalty for murder in Jamaica in July 2004 (see C Dyer, “UK limits Jamaica death sentence” <<http://www.guardian.co.uk/print/0,3858,4966067-103690,00.html>> (accessed 19 July 2004).

²⁵⁸ *Reyes v The Queen* (2002) 2 App. Cas. 235 (Privy Council), para 43. The decision in *Reyes* was confirmed by the Privy Council in *The Queen v Hughes* (2002) 2 App. Cas. 259 (Privy Council), where it was again held that the mandatory death penalty for murder was cruel, inhuman and degrading, and therefore unconstitutional. The above judgments were further confirmed in *Fox v The Queen* (2002) 2 App. Cas. 284 (Privy Council) in which the Privy Council held that the criminal law provision in the code of St. Kitts and Nevis was unconstitutional to the extent that it required a court to impose the death penalty on those convicted of murder.

²⁵⁹ *Roodal v The State of Trinidad and Tobago*, Privy Council Appeal No. 18 of 2003, judgment of 20 November 2003, paras 29-32 & 35; [2003] UKPC 78. Privy council judgments are available at <<http://www.privacy-council.org.uk>> (accessed 16 December 2004).

mandatory by virtue of a generous interpretation of the rights in the Constitution, taking into account the international obligations of Trinidad and Tobago.

The Inter-American Commission on Human Rights²⁶⁰ and the Inter-American Court of Human Rights have also found mandatory death sentences to be unconstitutional. In *Hilaire et al v Trinidad and Tobago*,²⁶¹ the Inter-American Court held that a legislative schema that submits all persons charged with murder to a judicial process that does not consider the individual circumstances of the accused or the particular nature of the crime violates the prohibition against “arbitrary” deprivation of life. This decision is very important in that the Court arrived at its decision despite the saving clause in the Constitution. This can be insightful with regard to challenges to the mandatory death penalty in Africa as the African Charter and some national constitutions prohibit the arbitrary deprivation of life. Thus, allowing for the possibility of an interpretation to the effect that mandatory death sentences in such jurisdictions is an arbitrary deprivation of life.

In the Commonwealth Caribbean, most recent series of legal challenges to the death penalty deals with the mandatory nature of the death penalty for murder.²⁶² This could also be a positive route to take in Africa, with the goal of abolishing the death penalty. Taking into account the above decisions, this route is important because in retentionist African states where the death penalty is mandatory for certain offences, executions would amount to an arbitrary deprivation of life as convicted persons are executed for crimes that do not exhibit characteristics of utmost seriousness in violation of article 6(2) of the ICCPR.

²⁶⁰ In *Aitken v Jamaica*, Case 12.275, Report No. 58/02, 21 October 2002 and *Sewell v Jamaica*, Case 12.347, Report No. 76/02, 27 December 2002, the Inter-American Commission found the imposition of a mandatory death sentence to be inconsistent with article 4(1) of the American Convention.

²⁶¹ *Hilaire et al v Trinidad and Tobago*, judgment of 21 June 2002, Series C, No. 94, paras 103 & 106. The Inter-American Commission on Human Rights has also found mandatory death penalty to be cruel, inhuman and degrading in a number of cases (see *Downer and Tracey v Jamaica*, 13 April 2000, Report No. 41/00; *Baptiste v Grenada*, 13 April 2000, Report No. 38/00; *Edwards v The Bahamas*, 4 April 2001, Report No. 48/01. (Decisions available at website <<http://www.cidh.oas.org>> (accessed 20 July 2004)).

²⁶² Harrington (2004) 126.

Therefore, it is clear that for a trial to be fair and to establish whether the death penalty is an appropriate sentence for an individual case, accused persons should have the opportunity to present mitigating circumstances that arise in their case, which distinguishes them from other more severe cases of the same crime. Otherwise, imposition of the death penalty would constitute a violation of the right to life (and the right not to be subjected to cruel, inhuman and degrading punishment). The abolition of mandatory death penalty in retentionist African states is therefore vital, with a view to completely abolishing it.

2.4.3 Death row

The death penalty, in most cases, is usually preceded by long confinement, waiting to be executed. In the 19th century, executions took place within hours or days of a sentence of death, but delays have steadily increased in length, and more often than not are measured in years.²⁶³ The death penalty has been preceded by long confinement in some African states. In Uganda, some have spent over 20 years on death row. Ogwang, currently the longest serving prisoner on death row in the Luzira Upper Prison, has for example, been on death row for over 20 years.²⁶⁴ Lieutenant Colonel Addallah, Amin's notorious governor for the Central province who was convicted of murder of a district administrator, was on death row for 22 years.²⁶⁵ In Kenya, death row inmates have spent 20 years or more in jail.²⁶⁶ In Ghana, some prisoners have spent over 10 years on death row.²⁶⁷ In 2001, there were apparently at least 30 prisoners who have been on death row between eight and twenty-five years in

²⁶³ Hudson (2000) 834.

²⁶⁴ See *Susan Kigula and Others v The Attorney General*, The legal challenge to capital punishment in Uganda: 1st draft of submissions on the proposed issues framed for determination before the Constitutional Court of Uganda, prepared by M/s Katende, Ssempebwa & Co. Advocates.

²⁶⁵ W Wairagala "The death penalty in Uganda" <<http://www.thedeathhouse.com>> (accessed 10 July 2003).

²⁶⁶ G Munene "Plan to release death row prisoners" <<http://allafrica.com/stories/200307150153.html>> (accessed 22 July 2003).

²⁶⁷ "President grants amnesty to prisoners" <<http://allafrica.com/stories/printable/200306300853.htm>> (accessed 4 July 2003).

Zambia; and some prisoners served at least eighteen years on death row before being pardoned in Swaziland.²⁶⁸

In some jurisdictions, the law specifies where a prisoner awaiting execution is to be confined. For example, article 117 of the Penal Code of Ethiopia 1957 provides that the prisoner awaiting the confirmation or the execution of the sentence be detained under the same conditions as a prisoner serving sentence of rigorous imprisonment. In Swaziland, the law requires condemned prisoners to stay on death row until the execution warrant has been signed.²⁶⁹ In other states, like Ghana and Zimbabwe, condemned prisoners are kept separately; in others, like Cameroon and Nigeria, they are mixed into cells with those awaiting trial or other convicts respectively.

Generally, in most jurisdictions, where the condemned prisoners are confined is called “death row”. Thus, death row refers to the area in a prison that houses inmates awaiting execution and is often considered an institutionalised hell.²⁷⁰ Vogelmann describes death row as a place whose sole purpose is to preserve those who live there so that they may be executed.²⁷¹ It is, therefore, in the death chamber that the condemned and their executions make capital punishment a social reality. The fact that death sentences are continuously passed but executions are not carried out, leads to an increase in the number of prisoners under sentence of death or on death row. For example, in Zambia by the end of 2000, there were more than 230 on death row and up to 100 in Ethiopia.²⁷² By the end of 2001, there were 440 people under sentence of death in Burundi, 59 in Swaziland and 1925 in Kenya.²⁷³ By the end of 2002, there

²⁶⁸ Hood (2002) 111.

²⁶⁹ Stated in the report of the national coordinator of Swaziland, George Vukor-Quarshie, 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 <www.biicl.org/deathpenalty> (accessed 30 June 2004)).

²⁷⁰ Hudson (2000) 835.

²⁷¹ Vogelmann (1989) 195.

²⁷² *Amnesty International Report* (2001) 100 & 272.

²⁷³ See *Amnesty International Report* (2002) 63 & 245; D Mugonyi & M Njeru, “President Kibaki pardons 28 death row convicts” <http://www.santegidio.org/pdm/news2003/26_02_03_b.htm> (accessed 18 March 2003).

were at least 450 on death row in Burundi, more than 80 in the DRC, at least 12 in Swaziland and 354 in Uganda.²⁷⁴

By the end of 2003, over 450 prisoners were under sentence of death in Burundi, at least 3200 on death row in Kenya.²⁷⁵ However, with regard to Kenya, the government stated in 2004 that there are 1900 convicts serving in Kenyan jails who have been sentenced to death. Of these, 200 have exhausted their judicial remedies in terms of seeking to have the death sentence lifted, and 1,700 have not yet exhausted their judicial remedies.²⁷⁶ This reduction in number is as a result of the commutation of death sentences in Kenya in 2003, as seen in 2.3.1 above. As of July 2003, there were 487 prisoners on death row in Nigeria.²⁷⁷ In Uganda as of 1 January 2004, there were 457 death row inmates.²⁷⁸

The above figures are examples of the numbers that have been documented. As seen above, while the number of people on death row has decreased in Swaziland, it has increased in other countries like Kenya and Uganda. It should be noted that there are numerous prisoners on death row, especially in *de facto* abolitionist African states or those that have a moratorium in place but the exact numbers have not been documented. The increase in the number of prisoners on death row in most states is a matter of concern, as the consequence is overcrowding and poor conditions.²⁷⁹

²⁷⁴ *Amnesty International Report* (2003) 63, 80, 236 & 258.

²⁷⁵ *Amnesty International Report* (2004) 36 & 57.

²⁷⁶ Second periodic report of Kenya, para 54.

²⁷⁷ This number is the total of 24 states, with the state of Ogun being the highest with 107 death row inmates. See Amnesty International, “Nigeria: The death penalty and women under the Nigerian Penal systems” AI Index: AFR 44/007/2004, 10 February 2004.

²⁷⁸ Stated in the report of the national coordinator of Uganda, Emmanuel Kasimbazi, 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 <www.biicl.org/deathpenalty> (accessed 30 June 2004)).

²⁷⁹ Generally, the conditions of detention in prisons have been a matter of concern in most African states. See the reports of the Special Rapporteur on Prisons and Conditions of Detention in Africa (Dr Vera Chirwa) on Malawi, Zimbabwe, Mali, Central African Republic, The Gambia and Mozambique. Available at website <www.penalreform.org> (accessed 28 May 2004).

With regard to overcrowding, for example, the death row section in the Mukobeko maximum-security prison (Zambia) was built for 50 prisoners but by 2004, it houses more than 200 prisoners.²⁸⁰ Also, the death row section of the Lusaka prison in Zambia was originally built for 48 prisoners under sentence of death, but in the spring of 2001, it had more than 200 prisoners, with some suffering from tuberculosis but no access to medical treatment.²⁸¹ A report by independent watchdog, Foundation for Human Rights Initiative, described prison conditions in Uganda as “overcrowded, inmates malnourished with some almost naked, staff quarters appalling and inmates overworked”.²⁸² Overcrowding is evidence, for example, in the Luzira prison in Uganda, which is the country’s largest prison, was constructed in 1927 to house 624 prisoners but by 2002, it was housing 2000 inmates.²⁸³

The horrible conditions on death row have been well documented. In Nigeria, the living conditions of 12 juveniles sentenced to death by the Lagos State Armed Robbery and Firearms Tribunal in June 1988 for armed robbery were reportedly “unfit for any human, much less young adolescents”.²⁸⁴ One would think that as years go by, the death row conditions would improve in many African states. Yet, the conditions are still deplorable. For instance, the conditions on death row in the Chikurubi Maximum Security Prison in Zimbabwe were described in *Conjwayo v Minister of Justice and Another* as follows:²⁸⁵ Prisoners are confined separately in a windowless cell that is 4,6 metres long by 1,42 metres wide. The cell has a low concrete platform covered by a sleeping mat. An electric light burns in each cell, which provides the sole source of illumination and is never extinguished.

²⁸⁰ Stated in the report of the national coordinator of Zambia, Frederick Ng'andu, 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 <www.biicl.org/deathpenalty> (accessed 30 June 2004)).

²⁸¹ Hood (2002) 110-111.

²⁸² As above.

²⁸³ See W Wairagala, “The death penalty in Uganda” <<http://www.thedeathhouse.com>> (accessed 10 July 2003).

²⁸⁴ Hatchard & Coldham (1996) 174.

²⁸⁵ *Conjwayo v Minister of Justice and Another* 1991 (1) ZLR 105 (SC), 107-108.

Similarly, in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others*, the conditions on death row in the Harare Central Prison in Zimbabwe were described as follows: Prisoners are confined separately in a cell that is approximately three-and-a-half metres long by two metres wide, with a single window very high up from which only the sky is visible, and the prisoner is being obliged to utilise a chamber pot as there is no inbuilt toilet. At 1500 hours, the condemned prisoner is required to leave all clothing outside his cell; thereupon, he is incarcerated naked, until the following morning.²⁸⁶

In most African states, including Tanzania, the government has used the poor state of the economy in their countries to justify the substandard conditions on death row. On the contrary, this argument has been strongly rejected by Mwalusanya J in *Republic v Mbushuu and Another*, stating that “[i]t is my view that the defence of poverty can be offered elsewhere, but not when the basic human rights of an individual are at stake”.²⁸⁷ In addition, human rights standards have developed, as discussed in chapter five, which implies that governments cannot retain the death penalty and raise the economic argument, as long stay on death row under such deplorable conditions renders the ensuing execution cruel, inhuman and degrading.

2.4.4 Execution

In most cases, execution warrants are signed after a convicted person has exhausted the appeal processes (both judicial and non-judicial). Executions are either carried out in public²⁸⁸ or in secret. But in most African states, executions are not carried out in public, and are at times carried out secretly (like the execution of Bosch in 2001 in Botswana) with people becoming aware of it after the execution has been carried out. For certain offences, executions could be carried out in public in Burundi and

²⁸⁶ *Catholic Commission* (1993) 246-247.

²⁸⁷ *Mbushuu* (1994) 350.

²⁸⁸ With regard to public executions, the UN Human Rights Committee has stated that such executions are incompatible with human dignity (see concluding observations of the Human Rights Committee on the initial report of Nigeria submitted under article 40 of the ICCPR, UN Document No. CCPR/C/76/Add.65, 24 July 1996, para 16).

Guinea.²⁸⁹ Executions broadcasted on television or in public have taken place in the DRC, Equatorial Guinea, Gabon (1982, televised), Libya (1984, televised), Nigeria, Rwanda, Sierra Leone, Somalia and Uganda.²⁹⁰

There exist extra-legal and legal methods of execution. The existence of extra-legal methods is as a result of the fact that people resort to informal justice. Informal justice has manifested itself on the African continent in genocide (Liberia, Rwanda and Sierra Leone), mass executions and brutal killings, including political assassinations. An example of extra-legal executions is that carried out in Cameroon by the “operational command unit” (the “Bepanda nine” case). In February 2001, nine boys were arrested in Douala for the theft of a neighbour’s gas bottle, and later killed.²⁹¹ Extra judicial executions by security forces in many African states and elsewhere are a matter of concern.²⁹² Regarding legal methods, the most common methods of execution in Africa include hanging, shooting (usually by firing squad) and stoning.²⁹³

The methods of executions are provided for in the penal legislation of African states. For example, section 69 of the Prisons Act chapter 90 of the Laws of Kenya provides

²⁸⁹ Hood (2002) 101.

²⁹⁰ Hood (2002) 102.

²⁹¹ “Cameroon: The government must throw more light on the disappearance of 9 children in Douala” AI Index: AFR 17/002/2001, 2 March 2001.

²⁹² See the annual reports of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions to the Commission on Human Rights <<http://www.ohchr.org/english/issues/executions/annual.htm>> (accessed 18 December 2004). Furthermore, due to the increase in extra-legal executions, UN ECOSOC recommended the “Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions” (ECOSOC resolution 1989/65 of 24 May 1989). In paragraph 1 of this resolution, ECOSOC recommended that the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions should be taken into account and respected by Governments within the framework of their national legislation and practices.

²⁹³ Other methods of execution that have, in the past, been employed in some African states include beheading by guillotine (Congo) and beheading by sword and execution by means of the weapon used (Mauritania). See Amnesty International (1989) 123 & 174. There are other methods that have been used in other countries out of Africa. For example, execution by electrocution, poisonous gas and lethal injection (used for example in the United States of America), execution by bullet from a pistol in the back of the head (China), and execution by strangling and subsequently cutting the body into pieces and thrown into acid (Pakistan). This method of execution was ordered by a Pakistan special court in March 2000 for a man convicted of serial killing and mutilation of dozens of runaway children. However, the Council of Islamic Ideology declared this un-Islamic and an appeal was launched (see *Amnesty International Report* (2001) 186).

that any person sentenced to death shall be hanged by the neck until he is dead and the sentence shall be carried out in such a manner the Commissioner of prisons shall direct.²⁹⁴ Prior to execution by hanging, the prisoner is taken for neck and body measurements, as the ropes need to be the right strength and the drop needs to be worked out in relation to the individual's weight.²⁹⁵ The prisoner is hanged from a rope tied round his neck and is killed by the force of the rope exerted against the body pulled down by the force of gravity.²⁹⁶ Death is either brought about by damage to the spinal code or by asphyxiation due to constriction of the trachea. At times, the execution results in instant death but in some cases, death does not occur. Cases have been documented of failed hangings in various countries including Tanzania and Uganda.²⁹⁷ Hanging is used in Burundi, Cameroon, Congo, Egypt, Equatorial Guinea, Ethiopia, The Gambia, Kenya, Lesotho, Liberia, Libya, Malawi, Nigeria, Sierra Leone, Sudan, Swaziland, Tanzania, Tunisia, Uganda, Zambia and Zimbabwe.²⁹⁸

The hanging method was described in *Republic v Mbushuu and Another* as follows:

The prisoner is dropped through a trapdoor eight to eight and a half feet with a rope around his neck. The intention is to break his neck so that he dies quickly. The length of the rope is determined on the basis of such factors as body weight and muscularity or fatness of the prisoner's neck. If the hangman gets it wrong, the prisoner is dropped too far, the prisoner's head can be decapitated or his face can be torn away. If the drop is too short then the neck will not be broken but instead the prisoner will die of strangulation.²⁹⁹

²⁹⁴ Stated in the report of the national coordinator of Kenya, Joy Asiema, 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 <www.biicl.org/deathpenalty> (accessed 30 June 2004)).

²⁹⁵ Vogelman (1989) 192.

²⁹⁶ Amnesty International (1989) 54.

²⁹⁷ See *Mbushuu* (1994) 343, and the affidavit of Anthony Okwonga below.

²⁹⁸ Information gathered from a variety of sources, including Amnesty International and the Penal statutes of the respective countries. The sources are available on file with the author.

²⁹⁹ *Mbushuu* (1994) 343.

Also, Okwonga, a retired prison officer of the Luzira prison in Uganda has described in great detail the preparation put in place for hanging at the Luzira prison. He stated the following:

[P]risoners to be executed are dressed in an unusual overall-like outfit with no provisions for hands and feet. They are covered from head to toe. They are handcuffed and leg-cuffed to avoid instances of violence. Black hoods are placed over their heads. Weights are placed into the side pockets of their outfits in the case of smaller or lighter prisoners to make them heavier. With the hoods over their heads, the prisoners are blindfolded when they are led to their death. At the gallows, their legs are tied up, a noose is put over their heads and it is tightened at the back of the head, cutting off breathing. There is a metal loop on the right side of the neck designed to break the prisoner's neck when he drops. When all is set, the hangman releases a lever which opens up the trap doors at the bottom of the gallows, sending the prisoner to his death. After the prisoner's body drops, the assembled officers, priests and medical personnel proceed to the bottom of the gallows to certify the death. In the event that the prisoner is not dead, then the prisoner is killed by hitting them at the back of the head with a hammer or a crow-bar. The bodies are then placed in hastily prepared coffins and buried unmarked in mass graves under the prison vegetable garden. They are also sprayed with acid to help them decompose faster.³⁰⁰

As regards shooting, the execution is carried by a single executioner or by a firing squad. In Africa, firing squad is used and is mostly employed by military courts. Death is as a result of damage to the vital organs such as heart, damage to the central nervous system or haemorrhage.³⁰¹ Same with hanging, death can either be immediate or in some cases prolonged. Execution by firing squad is employed in Algeria, Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Congo, DRC, Egypt, Equatorial Guinea, Ethiopia, Ghana, Liberia, Libya, Madagascar, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Togo, Tunisia and Uganda.³⁰²

³⁰⁰ Affidavit of Anthony Okwonga, See *Susan Kigula and Others v The Attorney General*, The legal challenge to capital punishment in Uganda: 1st draft of submissions on the proposed issues framed for determination before the Constitutional Court of Uganda, prepared by M/s Katende, Ssempebwa & Co. Advocates) 55. The affidavit of Ben Ogwang corroborates that of Anthony Okwonga (As above).

³⁰¹ Amnesty International (1989) 57.

³⁰² The sources from which the information was gathered are available on file with the author.

Stoning is mostly common with states that apply the *Shari'a* law, as it is mostly used for offences such as adultery. This method is employed in Mauritania, Nigeria and Sudan.³⁰³ With stoning, a man is buried up to his waist and a woman to above her chest, and the stones may not be too small to delay death or be too big to result in swift death.³⁰⁴ Thus, stoning can cause a protracted death. Death is caused by damage to the brain, asphyxiation or a combination of injuries.³⁰⁵

2.4.5 Scale of death sentences and executions between 2000 and 2004

In states that are considered abolitionist in practice and in retentionist states, the passing of death sentences has been ongoing. The reported death sentences passed between 2000 and 2004 include the following:³⁰⁶ Death sentences were passed in 2000 in Burundi (99), Egypt (79), Mali (14), Malawi (53), Rwanda (164) and Zambia (11); in 2001 in Burundi (40), Central African Republic (2), Egypt (103), Guinea (22), Kenya (26), Libya (8), Nigeria (31), Rwanda (120), Sudan (26), Swaziland (12) and Tunisia (1); in 2002 in Burundi (50), Central African Republic (25), Egypt (115), Ethiopia (7), Kenya (126), Libya (2), Nigeria (12), Rwanda (40), Sudan (120), Togo (1) and Uganda (24); in 2003 in Burkina Faso (2), Burundi (14), Cameroon (8), Chad (4), DRC (30), Ethiopia (6), Ghana (1) Morocco (14), Nigeria (1), Rwanda (18),

³⁰³ As above.

³⁰⁴ 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).

³⁰⁵ Amnesty International (1989) 61.

³⁰⁶ The figures presented are those that are known to the author, and were based on information from the following: Comments by the government of Egypt on the concluding observations of the Human Rights Committee on the third and fourth periodic reports of Egypt, UN Doc. CCPR/CO/76/EGY/Add.1, 4 November 2003, para 9. Amnesty International, “Death sentences and executions in 2003” AI Index: 50/006/2004, 6 April 2004; *Amnesty International Report* (2001) 61-62, 166, 203 & 272; *Amnesty International Report* (2002) 63, 94, 115, 145, 161, 186, 209, 230 & 245; *Amnesty International Report* (2003) 63, 68, 95, 103, 148, 164, 211, 233, 250 & 258-259; & *Amnesty International Report* (2004) 33, 37, 52-53, 68, 71 & 84; Amnesty International press release “Sudan: 24 sentenced to death after unfair trial” AI Index: AFR 54/027/2003, 29 April 2003; “Death penalty / fear of imminent execution” AI Index: AFR 62/004/2003, 10 January 2003; “Moroccan Islamists sentenced to death” <<http://news.bbc.co.uk/2/hi/africa/3060747.stm>> (accessed 13 July 2003); “Death sentences for Morocco bombings” <http://news.bbc.co.uk/2/hi/in_depth/3162285.stm> (accessed 30 August 2003); “Libya death sentence for medics” <<http://news.bbc.co.uk/2/hi/africa/3689355.stm>> (accessed 10 May 2004).

Sudan (24) and Swaziland (1),³⁰⁷ and in 2004 in Algeria (21), Burundi (44), Cameroon (27), Chad (19), DRC (27), Egypt (1), Equatorial Guinea (1), Eritrea (7), Ethiopia (3), Libya (6), Morocco (1), Nigeria (14), Senegal (1), Sierra Leone (10) and Sudan (100).³⁰⁸ In addition, in February 2005, two people were sentenced to death in Burkina Faso.³⁰⁹

Some previous studies have avoided addressing reasons for the continuous passing of death sentences in some countries on the African continent.³¹⁰ Retention of the death penalty in statute books of most African states is obviously a reason for this ongoing death sentences, as judges have to apply the law. Another reason could be the fact that some capital trials do not conform to international and national fair trial standards, as seen in chapter six. Procedural safeguards for the imposition of the death penalty are often not adhered to in some African states, which can lead to the passing of death sentences in cases that it would not have otherwise been passed. The passing of some of these death sentences could also be attributed to political pressure, especially in cases where an offender is charged with a political offence, for example, terrorism or treason. In such cases, there is a possibility of the death penalty being used as a tool of political repression.³¹¹

Although the passing of death sentences has been ongoing in Africa, the scale of executions has reduced. In some African states, like Ghana, Mauritania, Liberia,

³⁰⁷ Death sentences were passed in 2003 in 19 African states, but only 11 states are listed here, as the number of death sentences in the other states has not been reported. The 19 African states are Algeria, Burkina Faso, Burundi, Cameroon, Chad, DRC, Egypt, Ethiopia, Ghana, Malawi, Morocco, Nigeria, Rwanda, Somalia, Sudan, Swaziland, Tanzania, Uganda & Zambia. See “Death sentences and executions in 2003” AI Index: ACT 50/006/2004, 6 April 2004.

³⁰⁸ Death sentences were passed in 2004 in 21 African states, but 15 states are listed here, as the number of death sentences in the other states (Kenya, Rwanda, Somalia, Tanzania, Uganda & Zimbabwe) has not been reported. See “Death sentences and executions in 2004” AI Index: ACT 50/005/2005, 5 April 2005.

³⁰⁹ See “La mort pour Saul” and “Après Saul, un 2e condamné à mort” in *L’Observateur* <<http://www.lobservateur.bf>> (accessed 21 February 2005).

³¹⁰ For example, Hood discusses the scale of death sentences in the USA and Africa. He points out that there have been fluctuations in the number of death sentences worldwide over the past twenty years but does not provide the reader with reasons as to why the increase in the number of death sentences in some African countries. See Hood (2002) 87-93.

³¹¹ See chapter six of this thesis.

Malawi, Swaziland and Zambia, there is a moratorium on executions (official and unofficial). There are different reasons for such moratoriums. In Swaziland, for example, the reason given by the government is that it has suspended executions while it searches for a more humane way of carrying out the death sentence.³¹² However, it has been alleged that the true reason why executions have not taken place is because the government has not been able to procure another executioner since the last one died.³¹³ Executions are currently not carried out in Malawi because the former president, Dr Muluzi promised never to sign the death sentence for a fellow human being.³¹⁴ The Zambian president has also refused to sign execution warrants.³¹⁵

Notwithstanding the decrease in the scale of executions on the African continent, executions have taken place in some African states between 2000 and 2004. In 2000, executions were carried out in Burundi (2) and Egypt (at least 22).³¹⁶ In 2001, people were executed in Botswana (1), Egypt (4), Guinea (7), Sudan (3), Zimbabwe (3) and Uganda (2).³¹⁷ In 2002, 17 were executed in Egypt, one in Nigeria, 40 in Sudan and two in Uganda.³¹⁸ In 2003, executions were carried out in a number of African states, for example, Egypt, Somalia, Sudan and Zimbabwe, some of which the numbers have not been documented.³¹⁹ With regard to executions in 2003 for which the numbers

³¹² Stated in the report of the national coordinator of Swaziland, George Vukor-Quarshie, 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 <www.biicl.org/deathpenalty> (accessed 30 June 2004)).

³¹³ As above.

³¹⁴ Statement from his speech to the Eighth General Assembly of the World Council of Churches in Harare, Zimbabwe, quoted in Agostoni (2002) 16.

³¹⁵ “Zambia: President outlaws death penalty” <<http://www.legalbriefafrica.co.za/newsletters/LBAfricaUSA029.html>> (accessed 13 February 2004).

³¹⁶ *Amnesty International Report* (2001) 61 & 94.

³¹⁷ *Amnesty International Report* (2002) 94, 115 & 230; “Bosch hanged in secrecy” <http://www.news24.com/News24v2/ContentDisplay/genericFrame/0,6178,2-1140_1005139,00.html> (accessed 12 February 2003); “Uganda – Ugandan soldiers executed” <http://www.santegidio.org/pdm/news2003/06_03_03_b.htm>(accessed 11 February 2004); “Murderers hanged in Zimbabwe” <http://www.zimbabwesituation.com/oct10_2001.html> (accessed 30 January 2003).

³¹⁸ *Amnesty International Report* (2003) 95, 233 & 258; “Nigeria: First execution under sharia condemned” <<http://www.hrw.org/press/2002/01/nigeria0108.htm>> (accessed 30 January 2003).

³¹⁹ See “Death sentences and executions in 2003” AI index: ACT 50/006/2004, 6 April 2004.

were reported, executions were carried out in Botswana (4), Chad (9), DRC (15), Sierra Leone (10), Somalia (4), Sudan (13), Uganda (7) and Zimbabwe (4).³²⁰ In 2004, one person was executed in Tanzania on 6 December 2004,³²¹ six people were hanged in Egypt on 22 September 2004,³²² two people were executed in Sudan and executions were carried out in Somalia, for which the figures have not been reported.³²³

2.5 Conclusion

Most African states still retain the death penalty. The crimes for which it is imposed vary from country to country. As seen in this chapter, death was imposed for certain offences, when caught in the act, in pre-colonial times. However, it was not institutionalised during this period as it is today and was used as a last resort, as there was much reliance on compensation. Colonialism saw the introduction of a range of offences and the institutionalisation of the system of capital punishment. Although sentencing policies during this period were based on principles of retribution and deterrence, compensation was still resorted to.

After the colonial period, the policies of independent African governments showed a remarkable continuity with those of its colonial predecessors. This led to the retention of the death penalty for a wide range of offences and the extension of its scope in states like Cameroon, Ghana and Nigeria to offences that cannot be considered “the

³²⁰ See Hands Off Cain (2004) 158; “Botswana rushes another South African to the gallows” <<http://www.mg.co.za/Content/13.asp?ao=17616>> (accessed 11 February 2004); “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 11 February 2004); “Firing squad executes 3 Ugandan soldiers” <<http://edition.cnn.com/2003/WORLD/africa/03/04/uganda.execution.ap>> (accessed 14 February 2004); *Amnesty International Report* (2004) 40; “Uganda: Unacknowledged detention of 14 persons and reported executions of 4 of them” <<http://www.hrw.org/press/2003/10/uganda100203-1tr.htm>> (accessed 12 February 2004); “Death penalty / fear of imminent execution” AI Index: AFR 62/004/2003, 10 January 2003; “Campaign questions Zimbabwe hangings” <http://www.zimbabwesituation.com/jun18_2003.html> (accessed 30 June 2003).

³²¹ A Tanzanian LLM student at the Centre for Human Rights, University of Pretoria, brought this information to the attention of the author.

³²² “Egypt: Continuing executions while use of death penalty decreases worldwide” AI Index: MDE 12/010/2004, 8 October 2004.

³²³ See “Death sentences and executions in 2004” AI Index: ACT 50/005/2005, 5 April 2005.

most serious”. Thus, in disregard of the ICCPR and other standards on the death penalty. There is still much emphasis on retribution and deterrence.

The retention of the death penalty in the penal statutes by states that consider themselves *de facto* abolitionists is a matter of concern. This is because a clear indication by these states to do away with the death penalty is not a guarantee that they would not carry out executions, as the death penalty is still in their statutes and they have not ratified international instruments geared towards abolition of the death penalty. Another issue of concern is the difficulties in applying the law with regard to capital cases. This is attributed to the corrupt practices of judicial officials, and generally flaws in the criminal justice system such as the lack of resources.

Due to the fact that the effectiveness of the criminal justice system in administering justice is questionable in most African states, it is, therefore, imperative that mitigating factors be considered in capital trials in states that still retain the death penalty. It is important for mitigating factors to be considered for sentencing to be rational, humane and rendered in accordance with the requirements of due process. It is also important that those convicted of capital offences be considered for pardon or clemency as this process can be used to correct possible errors in the trial, mitigate the harshness of the sentence or to compensate for the rigidity of the criminal law. Overall, improving national criminal justice systems to make them more efficient would restrict the use of the death penalty in Africa.

A major concern is the veil of secrecy under which death penalty matters are handled. The reasons for resuming executions in some states, the clemency process and executions themselves are obscured. The secrecy in the clemency process, for example leads to disparity in granting pardon and allows for arbitrariness in the exercise of clemency. There is, therefore, need for transparency and accountability in the whole process of administering capital punishment. However, due to the fact that the fundamental human rights of accused persons and those convicted is at stake, abolishing the death penalty will ensure protection of their rights.

Although most states see the death penalty as an essential instrument to curb crime, the fact that South Africa, which had the highest crime rates in the world, abandoned

the death penalty on the grounds that it infringed fundamental principles of human rights, gives grounds for optimism.³²⁴ In addition, the reluctance of some states to carry out executions makes it appropriate for such states to abolish the death penalty instead of passing on death sentences that would not be enforced, with consequences such as overcrowding and poor prison conditions.

Moreover, the reliance on principles of retribution and deterrence, and the fact that execution is an appropriate and effective form of punishment by most retentionist states is problematic. Basing the retention of the death penalty on principles of retribution and deterrence is fundamentally flawed as discussed in the subsequent chapter. In a nutshell, the challenges to the death penalty in Africa imply that most African states have to rethink their position with regard to the death penalty. Although some of the challenges have not been successful, some, as noted above, can be very insightful to other jurisdictions. A positive trend is the willingness of the courts to deal with death penalty issues in the constitutional context.

³²⁴ Hood (2002) 42.

CHAPTER THREE

REBUTTING THE ARGUMENTS FOR THE RETENTION OF THE DEATH PENALTY IN AFRICA

- 3.1 Introduction
- 3.2 International law
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 - 3.6.3.1 The death penalty prevents an offender from committing other crimes
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3.1 Introduction

Punishment has been defined as a deprivation or suffering inflicted by a court of law, as specified by the law transgressed by the sentenced person.¹ Criminal law specifies the punishment, and in cases where the violation is serious, such as intentional homicide, the punishment may be death. Justice Stewart has stated that capital punishment for the crime of murder is not disproportionate to the severity of that crime.² Thus, the death penalty comes into question with regard to severe crimes.

Generally, in ancient societies, acceptance of the death penalty depended on three principal factors: first, the insignificant value attached to human life; second, individual and tribal vengeance which was seen as just and necessary; and third, the sovereign was both the only source of justice and the guardian of peace or public security, with the right to inflict death in the name of the organised society he incarnated.³ In recent societies, different reasons have emerged which make recourse to the death penalty appear necessary.

Some African states, for example Tanzania, retain the death penalty because the government believes that it has “a part to play in the society”, as a deterrence tool.⁴ Also, Togo has justified the retention of the death penalty on the social and political reality of the country at the time the Togolese Penal Code was drawn up.⁵ In Swaziland, King Mswati III has justified the retention of the death penalty on the ground that, if repealed, it would increase the threat of serious crimes such as ritual

¹ Van den Haag & Conrad (1986) 55.

² *Gregg v Georgia* (1976) 428 U.S. 153, para 155. The issue in this case was whether the imposition of the death sentence for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments of the United States (US) Constitution. The Supreme Court held that it did not violate the Constitution. The Court's position was that capital punishment might be the appropriate sanction in extreme cases (Justices Brennan and Marshall dissented).

³ Ansel (1967) 4–5.

⁴ Third periodic report of Tanzania submitted under article 40 of the ICCPR, UN Doc. CCPR/C/83/Add.2, 7 October 1997, para 52.

⁵ Third periodic report of Togo submitted under article 40 of the ICCPR, UN Doc. CCPR/C/TGO/2001/3, 5 July 2001, para 107.

murder.⁶ As seen in this chapter, defenders of the death penalty believe that execution is less painful than most natural ways of dying and that the death penalty is legitimate and necessary. Some members of parliament in Kenya during the 1994 motion in parliament to abolish the death penalty argued that abolishing capital punishment would be tantamount to “licensing murder”.⁷ Thus, they saw the death penalty as necessary to prevent murder. Schutte, former South African member of parliament, has seen the death penalty as imperative to uphold law and order, and to ensure respect and confidence in the criminal justice system.⁸

Opponents to the death penalty (abolitionists), as seen in this chapter, see the death penalty as not necessary or not desirable. Some defenders of the death penalty, like Anderson, have acknowledged the fact that the death penalty is not desirable, but Anderson goes further to state that this “awful punishment” is forced by ice-cold brutal reality.⁹ Thus, he sees capital punishment as an instrument among many in the fight for a more righteous and better world.

In addition, as noted in chapter two, the death penalty has been seen as the definitive measure of sovereignty. Sarat points out that capital punishment is seen as one of the dramatic symbols of the presence of sovereignty in states where sovereignty is fragile, and that the maintenance of capital punishment in such states is essential to the demonstration that sovereignty could reside in the people.¹⁰ The death penalty has also been seen as necessary to safeguard state security. Barishaki, the Ugandan Commissioner for civil litigation, has argued that the death penalty is necessary to safeguard state security by barring errant soldiers from deserting and killing

⁶ D Mavunduse, “A new millennium free from death penalty in southern Africa?”
<<http://www.sardc.net/editorial/sanf/1999/09/30-09-1999-nf2.htm>> (accessed 30 June 2004).

⁷ D Mugonyi & M Njeru, “President Kibaki pardons 28 death row convicts”
<http://www.santegidio.org/pdm/news2003/26_02_03_b.htm> (accessed 18 March 2003).

⁸ Maduna (1996) 194.

⁹ D Anderson, *The death penalty: A defence* (2001) 1 (Introduction), Chapter 2
<http://w1.155.telia.com/~u15525046/ny_sida_3.htm> (accessed 1 October 2003), hereinafter referred to as Anderson (2001).

¹⁰ Sarat (1999) 5.

civilians.¹¹ However, the sovereignty and state security argument above is questionable, as sovereignty and state security cannot be a substitute for human rights considering the universality of human rights or its progressive acceptance by African states.

On the other hand, the death penalty's existence is questioned, as it is seen as a violation of human rights as seen in chapters four, five and six below. Moreover, some Africans have stated their opposition to it. For example, Konaré, former president of Mali and Chairperson of the AU Commission, has on several occasions stated his opposition to the death penalty.¹² The Ethiopian Human Rights Council has argued that the death penalty is barbaric and described as flawed arguments that claim that it reduces crime in society.¹³ Further, Kamakil, the Kenyan Commissioner of prisons, has stated his opposition to the death penalty in the following words: "We are longing for the day Parliament will remove the death penalty from the Constitution. Sometimes many people are hanged for wrongs reasons".¹⁴

As mentioned in the introduction chapter, one of the research questions of this thesis is: Why do most African states retain the death penalty? This chapter discusses the main arguments by Africans for the retention of the death penalty in Africa. It first postulates, without embracing the various arguments; then, the validity of each of them are considered, specifically from a human rights point of view. These arguments are discussed with a view to providing the reader with an understanding of the reasons why most African states retain the death penalty. It should be noted that reference is also made to examples or cases from outside Africa to substantiate certain arguments for the retention of the death penalty in Africa. Also, the question of alternatives to the death penalty in Africa is mentioned briefly, as it is dealt with in the concluding chapter of this thesis.

¹¹ H Abdallah, "Army executions necessary" <<http://allafrica.com>> (accessed 23 January 2004).

¹² *Amnesty International Report* (2001) 166.

¹³ "Call to abolish death penalty in Ethiopia" *Mail and Guardian*, 3 October 2003; see <<http://www.mg.co.za/Content/13.asp?ao=21422>> (accessed 13 October 2003).

¹⁴ D Mugonyi & M Njeru, "President Kibaki pardons 28 death row convicts" <http://www.santegidio.org/pdm/news2003/26_02_03_b.htm> (accessed 18 March 2003).

3.2 International law

International law has been defined as a body of rules and principles that are binding upon states in their relations with one another.¹⁵ Historically, international law was viewed as a law of sovereign states. However, as Schabas points out, this view evolved in the 20th century. He states that international law is no longer restricted to the rights and obligations of states between themselves but now encompasses rights and obligations that states undertake to respect vis-à-vis individuals.¹⁶ It has as one of its aims the protection of the human rights of the individual against his or her own government. Therefore, human rights can be seen as one of the principal themes of international law as they have been incorporated into it.

3.2.1 The death penalty is provided for in international law

Defenders of the death penalty (retentionists) are of the view that the death penalty has not been abolished by international law. This argument is fully elaborated here, and its validity is considered in 3.2.2 below. For example, Malabo of Zambia, who was once president Chiluba's legal adviser, insists that the death penalty in Zambia has a constitutional basis and is in line with the ICCPR, which reserves the death penalty for the most serious crimes.¹⁷ Justice Chaskalson also acknowledged the fact that capital punishment is not prohibited by public international law in *S v Makwanyane*, when he pointed out that

[c]apital punishment is not prohibited by public international law, and that is a factor that has to be taken into account in deciding whether it is cruel, inhuman or degrading punishment.¹⁸

¹⁵ Dugard (2000) 1. It should be noted that international law also includes non-binding rules and principles, such as those enshrined in resolutions of, for example, the UN General Assembly.

¹⁶ Schabas (1996) 17.

¹⁷ AFRICANEWS – “Zambia: Prisoners challenge capital punishment”
<<http://lists.peacelink.it/afrinews/msg00190.html>> (accessed 12 February 2004).

¹⁸ *S v Makwanyane* 1995 (3) SA 391, para 36 (hereinafter referred to as *Makwanyane* (1995)).

Looking at international instruments, it is clear that capital punishment is not prohibited by international law.¹⁹ The subsequent paragraphs discuss provisions in international instruments with the aim of showing that it does not prohibit the use of the death penalty, but some merely place restrictions on its use. Some international instruments make no mention of the death penalty, for example, the UDHR. Article 3 provides that “everyone has the right to life, liberty and security of person”, but makes no reference to the death penalty. Since most African states still retain the death penalty, they could read this provision as allowing for its imposition.

Article 6(1) of the ICCPR is silent on the death penalty. It provides that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. The ICCPR therefore allows for the imposition of the death penalty as long as it is not arbitrary, as article 6 of the ICCPR goes further to place restrictions on the use of the death penalty. According to article 6(1), the death sentence is acceptable if those sentenced to death are given “the right to seek pardon or commutation of the sentence”. The granting of amnesty, pardon or commutation of the sentence is not mandatory due to the use of the word “may” in this article. In other words, those sentenced to death have the “right to seek” pardon or commutation, but the granting of such pardon or commutation is a matter of discretion.

Furthermore, article 6(5) excludes the imposition of the death penalty on persons below 18 years of age and prohibits the carrying out of executions on pregnant women. Thus, the death penalty is a valid sentence as long as it is not imposed on someone below 18 and a pregnant woman is not executed. It should be noted that the ICCPR does not prohibit the imposition of the death sentence on a pregnant woman.²⁰

The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty goes further than the ICCPR. But still, it does not provide for absolute abolition of the death penalty. Article 2(1) of the Protocol allows states to apply the

¹⁹ It should be noted that the Supreme Court of Norway had conceded that the application of the death penalty in Norway is valid as it is prohibited by international law, and thus could be legitimately imposed despite the fact that it was inapplicable under the country’s criminal law (*Prosecutor v Klunge* (1946) 13 Ann. Dig. 262 (Supreme Court, Norway), cited in Schabas (1997) 1).

²⁰ See chapter two for a discussion on this provision.

death penalty in time of war to a conviction for a most serious crime of a military nature committed during wartime, if a reservation was made to this effect at the time of ratification or accession. In addition, the CRC does not abolish the death penalty. It merely prohibits its imposition on persons below eighteen years of age.²¹

Treaties of international humanitarian law do not prohibit the death penalty but merely provide rules regarding its imposition in time of war. The Third Geneva Convention protects prisoners of war by limiting the scope of imposition of the death penalty on them, and provides that where a death sentence has been passed, the execution shall not be carried out before the expiration of a period of at least six months.²² Therefore, an execution is valid if carried out after the expiration of a period of six months.

The Fourth Geneva Convention protects civilian persons in time of war. It does not prohibit the imposition of the death penalty. It only prohibits the deprivation of the right of petition for pardon or reprieve for those condemned to death.²³ The Geneva Conventions have two Protocols limiting the scope of application of the death penalty but not abolishing or prohibiting its use. Protocols I and II prohibit the application of the death penalty on pregnant women or mothers and on juveniles.²⁴ The death penalty is thus a valid punishment as long as certain conditions are met.

²¹ Article 37(a).

²² Articles 100 and 101, Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), 75 U.N.T.S. 135.

²³ Articles 68 and 75, Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention), 75 U.N.T.S. 287.

²⁴ See Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), articles 76(3) and 77(5); and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), article 6(4).

With regard to human rights instruments in the various regional human rights systems, most of them do not abolish the death penalty absolutely as seen below. In the European human rights system, with regard to states that are yet to ratify Protocol No. 13,²⁵ the death penalty could be imposed as an exception to the right to life under article 2(1) of the European Convention on Human Rights (European Convention).²⁶ A look at article 2 reveals that it does not envisage abolition of the death penalty. Moreover, it makes little provision for safeguards or limitations on the use of the death penalty. Subsequently, Protocol No. 6 to the European Convention was adopted,²⁷ which does not completely abolish the death penalty. In *Soering v United Kingdom*, the European Court of Human Rights pointed out that article 2 of this Protocol does not preclude the death penalty, as it allows member states to use the death penalty in time of war.²⁸

In the Inter-American human rights system, the American Convention does not preclude the death penalty but merely places limitations on its use. Article 4(3) of the American Convention prevents states that have abolished the death penalty from reintroducing it. Therefore, the American Convention is an abolitionist instrument only to the extent that states that abolished the death penalty before ratifying the American Convention are bound as a question of international law not to use the death penalty. However, those that have not, or did not abolish the death penalty before ratifying the Convention, are free to use it as long as they adhere to the safeguards on its use. The American Convention further provides safeguards and limitations on the death penalty, excluding its use for political crimes and related common crimes, and for juveniles and the elderly,²⁹ but in other cases, the death penalty is a legitimate sentence.

²⁵ See 3.2.2 below for a discussion of Protocol No.13.

²⁶ Adopted in 1950, entered into force on 3 September 1953 (E.T.S. 5, 213 U.N.T.S. 222). The Convention is the only instrument to attempt an exhaustive list of exceptions to the right to life.

²⁷ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, adopted on 28 April 1983, entered into force on 1 March 1985 (E.T.S. 114).

²⁸ *Soering v United Kingdom*, Series A, No. 161 (1989), para 103 (European Court of Human Rights), hereinafter referred to as *Soering* (1989).

²⁹ Article 4(4) and 4(5) of the American Convention respectively.

The American Convention was supplemented by a Protocol dealing with the abolition of the death penalty.³⁰ However, the Protocol does not prohibit the death penalty as article 2 makes provision for a reservation to be made by state parties regarding application of the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

In the African human rights system, as stated in chapter two, the African Charter in article 4 prohibits the “arbitrary” deprivation of life. This article could be read to imply that it permits the death penalty, as the African Charter as a whole makes no mention of the death penalty or the need to abolish.³¹ In addition, as noted in chapter two, the African Children’s Charter and the African Women’s Protocol do not preclude the death penalty, but for certain categories of persons.

Regarding the Islamic system, capital punishment is considered an integral part of the law. The Islamic human rights system has no convention, but the Islamic Council has adopted a Universal Islamic Declaration of Rights, which guarantees the right to life and provides for the death penalty under the authority of the law in its article 1(a).³² In addition, the League of Arab States has adopted the Arab Charter on Human Rights,³³ which proclaims the right to life in its article 5. It goes further to provide for the imposition of the death penalty for the most serious crimes, prohibits its imposition for political offences, and on a person under the age of 18, a pregnant woman prior to her delivery or on a nursing mother within two years from the date on which she gave birth.³⁴ Thus, the death penalty is a legitimate punishment in the Islamic human rights system.

³⁰ Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted on 8 June 1990, entered into force on 28 August 1991 (O.A.S. Treaty Series No. 73 (1990), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 80 (1992)).

³¹ Generally, the African Charter has been criticised as falling short of truly effective human rights protection (see Flinterman & Henderson (1999) 395).

³² Adopted on 19 September 1981 (21 *Dhul Qaidah* 1401).

³³ Adopted on 15 September 1994, reprinted in (1997) 18 *Human Rights Law Journal* 151 (it had not yet been ratified by any members of the league of Arab States as of December 2004).

³⁴ Articles 10, 11 and 12 respectively, of the Arab Charter on Human Rights.

It is clear from the abovementioned that the death penalty is provided for in international law. While some instruments make no mention of the death penalty, others allow its application in certain circumstances or restrict the offences for which it is imposed.

3.2.2 Rebuttal of argument

To begin with, it should be borne in mind that caution has to be taken in dealing with capital punishment in international law because capital punishment is also related to domestic jurisdiction. Each country has its own laws on the death penalty. However, these laws have to be in accordance with international human rights law. International law is comprised of global and regional (human rights) treaties. And the silence of some of these treaties, for example, the African Charter, on the death penalty is not a bar to calling for abolition of the death penalty. International law contains minimum obligations; states may go beyond those obligations by elevating international law standards in their domestic systems. Thus, the international law argument is not conclusive.

The argument that the death penalty is allowed under international law is subject to compliance with the restrictions placed on its imposition and procedural safeguards with regard to its imposition. In the light of progressive acceptance of human rights, a systematic reading of the existing human rights instruments inevitably leads to the conclusion that the death penalty is a violation of human rights.³⁵ In the African continent, “human rights” has been the basis for the abolition of the death penalty in South Africa in the landmark judgment passed by the South African Constitutional Court in which it declared the death penalty unconstitutional.³⁶

As noted above, article 3 of the UDHR makes no mention of the death penalty, guaranteeing the right to life in clearly unqualified terms. As discussed in chapter four, looking at the *travaux préparatoires* and subsequent interpretations of this article by the UN General Assembly and ECOSOC resolutions, it is clear that the

³⁵ Slama (2001) 427.

³⁶ *Makwanyane* (1995), see chapters four and five for further discussion of the case.

death penalty was considered to be incompatible with the right to life.³⁷ According to Schabas, article 3 of the UDHR is abolitionist in outlook for the reason that by its silence on the death penalty, it directly envisages its abolition and implicitly admits its existence as a necessary evil.³⁸ Therefore, the UDHR cannot be used to justify the application of the death penalty, especially considering the fact that the right to life provision is not qualified.³⁹

Under the ICCPR, the Third and Fourth Geneva Conventions, the European Convention, the American Convention, and the African Charter, the imposition of the death penalty will only be a valid punishment if the safeguards and restrictions on its implementation are respected. Further, with the adoption of Protocol No. 13 (discussed below), it is my view that the European Convention cannot be used at present, even by states that have not ratified the Protocol, to justify the argument above that the death penalty is provided for in international law. Article 2 of the European Convention could be interpreted, taking into consideration for example the developments in the European system after 1994 as seen below, to imply that it precludes the death penalty.⁴⁰ The Parliamentary Assembly of the Council of Europe in recommendation 1246 (1994)

[considered] that the death penalty has no legitimate place in the penal systems of modern civilised societies, and that its application may well be compared with torture and be seen as inhuman and degrading punishment within the meaning of Article 3 of the European Convention on Human Rights.⁴¹

³⁷ Roosevelt, chairperson of the drafting Committee of the UDHR referred to movement in progress in some states to abolish the death penalty, and recommended that it might be better not to make explicit mention of the matter (UN Doc E/CN.4/AC.1/SR.2, 10). For more on this, see Schabas (2002) 30. For subsequent interpretations, see General Assembly resolution 2393 (XXIII), General Assembly resolution 2857 (XXVI), General Assembly resolution 44/128, and ECOSOC resolution 1930 (LVIII).

³⁸ Cited in Slama (2001) 403.

³⁹ See chapter four for a discussion of the effect of qualified and unqualified right to life provisions in relation to the death penalty.

⁴⁰ Generally, the object and purpose of the European Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (*McCann and Others v United Kingdom* (1995) Series A, No. 324, Application No. 18984/91 (European Court of Human Rights), para 146).

⁴¹ Parliamentary Assembly of the Council of Europe recommendation 1246 (1994) on the abolition of capital punishment, para 3, adopted on 4 October 1994.

The Parliamentary Assembly has further acknowledged the importance of countries that have not yet abolished the death penalty to join the trend for abolition. In resolution 1044 (1994), it called “upon all the parliaments in the world which have not yet abolished the death penalty, to do so promptly following the example of the majority of the Council of Europe member states”.⁴² In the same resolution, the Assembly made it obligatory for all new member States to sign and ratify Protocol No. 6 and to introduce a moratorium on executions.⁴³ Abolition of the death penalty became a pre-condition for membership of the Council of Europe. In resolution 1097 (1996),⁴⁴ the Parliamentary Assembly, making reference to resolution 1044 (1994), reminded applicant states to the Council of Europe that the willingness to sign and ratify Protocol No. 6 to the European Convention and to introduce a moratorium upon accession has become a prerequisite for membership on the part of the Assembly.

The Parliamentary Assembly of the Council of Europe has also indicated its interest to delete the second sentence of article 2(1) of the European Convention that allows for the death penalty so as to match theory with reality.⁴⁵ The adoption of Protocol No. 13 to the European Convention, which abolishes the death penalty in all circumstances, in my opinion, changes the interpretation of article 2 of the European Convention and rebuts article 2 of Protocol No. 6 stated above.⁴⁶ Protocol No. 13 provides in its preamble that “abolition of the death penalty is essential for the protection of [the

⁴² Parliamentary Assembly of the Council of Europe resolution 1044 (1994) on the abolition of capital punishment, para 7, adopted on 4 October 1994.

⁴³ Resolution 1044 (as above) para 5.

⁴⁴ Parliamentary Assembly of the Council of Europe resolution 1097 (1996) on the abolition of the death penalty in Europe, para 6, adopted on 28 June 1996.

⁴⁵ The reality, that strengthened the interest of the Parliamentary Assembly, is the fact that more modern national constitutional documents and international treaties no longer include such provisions. See Parliamentary Assembly Opinion No. 233 (2002) on the draft Protocol to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances, para 5. Similarly, with regard to amending article 2, the European Court of Human Rights has noted that abolition status of the death penalty throughout Europe, should be seen as an agreement by contracting states to amend article 2(1) of the European Convention (see *Öcalan v Turkey*, Application No. 46221/99 (2003) ECHR 125, judgment of 12 March 2003, para 175; (2003) 7 *Amicus Journal* 24).

⁴⁶ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, adopted by the Committee of Ministers in February 2002, entered into force on 1 July 2003. 29 countries have ratified Protocol No. 13, and 14 countries have signed but are yet to ratify the Protocol (see Amnesty International, “Ratification of international treaties” <<http://web.amnesty.org/pages/deathpenalty-treaties-eng>> (accessed 31 March 2005)).

right to life] and for the full recognition of the inherent dignity of all human beings”. Article 1 of the Protocol abolishes the death penalty, article 2 goes further to prohibit any derogation, and article 3 prohibits any reservations, in respect of the provisions of the Protocol. Article 5 of the Protocol provides that “[a]rticles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly”. This, therefore, implies that an interpretation of article 2(1) of the European Convention in the light of this Protocol inevitably leads to the conclusion that the death penalty is precluded.

With regard to the CRC, African Children’s Charter and African Women’s Protocol, their scope is limited to the protection of specific vulnerable groups. The death penalty has been prohibited for those groups in the above instruments, thus they abolish the death penalty as far as their scope reaches.

Furthermore, the African Charter cannot be used to justify the argument that the death penalty is provided for in international law. The fact that article 4 of the Charter makes no mention of the death penalty could be interpreted, in the light of article 60 of the Charter, to imply that it precludes the death penalty.⁴⁷ Also, adopting Schabas’ view on the UDHR mentioned above, it could be said that the African Charter is abolitionist in outlook, as it makes no mention of the death penalty unlike other human rights instruments in the African system or other regional systems.

Even if an interpretation is to the effect that the death penalty is allowed, its application is, however, limited. Article 4 of the African Charter prohibits the arbitrary use of the death penalty, thus it allows for the death penalty only if it is in accordance with the law. Nonetheless, similar provisions in other jurisdictions prohibiting the arbitrary deprivation of life have been interpreted to preclude the death penalty.⁴⁸ In other words, the death penalty has been seen to be an arbitrary deprivation of life. Also, the conclusions of Justice Chaskalson and other judges of the South African Constitutional Court that the death penalty is “arbitrary” is powerful

⁴⁷ See chapter four for further discussion on a possible interpretation of article 4 of the African Charter leading to the conclusion that it precludes the death penalty.

⁴⁸ See the decision of the Hungarian Constitutional Court, Decision 23/1990 of 24 October 1990, discussed in chapter four (4.6.2) of this thesis.

support for an interpretation of article 4 of the African Charter to the effect that it prohibits capital punishment.⁴⁹ Taking this into consideration, as required under article 60 of the African Charter, it could be said that the Charter does not allow for the death penalty.

Based on the above, there are some question marks about the argument that the death penalty is provided for in international law, as the death penalty is a violation of human rights.⁵⁰ Even where international instruments place restrictions on its imposition, these restrictions are usually not respected, as discussed in chapter six of this thesis.

3.3 Traditional African societies

It is important to note that, in discussing capital punishment, one has to keep in mind the issue of cultural diversity. Every culture has its peculiarities, thus, one has to respect the viewpoint of each of them, provided that it is consistent with the principles of democracy, the rule of law and human rights.

3.3.1 Some African traditional philosophies allow for the imposition of the death penalty

This argument highlights the need for traditional justice to return. Retention of the death penalty with regard to African traditional philosophies is supported on the basis of two main arguments:

First, the death penalty is a valid punishment as death was imposed for certain offences in pre-colonial African societies, as seen in chapter two. For example, in indigenous Igbo society, an ethnic group in Nigeria, death was seen as the sole punishment for murder. Aja writes that the traditional Igbo was and still is at pains in

⁴⁹ See *Makwanyane* (1995). It should be noted that Members of the Supreme Court of Nigeria have shown some interest in the arguments by which article 4 is held to prohibit capital punishment (see *Nemi and Others v The State* (1994) 1 LRC 376).

⁵⁰ Other writers also hold this view. See, for example, Slama (2001) 427.

understanding why certain murderers are not sentenced to death for lack of evidence or some other technicalities.⁵¹

Second, retention of the death penalty is justified on the ground that some African traditional practices that have been taking place in pre-colonial and colonial Africa, and are currently taking place in some African countries, allow for its imposition. Imposition of the death penalty is similar to these practices, as the practices permit the taking of the life of a person for certain reasons. In other words, the same as the death penalty allows the state to take the life of a criminal convicted of a capital offence, so does a traditional practice allow a person or the community to take the life of another for reasons of defending the honour of one's family, for purposes of ritual or for a crime punishable with death that the particular individual has committed. Abolishing the death penalty would, therefore, mean discarding such practices. The subsequent paragraphs examine some of these practices.

“Trial by ordeal” is one of the African traditional practices that allow for the killing of another human being. “Ordeal” means miraculous decisions or judgements employed in determining the truth or falsity of a claim. Trial by ordeal takes place in cases in which guilt is uncertain. During such trials, the accused is submitted to painful, dangerous, and lethal tests, which are believed to be under the spell of supernatural forces. The ordeals used include the ordeal of the bier, the fire ordeal, and the water ordeal.⁵² The Ashantis of Africa believe that the corpse would, in some way or other pinpoint the murderer, who will then be killed, as death is the punishment for those who commit murder.⁵³ Also, trial by ordeal still takes place with regard to theft or murder cases in some rural parts of Cameroon, especially in the North West region.

With regard to the fire ordeal, the accused has to walk through the fire unscathed so as to prove his innocence; and with water ordeal, the accused, bound hand and foot and

⁵¹ Aja (2000) 230-231.

⁵² The ordeal of the bier has occurred in Europe and Africa. See H Thein, “Trial by ordeal” <<http://www.myanmar.com/gov/perspec/2003/1-2003/tri.htm>> (accessed on 5 January 2004).

⁵³ As above.

fastened with a rope is thrown into water.⁵⁴ The belief is that the water would receive him if he is innocent or cast him up or reject him if he is guilty. If he is innocent, he is then pulled out. If he is not innocent, he is allowed to drown and die in the water. Thus, some trials by ordeal lead to death as punishment for the crime committed and abolishing the death penalty will mean that trials by ordeal that lead to death will not be legitimate. Since trials by ordeal are seen as the best way of ascertaining guilt in some African societies, retention of the death penalty will enable the continuance of such practices that facilitate the administration of justice.

“Honour killings” also allow for the imposition of the death penalty. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions, with regard to the question of traditional practices and customs, has confirmed the occurrence of practices such as honour killings in which husbands, fathers or brothers murder their wives, daughters or sisters in order to defend the honour of the family in some countries, including African states.⁵⁵ The Special Rapporteur further noted in the report that honour killing is usually a decision by a tribunal consisting of male family members, and is as a general rule, carried out by an under-age male relative of the woman. It is also alleged that the police often fail to intervene to stop potential honour killings brought to their attention. The fact that the police fail to intervene means that this practice is recognised as a legitimate African traditional practice.

Honour killings tend to be more prevalent in, but are not limited to, countries with a majority Muslim population. In Africa, such killings take place mainly in North Africa; and honour killings have been reported in Egypt, Morocco and Uganda. For example in Egypt, a father is reported to have paraded his daughter’s severed head through the streets shouting, “I avenged my honour”.⁵⁶

⁵⁴ As above.

⁵⁵ Report of the Special Rapporteur on extrajudicial, summary or arbitrary execution on country situations (E/CN.4/1999/39/Add.1).

⁵⁶ “Widespread violence against women in Africa documented”
<http://www.afrol.com/categories/women/wom003_violence_unfpa.htm (accessed 5 January 2004).

“Ritual murder” is another traditional African practice that allows for the killing of persons for the purposes of rituals. Ritual murder is practiced in certain parts of sub-Saharan Africa,⁵⁷ such as Congo and South Africa (KwaZulu-Natal). From the above African traditional practices, it is clear that abolishing the death penalty would mean discarding such practices that are embedded in some African societies.

3.3.2 Rebuttal of argument

It is not disputed that the taking of life (“death penalty”) has been a form of punishment for certain offences in some traditional African societies. However, it was rarely or never imposed in some societies. Soga has pointed out, with regard to the Ama-Xosa (South Africa), that the “death penalty” was never imposed for the reason that – “Why sacrifice a second life for one already lost?”⁵⁸ This attests to the fact that everyone’s life is valuable, and even murderers have to be treated in light of the value of their lives. The fact that some kings were opposed to the “death penalty” brings its validity into question. For example, the Sotho King Moshoeshoe was opposed to capital punishment.⁵⁹

As noted in chapter two, death for certain offences existed in traditional African societies as an exception and not a law. Accordingly, Justice Kriegler has stated that the relatively well-developed processes of indigenous societies did not in general encompass capital punishment for murder.⁶⁰ In some African societies, customary notions of compensation and restitution were mostly relied on with regard to capital offences. African courts were much more ready to promote reconciliation and order compensation. For example, though the Baganda killed a murderer in some instances, generally, the penalty was the payment of blood money.⁶¹ The usual method of

⁵⁷ H Clerc, “Police fear ritual murder has spread to Europe”
<<http://www.mg.co.za/Content/13.asp?a=13&o=4012>> (accessed on 5 January 2004).

⁵⁸ Cited in *Makwanyane* (1995) para 377.

⁵⁹ *Makwanyane* (1995) para 378.

⁶⁰ *Makwanyane* (1995) para 381.

⁶¹ Elias (1956) 136.

punishment among the Busoga was fines.⁶² The Luo of Western Kenya and traditional Sudanese societies also resorted to compensation, as the murderer of a man was required to marry the wife of his victim.⁶³ This is because killing the murderer would mean loss of two breadwinners thereby making two families fatherless. In the Igbo society, in the case of wilful murder, the murderer could go on exile and upon return after a stipulated period, and after having performed the appropriate sacrifices and made prescribed restitutions, was integrated into the community.⁶⁴ Byamukama writes that in some African ethnic groups of western Uganda, Rwanda and northwestern Tanzania where a murderer was killed, compensation was an available option that could be arranged before angry relatives could avenge the death of their relatives.⁶⁵ Thus, the death was considered as a last resort.

Conceptually, there is difficulty accepting the taking of life in traditional African societies as the “death penalty”. Death was imposed as a response to the crime, when caught in the act. Concrete cases have not been documented showing that the death penalty was institutionalised in African societies or that a murderer, for example, was confined in a place (or prison) waiting to be killed. Hence, the death penalty in Africa as practiced today is not in the African tradition⁶⁶ (that is, the present death penalty system is not as it was practiced in traditional African societies), but as was introduced by the colonial powers since “African governments continue to echo the colonial rulers’ claims that execution is an appropriate and effective form of punishment”.⁶⁷

With regard to the argument that certain African practices allow for the taking of life, it is not disputed that it is important to take into consideration traditional practices, including those that allow for the killing of a person, when dealing with the death

⁶² Roscoe (1924) 102.

⁶³ Agostoni (2002) 76.

⁶⁴ Aja (2000) 231.

⁶⁵ Agostoni (2002) 74.

⁶⁶ This view has been portrayed by president Olusegun Obasanjo of Nigeria during the meeting of the Organisation of African Unity (OAU) in 1999. See Agostoni (2002) 76.

⁶⁷ Agostoni (2002) 77.

penalty. Justice Kriegler has acknowledged the need to take into account the traditions, beliefs and values of all sectors of a society with regard to developing jurisprudence.⁶⁸ Although abolishing the death penalty could mean discarding some African traditional practices, Justice Kriegler noted, with regard to the South African context, that in order to ensure compatibility with the principles of the new constitutional order, many aspects and values of traditional African law will have to be discarded or developed.⁶⁹

The necessity to discard such practices or philosophies comes to light if one considers the clash between traditions and modern values. Due to this clash, the evolution of such traditions, beliefs and values has to be taken into account in determining whether it is important to rely on them to justify the retention of the death penalty in Africa. At this point, it is important to understand what tradition actually means. Tradition is “a belief or practice transmitted from one generation to another and accepted as authoritative, or deferred to, without argument” or a practice or belief that is inherited, accepted, and preserved from previous generations.⁷⁰ Modernity refers to “the ideas, principles, and ideals covering a whole range of human activities that have underpinned western life and thought since the seventeenth century”.⁷¹ Every society in our modern world, from the point of view of a deep and fundamental conception of tradition, is traditional in as long as it maintains and cherishes values, practices and outlooks handed down to it by previous generations.⁷²

In general, based on the intelligibility of the concept of the modernity of tradition, traditions are not irreconcilable with modernity. However, some African traditional philosophies or practices, such as those that allow for the taking of life, are irreconcilable with modernity. Bearing in mind the fact that no human culture is unchanging, a traditional society does undergo varieties of changes eventually. The

⁶⁸ *Makwanyane* (1995) para 361.

⁶⁹ *Makwanyane* (1995) para 383.

⁷⁰ Gyekye (1997) 219, 264 & 271.

⁷¹ Gyekye (1997) 271.

⁷² Gyekye (1997) 217.

question that one needs to ask therefore is: What is the place of African traditional philosophies in modern African societies? In answering this question, the relevance of African traditional philosophies that allow for the taking of life in modern African societies has to be assessed. In carrying out this assessment, I will rely on two criteria provided by Gyekye, to judge the relevance of traditional values and ideas (and practices) to the circumstances of the present.⁷³ The fundamental nature of such African traditional philosophies or practices, and their functionality in the setting of the present are the two important criteria to be used.

How fundamental are these African traditional practices that allow for the imposition of the death penalty to human existence? The fundamental nature of a traditional practice has to be determined by human desires, wants and sentiments. Therefore, a traditional practice will be fundamental in a modern society if human desires or sentiments with regard to such practices are strong, and vice versa. The fact that fewer societies resort to trials by ordeal, ritual murder, honour killings, and other African traditional practices that allow for the taking of the life of a person shows that human sentiments or desires for such practices to go on is weakening.

In addition, the decline in sentiments and desires towards such practices is evidenced by the fact that African “courts”, presided over by chiefs and other traditional authorities, were much more ready to promote reconciliation and order compensation. For example, amongst the Moudang of Chad, one of the modes of conflict settlement is vengeance, under which the debit of an offence is measured by a human life. A murder victim’s clan has only two days to kill the murderer or one of his brothers. If this period expires, divination is resorted to. If the murderer is still alive after two days, vengeance comes to a close. Conciliation and compensation is then used to settle the conflict.⁷⁴ Therefore, such African traditional practices that allow for the taking of human life are not fundamental to human existence, and accordingly, not essential in modern African societies.

⁷³ Gyekye (1997) 260.

⁷⁴ Rouland (1994) 275.

With regard to the second criteria, the question one needs to answer is one of functionality - whether or not the African traditional practices that allow for the imposition of the death penalty play any effective or meaningful role in modern African societies. If such practices are effective and meaningful, then they have a place in modern African societies; if not, then they have to be regarded as outdated. Therefore, they have to be discarded, as they have no place in a modern society. As discussed above, trial by ordeal is used to ascertain guilt. But in modern African societies, trials take place in courts where guilt can be ascertained without submitting an accused to lethal tests.

An example of changing customs with regard to the death penalty, which goes to show that certain traditional practices have no role in a modern society, is that of the Basotho people. Previously, under the laws and customs of the Basotho people of southern Africa, notorious stock thieves, who are likely to put the country to war by stealing from neighbouring nations, were sometimes put to death. But in recent times, such cases are now heard under statute law in subordinate courts, where stock thieves are not put to death.⁷⁵ Moreover, the death penalty was not very fundamental in Basotho laws as not all murderers were put to death. Someone who commits murder was fined ten head of cattle, and if the murder was accidental, he was fined four or five head of cattle.⁷⁶

Thus, after considering the above two criteria, it is clear that African traditional philosophies or practices that allow for the taking of life for certain reasons or as punishment for a crime, have no place in modern African societies. This is so, especially if one takes into consideration the fact that the death penalty as practiced today is not in the African tradition and that there is a worldwide trend towards abolition of the death penalty.⁷⁷

⁷⁵ Duncan (1960) 112.

⁷⁶ Duncan (1960) 104-106.

⁷⁷ See chapter seven for a discussion of the abolition trend.

3.4 Religions in Africa

3.4.1 Major religions in Africa prescribe the death penalty

In addition to the death penalty being a philosophical, criminal-policy, human rights and social issue, it is also a religious issue. This is because it deals with issues like morality, life, and death. As Anderson rightly points out, it is natural for the death penalty to have religious points of attachment as it falls within the natural law ideology, contrary to the positivistic legal ideology.⁷⁸ Defenders of the death penalty, as seen below, are often of the view that major religions in Africa prescribe the death penalty, and therefore, it is justified for it to be used. Religion is relied on here because of its role and importance as a source of morality and law in Africa. The religious argument, with regard to the Bible and Islam (*Shari'a*), is discussed below, in each instance by postulating the argument for and by a rebuttal of the main contentions in favour of the death penalty.

3.4.1.1 The death penalty is prescribed in the Bible

For the purpose of this study, the literalist interpretation of two texts (the Old Testament and the New Testament), as advocated by proponents of each view, is adopted, without generalising the religion and its precepts as such. The Bible has been defined as “the sacred book of Christians, comprising the Old Testament and the New Testament” or “the sacred book of some other religion”.⁷⁹ It is an important cultural document, which continues to influence a great part of the world. It should be noted that two religions have roots in the Bible: first, Judaism, which originates from the Old Testament, and second, Christianity, which originates from both the Old and the New Testament of the Bible. The most influential factor accounting for the early and widespread acceptance of the death penalty was undoubtedly the Bible.⁸⁰ The subsequent paragraphs examine the Old and the New Testament of the Bible in

⁷⁸ Anderson (2001) 1, Chapter 5

⁷⁹ See *Longman Dictionary of the English Language* in *Penguin Hutchinson Reference Library* (1996) (CD-ROM).

⁸⁰ Megivern (1997) 9.

relation to the death penalty with the aim of showing, as defenders of the death penalty hold, that it prescribes the death penalty.

The Bible adopts a retributivist position on punishment. It places emphasis on the principle of retribution as can be seen in Exodus 21:23-25, which provides that punishment shall be “life for life,” an eye for an eye, a tooth for a tooth. Anderson has interpreted this to mean the following:⁸¹

If we harm another fellow human we at the same time admit that – according to the spirit of [this principle, “an eye for an eye”] – that others (i.e. the state governed by law) can do the same to us ... The principle means that the punishing consequence should be equal to what the victim has suffered ... The Biblical principle of “eye for eye” lays the foundation for the death penalty. The fundamental rule is that a life has to be paid for with a life. The Biblical expression “life for life” (Ex[odus] 21:23) often meant a death penalty, but not always.

Death is provided for in the Bible⁸² for crimes such as murder, cursing one’s parents, kidnapping, assault against one’s parents, magic, sexual relations with an animal, offering of sacrifices to other gods, homosexuality, blasphemy, adultery, incest, disobedience, and rape.⁸³ The provisions in the Bible on the death penalty also state the methods of execution - stoning, using a sword, spear or arrow, and burning are the manners of executions that could be used.⁸⁴

Some African priests such as Pastor Leicher, with reference to the Bible, have therefore justified the use of the death penalty in Africa and elsewhere. Pastor Leicher of the Pro-death Penalty Party in South Africa, who feels strongly about the death penalty, has relied on the Bible to justify why it should be reintroduced in South Africa and its retention in general. He argues, basing his argument on the premise that murder is the unlawful taking of life while killing is not, that the sixth commandment

⁸¹ Anderson (2001) 1, Chapter 5. The expression “life for life” does not mean a death penalty if a person accidentally kills someone he does not hate or did not intend to hurt or was not his enemy.

⁸² *Good News Bible* (1994).

⁸³ See Genesis 9:6; Exodus 21:12 & 15-17, 22: 18-19, 31:14; Leviticus 20:1-5 & 10-14, 19-21& 27, 21:9, 22: 20, 24:14-16, 23; Deuteronomy 13:1-5, 17:2-1 & 8-13, 18:20, 19:16 & 19, 22:22-25; Numbers 15:32-36, 35:16-21; Matthew 18:6.

⁸⁴ See Leviticus 20:17, 21:9; Exodus 19:13, 32:27; and Numbers 25:7-8.

reads, “Thou shall not commit murder” and not “Thou shall not kill”, meaning that it allows for the death penalty.⁸⁵ Therefore, the Bible allows the state to kill a murderer, but it is unlawful to commit murder.

Other retentionists have regarded the death penalty as a reflection of the will of God. Fischer, former South African Member of Parliament has stated as follows:

[T]he holy character of God is the basis of capital punishment ... The fact that God is holy and righteous, that He will not tolerate lawlessness, and that He seeks to punish it and expunge it from societies by placing a sword in the hands of the State, are foundational principles of our understanding of the legitimacy of capital punishment ... the civil government has the duty to put murderers to death.⁸⁶

In addition, Anderson has pointed out that that God’s use of the death penalty for certain crimes shows that he values mankind and the eternal moral principles, and that capital punishment exists as a defence and recognition of the high dignity and value of mankind.⁸⁷ The Bible’s position on the death sentence could be seen as firm as it denounces compensation in its place. In Numbers 35:31 it is stated, “a murderer must be put to death. He cannot escape this penalty by the payment of money”.

The New Testament does not attack or condemn capital punishment. Jesus actually agreed to the Old Testament law on murder as can be seen in Matthew 15:3-4. In his preaching, he reminded people to respect the law on the death penalty by saying: “And why do you disobey God’s command and follow your own teaching? For God said ... ‘whoever curses his father or his mother is to be put to death’”. Defenders of the death penalty could see this statement as an acknowledgement by Jesus that the death penalty is justifiable and valid. He accepts the death sentence as can be seen in Matthew 18:6, where he says that if anyone causes a Christian to sin, he should be

⁸⁵ Pastor Steve Leisher believes God has sent him a message “to fight for the death penalty so as to bring justice to the land”. He stated his view during a discussion on “Death and democracy”, broadcasted on Special Assignment, SABC 3 at 21h30 on 9 March 2004 (South Africa). For further information on the discussion on “death and democracy”, see <<http://www.sabcnews.com/specialassignment/deathdemoc.html>> (accessed 4 April 2004).

⁸⁶ Maduna (1996) 193.

⁸⁷ Anderson (2001) 5-6, Chapter 5.

punished with death by drowning. Even Jesus himself was later a victim of capital punishment. The death sentence was pronounced on him. The manner of his execution was by nailing him on a cross. In sum, defenders of the death penalty in Africa, maintain that it should be retained, as the Bible prescribes it.

3.4.1.2 Rebuttal of argument

Abolitionists have acknowledged the fact that the Bible recognises the death penalty as a form of punishment, and prescribes the death penalty for certain offences. However, at the very least, the argument is not beyond dispute or conclusive. Prejean, a nun and a well-known abolitionist has stated as follows:

It is abundantly clear that the Bible depicts murder as a capital crime for which death is considered the appropriate punishment, and one is hard-pressed to find a biblical “proof text” in either the Hebrew Testament or the New Testament which unequivocally refutes this. Even Jesus’ admonition “Let him without sin cast the first stone,” when he was asked the appropriate punishment for an adulteress (John 8:7) – the Mosaic Law prescribed death – should be read in its proper context.⁸⁸

Therefore, the provisions in the Bible have to be read in their proper context. Pastor Leicher of the Pro-death Penalty Party in South Africa, argues that the sixth commandment allows for the death penalty, as it reads, “Thou shall not commit murder” and not “Thou shall not kill”.⁸⁹ He supported his argument by stating that “murder is the unlawful taking of life”, while killing is lawful,⁹⁰ implying that if someone takes the life of another unlawfully (commits murder), the death penalty has to be imposed on that person. This argument is fundamentally flawed as he fails to consider other versions of the Bible that read - “thou shall not kill”. The above commandment can, therefore, not be used to justify the retention of the death penalty, as the wording of the text is not uniform, thus providing a loophole for wrong interpretations. The late Pope used this same verse of the Bible to argue against the

⁸⁸ Prejean (1996) 248.

⁸⁹ He stated this argument during a discussion on “Death and democracy”, broadcasted on Special Assignment, SABC 3 at 21h30 on 9 March 2004 (South Africa).

⁹⁰ As above.

death penalty, further stating that the Catholic Church welcomes all initiatives protecting human life, including abolition of the death penalty.⁹¹

Furthermore, it appears that Numbers 35:31, as stated above, denounces compensation, thus justifying the imposition of the death sentence. However, pardon and amnesty have not been denounced in the Bible, as there are instances in which a murderer can get amnesty or pardon. A murderer can escape the death penalty if the evidence in support of the accusation for murder is only that of one witness as provided for in Numbers 35:30. It states:

Anyone accused of murder may be found guilty and put to death only on the evidence of two or more witnesses; the evidence of one witness is not sufficient to support an accusation for murder.

Thus, the death penalty is not an absolute sentence as defenders of the death penalty try to portray. In the Old Testament, the deliberate murderer need not under all circumstances be put to death.⁹² In the New Testament, because of Jesus' teaching of love and forgiveness, there have been cases in which pardon has been granted. In John 8, Jesus sets free a woman who was about to be stoned to death for committing adultery. This rebuts the argument that the Bible allows for the death penalty. Thus, Jesus' distinctive teachings in the New Testament on non-retaliation, forgiveness, and love, even for one's enemies, runs counter to the above argument by defenders of the death penalty. Religious leaders have used three instances in the Bible to show the inappropriateness of the death penalty – the example of Jesus offering forgiveness at the time of his own unfair death, God's boundless love for every person, and the biblical imperative of reconciliation wherever there is conflict.⁹³

⁹¹ Message of his Holiness, Pope John Paul III, presented at the "Second World Congress against the Death Penalty" held in Montréal, Canada from 6-9 October 2004. The author of this thesis was present at this Congress.

⁹² C Henry, "Does Genesis 9 justify capital punishment? Yes" in R Youngblood, *The Genesis Debate* (1990) 241, cited in Megivern (1997) 13.

⁹³ Megivern (1997) 394.

It is clear from the above that the Bible cannot be used to justify the retention of the death penalty. Most of the provisions on the death penalty are found in the Old Testament, which was written before the New Testament. The New Testament lays emphasis on forgiveness, non-retaliation and love. The New Testament supersedes the Old Testament. Jesus said in Matthew 5:38-39 that “you have heard that it was said, 'An eye for an eye and a tooth for a tooth.' But I tell you ... whoever slaps you on your right cheek, turn the other to him also.” This goes to invalidate the phrase “an eye for an eye” in the Old Testament.

In addition, Chimhini, former executive director of ZimRights has stated that “the legendary eye for an eye concept is outdated, inhumane, immoral and evil.”⁹⁴ Also, the Zambian President’s refusal to sign execution orders because he is a Christian⁹⁵ shows that the Bible cannot be used to justify the retention of the death penalty. Mwanawasa has gone further to justify the abolition of capital punishment from a Biblical point of view. He states the following:

The first known and recorded murder is the murder by Cain, who killed his brother Abel. God as judge did not impose capital punishment on Cain but sentenced him to life imprisonment adding that whoever shall kill Cain shall be punished seven times. It is also noted that the sixth of the ten commandments that God gave to Moses states as follows: “thou shall not kill”... It will be misleading to cite verses in the Bible, particularly from the Old Testament, out of context as representing Christian thinking ... Even for those proponents who justify death for vengeance purposes, my submission is that, it is not for man to perpetrate vengeance. This should be preserved for God (see Romans 12:9) ... I feel strongly about the issue of capital punishment that I have informed the Prerogative of Mercy Committee that as long as I remain President, I shall not execute a death warrant.⁹⁶

On the whole, progressive acceptance of human rights standards on the abolition of the death penalty supersedes the Bible. Thus, Migivern has stated that whatever “right to kill” may have accrued to states in circumstances of the past, it has been fully

⁹⁴ D Mavunduse, “A new millennium free from death penalty in southern Africa?” <<http://www.sardc.net/editorial/sanf/1999/09/30-09-1999-nf2.htm>> (accessed 30 June 2004).

⁹⁵ *Legalbrief News Diary*, 23 May 2003 <<http://www.legalbrief.co.za>> (accessed 10 July 2003).

⁹⁶ *Hands Off Cain* (2004) 9-11.

superseded by the “right to life” of the human person in the circumstances of the present.⁹⁷

3.4.1.3 The death penalty is prescribed in the *Shari'a*

The *Shari'a* contains the rules by which a Muslim society is organised and governed, and it provides the means to resolve conflicts among individuals and between the individual and the state.⁹⁸ Islam is one of the major religions in Africa that prescribe the death penalty. Some Arab scholars are of the view that the retention of the death penalty is “essential for the maintenance of law and order”.⁹⁹ African countries with legal systems that adopt Islamic law (the *Shari'a*) are the major supporters of the death penalty. In North Africa, support for the retention of the death penalty has been strengthened by the growing influence of Islamic law.¹⁰⁰ Muslims in Nigeria have repeatedly emphasised that the abolition of death penalty will be perceived as a direct affront to their religion.¹⁰¹ It is their contention that the religion provides for the application of death penalty and such provisions are immutable.¹⁰² Against the backdrop of constant religious crisis in the country, it portends a grave danger to abolish the death penalty without resolving the religious questions raised by the

⁹⁷ Megivern (1997) 489.

⁹⁸ The word *Shari'a* means "the path to a watering hole". It denotes an Islamic way of life that is more than a system of criminal justice. *Shari'a* is a religious code for living, in the same way that the Bible offers a moral system for Christians. Most Muslims to a greater or lesser degree, as a matter of personal conscience, adopt it. But it can also be formally instituted as law by certain states and enforced by the courts. Many Islamic countries have adopted elements of *Shari'a* law. See S Steiner, “Sharia law” <<http://www.guardian.co.uk/theissues/article/0,6512,777972,00.html>> (accessed 1 October 2003), for further information on the Islamic legal system.

⁹⁹ H Yahmdi, “Between human rights and religion about capital punishment” in *Realités* (2000) 7, No. 758, Tunisia; cited in Slama (2001) 398, 419.

¹⁰⁰ For example, in Nigeria; see A Olajide, “Shariah gains more ground in Yorubaland” in *Weekly Trust* (Kaduna), 15 November 2002 <<http://allafrica.com/stories/200211150139.html>> (accessed 1 October 2003). See also, S Steiner, “Sharia law” in *Guardian Unlimited*, 20 August 2002 <<http://www.guardian.co.uk/theissues/article/0,6512,777972,00.html>> (accessed 1 October 2003).

¹⁰¹ 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)).

¹⁰² As above.

Muslims.¹⁰³ Also, at the UN General Assembly late in 1994, Sudan expressed the view that “capital punishment is a divine right of some religions. It is embodied in Islam and these views must be respected”.¹⁰⁴ The government, therefore, used the provision of the death penalty under Islamic law to justify its retention in Sudan.

It is important to first look at the sources of Islamic law and capital offences in order to better understand the argument that the death penalty should be retained because Islamic law prescribes it. There are two sources of Islamic law: first, the Koran (*Qu’ran*), which contains the words of Allah (God). It was definitively transcribed some 40 years after the death of the prophet Mohammed, and is arranged in 114 *sura* (chapters). The second source is the *Sunna*, which was compiled 136 years after the death of the prophet Mohammed. The Koran is the principal source of the *Shari’a*, which is supplemented by the *Sunna*.¹⁰⁵ It should be noted that there is no dispute among Muslims that the Koran is the basis of the *Shari’a* and that its specific provisions are to be scrupulously observed.¹⁰⁶

With regard to the death penalty in the *Shari’a*, the question of interpretation has to be examined. Bassiouni has pointed out that “to understand the *Shari’a* in all its complexities requires knowledge of the jurisprudential and scholarly interpretations and applications” throughout different Muslim regions characterised by “different cultures, customs and mores” that influence the way they interpret and apply the *Shari’a*.¹⁰⁷ There have been debates among different schools of jurisprudence as to whether the Koran and the *Sunna* should be interpreted literally, or on the basis of the intent and purpose of the text, or both. Thus, whether or not capital punishment is a legitimate punishment in *Shari’a* will depend on the form of interpretation.

¹⁰³ As above.

¹⁰⁴ Hood (2002) 38.

¹⁰⁵ Bassiouni (2000) 65. It should be noted that when it comes to interpretation of the law, there are other sources of law that supplement the above two sources. These sources include: *Al-Urf* (custom and usage), *Maslaha* (public interest), *Istihsan* and *Istihlas* (equity), *Ijtihad* (best reasoning), treaties and pacts, and the edicts of the *Khalifas* and local rulers.

¹⁰⁶ “Islamic law - The Sharia” <<http://www2.ari.net/gekl/islam/law.htm>> (accessed on 1 October 2003).

¹⁰⁷ Bassiouni (2000) 73.

There are three categories of interpreters: first, traditionalists who are also seen as literalists and rely on the purposes of the *Shari'a* in their interpretations of the Koran. Second, fundamentalists who are dogmatic and seek solutions of earlier times as a remedy for difficult contemporary problems. The reason is that fundamentalists have a firm conviction that Islam cannot be altered. Third, reformists and *Ilmani*¹⁰⁸ who search for the purposes and policies of the *Shari'a* so as to address contemporary problems, and also rely on jurisprudential techniques in light of scientific knowledge because they seek to achieve the legislative goals of the *Shari'a*.

As regards capital offences, there are three sets of crimes within *Shari'a* for which the death penalty could be imposed. These are *Hudud*, *Qesas*, and *Ta'azir*. These crimes do not have the same sources of law, thus, multiple sources of law are used to define crimes. The subsequent paragraphs examine these crimes with regard to the death penalty with a view to showing, as argued above, that *Shari'a* law prescribes the death penalty.

The penalties for *Hudud*¹⁰⁹ crimes are set out in the Koran, and the Sunna supplements them. In general, the penalties for *Hudud* crimes are not universally adopted as law in Islamic countries. Some countries, such as Saudi Arabia, which applies Islamic law in its entirety, enforce the penalties for *Hudud* offences. In others, such as Pakistan, the penalties have not been enforced. The majority of Middle Eastern countries, including Jordan, Egypt, Lebanon and Syria, have not adopted *Hudud* offences as part of their state laws. Death is the penalty for certain *Hudud* crimes: *Haraba* (brigandage or armed robbery that results in homicide), *Baghi* (transgression or uprising against a legitimate ruler), *Zena* (adultery committed by a married person), and *Ridda* (apostasy). The Koran or the *Sunna* prescribes the death penalty for these crimes.

Qesas crimes relate to transgressions against the physical integrity of a person, which includes homicide and infliction of physical injury. Penalties for *Qesas* crimes are provided for in the Koran. With regard to *Qesas* crimes, the Koran adopts a

¹⁰⁸ *Ilmani* means those who use knowledge and refers to the forward thinking traditionalists.

¹⁰⁹ In Arabic, *Hudud* means the limits or the limits prescribed by Allah.

retributivist position on punishment, as the punishments emphasise the principle of “an eye for an eye, a tooth for a tooth”.¹¹⁰ Death is the punishment for homicide (premeditated or intentional murder) if the family of the victim seeks retaliation.

The penalties for *Ta'azir* crimes can be the same as that for *Hudud* and *Qesas* crimes. Because *Ta'azir* crimes can be legislated, their penalties reflect cultural perspectives and social policy choices. With regard to *Ta'azir* crimes, the death penalty can be imposed as punishment for espionage and sodomy.¹¹¹ From the aforementioned, it is clear that the death penalty can be imposed under *Shari'a* law.

3.4.1.4 Rebuttal of argument

The death penalty for most offences under *Shari'a* law is discretionary, for instance, *Hudud* crimes must satisfy all evidentiary requirements. Due to the fact that the *Shari'a* is concerned with the paramount issues of fairness, procedural safeguards have been put in place to ensure a fair trial.

With regard to the above crimes, the prosecution is bound to prove its case on an absolute standard of certainty, free from all ambiguity or doubt. This burden of proof, with its intricate system of checks and balances, is so rigorous that it is surmised by some Islamic scholars that the *Hudud* does not permit proof by circumstantial evidence.¹¹² For example, as proof of the offence of adultery, the Koranic requirement is four “reputable” adult witnesses (known as persons of impeccable moral uprightness) and who were independent witnesses to the actual act. Otherwise the person alleging the offence of adultery would be flogged 80 times, for bearing false witness. The verse states: “And those who launch a charge against chaste women and

¹¹⁰ *Qesas* means equivalence. It can be seen as *Talion* law because it calls for the infliction upon the wrongdoer of the same injury that he caused to his victim.

¹¹¹ Slama (2001) 420.

¹¹² M Iman, “Punishments under Sharia and their significances” *Newswatch* (Lagos), Volume 36, Number 18, 4 November 2002 <<http://allafrica.com/stories/200211040748.html>> (accessed 1 October 2003).

produce not four witnesses-Flog them with 80 stripes; And reject their evidence ever after: for such men are wicked transgressors” (Surah An-Nur 24:23).¹¹³

The above implies that imposition of the death penalty under the *Shari'a* is an exceptional measure. Thus, the *Shari'a* cannot be a firm base for arguing for the retention of the death penalty, since very strict requirements have to be satisfied, and in case of doubt, the law is always interpreted for the benefit of the accused,¹¹⁴ and the *Qu'ran* precludes punishment (including capital punishment) where an offender genuinely repents.¹¹⁵

Moreover, some opponents of the death penalty have stated that the death penalty for several crimes in Muslim states is a policy choice, but not one that is necessarily mandated by *Shari'a*, as its application for most offences is either optional or conditional.¹¹⁶ For example, *Hudud* crimes must satisfy all evidentiary requirements. The death penalty is optional for all *Hudud* crimes but for armed robbery where it results in homicide.¹¹⁷ However, this punishment can be remitted if the offender repents before arrest. In Sudan for example, that adopts *Shari'a* law, section 169(1) of the Penal Code 1991 provides that the penalty (which is the death sentence) for armed robbery can be remitted if the offender repents before his arrest. Even for adultery, where the death penalty is optional, if imposed it can be remitted if the offender retracts his confession or if a witness retracts his testimony.¹¹⁸

With regard to *Qesas* crimes, the death penalty will not be imposed in cases of murder, where there is forgiveness by the victim and the heirs of the victim. For example, section 38(1) of the Sudanese Penal Code 1991 provides that execution for *Qesas* shall be remitted with pardon of the victim or his relatives. The *Shari'a* does

¹¹³ Iman (as above).

¹¹⁴ Bassiouni (2000) 83.

¹¹⁵ Bassiouni (2000) 82-83.

¹¹⁶ Bassiouni (2000) 84.

¹¹⁷ Bassiouni (2000) 78.

¹¹⁸ See, for example, sections 146 & 147 of the Sudanese Penal Code 1991.

not provide for the death penalty for *Ta'azir* crimes. Such crimes can be legislated by secular legislation, thus can be the subject of penalties other than death.¹¹⁹ Therefore, Muslim states can inhibit the death penalty and still remain consistent with the *Shari'a*.¹²⁰

3.5 Public opinion

The concept of public opinion, it should be noted, is unquestionably open to a number of interpretations. Public opinion refers to the opinions, views or beliefs held by the general public, especially on an issue of national importance.¹²¹ Public opinion can be established through polls, referendum or other surveys. Public opinion surveys carried out in some African states, as seen below, have shown that the majority favour the death penalty.

In South Africa for example, a number of surveys have shown that the majority of the population favoured the retention of capital punishment.¹²² A Markinor survey in 1995 indicated that 62 per cent of the entire population favoured the retention of capital punishment.¹²³ In 1996, a Human Sciences Research Council survey found that 71.4 per cent of the South African population favoured the death penalty.¹²⁴ Another survey was conducted during the same period by the University of Stellenbosch, which indicated that 64 per cent of the African National Congress (ANC) membership favoured the return of the death penalty in South Africa.¹²⁵ Also, in 2004, an opinion

¹¹⁹ Bassiouni (2000) 82.

¹²⁰ For example, in 1980, the death penalty was reduced in Libya to only four crimes. This can be seen as a step towards abolition see chapter two for a discussion on the restriction of the number of offences for which the death penalty is imposed as a step towards abolition.

¹²¹ See *Longman Dictionary of the English Language* in *Penguin Hutchinson Reference Library* (1996) (CD-ROM).

¹²² For more information on these surveys, see Human Sciences Research Council, *In focus forum*, October 1996 Volume 4, Number 2.

¹²³ As above.

¹²⁴ As above.

¹²⁵ As above.

poll was carried out in South Africa with regard to whether the death penalty should be reinstated.¹²⁶ 90 per cent of the population voted for the reinstatement of the death penalty and 10 per cent voted against it.¹²⁷

3.5.1 Public opinion in Africa favours the death penalty

On the basis of available evidence (discussed in this section), it is assumed that the majority in all African societies favour the retention of the death penalty. Therefore, “public opinion demands it” is one of the reasons commonly given for retaining the death penalty in Africa. According to this argument, the laws of a country are to mirror the will of the people. This reason has been put forward not only by retentionists generally but also by officials who say that they personally oppose capital punishment.¹²⁸ Despite continued campaigning against the death penalty by Tanzanian Non-Governmental Organisations (NGOs) and religious groups, the Justice Minister said in July 2002 that the government had no plans to abolish the death penalty, stating that it had widespread public support.¹²⁹ Also, in Zanzibar (Tanzania), the Minister of State in the president’s office responsible for constitutional affairs, Mwakanjuki, stated that Zanzibar will not be swayed by ongoing crusades worldwide against the death penalty, as the government believes the death penalty is still accepted by the people of Zanzibar since it has received no complaints condemning it.¹³⁰ The president of Botswana in a *BBC Hardtalk* interview with Sebastian after Bosch was executed, asserted that there is nothing that he could do in terms of granting clemency since the law and the people are in favour of the death penalty.¹³¹

¹²⁶ The question for the opinion poll “should South Africa bring back the death penalty?” was posed by the presenter of the programme Special Assignment, SABC 3 at 21h30 on 9 March 2004. For further information, see <<http://www.sabcnews.com/specialassignment>> (accessed 4 April 2004).

¹²⁷ The results of the opinion poll were released during the next broadcasting of the programme Special Assignment SABC 3 at 21h30 on 16 March 2004.

¹²⁸ Amnesty International (1989) 22.

¹²⁹ *Amnesty International Report* (2003) 245.

¹³⁰ “Death penalty to stay” *Daily News* (Tanzania), 23 October 2003.

¹³¹ O Tshosa, “The death penalty in Botswana in the light of international law” 8, paper 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 website <<http://www.biicl.org/deathpenalty>> (accessed 30 June 2004)).

Those who put forward the public opinion argument often cite opinion polls evidently showing strong support for the death penalty, and argue that it would be undemocratic in the face of such support for the death penalty to be abolished as abolition without public support would undermine confidence in the law and possibly lead to private vengeance. Therefore, the strength of public opinion in favour of the death penalty counts against its abolition. For example, Malabo, legal affairs minister of Zambia, has stated that the government will only accede to the Second Optional Protocol to the ICCPR when it has achieved full national consensus on the abolition of the death penalty.¹³²

Some governments or courts in Africa have used public opinion as one of the barometers for deciding whether the death penalty is constitutional or not, or whether it violates evolving standards of decency. Public support for the death penalty has been used by the government of Tanzania to head off a challenge to capital punishment. In *Republic v Mbushuu and Another*,¹³³ the Tanzanian High Court had to decide on the constitutionality of the death penalty. It was pointed out in this case that it can be asserted with certainty that the majority of the people in Tanzania support the death penalty, and that the minority support abolition. It was argued by counsel for the Republic that

[i]n a democratic state like Tanzania, the views of the majority should be respected. This is because for any system of justice to work, it must be credible in the eyes of the people of the country concerned. For this reason the court's and parliament's attitudes should not be radically different from those of society as a whole. It is very dangerous in fact to allow penal policy to jump too far ahead of the population, since it will result in the loss of public confidence in the criminal justice system and concomitantly in the alienation of the public from it. There is abundance evidence that members of the Tanzanian public often resort to mob justice in a situation in which they feel that the criminal justice system and/or its agencies lack the competence or the will to protect them against crimes. Therefore no civilised community should provoke such a situation in the name of a so-called 'progressive' penal policy.¹³⁴

¹³² AFRICANEWS – “Zambia: Prisoners challenge capital punishment”
<<http://lists.peacelink.it/afrinews/msg00190.html>> (accessed 12 February 2004).

¹³³ *Republic v Mbushuu and Another* [1994] 2 LRC 335 (hereinafter referred to as *Mbushuu* (1994)).

¹³⁴ *Mbushuu* (1994) 349.

The above passage is to the effect that the abolition of the death penalty will go against public support for the death penalty, and if this is done, then people will lack confidence in the law or criminal justice system and might resort to vengeance. Despite the above, the High Court went ahead to rule that the death penalty was unconstitutional because it found that it is not in the public interest.¹³⁵ On appeal, the Tanzanian Court of Appeal declared the death penalty to be constitutional on the ground that the society deems the death penalty as reasonably necessary.¹³⁶ The Court was of the view that it was for the society to decide whether or not the death penalty is reasonably necessary, and since society favoured the death sentence, the “reasonable and necessary” standard had been met. The Court of Appeal expressed its view in the following words:

[I]t is our decided opinion that what measures are necessary to deter the commission of capital crimes or to protect society are matters for decision by every individual society...the crucial question is whether the death penalty is reasonably necessary to protect the right to life. For this we say it is the society which decides. The trial judge in the above passage acknowledges that presently the society deems the death penalty as reasonably necessary. So, we find that although the death penalty as provided by s 197 of the Penal Code offends art 13(6)(a) of the Constitution it is not arbitrary, hence a lawful law, and it is reasonably necessary and it is thus saved by art 30(2).¹³⁷

Seleoane has pointed out that one has to recognise the fact that the people are never in agreement on matters such as capital punishment.¹³⁸ It is necessary that an opportunity be created for people to express themselves fully on such matters, and it is not for the Court to decree that the people should never be afforded the opportunity to influence the outcome of the debate on capital punishment.¹³⁹ Thus, he saw the South African Constitutional Court’s placing of the issue beyond the reach of the people in *S v*

¹³⁵ *Mbushuu* (1994) 358.

¹³⁶ *Mbushuu and Another v Republic* [1995] 1 LRC 216, 232 (hereinafter referred to as *Mbushuu* (1995)).

¹³⁷ *Mbushuu* (1995) 231-232 (CA).

¹³⁸ Seleoane (1996) 47.

¹³⁹ Seleoane (1996) 47-48.

Makwanyane as fairly undemocratic, as the Court did not receive statistics on the attitudes of the population to capital punishment.¹⁴⁰

With regard to the point that public opinion cannot be relied on as it fluctuates or that the public is inconsistent, defenders of the death penalty, such as Seleoane, do not see this as a problem because people's attitudes are always influenced by what is happening on the ground, and a community is always changing and evolving. The fact that attitudes change does not mean that people should not be able to determine the laws that they are expected to live under. They should be able to determine these laws through their elected representatives. In support of this, Seleoane states the following.¹⁴¹

[I]n pronouncing that the people must never be afforded the opportunity to decide whether we shall have capital punishment or not, the Constitutional Court [in the *Makwanyane* case] was no longer interpreting the Constitution. The Court was then prescribing that its judgement is timeless and immutable. The Court was laying down that provisions of the Constitution which allowed it to arrive at the particular judgement the Court arrived at, in my respectful view, is undemocratic: and the Court itself says so. The pronouncement of the Court, in my respectful view, goes against nature itself: nothing in nature is timeless and immutable.

Thus, a wide opinion among the people supporting the death penalty is a reason for its retention. Anderson, in support of this point, states that

the death penalty is a serious question concerning life or death for people. It is therefore reasonable to assert that people – after an impartial and unbiased information and when both sides have got as much space in media – should be allowed to state their opinion by a consultative popular vote, concerning the being or non-being of the capital punishment. This would be healthy for democracy and for the modern state governed by law.¹⁴²

Anderson is, therefore, of the opinion that it will not be healthy for a democracy if public opinion is not taken into consideration in deciding whether to abolish or retain the death penalty. A crisis of democracy will arise if the government manifestly

¹⁴⁰ As above.

¹⁴¹ Seleoane (1996) 78.

¹⁴² Anderson (2001) 2 (Argument 16), Chapter 2.

ignores the will of the people. For example, the people elect the Constitutional Assembly because for the constitution to be legitimate, it has to be written by those who have the people's mandate (that is, those who have been elected by the people to write the constitution according to the will of the people). In such circumstances, it is difficult for the government to come up with any clear basis on which they can ignore the will of the people. Thus, failure to take cognisance of the will of the people will be to ridicule the whole exercise.

Furthermore, in a democratic society, as can be deduced from the position in the USA, states have to give the people (both retentionists and abolitionists) an opportunity to state their opinion on the death penalty. The process used to arrive at a decision should also be democratic. In *Furman v Georgia*, Justice Powell stated that in a democracy, the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives.¹⁴³ The majority of the United States Supreme Court held, and in support of the above, in *Gregg v Georgia*, that the fact that state legislators had revised their laws in order to ensure that capital punishment could be enforced against the most egregious type of murderer was an expression of public sentiment; and that this cannot be overturned by an abstract judgment that the death penalty, by itself, was "cruel and unusual punishment".¹⁴⁴

Legislative steps, as stated above, are not the only indicator of public opinion. Another indicator of public opinion can be found in the views, not necessarily legislative actions, of the citizen's elected officials or representatives. For example, the United States stated in a report to the UN Human Rights Committee that, "the majority of citizens through their freely elected officials have chosen to retain the death penalty for the most serious crimes, a policy which appears to represent the majority sentiment of the country".¹⁴⁵ Also, Botswana has uttered the view that the

¹⁴³ *Furman v Georgia* (1972) 408 US 238 at 436-437.

¹⁴⁴ See *Gregg v Georgia* 428 U.S. 153. See also, S Dike, *Capital punishment in the United States* (1982) 60, cited in Hood (2002) 235.

¹⁴⁵ Initial report of United States of America submitted under article 40 of the ICCPR, UN Doc. CCPR/C/81/Add.4, 24 August 1994, para 139.

state must “express the will of the people”¹⁴⁶ In addition, the European Court of Human Rights has pointed out the importance of taking into consideration the opinion of the public with regard to the law, and that public opinion cannot be ignored in a democracy. Walsh J in *Dudgeon v United Kingdom* stated as follows:

[I]n a democracy the law cannot afford to ignore the moral consensus of the community. If the law is out of touch with the moral consensus of the community, whether by being either too far below or too far above it, the law is brought into contempt.¹⁴⁷

It is clear from the aforementioned that, as argued by defenders of the death penalty in countries where public opinion is in support of the death penalty, it should be retained, as abolishing it in the face of such support will be undemocratic. Moreover, abolition of the death penalty without public support would undermine confidence in the law and possibly lead to private vengeance.

3.5.2 Rebuttal of argument

In some African states where there is reliance on the public opinion argument, public opinion surveys have not been carried out. Thus, it is doubtful if the assertions are accurate. In *Republic v Mbushuu and Another*, in which the public opinion argument was raised, it was asserted with confidence that the majority of the people of Tanzania are not against capital punishment and that the abolitionists are a minority group, although no public opinion survey was carried out at that time.¹⁴⁸ In other countries, public opinion polls or surveys have been carried out. In Uganda, for example, an opinion survey was carried out among ordinary people in the capital Kampala, which showed opposition to the execution of Ugandan soldiers carried out in 2002.¹⁴⁹

¹⁴⁶ Hood (2002) 233.

¹⁴⁷ *Dudgeon v United Kingdom* (1982) 4 EHRR 149 at 184.

¹⁴⁸ *Mbushuu* (1994) 349.

¹⁴⁹ “Ugandan soldiers executed” <http://www.santegidio.org.pdm/news2003/06_03_03_b.html> (accessed 11 February 2004).

Furthermore, the fluctuating and inconsistent nature of public opinion is problematic, although defenders of the death penalty fail to see it as a problem as noted above. Public opinion is strongly divided and more often than not, it is based on an incomplete understanding of the relevant facts and the results of opinion polls vary depending on the type of questions posed.¹⁵⁰ This points to the fact that public opinion cannot be relied on to defend the death penalty.

The inconsistency of public opinion is due to its reliance on irrational reasoning that is based on ignorance. Research has shown that public opinion on capital punishment, in for example South Africa and USA, is generally ignorant and often based on incorrect beliefs.¹⁵¹ These include the belief that the death penalty is a deterrent to crime. Didcott J in *S v Makwanyane* stated that “most members of the public who support capital punishment do so primarily in the belief that, owing to its uniquely deterrent force, they and their families are safer with than without persecution”.¹⁵² But it has not been proven to deter more effectively than other forms of punishment as discussed below.

However, some weight has to be given to public opinion, and it may be accepted that, at present, a majority of Africans do support the death penalty. But since public opinion is bound to fluctuate, the question that arises is: When can public opinion be relied on? Dworkin distinguishes two categories of issues – “choice sensitive” and “choice-insensitive” issues.¹⁵³ The former relates to policy decisions, that is, “issues whose correct solution, as a matter of justice, depends essentially on the character and distribution of preferences within the community”.¹⁵⁴ The latter relating to decisions

¹⁵⁰ For example, in a study carried out in New York by William Bowers, 71 per cent supported capital punishment. But the number dropped to 19 per cent when asked if offered the alternative of life without parole plus restitution to the victim’s family (Hodgkinson (2000) 22).

¹⁵¹ Garland (1996) 10.

¹⁵² *Makwanyane* (1995) para 188.

¹⁵³ R Dworkin, “What is equality? Part 4: Political equality” (1987) 22 *University of Francisco Law Review* 1, referred to in Viljoen (1996) 666.

¹⁵⁴ As above.

of principle, that is, those issues the right answer to which does not depend substantially on what a majority of people might think.¹⁵⁵

Although Dworkin does not clearly identify the issue under which capital punishment falls, it is suggested that, since determining what category under which it falls is a choice-intensive issue and considering its severe nature, the death penalty falls under the second category. The South African Constitutional Court in addressing the role of public opinion in the context of the death penalty, though not explicitly, places the question of the constitutionality of the death penalty under the second category. As can be inferred from the *Makwanyane* decision below, determining whether or not to abolish the death penalty does not depend substantially on what the majority of people think.

In the landmark case of *S v Makwanyane*, in which the Court had to decide on the constitutionality of the death penalty, Justice Chaskalson stated as follows:

Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty ... By the same token the issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority.¹⁵⁶

The Court is clear that in order to protect minorities, it has to reject the merits of public opinion relating to important constitutional issues. Justice Chaskalson goes further to state his disagreement with the decision in the *Mbushuu* case in which the Court of Appeal of Tanzania found the death penalty to be constitutional on the ground that society favoured the death sentence, thus, meeting the reasonable and necessary standards.¹⁵⁷ He noted that the Court in deciding whether the death penalty

¹⁵⁵ As above.

¹⁵⁶ *Makwanyane* (1995) para 88.

¹⁵⁷ *Makwanyane* (1995) para 114-115.

is constitutional considers societal attitudes in evaluating whether the legislation is reasonable and necessary, but the ultimate decision must be that of the Court and not the society.¹⁵⁸ In support of the above, Didcott J stated that

[t]he issue is also, however, a constitutional one. It has been put before [the Court] squarely and properly. We cannot delegate to Parliament the duty that we bear to determine it, or evade that duty otherwise, but must perform it ourselves ... To allow ourselves to be influenced unduly by public opinion would, in any event, be wrong.¹⁵⁹

Madala J, clearly states that the Court does not have to “canvass the opinions and attitudes of the public” when deciding on the constitutionality of the death penalty or any enactment.¹⁶⁰ Kentridge J in the same case also pointed out that

[c]apital punishment is an issue on which many members of the public hold strong and conflicting views. To many of them it may seem strange that so difficult and important a public issue should be decided by the eleven appointed judges of this court.¹⁶¹

In a nutshell, public opinion cannot be a decisive factor with regard to the constitutionality of the death penalty. It should be noted that the extent to which governments will respect public opinion in penal policy matters depends on their political ideology and the sources from which they believe the authority of the law should emanate. However, it is suggested that respect for, and protection of, human rights should never be dependent, for the most part, on public opinion.

3.6 Criminological justifications for the imposition of capital punishment

The death penalty is unavoidable in discussions of punishment. Therefore, understanding the theories of punishment is important in understanding the debate on the death penalty. There have been a considerable number of criminological studies on the issue of punishment, which deal with the theories of punishment. Retentionists

¹⁵⁸ *Makwanyane* (1995) para 115.

¹⁵⁹ *Makwanyane* (1995) para 188.

¹⁶⁰ *Makwanyane* (1995) para 256.

¹⁶¹ *Makwanyane* (1995) para 192.

have used the purposes of punishment to justify the imposition of the death penalty. The main theories behind the concept of capital punishment concern retribution, deterrence, prevention and rehabilitation.¹⁶² The subsequent paragraphs discuss these theories, as used by Africans, to justify the retention of the death penalty.

3.6.1 Retribution

3.6.1.1 The death penalty has to be imposed for the purpose of retribution

Retribution is one of the arguments used to justify the retention of the death penalty in most retentionist African states. In Sudan, for example, the death penalty is allowed for the purposes of retribution.¹⁶³ The Libyan government has stated that the death penalty is restricted in Libya to, amongst others, cases in which it can be imposed by way of retribution.¹⁶⁴ The Attorney General in *S v Makwanyane* contended that the imposition of the death sentence “meets the sentencing requirements for extreme cases of murder more effectively than any other sentence can do”, basing his contention on, *inter alia*, the fact that it meets the need for retribution.¹⁶⁵

The retributive theory is based on the premise that the commission of a crime disturbs the balance of the legal order, which will only be restored once the offender is punished for his crime.¹⁶⁶ In other words, since a crime is a negation of the law, punishing the offender is an attempt towards cancelling the crime, thus restoring the balance of the legal order. If this balance is not restored, society will succumb to popular justice - people taking the law into their own hands. In the death penalty context, retribution implies that only the taking of the murderer’s life restores the

¹⁶² Seleoane (1996) 5. Also see generally, Loewy (2000).

¹⁶³ See section 33 of the Constitution of the Republic of Sudan 1998, providing for the infliction of the death penalty for the purposes of retribution.

¹⁶⁴ See the third periodic report of Libya submitted under article 40 of the ICCPR, UN Doc. CCPR/C/102/Add.1, 15 October 1997, para 27.

¹⁶⁵ *Makwanyane* (1995) para 112.

¹⁶⁶ Snyman (1992) 17-18.

balance of justice and allows society to show believably that murder is intolerable and will be punished in kind.¹⁶⁷

Expiation, formal denunciation, and mollification of the injured party are three variants to retribution that have been recognised by Burchell and Hunt.¹⁶⁸ Expiation aims at purifying society by removing the criminal from its midst. With expiation, emphasis is placed on the offender's moral blameworthiness – the more moral blameworthy the offender, the more severe will be the punishment.

As regards formal denunciation, punishment is justified on the ground that it is a categorical denunciation of the crime by the community. The community denounces the crime because it is a way of expressing its compassion towards the affected victim(s) of the crime, affirming that the violent criminal or murderer does not deserve the compassion of the state, and promoting respect for human life. In *Republic v Mbushuu and Another*, it was argued that

[s]ociety through the death penalty must denounce the taking of human life in the most emphatic manner possible and it is therefore right that society's extreme disapproval and indignation should be signified by imposing the ultimate penalty of death. By doing so society reinforces and promotes public respect for life.¹⁶⁹

Lord Denning has also emphasised the importance of punishment as an emphatic denunciation of crime by the community. In 1953, before a Commission of Inquiry investigating the desirability of retaining the death penalty in Britain, he stated:

Punishment is the way in which society expresses its denunciation of wrong doing: and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them...The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not ... The

¹⁶⁷ Michigan State University and Death Penalty Information Centre, "Arguments for and against the death penalty" (2000) <<http://deathpenaltyinfo.msu.edu>> (accessed 3 October 2003).

¹⁶⁸ Burchell & Hunt (1970) 69-72.

¹⁶⁹ *Mbushuu* (1994) 353.

ultimate justification of any punishment is not that it is a deterrent, but that it is the emphatic denunciation by the community of the crime.¹⁷⁰

Mollification involves preventing the public from taking the law into its own hands. It is to the effect that the offender should be punished in such a way that the aggrieved party will be satisfied, and not take the law into his or her own hands, since the offender will now see the law as effective and will continue to respect it. Pasteur Bizimungu, former president of Rwanda, in support of the death penalty stated that the death penalty will prevent people from taking the law into their own hands.¹⁷¹ The Attorney General in *S v Makwanyane* put forward the same argument. He maintained that the law will be brought into disrepute if the courts impose lenient sentences on convicted criminals; and that in such a situation, members of the society will then take the law into their own hands.¹⁷² In addition, Schreiner J pointed out in *R v Karg* that

it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands.¹⁷³

Also, in *Republic v Mbushuu and Another*, it was argued in favour of the Republic that to prevent the law from falling into disrepute, the law must satisfy the peoples' thirst for vengeance, as many people believe that murderers deserve to die.¹⁷⁴ Thus, satisfying peoples' thirst for vengeance discourages them from revenging or taking the law into their own hands. In support of this, during debates by the Constituent Assembly in Uganda, it was stated that the death sentence gives mental satisfaction to the bereaved family and discourages them from revenge.¹⁷⁵

¹⁷⁰ *Report of the Royal Commission on Capital Punishment (1949-1953)* 18; reference has also been made to the statement of Lord Denning in *Seleoane* (1996) 7, and in *Furman v Georgia* (1972) 408 US 238 at 453.

¹⁷¹ Amnesty International, "Africa: A new future without the death penalty" AI Index: AFR 01/003/1997, 1 April 1997.

¹⁷² *Makwanyane* (1995) para 124.

¹⁷³ *Seleoane* (1996) 8.

¹⁷⁴ *Mbushuu* (1994) 355.

¹⁷⁵ Amnesty International, "Africa: A new future without the death penalty" AI Index: AFR 01/003/1997, 1 April 1997.

Retribution has its basis in religious values that maintained that it is appropriate to take “an eye for an eye” and “a life for life”. Therefore, retribution or *lex talionis* is a reflection of the Roman *jus talionis*, the law of retaliation, which calls for the infliction upon the wrongdoer of the same injury that he or she caused to his or her victim.¹⁷⁶ For example, section 28 of the Sudanese Penal Code 1991 provides that a person who has committed a given violation of law should be punished in the same way and by the same means that he has used in harming another. Capital punishment is associated with retribution, especially with respect to those condemned to death for murder. Thus, retribution has been seen as “a murder for a murder”.

Retributivists see punishment as something morally deserved by criminals. Society, therefore, has a moral obligation to impose capital punishment. Kant, in support of the retributive theory, states the following:

If [he] has committed a murder, he must die ... [t]here is no substitute that will satisfy the requirements of legal justice. There is no equality between the crime and the retribution unless the criminal is judicially condemned and put to death.¹⁷⁷

Those who support the death penalty, thus, see it as the only punishment deserved by offenders who commit the most cruel and heinous crimes; no other punishment can substitute this. This is because executing the offender brings closure to the ordeal for the victim’s family and ensures that the murderer will not commit such crimes again. As mentioned above, the Attorney General in *S v Makwanyane*¹⁷⁸ contended that the imposition of the death sentence “meets the sentencing requirements for extreme cases of murder more effectively than any other sentence can do”. Therefore, any lesser punishment would be seen as undermining the value society places on protecting lives. Furthermore, despite substantial evidence that the death penalty has been inequitably applied, retributivists still justify the application of the death penalty by arguing that inequitable application is not inherent in the penalty, and that it is

¹⁷⁶ Slama (2001) 400

¹⁷⁷ I Kant, “The general theory of justice” in *The metaphysical elements of justice*, trans. J Ladd (1965) 102. Referred to in Van den Haag & Conrad (1986) 22.

¹⁷⁸ *Makwanyane* (1995) para 112.

better that some receive their “just deserts” however biased the sample executed, than that none do.¹⁷⁹

According to the retribution argument, certain offenders must be killed not to prevent crime but because of the demands of justice.¹⁸⁰ The government of Ethiopia has stated that it supports the retention and use of capital punishment for most serious offences such as genocide and multiple crimes against humanity, as retaining the use of the death penalty means bowing to the demands of justice from victims and their relatives.¹⁸¹ Thus, justice requires the death penalty as the only suitable retribution for heinous crimes. Justice in such cases is not only about arresting the criminal and getting a conviction, but primarily about the punishment, which has to be just.

In a society that aims at law and order, justice has to be administered, but if justice is not administered, then “justice” and “law” in its usual and original meaning has ceased to function. Anderson argues that, “as long as a punishment bears no proportion to a crime the justice is weak and deadly sick” and that if the death penalty is not imposed on a murderer, then complete justice has not been performed.¹⁸² The state’s role in dispensing justice, to punish criminals, is therefore a justification for capital punishment.

3.6.1.2 Rebuttal of argument

There is some difference of opinion as to the propriety of considering retribution as a legitimate purpose of punishment. An examination of the operation of the death penalty reveals that the retribution argument is fundamentally flawed. Retribution can be seen as vengeance under the guise of justice. It is important at this point to look at the meaning of “justice” so as to understand if imposing the death sentence for purposes of retribution amounts to justice. Justice has been defined as follows:

¹⁷⁹ Lempert (1981) 1178-1179.

¹⁸⁰ Amnesty International (1989) 16.

¹⁸¹ Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

¹⁸² Anderson (2001) 5-7 (Argument 1), Chapter 2.

An attempt (a) to punish persons guilty of crime, (b) not to punish innocent persons, (c) to punish the guilty according to what is deserved by the seriousness of the crime and the culpability of the persons guilty of it.¹⁸³

Based on the above definition, it is clear that all forms of punishment by their nature are retributive, not only the death penalty. Therefore, a criminal who has done something wrong, deserves punishment – a repayment (retribution) for the wrong he did. Abolitionists, even those that are relatives of victims of crime, have refused to accept that murderers deserve to die.¹⁸⁴ In the light of this, it could be argued that someone who has committed murder or any serious offence must not only be put to death. Another punishment other than death can be inflicted.

As mentioned above, retributivists justify the death penalty as a categorical denunciation of crime by the community. But they fail to advance any convincing argument that the community cannot find alternative ways of showing its denunciation of crime. A severe punishment, such as life imprisonment, can adequately demonstrate the community's denunciation of crime, and will prevent the public from taking the law into its hands. In support of this and in rebutting the retribution argument for the death penalty, Justice Chaskalson in *S v Makwanyane* stated:

The righteous anger of family and friends of the murder victim, reinforced by the public abhorrence of vile crimes, is easily translated into a call for vengeance. But capital punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. We have long outgrown the literal application of the biblical injunction of “an eye for an eye, a tooth for a tooth”. Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it. The State does not put out the eyes of a person who has blinded another in a vicious assault, nor does it punish a rapist by contrasting him and submitting him to the utmost humiliation in gaol. The State does not need to engage in the cold and calculated killing of murderers in order to express moral

¹⁸³ Van den Haag & Conrad (1986) 55.

¹⁸⁴ For example, Coretta Scott King, widow of Dr Martin Luther King stated that “[a]lthough both my husband and mother-in-law were murdered, I refuse to accept the cynical notion that their killers deserve the death penalty ... Forgiving violence does not mean condoning violence ... For too long we have treated violence with violence and that's why it never seems to end”. See Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

outrage at their conduct. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal.¹⁸⁵

Justice Chaskalson further stated that “to be consistent with the value of *ubuntu*, ours should be a society that ‘wishes to prevent crime... (not) to kill criminals simply to get even with them’”.¹⁸⁶ Therefore, in the political context of democratisation in Africa in general, and national reconciliation in African states breaking through a past characterised by violence, the insistence on retribution as argued by retributivists, would mean insisting that vengeance be done, which does not accord with the concept of *ubuntu*.¹⁸⁷

Similarly, in *Republic v Mbushuu and Another*, Mwalusanya J, as seen in his statement below, saw the retribution argument as some crude urge for vengeance. It was argued in this case that the death penalty is in the public’s interest because it shows in emphatic terms that the government denounces murder; and that by imposing the sentence of death, society reinforces and promotes public respect for life.¹⁸⁸ What about respect for the life of the criminal? The right to life is still the “supreme right” and the most fundamental of all human rights. As discussed in chapter four, even murderers have to be treated in light of the value of their lives, a value not erased by the harm or injustice their lethal violence has caused the innocent. Thus, sentencing to death and executing a person violates that person’s right to life since even a murderer has an indisputable right to life. Therefore, if the Tanzanian government has to actually reinforce and promote public respect for life, it can only do so if it abolishes the death penalty. Mwalusanya J, in response to the argument by the Tanzanian government, stated:

¹⁸⁵ *Makwanyane* (1995) para 129. The concept of *ubuntu* recognises a person’s status as a human being, entitled to respect, dignity, value and acceptance from the members of the community such person happens to be part of (Langa J, para 224). The concept carries in it the ideas of humanness, social justice and fairness (Madala J, para 237).

¹⁸⁶ *Makwanyane* (1995) 131.

¹⁸⁷ It should be noted that the concept of *ubuntu* was part of the post-amble to the Interim Constitution under the heading of “national unity and reconciliation”.

¹⁸⁸ *Mbushuu* (1994) 353.

[E]ven if it is the case that the majority of the public do subscribe to some sort of an eye-for-an-eye retaliation approach in murder cases, a progressive government will not feel obliged to execute persons simply to satisfy some crude urge for vengeance. Rather, it will assume the responsibility for informing the public and seek to influence their views in a more enlightened direction. Often vengeful sentiments stem from fear in the face of increasing rates of violent crime. The death penalty, however, is not an instant solution to violent crime and the government should not hold it out as such. Retribution has no place in a civilised society and negates the modern concepts of penology.¹⁸⁹

In addition to the aforesaid, the retributivist argument in support of the death penalty fails to adequately address the crucial question “whether the state should be allowed to execute murderers”. Most of the attention of retributivists is directed at the question whether murderers deserve to die, which is not sufficient to justify the application of the death penalty.

Generally, retribution makes impossible demands on the criminal justice system.¹⁹⁰ A decision to execute everyone convicted of murder, for example, because they deserve to die, would undoubtedly fail to meet the fundamental requirements of fairness. This is because retributive capital justice is tainted by bias and by the influence of factors beyond the control of courts of justice, such as the poverty of the defendant, which prevents him from engaging competent counsel skilled in the art of criminal defence.¹⁹¹

3.6.2 Deterrence

The primary purpose of legal punishment is to deter crime. In other words, deterrence is the main purpose of the threats of punishment and of punishment itself.¹⁹² However, it should be borne in mind that threats of punishment cannot and are not meant to deter everybody all of the times, but are meant to deter most people most of the time.

¹⁸⁹ *Mbushuu* (1994) 355.

¹⁹⁰ Amnesty International (1989) 17.

¹⁹¹ Amnesty International (1989) 17.

¹⁹² Van den Haag & Conrad (1986) 56.

The deterrence theory operates at two levels – individual and general deterrence. The concept of individual deterrence aims at thwarting further criminal activity by the particular defendant who is before the court.¹⁹³ With individual deterrence, the offender is treated in such a way that he or she will in future shun away from committing other offences. In other words, the offender is treated in such a way that he or she will be deterred from committing an offence again. Strictly speaking, the death penalty is not concerned with individual deterrence in the sense that once the offender is executed, it cannot be said that the offender will be deterred from committing future crimes. Broadly speaking, the death penalty certainly “deters” the murderer who is executed, by preventing the murderer from murdering again.

General deterrence is to the effect that punitive sanctions imposed on a convicted criminal will deter others with similar tendencies from engaging in such conduct.¹⁹⁴ With general deterrence, the offender is treated in such a way that the treatment provides a lesson for the public at large. It can be deduced from this that deterrence protects the social order by restraining potential offenders from committing offences. The death penalty is associated with general deterrence.

3.6.2.1 The death penalty serves as a deterrent to crime

The deterrent argument is used to justify the imposition of the death penalty. The central premise of deterrence – that executing murderers will save more lives than are taken – provides a reasonable moral basis for a system of state executions.¹⁹⁵ Most African states, as seen below, retain the death penalty because of the belief that it is a deterrent to crime. Retentionist African states often argue that it is necessary to kill an offender so as to dissuade other people from committing the same kind of crime. They further contend that the threat of capital sanction, or the apparent risk of being executed, deters those who are about to commit a capital offence, than would other forms of punishment.

¹⁹³ Loewy (2000) 6.

¹⁹⁴ Loewy (2000) 6

¹⁹⁵ Lempert (1981) 1187-1188.

In 1994, the Zambian government held a series of nation wide consultations to enable it to decide on whether or not it should accede to the Second Optional Protocol to the ICCPR.¹⁹⁶ However, the government did not proceed with its proposal because the vast response was in favour of retaining the death penalty as a deterrent due to rising crime rate in the country.¹⁹⁷ Also, the Gambian military government used the deterrent argument when it was reinstating the death penalty in 1995. The preamble of the Death Penalty (Restoration) Decree 1995 states:

The existence of the death penalty as a lawful form of punishment for any offence under the laws of The Gambia is considered to be a deterrent to reduce or completely eradicate acts of homicide and treasonable offences and therefore consistent with The Gambia's commitment to the protection and promotion of human rights.

It would appear the government of The Gambia was not aware of what constitutes promotion and protection of human rights, as killing someone cannot be seen as promoting respect for life or protecting the right to life of the offender. Considering the progressive acceptance of human rights standards on the abolition of the death penalty, reinstating the death penalty cannot be seen as a commitment to the promotion and protection of human rights.

Further, it is reported that the president of Botswana, with reference to the death penalty, stated that “[t]he frequency of the occurrence of these heinous crimes makes it imperative that stringent laws be maintained to deter these perpetrators.¹⁹⁸ The government of Guinea has also justified the retention of the death penalty on the fact that it deters people from committing murder.¹⁹⁹

¹⁹⁶ Hatchard & Coldham (1996) 160.

¹⁹⁷ Hatchard & Coldham (1996) 160.

¹⁹⁸ *The Sun*, 8 November 1995, referred to in Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

¹⁹⁹ Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

In 2004, the Minister of Justice and Keeper of the Seals, in justifying the retention of the death penalty in Cameroon, stated that it is a deterrent measure.²⁰⁰ The deterrent justification has been uttered during trials regarding the constitutionality of the death penalty in some African states. For example, in *S v Makwanyane*, the Attorney General attached substantial weight to the need for a deterrent to violent crime. He asserted that “the death sentence is an indispensable weapon if [South Africans] are serious about combating violent crime”.²⁰¹ The increase in violent crime in South Africa over the past five years, during which the death sentence had not been enforced, was used to substantiate this assertion.

The deterrent argument is frequently used with regard to the crime of murder. It has been argued that since society has the highest interest in preventing murder, it should use the strongest punishment available to deter murder, and that is the death penalty.²⁰² Those in support of the death penalty in Tanzania have argued that executing murderers will effectively deter potential murderers from killing.²⁰³ Also in *Republic v Mbushuu and Another*, it was argued in favour of the Republic that the death penalty has some deterrent effect and is, thus, necessary to protect society, as executing some of the murderers will deter at least some potential killers from committing murder.²⁰⁴ Potential murderers will, therefore, think twice before killing for fear of being sentenced to death and executed. This is because people fear death, due to the death penalty’s finality, more than anything else.

Some African scholars like Snyman have voiced the deterrent justification. As maintained by Snyman, there is every indication that the death penalty does serve as a deterrent. He relied on statistics supplied by the South African Police Service, which

²⁰⁰ See *Le Messenger* (a Cameroonian newspaper), No 681 of 5 July 2004, p 3.

²⁰¹ *Makwanyane* (1995) para 116.

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 Stated in the report of the national coordinator of Tanzania, Richard Shilamba, 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)).

²⁰⁴ *Mbushuu* (1994) 352.

clearly show that in the decade following the abolition of the death penalty, the murder rate was approximately twice as high as in the 1970s, when the death sentence was still in force.²⁰⁵ Other non-African scholars have asserted that the death penalty does deter.²⁰⁶ From the studies of scholars (both African and non-Africans), it is clear that reliance on the deterrence theory is used to justify the retention of the death penalty. However, it is also clear that there is very little statistics in Africa to justify the argument that the death penalty serves as a deterrent to crime.

3.6.2.2 Rebuttal of argument

Many have seen the deterrent argument as flawed and argue that the death penalty is not an effective deterrent. For example, the Ethiopian Human Rights Council has described as flawed arguments that claim the death penalty reduces crime in society,

²⁰⁵ Snyman (1992) 29-30. Generally, the deterrent effect of the death penalty has since mid-1970s been proved by calculating over time or across jurisdictions or both, the correlation between the rate of executions and the rate of homicides. However, this is done only after all other factors that may affect both these rates have been controlled through the use of “multiple regression analysis” (Hood (2002) 213). In 1967, Norval Moris observed that the deterrent effect of the death penalty may be tested using three standard methods: First, the commission of capital crimes such as murder may be measured in a given jurisdiction before and after the abolition or reintroduction of the death penalty. Secondly, the rate of crime of two or more jurisdictions – similar except that at least one has abolished the death penalty – may be compared. Thirdly, the commission of a crime such as murder within a single jurisdiction may be measured before and after widely publicised executions of murderers. (see United Nations, *Capital punishment developments 1961 to 1965* (1967) 40-41). There are, therefore, four standard methods by which the deterrent effect of the death penalty may be proved.

²⁰⁶ Van den Haag has insisted that, even though statistical demonstrations are not conclusive, and perhaps cannot be, capital punishment is likely to deter more than other punishments because people fear death deliberately inflicted by law more than anything else (see “The ultimate punishment: A defence” <<http://www.pbs.org/wgbh/pages/frontline/angel/procon/haagarticle.html>> (accessed 13 October 2003)). He substantiates his argument by looking at what most prisoners under sentence of death will prefer – execution or life in prison? He states that 99 per cent of all prisoners under sentence of death, who have the choice between life in prison and execution, prefer life in prison. An indication of this preference can be seen by means of appeals, pleas of commutation, and the use, by the prisoners under sentence of death, of any means at their disposal to prevent execution (see Van den Haag & Conrad (1986) 68). Ehrlich has also shown in his investigations that the death penalty does have a clear deterrent effect. He studied the relationship between homicide rates and executions in the United States between 1935 and 1969, which led him to the conclusion that the higher the rate of executions the lower the homicide rate. He further concluded that his study has indicated “the existence of a pure deterrent effect of capital punishment” and suggested that, “an additional execution per year over the period in question may have resulted, on average, in seven or eight fewer murders” (See I Ehrlich, “The deterrent effect of capital punishment: A question of life and death” (1975) 65 *American Economic Review* 397-419; referred to in Hood (2002) 222-223). A subsequent study conducted by Ehrlich, in which he used a cross-sectional method and not a time series method as used in his earlier study, confirmed the conclusions of his earlier studies (see I Erlich, “Capital punishment and deterrence: Some further thoughts and additional evidence” (1977) 85 *Journal of Political Economy* 741-788; referred to in Hood (2002) 222-223).

as it has not been proven that the death penalty reduces crimes more than other forms of punishment.²⁰⁷ The executive director of Inter-African Network for Human Rights, Mwanajiti, has also pointed out that the death penalty had failed to reduce crime in most jurisdictions.²⁰⁸ Van Rooyen has also stated that the death penalty as a unique deterrent argument can have no credibility at all.²⁰⁹

This brings into question the effectiveness of the death penalty as a deterrent to crime, which can be determined by three factors: First, the credibility of the threats, which involves issues like the magnitude of the risk for the offender being apprehended, convicted and punished as threatened, and the proportion of offenders that are actually punished. Second, the size of the threatened punishment, which concerns the triviality or credibility of the punishment. Third, the attractiveness of the crime from which the threat is to deter.²¹⁰

From the above factors, it is clear that any form of punishment can be an effective deterrent as long as it is consistently and promptly employed. Bedau has rightly noted that capital punishment cannot be effectively and promptly employed.²¹¹ This is because only a small number of those who are charged with capital offences are sentenced to death, and only a small proportion of those sentenced to death are actually executed.

In *Republic v Mbushuu and Another*, it was noted that the deterrent effect of the death penalty is diminished by the fact that not all murderers are hanged but only a few are hanged and in private.²¹² Mr Mwambe, arguing for the Republic, conceded that

²⁰⁷ “Call to abolish death penalty in Ethiopia” *Mail and Guardian*, 3 October 2003; see <<http://www.mg.co.za/Content/13.asp?ao=21422>> (accessed 13 October 2003).

²⁰⁸ “Zambia: Fight to abolish the death penalty” <<http://www.irinnews.org/print.asp?ReportID=40989>> (accessed 20 May 2004).

²⁰⁹ Van Rooyen (1991a) 4.

²¹⁰ Van den Haag & Conrad (1986) 56.

²¹¹ H Bedau, “The case against the death penalty” <<http://www.aclu.org>> (accessed on 8 January 2004).

²¹² *Mbushuu* (1994) 352.

hangings in secret as done at present in Tanzania have no deterrent effect.²¹³ The relative infrequency with which the death penalty is imposed, therefore, suggests a minimal deterrent effect.²¹⁴

As mentioned above, defenders of the death penalty have argued that it is necessary to kill an offender so as to dissuade other people from committing the same kind of crime. That the obvious risk of being executed deters those who are about to commit capital crimes from doing so, and that a potential murderer will think twice before committing murder for fear of being sentenced to death and later executed. Therefore, the death penalty is seen as an indispensable weapon in combating violent crime. However, one of the problems with the deterrent argument is that defenders of the death penalty do not seem to understand what the greatest deterrent to crime actually is.

Abolitionists do not dispute the point that the threat of capital punishment or execution may deter some people. What they avow is that it is not the greatest deterrent. Most people who commit murders either do not expect to be caught or do not carefully weigh the differences between a possible execution and life in prison before they act. In *S v Makwanyane*, Justice Chaskalson rightly pointed out that “the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished”.²¹⁵ Justice Chaskalson was of the opinion that both the death penalty and life in prison are deterrents and that the main question should be “whether the possibility of being sentenced to death, rather than being sentenced to life imprisonment, has a marginally greater deterrent effect”.²¹⁶

The above statement by Justice Chaskalson with regard to the greatest deterrent to crime being the likelihood of being apprehended reminds one of the “pickpocket anecdote” that is often referred to in the literature of abolitionists. In 18th century

²¹³ *Mbushuu* (1994) 352-353.

²¹⁴ Lempert (1981) 1192-1193.

²¹⁵ *Makwanyane* (1995), para 122.

²¹⁶ *Makwanyane* (1995) para 123.

London, numerous pickpockets were seen to be active in a crowd that had gathered to see a pickpocket hanged. The fact that someone was being hanged at that same moment did not deter the pickpockets from committing a crime for which death was the punishment. The fact that the pickpockets selected the moment when the strangled man was swinging above them as the happiest opportunity to commit the crime attest to the point that “the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished”. They knew that everybody’s eyes were on the strangled person and all were looking up, so the possibilities of their being apprehended were very slim.²¹⁷

The death penalty fails as a deterrent for the reason that murders are, more often than not, committed in the heat of the moment, in moments of passion or anger, or by criminals who are substance abusers and acted impulsively. In *Republic v Mbushuu and Another*,²¹⁸ the above was reiterated to show why the death penalty fails as a deterrent. It is impracticable for such persons to be deterred by the threat of the death sentence and execution from committing murder. Moreover, these persons may or may not have premeditated their crimes. Even if they had premeditated their crimes, they plan its commission carefully so as to ensure that they are not caught. The threat of the death sentence being imposed or execution carried out would not deter such planners.

Furthermore, the lack of conclusive evidence that the death penalty is a deterrent to murder or other crimes implies that defenders of the death penalty merely speculate its deterrent effect. In support of the point that such speculations are unacceptable, Justice Chaskalson in *S v Makwanyane* cites Wright J in *The People v Anderson*, who points out that “a punishment as extreme and as irrevocable as death cannot be predicated upon speculation as to what the deterrent effect might be”.²¹⁹

Justice Chaskalson also rebuts the argument put forward by the Attorney General (stated above) that the increase in the incidence of violent crime was due to the fact

²¹⁷ For further discussion on this, see Van den Haag & Conrad (1986) 244-246 & 249-250.

²¹⁸ *Mbushuu* (1994) 352.

²¹⁹ *Makwanyane* (1995) para 127.

that the death sentence was not enforced. Justice Chaskalson's argument was that though death sentences were not carried out throughout the period referred to above, the death sentence was still a lawful punishment and was imposed by the courts.²²⁰ When the moratorium was not official,²²¹ criminals had no assurance that any death sentence passed on them will not be carried out, yet they were not deterred from committing crime. Justice Chaskalson then rightly attributed the increase in crime to social change, associated with political turmoil and conflict in the country, homelessness, unemployment and poverty.²²² Therefore, there is no proof that the death penalty deters more effectively than imprisonment. A survey conducted for the United Nations in 1988 and updated in 1996 concluded that research has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment.²²³ Such proof is unlikely to be forthcoming, and that the evidence as a whole still gives no positive support to the deterrent hypothesis.²²⁴

The lack of qualitative evidence to the effect that the death penalty serves as a deterrent to crime requires that the death penalty be abolished. Human rights activists and the Catholic Church in Zambia have argued that capital punishment should be abolished, as it has never been known to be a deterrent to crime.²²⁵ Further, studies have been conducted on the relationship between homicide rates and executions, which purport to show that the death penalty does not have a deterrent effect. Kalinde, a University of Zambia law lecturer, has stated that a research, which was carried out in Zambia, proves that the death penalty was not a deterrent to crime.²²⁶ One of the most cited studies conducted in Africa in this regard is that of Adeyemi, a professor of

²²⁰ *Makwanyane* (1995) para 118.

²²¹ The moratorium was only formally announced on 27 March 1992.

²²² *Makwanyane* (1995) para 119.

²²³ "Let's get rid of the death penalty: Why the death penalty should be abolished" <http://www.amnesty.org.nz/web/pages/home.nsf/0/7e228581809defc3cc256a680019056b?OpenDocument> (accessed 8 January 2004).

²²⁴ As above.

²²⁵ AFRICANEWS – "Zambia: Prisoners challenge capital punishment" <http://lists.peacelink.it/afrinews/msg00190.html> (accessed 12 February 2004).

²²⁶ As above.

law and criminology in Nigeria.²²⁷ He compared statistics on murders and executions between 1967 and 1985, and found an increase in murder rates even though murder was punishable by death; and an increase in armed robberies, also punishable by death.²²⁸ The introduction of the death penalty for armed robbery in 1970 was followed by an increase rather than a decrease in armed robberies.²²⁹ The study, therefore, concluded that "no efficacy can be shown for the operation of the death penalty" for murder and armed robbery in Nigeria.²³⁰

In addition, it was reported in 1996 that despite the executions in Nigeria, the crime rate, most especially armed robbery, has continued to increase.²³¹ This implies that the executions did not deter armed robbers from committing more robberies. Subsequently, in June 2001, the State Governor of Oyo in Nigeria proposed that Nigeria abolish the death penalty from its legislation, as death sentences have not reduced the number of innocent people murdered.²³²

The conclusion of most deterrence studies is that the death penalty is, at best, no more of a deterrent than a sentence of life in prison.²³³ Since defenders of the death penalty argue that it serves as a deterrent, they bear the burden of proving that the death penalty deters more than other severe forms of punishment. However, capital

²²⁷ Amnesty International, "Africa: A new future without the death penalty" AI Index: AFR 01/003/1997, 1 April 1997.

²²⁸ As above.

²²⁹ Hood (2002) 216. A Ugandan law lecturer, Mukubwa, also stated in 1994 that there has been a marked increase in armed robberies since the execution of prisoners at Luzira prison in 1993; and that the introduction of capital punishment for defilement was followed by an alarming increase in reported cases of defilement (See *The New Vision*, 19 July 1994).

²³⁰ Amnesty International, "Africa: A new future without the death penalty" AI Index: AFR 01/003/1997, 1 April 1997.

²³¹ As above.

²³² Amnesty International, "West Africa: Time to abolish the death penalty" AI Index: AFR 05/003/2003, 10 October 2003.

²³³ Michigan State University and Death Penalty Information Centre, "Arguments for and against the death penalty" (2000) <<http://deathpenaltyinfo.msu.edu>> (accessed 3 October 2003).

punishment does not solve society's crime problem but leaves the underlying causes of crime unaddressed, as less attention is paid to the causes of crime.²³⁴

An examination of crime statistics in abolitionist states shows how flawed the deterrent argument is, as crime rates still increase despite the abolition of the death penalty, implying that other factors influence crime rates. For example, in South Africa, recorded murders decreased between 2000 and 2002 by two per cent, which is a continuation of a trend whereby the yearly number of murders has been declining since 1994 (before abolition of the death penalty) and after abolition.²³⁵ This goes to show that the increase in crime rates cannot be used to justify the retention of the death penalty as crime rates can decrease or increase with or without the death penalty on the statute books.²³⁶

Increase or decrease in crime rates could, therefore, be associated with the factors listed above that affect crime. Since so many variables are involved as regards crimes, the argument that the death penalty deters cannot be justified objectively. It is relatively safe to conclude that the overall serious crime rate is influenced by many other factors, thus rendering the deterrent argument objectionable.

Moreover, it is without doubt that executions encourage disrespect for human life and for the human body and could even incite violence. Some African governments and lawyers have held the same view. For example, a Zimbabwean lawyer, Feltoe, wrote that “[i]n symbolic terms the official killing of killers can hardly be said to foster respect for the sanctity of life. It is contradictory to killing people to show that killing

²³⁴ These include: unemployment, poor economic growth, political instability, social problems, racial and cultural oppositions, alcohol and drug abuse, psychological illness, the ease to supply guns, an ineffective police force, insufficient child raising, poor home and school environment and a legal system that lacks the trust of the people.

²³⁵ Leggett et al (2003) 14. Also, a state-by-state analysis of homicide rate in the United States showed lower rates of homicide in states that do not have the death penalty in their statutes (Hodgkinson (2000) 20). In Canada, the homicide rate was 43 per cent lower in 1999 than it had been in 1997, the year before abolition (Hood (2002) 214).

²³⁶ For example, in New York, a dramatic drop by 50 per cent over the past decade in homicide rate was attributed to a policy of “zero tolerance” by the former chief of police Bratton and not to the reinstatement of the death penalty in 1994 after two decades of abolition (Hodgkinson (2000) 20).

is wrong”.²³⁷ Former president of The Gambia, Jawara, has stated that the “[d]eath penalty can never be a solution; violence only asks for more violence”.²³⁸ Thus, its use is an example of state violence that only goes to promote a culture of violence, and not to deter others from committing crimes.

3.6.3 Prevention

3.6.3.1 The death penalty prevents an offender from committing other crimes

Prevention means an offender should be prevented from committing other crimes. Thus, those who favour the retention of the death penalty also rely on the preventive theory to justify its imposition. This theory is based on the idea that punishing an offender will prevent him or her from committing other crimes. Proponents of this theory hold the view that the death penalty, as a form of punishment, prevents the commission of a crime permanently thus very effective.

Burchell and Hunt have stated that the death penalty “may certainly validly, if cynically, be defended as a permanent preventative”.²³⁹ Once the criminal is executed, he is incapacitated forever. Death incapacitates totally and permanently, as opposed to imprisonment that incapacitates only partially and temporarily. This appears to be an obvious argument that even abolitionist cannot refute. Executing a criminal means a clear-cut stop of new crimes committed by that criminal as the dead criminal cannot commit future crimes or do harm to others.

Often linked to the prevention argument, is the argument that in preventing criminals from repeating their crimes or committing further crimes, the death penalty creates a somewhat safer society. An illustrative example of how the death penalty creates a

²³⁷ Amnesty International, “Africa: A new future without the death penalty” AI Index: AFR 01/003/1997, 1 April 1997.

²³⁸ As above.

²³⁹ Burchell & Hunt (1970) 73. They further argue that while prevention is legitimate, it must be balanced by “considerations of ‘fairness and consistency’ and the moral blameworthiness of the offender”.

safer society is provided by Anderson.²⁴⁰ He states that after a man who has raped and strangled two young children is sentenced to death, all of society can once again feel at ease and they will no longer have to keep their children indoors. Safety returns to society, and society does not have to fear his upcoming release, or failed custody and rehabilitation treatment.²⁴¹

3.6.3.2 Rebuttal of argument

The preventive argument is flawed in that, first, there are other ways of preventing an offender from committing future crimes. In this regard, Justice Chaskalson in *S v Makwanyane* stated the following:

Prevention is another object of punishment. The death sentence ensures that the criminal will never again commit murders, but it is not the only way of doing so, and life imprisonment also serves this purpose. Although there are cases of goal murders, imprisonment is regarded as sufficient for the purpose of prevention in the overwhelming number of cases in which there are murder convictions, and there is nothing to suggest that it is necessary for this purpose in the few cases in which death sentences are imposed.²⁴²

From the above, it is clear that life imprisonment can also prevent criminals from ever committing murder, and life imprisonment without parole could be seen as a permanent preventative measure. In support of alternative preventive measures, which indicates that the preventative argument is flawed, Van Rooyen has stated that a person who does not “deserve” to live in society can be permanently removed from it, by means of life imprisonment, without being exterminated, and that a person who is a danger to society can likewise be incapacitated permanently.²⁴³

It is worth noting that although political instability could result in the release of some prisoners, imprisonment is still a valid option as it gives the prisoner an opportunity to

²⁴⁰ Anderson (2001) 1 (Argument 10), Chapter 2.

²⁴¹ As above.

²⁴² *Makwanyane* (1995) para 128.

²⁴³ Van Rooyen (1991a) 9.

reform, which the death penalty does not. Thus, the preventive argument in the context of the death penalty is also flawed in that it does not offer the offender an opportunity to be reformed. Some African states have considered abolishing the death penalty for this reason, amongst others. For example, the Ugandan Minister of Justice and Constitutional Affairs, Mukwaya, has stated that “the government is considering scrapping the death sentence on capital offences because it does not give the culprit time to reform. Long jail terms will replace the death penalty”.²⁴⁴ The president of Malawi has called on African heads of state to abolish the death sentence, as he believes that a person can reform.²⁴⁵

3.6.4 Rehabilitation

It is desirable for punishment to reform as it is for the benefit of society if an individual who has contravened society’s standards is rehabilitated. According to the rehabilitative theory, punishment is to help adjust the offender to the prevailing norms.²⁴⁶ Rehabilitation assumes that a person commits an offence because of some personality disorder that can be corrected. Punishment here is intended to change the offender’s intent, motivation or even character towards law-abiding conduct.

3.6.4.1 Rehabilitation is expensive and ineffective

As Loewy points out, there is serious difference of opinion as to the relative importance of rehabilitation. While some believe that it is unjust to take the taxpayers money to finance the rehabilitation of those they consider “less worthy” (since criminals represent the worst in society), others believe that rehabilitation, though desirable, should be subordinate to other purposes, such as deterrence,²⁴⁷ as it is ineffective. With regard to the first belief, those who hold such belief find it offensive

²⁴⁴ “Death sentence to be repealed” <<http://allafrica.com/stories/printable/200404300382.html>> (accessed 14 May 2004).

²⁴⁵ S Tejan-Sie, “The death penalty: A growing human rights issue” in *Concord Times* (Freetown), 11 October 2004

²⁴⁶ Seleokane (1996) 10.

²⁴⁷ Loewy (2000) 2.

to the sense of justice and feels that it is unreasonable, unfair and morally unsound to know that the taxpayer's money supports a living murderer or violent criminal. This was the argument of the government of Tanzania in *Republic v Mbushuu and Another*, where it argued that dangerous murderers should be executed rather than wasting large sums of public money in keeping them locked up in maximum-security prisons.²⁴⁸ Retentionists, therefore, see the death penalty as cheaper for the society as every execution means economical advantages in many areas for the society and the taxpayers. Their main concern is not how much money they spend but where the money principally goes or what it is used for. In support of this, Anderson states that

the main thing is not what is most expensive – the death penalty or lifetime in prison. The main thing is what the society's money is used for. The money used for in death penalty cases is mainly for the judicial system itself so that law and order can [be] guaranteed as far as possible until the execution. That is well invested money. The money used for when it comes to lifetime in prison is also used for the judicial system *but* more for expenses after a judicial process, when the violent criminal or the murderer in many years will be [paid] for guarding, room, food clothes, medical service, activit[ies] etc, and that from the citizens purse. *This is for many outrageous and offensive.*²⁴⁹

On the second belief above, retentionists are of the view that rehabilitation should be subordinate to other theories of punishments, such as deterrence and retribution. This implies some sort of divergence of opinion on the purpose of punishment.²⁵⁰ The fact that legal systems try to strike a balance between all theories of punishment by trying

²⁴⁸ *Mbushuu* (1994) 354.

²⁴⁹ Emphasis added. See Anderson (2001) 2 (Argument 17), Chapter 2.

²⁵⁰ Seleoane in acknowledging the divergence of opinion on the purposes of punishment asserts the following: Firstly, the requirement that the purpose of criminal law is to protect society against conduct which undermines certain minimum social standards should be borne in mind when offenders are punished. Secondly, some weight has to be assigned to the prevailing moral climate when offenders are punished. Lastly, in punishing an offender, regard must be had not only of the offender's rights, but also of the rights of the aggrieved person and of society as such, as failure to take the rights of the aggrieved person and of society into account poses a threat to the legal and/or judicial framework. See Seleoane (1996) 11-12. Seleoane's last assertion is very important as one of the arguments that has been raised by retentionists to justify the imposition of the death penalty is that capital punishment restores a victim's dignity thus giving back human value and respect for the victim's right to dignity. Furthermore, as mentioned above, it has been argued that the death penalty provides a safer society. Thus, in punishing an offender, regard must be had of the right of society to peace and security, and as argued by retentionists, the death penalty provides for peace and security as the criminal who is a threat to peace and security in the society is eliminated. Retentionists further argue that the death penalty means the greatest mark from the state that it defends the ordinary citizen's life, which means the state takes the citizen's life into account when punishing an offender.

to assign appropriate weight to the competing theories of punishment in every case that comes before the courts reveals this divergence. In acknowledging this divergence, Derham stated as follows:

No system of law adheres to one theory. Even primitive law, apparently based on vengeance, is also built on the hope of deterring others. A successful reform of the prisoner will prevent him from offending again. On the other hand, *the easiest way to prevent a prisoner from offending again is to hang him*, but this can scarcely be called a reformatory method.²⁵¹

In spite of the above difference of opinion, criminologists consider rehabilitation as a worthwhile goal of punishment. Defenders of the death penalty have not disputed this either. However, apart from the fact that supporters of the death penalty believe rehabilitation should be subordinate to other theories of punishment, their real objection to rehabilitation is simply that it does not work. Punishment for the sake of rehabilitation has not been shown to be effective. Proponents for the retention of the death penalty use the high degree of “recidivism”²⁵² among those who have been imprisoned as proof of the ineffectiveness of rehabilitation or the prison as a rehabilitative environment.

Surveys have shown that violent criminals and murderers who have been sentenced to prison and later released relatively often relapse into crime.²⁵³ High recidivism rates have been registered in some African states. The recidivism rate in South Africa stands at approximately 80 per cent according to South Africa's Institute for Security Studies, and prison personnel are unable to conduct programs that will both reduce the numbers of criminals in prison and rehabilitate those who are open to changing their lives.²⁵⁴ Financial constraints exacerbate the inability of prisons in Africa to rehabilitate prisoners. Defenders of the death penalty have argued that the very nature

²⁵¹ Emphasis added. See P Derham, *A text-book of jurisprudence* (1964) 320 cited in Seleane (1996) 10.

²⁵² Recidivism means the habit of relapsing into crime.

²⁵³ Anderson (2001) 2 (Argument 8), Chapter 2.

²⁵⁴ “International Narcotics and Law Enforcement: FY 2004 budget justification – Africa” Released by the Bureau for International Narcotics and Law Enforcement Affairs (June 2003) <<http://www.state.gov/g/inl/rls/rpt/cbj/fy2004/21883.htm>> (accessed 5 January 2004).

of the prison system runs counter to rehabilitation. For example, requiring a criminal to associate with other criminals makes it difficult to break the criminal of criminal tendencies.

3.6.4.2 Rebuttal of argument

As mentioned above, rehabilitation is a worthwhile goal of punishment. With regard to the first belief that it is unjust to take the taxpayers money to finance the rehabilitation of those they consider “less worthy”, if the main concern of defenders of the death penalty is where the money principally goes and what it is used for, then they should also be concerned about money used for capital trials. Even if the above argument had some basis, it cannot be morally acceptable for a criminal to be executed because of fear of spending one’s money on that criminal if the criminal is locked up. If a criminal is represented by a state appointed attorney, it will still be state’s money, including the taxpayer’s money that is used to pay that attorney. The enormous concentration of judicial services on capital trials in retentionist states to ensure that the death penalty is imposed actually diverts valuable resources away from other more effective areas of law enforcement.

Concerning the cost of imprisonment, the opinion of Mwalusanya J in *Republic v Mbushuu and Another* was contrary to that of those who support the death penalty. The government in this case argued that dangerous murderers should be executed rather than wasting large sums of public money in keeping them locked up in prison. However, Mwalusanya J stated the following:

In my considered opinion, if we are talking about expense, we should not forget that we are forced to spend large amounts to process through the elaborate system we have to decide whom we should execute. Clearly, it would be cheaper to kill murderers than to keep locked up for long periods, but it is a morally unacceptable argument that we should kill criminals because it is cheaper to do so. Considerations of economy cannot justify the taking of life ... Murderers imprisoned for life will be put to work whilst in prison and at least part of the profits generated by such work shall be used to pay compensation to the survivors. However, that cannot be achieved if the murderers are sentenced to death.²⁵⁵

²⁵⁵ *Mbushuu* (1994) 354-355

In addition, studies conducted in Canada and the United States have shown that it is not cheaper to kill murderers than to keep them locked up for long periods. For instance, a study done in New York in 1982 revealed that the average capital trial and the first stage of appeals alone cost the taxpayer about 1.8 million US dollars, more than twice as much as it would cost to keep a person in prison for life.²⁵⁶

The second belief suggesting that rehabilitation should be subordinate to other purposes of punishment denotes rejection of the possibility of rehabilitation of convicted persons. This is contrary to the reformatory theory, which considers punishment as a means to an end, that end being the reformation of a convicted person. In this regard, Madala J in *S v Makwanyane* notes that an offender has to be imprisoned for a long period for the purpose of rehabilitation; and that by treatment and training, the offender is rehabilitated or, at the very least, ceases to be a danger to society.²⁵⁷ This statement goes to rebut the argument that murderers should be executed due to the ineffectiveness of rehabilitation.

3.7 Conclusion

The abolition or retention of capital punishment is primarily a political issue; and political issues are resolved by the political branches of government, acting with at least one eye focussed on public opinion.²⁵⁸ Some defenders of the death penalty are of the view that the state has a natural right to kill.²⁵⁹ Many governments still believe that they can solve urgent social and political problems by executing a few or even hundreds of their prisoners; and many citizens are still unaware that the death penalty offers society no further protection but further brutalisation.²⁶⁰ Nevertheless, the best case for abolition rests on a commitment to respecting substantive due process, to respecting liberty, autonomy, and privacy except when there is no alternative but to

²⁵⁶ Amnesty International (1989) 24.

²⁵⁷ *Makwanyane* (1995) para 242.

²⁵⁸ Beschle (2001) 766.

²⁵⁹ Ramolotja (1998) 12.

²⁶⁰ Mihálik (1991b) 136.

limit them in order to accomplish some pressing social objective.²⁶¹ Moreover, supposing that there are strong arguments to both sides, the death penalty is so far reaching in its consequences that the argument of its importance should lie with those who defend it.

With the alarming increase in terrorist activities in Africa²⁶² and the current “war” on terrorism in general, it is without doubt that the public outcry for the death penalty may be high and political pressure may, in many circumstances, demand the implementation of the ultimate penal sanction (the death penalty). However, considering the fact that a large number of offences that fall within the category of terrorism cannot be classified as “most serious crimes”²⁶³ and the duty of all states to enforce and uphold human rights, increase in terrorist acts cannot be used to justify the retention of the death penalty in Africa.

Abolishing the death penalty would not only encourage respect for the right to life, but could also go a long way to reduce crime, as more attention would be given to the root causes of crime. In fact, executions have been seen as symbols of the inability or willingness of governments to tackle the root causes of crime, such as, poverty and inequality.²⁶⁴ In this regard, Van Rooyen noted that

[the death sentence] is a very convenient political alternative to real effective and difficult public protection and crime prevention programmes. It is a cheap way for politically inclined people to pretend to their fearful constituencies that something is being done to combat crime, to protect the innocent. It obscures the real difficulties, the real causes of crime. It delays long-term commitment to address these meaningfully.²⁶⁵

²⁶¹ Sarat (1999) 11.

²⁶² Cilliers (2003) 91. See also, A Botha, “Background: Terrorism in Africa”, paper presented at the Institute for Security Studies Seminar on Terrorism, 18-19 September 2003, 5-6, available at website <<http://www.iss.co.za/seminars/tero19sep03>> (accessed 5 May 2004).

²⁶³ J Yorke, “Extradition, terrorism and the death penalty in Africa: Charting through the Labyrinth”, paper 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)).

²⁶⁴ Agostoni (2002) 77.

²⁶⁵ Van Rooyen (1991a) 9-10.

Thus, abolition of the death penalty will turn the focus of African governments to the true causes of crime, which will in turn lead to a reduction in crime rate if the causes are addressed efficiently.

Furthermore, opposition to the death penalty by past and current African leaders denotes that the death penalty is undesirable. Some former and current African head of states have clearly stated their opposition to the death penalty and their desire not to sign execution warrants. For example, the former president of Zambia, Kaunda, has called for the abolition of capital punishment, stating that he was mainly forced by circumstances during wartime to sign death warrants - "It has pained me to sign the death warrants during my tenure, I did so with utmost reluctance".²⁶⁶ Also, Konaré, former president of Mali has consistently stated his opposition to the death penalty.²⁶⁷ In December 1998, Dr Muluzi, then president of Malawi, stated:

I have promised that I will never sign the death sentence for a fellow human being. I would like to reaffirm this commitment. Life is sacred, I believe a person can reform. I believe that forgiveness makes all of us better persons. In the cause of truth and justice I invited all heads of state in Africa, our common home, to abolish the death sentence, to work for the removal of violence among our peoples and to prepare a better future for our children.²⁶⁸

In spite of the opposition to the death penalty by some African leaders and the fact that the arguments for its retention are flawed or not so convincing, most African states still retain the death penalty in their laws. The leaders who oppose the death penalty have or did not go ahead to abolish it. This could partly be attributed to the lack of a combined effort of, among others, the executive, legislature and judiciary to abolish the death penalty. Moreover, as seen in chapter two, broader political factors impacted on current abolitionist states that led them to abolition. For example, abolition of the death penalty in former Portuguese colonies was largely due to colonial influence. Abolition in Djibouti was achieved through factors including

²⁶⁶ D Mavunduse, "A new millennium free from death penalty in southern Africa?" <<http://www.sardc.net/editorial/sanf/1999/09/30-09-1999-nf2.htm>> (accessed 30 June 2004).

²⁶⁷ *Amnesty International Report* (2001) 166.

²⁶⁸ Statement from his speech to the Eight General Assembly of the World Council of Churches in Harare, Zimbabwe, quoted in Agostoni (2002) 16.

public opinion, political will and empirical evidence.²⁶⁹ The adoption of a new constitution that abolished the death penalty was preceded by a change in government in Côte d'Ivoire²⁷⁰ and the return to multiparty politics in Seychelles.²⁷¹ The arbitrary use of death penalty during colonial period resulted in the constitution providing for abolition in Namibia.²⁷² In addition to other factors, constitutional reviews led to the abolition of the death penalty in Angola, Guinea Bissau and South Africa.²⁷³

Abolition of the death penalty in Africa has, therefore, coincided with democracy, the affirmation of the rule of law and the promotion of, and respect for, human rights. As most African states, at least formally, now embrace human rights and democracy, it will be appropriate for them to reconsider their policies on the death penalty, to consider abolishing it. This will accord with, *inter alia*, the promotion of, and respect for, human rights, since the death penalty conflicts with the right to life, the right not to be subjected to cruel inhuman and degrading treatment and fair trial rights as revealed in the subsequent chapters of this thesis.

²⁶⁹ Hood (2002) 39.

²⁷⁰ As above.

²⁷¹ Hatchard & Coldham (1996) 161, footnote 39.

²⁷² Hatchard & Coldham (1996) 161.

²⁷³ Amnesty International, "Africa: A new future without the death penalty" AI Index: AFR 01/003/1997, 1 April 1997.

CHAPTER FOUR

THE RIGHT TO LIFE AND THE DEATH PENALTY IN AFRICA

- 4.1 Introduction
- 4.2 The right to life under the United Nations human rights system
 - 4.2.1 The Universal Declaration of Human Rights
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4.1 Introduction

Although in the horizontal legal system of international law,¹ discussion of which rights take priority over others remains unsettled,² the right to life has been described as “[t]he most fundamental of all human rights”.³ All human rights are of no significance without the right to life as “life” is a prerequisite for the enjoyment of any other human rights. Accordingly, “the right to life has been properly characterised as the supreme human right, since without effective guarantee of this right, all other rights of a human being would be devoid of meaning”.⁴

As stated in a number of human rights treaties, there are some rights that states may derogate from in time of emergency, but there are also others that states may not derogate from, as these rights are deemed indispensable for a human rights regime. Among the non-derogable rights is the right to life.⁵ The United Nations (UN) Human Rights Committee, established under the ICCPR, has observed that the right to life is the supreme right from which no derogation is permitted even in time of public emergency that threatens the life of a nation.⁶ The Committee further noted that all measures of abolition should be considered as progress in the enjoyment of the right to life.⁷ In support of the conclusion of the Human Rights Committee, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has emphasised that

¹ The horizontal legal system of international law places all norms on the same plane, their interrelations ungoverned by any hierarchy. However, the ranking of rights is significant in determining states’ obligations to respect and protect certain rights under a variety of circumstances (see Orlin (2000) 73).

² As above. The Inter-American Commission on Human Rights also regards the right to life as fundamental and pre-eminent (See Davidson (1997) 261).

³ Lord Bridge in *R v Home Secretary, Ex parte Bugdaycay* [1987] AC 514, [1987] 1 All ER 940 (HL) at 5314 (AC).

⁴ M Norwak, “U.N. Covenant on Civil and Political Rights: CCPR Commentary”, referred to in Orlin (2000) 74. See also Carlson & Gisvold (2003) 67.

⁵ Other non-derogable rights include fair trial rights, and prohibition of torture, slavery and retroactive measures.

⁶ UN Human Rights Committee, General Comment No. 6: The right to life (article 6 of the ICCPR), 27 July 1982, para 1, (UN Doc. HRI\GEN\1\Rev.1 at 6 (1994)), hereinafter referred to as CCPR General Comment No. 6.

⁷ CCPR General Comment No. 6, para 6.

abolition of capital punishment is most desirable in order fully to respect the right to life.⁸

Furthermore, absolute abolitionists hold the firm view that the right to life is absolute as it prevails over every other moral consideration that might be thought to compete with it or override it. In support of this, Bedau has rightly pointed out that this is true only when we are referring to the right to life of the innocent.⁹ It should be noted that characterising the right to life as the supreme right does not mean that it is absolute. At the international or national level, the right to life is not accorded the status of an absolute right,¹⁰ as self-defence, from a moral and ethical point of view, justifies the taking of life by an individual or even the state under certain circumstances.¹¹ On the other hand, the death penalty cannot be construed as an act of self-defence against an immediate threat to life.

Although the right to life is not absolute, it is still the “supreme right” and the “most fundamental” of all human rights. Wennergren has stressed the importance of the right to life in a dissent in *Kindler v Canada*,¹² in which he stated:

The value of life is immeasurable for any human being and the right to life enshrined in article 6 of the Covenant is the supreme human right. It is an obligation of State parties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to (bilateral) treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply, as there is no room for it under Covenant obligations. It is worth repeating that no derogation from a State’s obligations under article 6, paragraph 1, is permitted ...

⁸ Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/1997/60, 24 December 1996, para 79.

⁹ Bedau (1999) 43.

¹⁰ Boyle (1985) 221, 222-223.

¹¹ Devenish (1990) 17.

¹² See dissenting opinion of Mr Bertil Wennergren in *Kindler v Canada*, Communication 470/1991, UN Doc. CCPR/C/48/D/470/1991, 30 July 1993 (Human Rights Committee).

Therefore, for the purposes of punishment under law, everyone's life is valuable and lives have equal value. Human life has infinite value or worth and so must be respected and protected accordingly, which therefore follows that even murderers have to be treated in light of the value of their lives, a value not erased by the harm or injustice their lethal violence has caused the innocent.¹³ Thus, sentencing to death and executing a person violates that person's right to life since even a murderer has an indisputable right to life, which has to be respected and protected in the same way as the right to life of a non-murderer is respected and protected. In addition, Sane has argued that "deliberately killing someone violates the most basic of all human rights – the right to life – and has no place in today's world".¹⁴ Thus, the core of the case against capital punishment is the notion that there is something inexcusable about taking the life even of a person guilty of an atrocious crime.¹⁵

Some defenders of the death penalty have, however, argued that a murderer forfeits his life, and hence putting him to death does not violate his right to life but merely infringes it.¹⁶ It is not disputed that under appropriate conditions, persons can forfeit their rights.¹⁷ But the question to be asked is: What about the other rights of the murderer that can only be enjoyed if he is alive or his rights to due process of law and to equal protection of the law? As seen below, where the death penalty is provided as an exception to the right to life, procedural safeguards must be adhered to. If

¹³ Bedau (1999) 40.

¹⁴ Amnesty International, "Towards a world without executions" AI Index: POL10/004/1999, 16 June 1999.

¹⁵ Devine (2000) 235. Although not discussed in this thesis, it is worth noting that the victim also has a right to life, which has to be defended. Accordingly, defenders of the death penalty have argued that capital punishment defends the right to life of the victim, it means the greatest mark from the state that it defends the ordinary citizen's "right to life" (see Anderson (2001) chapter 2). But the concept of punishment itself is recognition that the victim's right to life has been violated. Opposition to capital punishment is to ensure that the punishment inflicted does not lead to further violations, for example in this case, a violation of the right to life of the offender.

¹⁶ John Locke is in support of the argument that a murderer forfeits his life. See J Locke, *Second treatise of government* (1690), sec. 23.

¹⁷ For example, everyone's "right to liberty" is recognised in international and regional human rights instruments. However, it does not follow from this right that it is always wrong to deliberately deprive a person of liberty, as in the case of imprisonment of a convicted offender. Therefore, under appropriate conditions, persons can forfeit their right to liberty.

procedural safeguards are not respected, the imposition of the death penalty will amount to a violation of the right to life.

This chapter examines the right to life and its relation to the death penalty in Africa in the light of the protection afforded by various human rights instruments at the international and national levels. The chapter begins by discussing the right to life in the UN human rights system and makes reference to the jurisprudence of the UN Human Rights Committee on the death penalty as a violation of the right to life. Discussion of the UN system is relevant as African states are parties to major UN human rights instruments, such as the ICCPR.¹⁸ Further, the decisions of the African Commission on Human and Peoples' Rights on the right to life and the death penalty is also examined. Reference is also made to the right to life in the European and Inter-American human rights systems, when examining the right to life under the UN and African human rights systems. Subsequently, the chapter examines the right to life in African national constitutions and how African national courts have interpreted these provisions. Reference is also made to the judgments of other (non-African) national courts on the death penalty as a violation of the right to life, as courts in Africa draw inspiration from such judgments.

4.2 The right to life under the United Nations human rights system

4.2.1 The Universal Declaration of Human Rights

The UDHR is seen as the cornerstone of contemporary human rights.¹⁹ It is important to examine the UDHR with regard to the death penalty because of its continuing significance as a benchmark for human rights standards. In addition, the World Conference on Human Rights declared in June 1993 that

the Universal Declaration of Human Rights, which constitutes a common standard of achievement for all peoples and all nations, is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing

¹⁸ Moreover, all African states are member states of the UN. For a list of member states, see website <<http://www.un.org/Overview/unmember.html>> (accessed 21 March 2005).

¹⁹ Schabas (2002) 23.

international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.²⁰

Therefore, an examination of the UDHR is important as it serves as a source of inspiration not only to the UN bodies but also to other bodies (including courts) at the regional and national levels, irrespective of whether a state has consented to be bound by it, because it forms part of customary international law.²¹

Article 3 of the UDHR provides, “Everyone has the right to life, liberty and security of person”. This article, similar to article I of the American Declaration on the Rights and Duties of Man (American Declaration),²² makes no mention of the death penalty. Looking at the *travaux préparatoires* and subsequent interpretations of article 3 of the UDHR by the UN General Assembly and the Economic and Social Council resolutions, it is clear that the death penalty was considered to be incompatible with the right to life.²³ For example, during the drafting process, the *Comite Permanente de Relaciones Espiritualistas* submitted a letter on 8 February 1947 to the UN Secretary General requesting that capital punishment be outlawed “as any form of violent death is unChristian”.²⁴ Also, during the consideration of the Secretariat of the UNCHR’s draft article 3 at the second plenary session of the Drafting Committee in

²⁰ Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993.

²¹ The UDHR now forms part of customary international law, as it has inspired the adoption of other human rights treaties, it has served as a model for national bill of rights, and the organs of the UN have used it as a standard setting by which to measure the conduct of states (see Dugard (2000) 240-241).

²² Organization of American States (OAS) resolution XXX, adopted by the Ninth International Conference of American states, 1948 (reprinted in *Basic documents pertaining to human rights in the Inter-American system*, OEA/Ser.L/V/I.4 Rev.9, 31 January 2003 at 17). Although the American Declaration was originally intended as a non-binding declaration, similar to the UDHR, The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have held that it is today a source of international obligation for the OAS member states (see Inter-American Court of Human Rights, Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man within the framework of article 64 of the American Convention on Human Rights, 14 July 1989, Series A, No. 10 (1989)). Member states of the OAS are now legally bound to respect the provisions of the American Declaration. Article I of the American Declaration guarantees the right to life in similar terms with the UDHR, providing that “every human being has the right to life, liberty and security of his person.

²³ The *travaux préparatoires* shows that “the death penalty was viewed virtually unanimously as a necessary evil, one whose existence could not be justified on philosophical or scientific grounds” (Schabas (2002) 42. For subsequent interpretations of the UDHR, see UN General Assembly resolutions 2393 (XXIII), 2857 (XXVI) & 44/128, and ECOSOC resolution 1930 (LVIII).

²⁴ Schabas (2002) 29.

June 1947, Roosevelt suggested that it might be better not to use the term “death penalty” as there was a movement underway in some states to abolish the death penalty.²⁵ Subsequently, any reference to the death penalty was removed in the UDHR.

Although there was no real consensus that the UDHR should take an abolitionist stance, Schabas has rightly concluded that article 3 of the UDHR is abolitionist in outlook for the reason that by its silence on the death penalty, it directly envisages its abolition and implicitly admits its existence as a necessary evil.²⁶ Bearing the aforesaid in mind, the application of the death penalty in Africa is, therefore, a violation of the right to life, guaranteed under article 3 of the UDHR, which is binding on states as it constitutes customary international law.

4.2.2 The International Covenant on Civil and Political Rights

The ICCPR is considered because, as noted in chapter two, it has been ratified by 48 African states, signed by three and two are still to sign and ratify it. Unlike the UDHR, the ICCPR is a binding treaty and is not silent on the death penalty. Article 6 of the ICCPR, which derives from article 3 of the UDHR, prohibits the arbitrary deprivation of life. It further acknowledges the death penalty as an exception to the right to life while listing safeguards and restrictions on its implementation.²⁷ For the imposition of the death penalty to be seen an exception to the right to life, it has to be imposed for the most serious crimes,²⁸ procedural rules have to be respected, which include the right of anyone sentenced to death to seek pardon or commutation of the sentence, it must not be imposed on anyone one below the age of eighteen or be

²⁵ Schabas (2002) 30.

²⁶ Schabas (2002) 42-43. Schabas based his conclusion on the fact that several UN General Assembly and ECOSOC resolutions dealing with the limitation and ultimate abolition of the death penalty refer to article 3 of the UDHR in their preambles, implying that article 3 is favourable to abolition. To support his conclusion, he also cites the UN Secretary-General’s report of 1973 (UN Doc. E/5242, para 11), which asserted that article 3 of the UDHR implies limitation and abolition of the death penalty.

²⁷ The American Convention is similar to the ICCPR in that it recognises the death penalty as an exception to the right to life, laying down similar restrictions on its imposition (article 4). However, the CRC guarantees the right to life in its article 6 and does not recognise the death penalty.

²⁸ Article 6(2) of the ICCPR.

carried out on pregnant women.²⁹ Thus, the imposition of the death penalty will not amount to a violation of the right to life if the above conditions are met.

However, as discussed in chapter six, it should be noted that even if the above conditions are met, but the death penalty is imposed after an unfair trial, it would still amount to a violation of article 6 of the ICCPR. Furthermore, although the death penalty is provided for in article 6 of the ICCPR as an exception to the right to life, the *travaux préparatoires* and subsequent interpretations of article 6 provide strong evidence of a growing trend in favour of abolition of the death penalty.³⁰ The exceptions to the right to life under article 6 have therefore gradually developed, under international human rights treaty law, towards abolition.³¹

4.2.3 The United Nations Human Rights Committee

An examination of the jurisprudence of the UN Human Rights Committee is relevant, as 32 African states have ratified the Optional Protocol to the ICCPR, thus recognising the competence of the Human Rights Committee to receive and consider communications from individuals who claim to be victims of a violation by a state party.³² The decisions of the Human Rights Committee are not legally binding *stricto sensu*.³³ Nevertheless, they represent highly authoritative decisions which state parties are expected to implement.

²⁹ Article 6(4) & (5) of the ICCPR.

³⁰ See Schabas (2002) 45-77 & 93. Unlike the ICCPR (and the UDHR), the *travaux préparatoires* to the European Convention is of little assistance in the interpretation of article 2, guaranteeing the right to life. Thus, in interpreting article 2 of the Convention, one relies on the PACE opinions, other treaties on the abolition of the death penalty in Europe and the decisions of the European Court on Human Rights (see chapter 3 of this thesis).

³¹ See Schabas (1996) 20.

³² See article 1 of the Optional Protocol. The Protocol was adopted by the UN General Assembly in resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976 (UN Doc. A/6316 (1966), 999 U.N.T.S. 302). It has been signed by two African states and 19 are yet to sign and ratify the Protocol. See “Status of ratifications of the principal international human rights treaties” <<http://www.unhchr.ch/pdf/report.pdf>> (accessed 31 March 2005).

³³ The decisions of the Human Rights Committee are not legally binding *stricto sensu* because they do not confer an enforceable title upon the complainant in the event of a favourable decision by the Committee. See Schmidt (2000) 48.

The Human Rights Committee has elaborated on the right to life enunciated in article 6 of the ICCPR in its General Comment No. 6 and in some death penalty cases. This section focuses on the above General Comment and some of the Committee's cases, which show a change in views (progress towards abolition) based on evolving standards. In General Comment No. 6,³⁴ the Committee viewed the right to life as the supreme right from which no derogation is permitted even in time of emergency which threatens the life of the nation.³⁵ With regard to the death penalty, the Committee stated:

While it follows from article 6 (2) to (6) that State parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the “most serious crimes”. Accordingly, they ought to consider reviewing their criminal laws in this light and, in any event, are obliged to restrict the application of the death penalty to the “most serious crimes”. *The article also refers generally to abolition in terms which strongly suggest (paras. 2 (2) and (6)) that abolition is desirable ... [A]ll measures of abolition should be considered as progress in the enjoyment of the right to life.*³⁶

Thus, article 6 points to abolition of the death penalty as a human rights objective and as seen above, the Human Rights Committee encourages abolition. In addition, as seen in chapter two, the Committee's jurisprudence is that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6(1) of the ICCPR, in circumstances where it is imposed without any possibility of taking into account the defendant's circumstances or the circumstances of the particular case.³⁷

Further, under article 6(2) of the ICCPR, the death penalty is permissible as an exception to life if it is imposed only “for the most serious crimes”. Therefore, if it is imposed for a less serious crime, it cannot be seen as a valid limitation of the right to life. In *Lubuto v Zambia*, the Human Rights Committee had to address the issue of

³⁴ CCPR General Comment No. 6, para 7.

³⁵ CCPR General Comment No. 6, para 1. Article 4 of the ICCPR prohibits derogations from article 6 even in time of public emergency.

³⁶ CCPR General Comment No. 6, para 6 (emphasis added).

³⁷ See for example, *Rolando v Philippines*, Communication 1110/2002, UN Doc. CCPR/C/82/D/1110/2002, 8 December 2004, para 5.2.

whether Lubuto's rights under the ICCPR have been violated.³⁸ One of the issues to be determined was whether the sentence in the instant case (the death sentence) was compatible with article 6(2) of the ICCPR.³⁹ The Committee was of the view that the crime could not be considered as the "most serious crime", as the use of firearms "did not produce the death or wounding of any person".⁴⁰ The Committee, therefore, held that the mandatory imposition of the death penalty under the circumstances violated article 6(2) of the ICCPR, and that Lubuto was entitled, under article 2(3)(a) to an appropriate and effective remedy entailing the commutation of sentence.⁴¹

With regard to extradition, in *Kindler v Canada*, the Human Rights Committee had to address the issue of whether by extraditing Mr Kindler to the United States without seeking assurances that the death sentence would not be imposed, Canada exposed him to a real risk of a violation of his rights under the ICCPR.⁴² Human Rights Committee member, Wennergren, in his individual dissenting opinion in *Kindler v Canada*, was of the opinion that it would appear logical for article 6(1) to be interpreted widely, while article 6(2), which addresses the death penalty, be interpreted narrowly.⁴³ Wennergren based his opinion on the fact that in the *travaux préparatoires* to the ICCPR, many delegates and bodies participating in the drafting process saw the death penalty as an "anomaly" or a "necessary evil".⁴⁴ He went further to state that article 6 does not permit states that have abolished the death penalty to reintroduce it at a later stage, and that the right to life in article 6 of the ICCPR is the supreme human right that has to be protected without according priority

³⁸ *Lubuto v Zambia*, Communication 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev.1, 31 October 1995.

³⁹ As above, para 7.2

⁴⁰ As above.

⁴¹ As above, para 7.2 & para 9.

⁴² *Kindler v Canada*, Communication 470/1991, UN Doc. CCPR/C/48/D/470/1991, 30 July 1993, para 13.1. This case concerned the extradition of Joseph Kindler to the USA, where he will face the death penalty (para 2.1). The Committee found that the extradition did not violate Canada's obligations under article 6 of the ICCPR (para 14.6).

⁴³ Dissenting opinion of Mr Bertil Wennergren (*Kindler v Canada*).

⁴⁴ As above.

to the domestic laws of other countries.⁴⁵ Accordingly, he was of the view that Canada violated article 6(1) by consenting to extradite Mr Kindler to the United States, without having secured assurances that he would not be subjected to the execution of a death sentence.⁴⁶

In *Judge v Canada*, the Human Rights Committee had the opportunity to reconsider its position in *Kindler v Canada* above.⁴⁷ The Committee noted that its decision in *Kindler v Canada* was established ten years ago, and that since that time there has been a broadening international consensus in favour of the abolition of the death penalty, and in states which have retained the death penalty, a broadening consensus not to carry it out.⁴⁸ The Committee stated as follows:

For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.⁴⁹

Accordingly, the Human Rights Committee found Canada in violation of Judge's right to life under article 6(1) by deporting him to the United States, where he is under sentence of death, without ensuring that the death penalty would not be carried out.⁵⁰

⁴⁵ As above. However, it should be noted that the HRC is yet to take the view that article 6(2) of the ICCPR prevents the reintroduction of the death penalty (See Schabas (2002) 102).

⁴⁶ As above. HRC member Rajsoomer Lallah was also of the opinion that there was a case before the Committee to find a violation by Canada of article 6 of the ICCPR, as the right to life is fully respected and protected within Canada's territory but Canada abrogates that level of respect and protection by extraditing Mr Kindler to face the real risk of the death sentence. This inconsistency constituted a real risk of "arbitrary" deprivation of life within the terms of article 6(1), as unequal treatment is in effect meted out to different individuals (, those that are extradited and those that are not) within the same jurisdiction (see dissenting opinion of Mr Rajsoomer Lallah, paras 3.4 - 3.5).

⁴⁷ *Judge v Canada*, Communication 829/1998, UN Doc. CCPR/C/78/D/829/1998, 20 October 2003. This case concerned the deportation of Roger Judge to the United States to face capital punishment (paras 2.1 – 2.8)

⁴⁸ As above, para 10.3.

⁴⁹ As above, para 10.4.

⁵⁰ As above, para 10.6. Similarly, the South African Constitutional Court, as seen below, has found an extradition without seeking assurances that the death sentence would not be imposed to be in violation of the right to life.

4.3 The right to life in the African human rights system

4.3.1 African Charter on Human and Peoples' Rights

The African Charter provides for the right to life in article 4, which states: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. *No one may be arbitrarily deprived of this right*”.⁵¹ The language of article 4, by its reference to arbitrary deprivation of life, is similar to that of article 6(1) of the ICCPR, indicating a prohibition of the arbitrary use of the death penalty. In view of that, Mbaya has pointed out that it permits the death penalty, which is widespread in Africa, provided it is imposed in accordance with the law.⁵²

However, an objective and not subjective analysis of article 4 points towards abolition as a goal. Such an interpretation has to be done in good faith and in accordance with the ordinary meaning to be given to the terms of the African Charter in their context and in the light of its object and purpose.⁵³

Although there is little interpretative material to assist in construing article 4 of the African Charter, this article has to be interpreted in the light of

international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the Parties to the present Charter are members.⁵⁴

⁵¹ Emphasis added. In addition, see article 5 of the African Children's Charter, which guarantees every child the inherent right to life.

⁵² E Mbaya, “A la recherche du noyau intangible dans la Charte africaine” in Fribourg, *Le noyau intangible des Droits de l'homme* (1991) 221, referred to in Schabas (2002) 355.

⁵³ See article 31 (general rule of interpretation of treaties) of the Vienna Convention on the Law of Treaties, adopted on 22 May 1969, entered into force on 27 January 1980 (1155 U.N.T.S. 331).

⁵⁴ See article 60 of the African Charter.

Therefore, based on the above, the analysis of the death penalty in international and national human rights instruments may be useful for the purposes of interpreting article 4 of the African Charter.

First, the interpretation of article 3 (right to life) of the UDHR, which points towards abolition as a goal, relying in part upon the drafting history and also on subsequent developments in state practice including “soft law” principles adopted by the UN organs, can be very useful in interpreting article 4 of the African Charter.⁵⁵ Although the problem with drawing inspiration from the UDHR is that the right to life in article 3 is provided for in clearly unqualified terms while that of article 4 of the African Charter is provided for in somewhat qualified terms, it should be noted that both instruments do not explicitly mention the death penalty.

Second, the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty, may be useful for the purposes of interpreting article 4 of the African Charter. As noted in the introduction chapter, it has been ratified by six African countries and signed by two who are also parties to the African Charter. This Protocol abolishes the death penalty in peacetime.⁵⁶ Thus, drawing inspiration from this instrument implies that the death penalty should be quite an exceptional measure, and be applied only in wartime, while having in mind the ultimate goal of abolition, as the Protocol aims at abolition of the death penalty.

Third, article 4 of the African Charter has to be interpreted in the light of articles 5(3) and 30(e) of the African Children’s Charter and article 4(2)(j) of the African Women’s Protocol, which place restrictions on the application of the death penalty. In this light, it cannot be said that article 4 permits the death penalty in all circumstances.

Furthermore, the interpretation of other human rights norms and standards, such as resolutions on the death penalty, adopted by the UN and other bodies has to be incorporated in the interpretation of article 4 of the African Charter. Inspiration has to

⁵⁵ Schabas (2002) 356.

⁵⁶ See articles 1 and 2 of the Second Optional Protocol to the ICCPR.

be drawn from the 1999 resolution of the African Commission,⁵⁷ which was adopted because Non-Governmental Organisations (NGOs) had expressed concerns about recent death sentences carried out in Africa.

Overall, article 4 of the African Charter allows for the death penalty only if substantive and procedural safeguards, and the restrictions on its imposition, are respected. Otherwise, its imposition will be in violation of article 4 of the Charter.⁵⁸ But considering the fact that article 4 makes no mention of the death penalty, and adopting an objectively broad and creative manner of interpretation, it is my view that article 4 could be interpreted in such a way as to imply that it does not allow for the death penalty. Such reading can be arrived at by drawing inspiration from the interpretation of section 54(1) of the Constitution of the Republic of Hungary, which also prohibits the arbitrary deprivation of life. The Hungarian Constitutional Court,⁵⁹ in interpreting section 54(1), found the death penalty in Hungary to be an arbitrary deprivation of life. Considering the above decision, an interpretation of article 4 of the African Charter in like manner will mean that it does not permit the death penalty, as it will be considered an arbitrary deprivation of life.

Some scholars have gone further to seek guidance from the interpretation of the right to life provisions in national constitutions in interpreting article 4 of the African Charter. For example, Nowak rightly points out that the interpretation of the right to life provision of the South African Interim Constitution Act 200 of 1993 might serve as precedent for the interpretation of the African Charter as an abolitionist text.⁶⁰ This is because the African Charter, similar to the then Interim Constitution, does not explicitly mention the death penalty as an exception to the right to life.

⁵⁷ “Resolution Urging the State to Envisage a Moratorium on the Death Penalty” *Thirteenth Annual Activity Report: 1999-2000*, Annex IV (ACHPR). This resolution urged states to envisage a moratorium on the death penalty, to limit the imposition of the death penalty and to reflect on the possibility of abolishing it.

⁵⁸ See the jurisprudence of the African Commission discussed below.

⁵⁹ Decision 23/1990 of 24 October 1990 (Hungarian Constitutional Court).

⁶⁰ Nowak (2000) 42-43.

Although a direct parallel cannot be drawn between article 4 of the African Charter and the South African Interim Constitution, as the right to life provision in the latter is unqualified, the death penalty could still be seen as an arbitrary deprivation of life. As seen above, despite the qualified nature of the Hungarian Constitution, which is similar to the African Charter, the death penalty was found to be an arbitrary deprivation of life. Further, in *S v Makwanyane*, Ackermann J noted that the imposition of the death penalty is inherently arbitrary.⁶¹ Thus, the fact that the death penalty is inherently arbitrary implies that there is no guarantee that the right to equality before the law, for example, which is essential for the respect of due process rights, can be respected due to the arbitrary application of the death penalty. Thus, the death penalty cannot be saved by article 4 of the African Charter, as imposition of the death penalty without respect for due process rights constitutes a violation of the right to life.

It should be noted that the African Commission on Human and Peoples' Rights, a supervisory body of the African Charter, is yet to adopt such a broad and creative manner of interpretation. It should also be borne in mind that, in interpreting human rights treaties, objective criteria of interpretation that look to the text themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the parties, because the object of such treaties is to protect the basic rights of individual human beings.⁶² It is hoped that the African Commission and the future African Court on Human and Peoples' Rights will adopt such an interpretation, drawing inspiration from the jurisprudence in other jurisdictions and international human rights instruments abolishing the death penalty.

⁶¹ *S v Makwanyane* 1995 (3) SA 391 (CC), para 153 (hereinafter referred to as *Makwanyane* (1995)). The South African Constitutional Court held in this case that the death penalty was inconsistent with the country's Constitution, as it constitutes cruel, inhuman and degrading punishment within the meaning of section 11(2) of the Interim Constitution. See 4.5.4 below for further discussion of the case.

⁶² This was noted by the Inter-American Court of Human Rights, and could serve as persuasive authority in the interpretation of article 4 of the African Charter. See Inter-American Court of Human Rights, Advisory Opinion OC-3/83 of 8 September 1983, Restrictions to the death penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), Series A, No. 3, para 50.

4.3.2 The African Commission on Human and Peoples' Rights

Although, as seen in the introduction chapter, the Commission's position with regard to the death penalty remains unclear, it has been faced with the issue of the death penalty. The African Commission has emphasised the importance of the right to life in the following words: "The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life".⁶³ Thus, the African Commission has found a violation of article 4 of the African Charter in most cases in which the issue of the death penalty was raised, not only in the context of fair trial rights, but also in the context of the right to life.

In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, the African Commission found a violation of article 4 on the ground that the executions, after a trial that violated article 7 of the African Charter rendered the deprivation of life arbitrary.⁶⁴ The Commission noted that

[g]iven that the trial which ordered the executions itself violates Article 7, and subsequent implementation of sentences renders the resulting deprivation of life arbitrary and in violation of Article 4.⁶⁵

⁶³ *Forum of Conscience v Sierra Leone*, Communication 223/98, *Fourteenth Annual Activity Report: 2000-2001*; (2000) AHRLR 293 (ACHPR 2000), para 20. This case concerned the execution of 24 soldiers after trials that were allegedly flawed and in violation of Sierra Leone's obligation under the African Charter, as they had no right to appeal to a higher tribunal (paras 1-5).

⁶⁴ *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96 and 161/97, *Twelfth Annual Activity Report: 1998-1999*; (2000) AHRLR 212 (ACHPR 1998). 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 103. See chapter six of this thesis for a discussion of the death penalty in relation to article 7 of the African Charter.

The violation was compounded by the fact that the executions were carried out despite the Commission's request for a stay of execution, and while the case was pending. Likewise, in *Amnesty International and Others v Sudan*,⁶⁶ the Commission found the execution of prisoners after summary and arbitrary trials to be in violation of article 4 of the African Charter.

Also, in *Forum of Conscience v Sierra Leone*,⁶⁷ the Commission found that an execution after a trial that is in breach of due process of law (right to appeal) as guaranteed under article 7(1)(a) constitutes an arbitrary deprivation under article 4 of the African Charter.

Considering the above decisions, one would think that the Commission would, in subsequent cases, go further to find a violation of article 4, independent of article 7 of the African Charter. Unfortunately, this has not been the case. In *Interights et al (on behalf of Bosch) v Botswana*, the issue of the death penalty was raised in the context of, *inter alia*, the right to life.⁶⁸ Two of the issues raised related to alleged violations of article 4 of the African Charter: First, did the president, in exercising his clemency, arbitrarily deprive Bosch of her right to life? Second, was the execution of Bosch pending the consideration of her communication by the African Commission in violation of articles 1, 4 and 7(1) of the African Charter?⁶⁹

⁶⁶ *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. These were a series of four cases against Sudan regarding the imposition of the death penalty after unfair trials and the carrying out of executions after summary and arbitrary trials (paras 1-20).

⁶⁷ *Forum of Conscience v Sierra Leone*, Communication 223/98, *14th Annual Activity Report: 2000-2001*; (2000) AHRLR 293 (ACHPR 2000), para 20.

⁶⁸ *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). The High Court of Botswana convicted Mariette Bosch of murder on 13 December 1999 and sentenced her to death. An appeal to the Court of Appeal of Botswana in 2001 was unsuccessful (para 2). A petition was submitted on her behalf to the Commission alleging violations of her rights in the African Charter. The Chairman of the African Commission, after receiving the petition, wrote to the President of Botswana on 27 March 2001, appealing for a stay of execution pending consideration of the communication by the Commission (paras 7-10) The President did not respond to the appeal, and Bosch was executed by hanging on 31 March 2001 (para 11).

⁶⁹ Article 1 obliges a state party to comply with the requests of the African Commission.

With regard to the first issue on the clemency process, the Commission found that the clemency process did not fall under article 4 of the African Charter. The Commission noted that the process that can be challenged as arbitrary is that which includes the holding of a trial so that an accused is given an opportunity to defend his cause; further stating that the intervention of the president does not affect the non-arbitrariness of the process.⁷⁰ The Commission's finding was based on the fact that the president does not sit as a court to hear submissions on clemency and the attendance of the applicant and her lawyers at the hearing was impractical.

The Commission found the latter to be impractical as the clemency process in African states is shrouded in secrecy and could result in undermining the office and "dignity" of the president.⁷¹ What about the dignity of the applicant or defendant? The Commission's omission of the dignity of the defendant, guaranteed under article 5 of the African Charter, and placing more emphasis on the dignity of the president, is problematic. The Commission should have focussed on setting precedence, with regard to a fair clemency process, which eliminates totally or to some extent the secrecy in the whole process.

The Commission further noted in its decision that "a person must be given reasonable time in which to assemble the relevant information and to prepare and put forward his representations".⁷² Thus, implying that if the issue related to Bosch not being afforded adequate time to assemble the relevant information, and to prepare and put forward her representations with regard to the clemency process, then the finding of a violation would have been possible.

The African Commission avoided dealing with the issue on whether Bosch's execution pending the consideration of her communication by the African Commission was in violation of, amongst others, article 4 of the African Charter. The Commission's evasion of the issue was on the basis that it was not in possession of any proof that the president of Botswana did receive the written letter seeking a stay

⁷⁰ *Bosch* (African Commission), para 43.

⁷¹ *Bosch* (African Commission), para 46.

⁷² *Bosch* (African Commission), para 48

of execution.⁷³ The onus of proof should not be on the Commission. Once the letter was faxed, it was for the government of Botswana to ensure that the appropriate channels are in place to ensure that the president receives the letter. Therefore, in my opinion, the approach adopted in the *Bosch* case opens a door for future abuse, since states can use this as an excuse not to comply with the Commission's provisional measures.

Notwithstanding, in *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*⁷⁴ (as seen above), the Commission found a violation of article 4 of the African Charter, as the applicants were executed despite the Commission's request for a stay of execution and while their communications were still pending. Moreover, although the African Commission avoided dealing with the above issue, it acknowledged the evolution of international law and the trend towards the abolition of the death penalty. The Commission further encouraged all states party to the African Charter to take all measures to refrain from exercising the death penalty.⁷⁵

It is clear from the above decisions, with the exception of the *Bosch* decision, that 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 (discussed above and in chapter six). 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.⁷⁶ Similarly, the Commission, as seen above, is of the opinion that an execution after an unfair trial also constitutes a breach of article 4 of the African Charter.

⁷³ *Bosch* (African Commission), para 50.

⁷⁴ *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96 and 161/97, *Twelfth Annual Activity Report: 1998-1999*; (2000) AHRLR 212 (ACHPR 1998), para 103.

⁷⁵ *Bosch* (African Commission), para 52. In terms of article 62 of the African Charter, the measures taken have to be reported back to the Commission. States would, hereafter, have to include such measures in their periodic reports to the Commission.

⁷⁶ Schabas (2002) 112-113.

The African Commission's position is also similar to that of the Inter-American Commission on Human Rights (Inter-American Commission) and Inter-American Court of Human Rights (Inter-American Court). The Inter-American Commission has found the imposition of the death penalty without respect for due process rights to be in violation of the right to life.⁷⁷

Generally, the jurisprudence of the Inter-American Commission shows that executions are arbitrary and therefore contrary to article I of the American Declaration and article 4 of the American Convention in the following circumstances: First, when a state fails to limit the death penalty to the "most serious crimes"; second, when it denies an accused person the judicial guarantees of a fair trial; and third, when there is a disreputable and apparent diversity of practice within a member state resulting in inconsistency in the application of the death penalty for the same crimes.⁷⁸

Similarly, the Inter-American Court, in interpreting article 4 of the American Convention, guaranteeing the right to life, has considered the imposition of capital punishment without respect for due process to constitute an arbitrary deprivation of life. In Advisory Opinion OC-16/99, the Inter-American Court stated as follows:

Failure to observe 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 due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life "arbitrarily", as stipulated in the relevant provisions of human rights treaties (e.g. American Convention on Human Rights, Article 4; International Covenant on

⁷⁷ See *Andrews v United States*, Case 11.139, Report No. 57/96, 6 December 1996, OEA/Ser.L/V/II.98 doc. 6 rev. 13 April 1998 (Inter-American Commission). This case concerned William Andrews who had been sentenced to death, and was executed despite a precautionary measures request. The Commission noted that inherent in the construction of article I (American Declaration), is a requirement that before the death penalty can be imposed and before the death sentence can be executed, the accused must be given all the guarantees established by pre-existing laws, including guarantees both at the national and international levels (para 177). Consequently, the Commission found a violation of article I because Mr Andrews was tried by an impartial and incompetent court that did not provide him with equal treatment at law (paras 175-177 & 184).

⁷⁸ In addition to the above case, see, for example, *Graham v United States*, Case 11.193, Report No. 97/03, 29 December 2003; *Domingues v United States*, Case 12.285, Report No. 62/02, *Annual Report of the Inter-American Commission on Human Rights* (2001); *Thomas v United States*, Case 12.240, Report No. 100/03, 29 December 2003; *Beazley v United States*, Case 12.412, Report No. 101/03, 29 December 2003; *Aitken v Jamaica*, Case 12.275, Report No. 58/02, 21 October 2002; and *Sewell v Jamaica*, Case 12.347, Report No. 76/02, 27 December 2002.

Civil and Political Rights, Article 6), with the juridical consequences that a violation of this nature carries, in other words, those pertaining to the State's international responsibility and the duty to make reparation.⁷⁹

The Inter-American Court has identified three limitations, applicable to retentionist state parties, which could be of relevance to African states:

First, the imposition or application of this sanction is subject to certain procedural requirements whose compliance must be strictly observed and reviewed. Second, the application of the death penalty must be limited to the most serious common crimes not related to political offenses. Finally, certain considerations involving the person of the defendant, which may bar the imposition or application of the death penalty, must be taken into account.⁸⁰

Imposition of the death penalty without respect for the above limitations constitutes a violation of the right to life. It can be deduced from the above that mandatory death sentences are clearly inconsistent with article 4 of the American Convention. Further, it is clear that in respecting restrictions on the application of the death penalty, states have to envisage abolition of the death penalty as the ultimate goal. The Inter-American Court, in support of this, stated that the restrictions in article 4 are designed to delimit strictly the application and scope of the death penalty, in order to reduce its application "to bring about its gradual disappearance".⁸¹ Also, it follows from the Inter-American Court's opinion that reservations to a non-derogable right would be incompatible with the object and purpose of the human rights treaty guaranteeing that right.⁸²

⁷⁹ Inter-American Court of Human Rights, Advisory Opinion OC-16/99 of 1 October 1999, The right to information on Consular assistance in the framework of the guarantees of the due process of law., para 141(7). 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. It should be noted that Advisory Opinion OC-16/99 was endorsed by the UN General Assembly in December 1999 in the preamble of the resolution on "Protection of migrants" (UN Doc. A/RES/54/166).

⁸⁰ Advisory Opinion OC-3/83, para 55.

⁸¹ Advisory Opinion OC-3/83, para 57.

⁸² Advisory Opinion OC-3/83, paras 60-74.

Considering that the death penalty is being imposed in African states without respect for due process,⁸³ and the continuous application of mandatory death sentences in some African states,⁸⁴ the advisory opinions of the Inter-American Court could be very relevant to Africa. Imposition of the death penalty under such circumstances would amount to a violation of the right to life, as guaranteed under the African Charter.

4.4 The right to life in African national constitutions

The constitution is the supreme law of the land in most legal systems. It can be seen as “the legal embodiment of a country’s highest values, extending human rights guarantees to everyone in the country’s jurisdiction”.⁸⁵ As seen below, the right to life is guaranteed in the national constitutions of most African states.⁸⁶ Constitutional protection of the right to life falls under two categories: qualified and unqualified right to life provisions. This section examines the different categories, with the view of identifying what causes obstruction to (constitutional) challenges to the death penalty in Africa.

As it is usually more cumbersome to amend the constitution than other laws, an explicit constitutional provision on the death penalty or a qualified right to life provision, makes it difficult to challenge the constitutionality of the death penalty. Where the qualification is not clear, the possibility of relying on the provision to challenge the constitutionality of the death penalty would depend on the interpretation given to such a provision by the courts. The right to life is qualified, either by providing that it may not be deprived arbitrarily or other than in accordance with a sentence of a court of law, as seen in the examples below; or expressly stating the

⁸³ See chapter six of this thesis.

⁸⁴ See chapter two of this thesis.

⁸⁵ Amnesty International “Constitutional prohibitions of the death penalty” AI Index: ACT50/05/99, 1 September 1999 <<http://web.amnesty.org/rmp/dplibrary.nsf/other?openview>> (accessed 1 October 2003).

⁸⁶ A few constitutions do not have a right to life provision. These are the Constitutions of Gabon (1997), Egypt (1980), Libya (1977), Madagascar (1998) and Morocco (1996). Also, there are no constitutional provisions on the right to life in Somalia, as the Constitution was suspended on 27 January 1991 (see Heyns (2004) 1505) and in Swaziland, as the country presently has no constitution.

legality of the death penalty under the right to life provision.⁸⁷ Examples of qualified right to life provisions include:⁸⁸

Article 15 of the Constitution of the Federal Democratic Republic of Ethiopia 1995:

Every person has the right to life. No person may be deprived of his life except as a punishment for a serious criminal offence determined by law.

Article 16(1) of the Constitution of Sierra Leone 1996:

No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the laws of Sierra Leone, of which he has been convicted.

Article 33(1) of the Constitution of the Federal Republic of Nigeria 1999:

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

Article 22(1) of the Constitution of the Republic of Uganda 1995:

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

Article 12(1) of the Constitution of Zambia 1996:

⁸⁷ For example, article 13(a) of the Constitution of Equatorial Guinea 1999.

⁸⁸ In addition to the examples listed below, the right to life is qualified in the Constitutions of the following African states: Botswana (1999, article 4); Eritrea (1997, article 15(1)), Ethiopia (1995, article 15); The Gambia (2001, article 18(1)); Ghana (1996, article 13(1)); Kenya (1999, article 17(1)); Lesotho (2001, article 4 and 5); Liberia (1984, article 11); Malawi (2001, article 16); Mauritius (2001, article 4(1)); Niger (1999, article 33(1)); Rwanda (1991, article 12); Sudan (1998, article 20); Tanzania (1995, article 14); Togo (1992, article 13); Tunisia (1991, article 5); and Zimbabwe (2000, article 12(1)).

No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.

Some judges have taken the view that it is difficult to rely on clearly qualified right to life provisions to challenge the constitutionality of the death penalty. For example, in *Kalu v The State* (discussed below), Iguh J pointed out that one of the fundamental basis upon which the South African Constitutional Court pronounced the death penalty unconstitutional is “on account of the vital fact that the right to life in the relevant Constitution was unqualified”.⁸⁹ He therefore implied that it is difficult to challenge the constitutionality of the death penalty in Nigeria as the right to life in section 30(1) of the Constitution of the Federal Republic of Nigeria 1979 was provided for in clearly qualified terms.

Also, in the case of *S v Ntesang* (discussed below), an attempt to have the death penalty declared unconstitutional was not successful because of the qualification in the Botswana Constitution.⁹⁰ Therefore, challenging the constitutionality of the death penalty is problematic in African states in which the right to life is qualified in their constitutions.

Furthermore, in countries where the death penalty is explicitly provided for in the constitution under the right to life provision, relying on the right to life to challenge the death penalty would be impossible, unless the constitution is amended or the provision on cruel, inhuman and degrading treatment, if not qualified, is used (see chapter five). As seen in the provisions below, it is clear that in Equatorial Guinea, The Gambia, Lesotho, Malawi and Sudan, for example, it would be difficult for the death penalty to be challenged based on their right to life provisions. Article 13 of the Constitution of Equatorial Guinea provides:

⁸⁹ *Kalu v The State* (1998) 13 NWLR 531, 590 (hereinafter referred to as *Kalu* (1998)). See 4.5.4 below for a discussion of the South African Constitutional Court case, which confirms that the unqualified nature of the right to life provision partly justified the finding of the death penalty to be unconstitutional.

⁹⁰ *S v Ntesang* 1995 (4) BCLR 426, hereinafter referred to as *Ntesang* (1995).

All citizens shall enjoy the following rights and liberties:

(a) Respect for the person, life, integrity, dignity, and full national and moral development.

The death penalty may be imposed only for crimes established by law...

Article 18(1) of the Constitution of The Gambia 2001 guarantees the right to life in qualified terms. Article 18(2) goes further to state that

[a]s from the coming into force of this Constitution, no court in The Gambia shall be competent to impose a sentence of death for any offence unless the sentence is prescribed by law and the offence involves violence, or the administration of any toxic substance, resulting in the death of another person.⁹¹

Article 5(1) of the Constitution of Lesotho 2001 guarantees the inherent right to life, and prohibits arbitrary deprivation of life. Article 5(2) provides:

[A] person shall not be regarded as having been deprived of his life in contravention of this section if he dies ... in execution of the sentence of death imposed by a court in respect of a criminal offence under the law of Lesotho of which he has been convicted.

Article 16 of the Constitution of Malawi 2001 states:

Every person has the right to life and no person shall be arbitrarily deprived of his or her life. Provided that the execution of the death sentence imposed by a competent court on a person in respect of a criminal offence under the laws of Malawi of which he or she has been convicted shall not be regarded as arbitrary deprivation of his or her right to life.

Also, article 33 of the Constitution of the Republic of Sudan 1998 states as follows:

(1) No death penalty shall be inflicted, save as retribution or punishment for extremely serious offences by law.

(2) No death penalty shall be inflicted for offences committed by a person under eighteen years of age; and such penalty shall be executed upon neither pregnant nor succulent women,

⁹¹ This implies that as long as the death sentence is provided for in the law as a valid sentence, it is constitutional. Thus, this provision can be relied on to challenge the death sentence only if laws providing for it are repealed.

save after two years of lactation; nor shall the same be inflicted upon a person who has passed seventy years of age other than in retribution and prescribed penalties (hudud).⁹²

While it is difficult to rely on qualified right to life provisions to challenge the death penalty, on the other hand, there is possibility to challenge the constitutionality of the death penalty in countries where the right to life is provided for in clearly unqualified terms.⁹³ This was the situation in South Africa. In both the Interim Constitution Act 200 of 1993 and the final Constitution Act 108 of 1996, the right to life is textually unqualified.⁹⁴ In *S v Makwanyane* (discussed below), which addressed the question of the constitutionality of the death penalty, the unqualified nature of the right to life was referred to by several judges and was used to support an argument that the right to life is given stronger protection in the South African Constitution.⁹⁵ The Court went further to use the qualifications of the right to life in other jurisdictions to explain why challenges to the death sentence have failed in those jurisdictions.⁹⁶

From the aforesaid, it is clear that in African states like Cameroon,⁹⁷ in which the constitutionality of the death penalty has not yet been challenged and the right to life has no qualification, they can follow the South African example. This is because the absence of qualification indicates that the drafters of the constitution in question

⁹² It should be noted that article 33 does not deal with the right to life, but with security from death save in justice. Thus, the death penalty is permissible here in the interest of justice. The right to life is guaranteed in qualified terms under article 20 of the Constitution.

⁹³ The right to life is unqualified in the constitutions of the following African states: Algeria (1996, article 34); Benin (1990, article 15); Burkina Faso (2000, article 2); Burundi (2001, article 21); Cameroon (1996, Preamble); Chad (1996, article 17); Congo (2001, article 7); Guinea (1990, article 6); Mali (1993, article 1); Mauritania (1991, article 13); and Senegal (2001, article 7).

⁹⁴ Section 9 of the Interim Constitution provided for the right to life in the following words: “Every person shall have the right to life”. Section 11 of the final Constitution provides: “Everyone has the right to life”.

⁹⁵ *Makwanyane* (1995) para 85.

⁹⁶ *Makwanyane* (1995) para 38.

⁹⁷ The Preamble of the Constitution of the Republic of Cameroon (1996) provides: “Everyone has the right to life, to physical and moral integrity and to humane treatment in all circumstances ...” However, it is unfortunate that at present, the Constitution has no justiciable Bill of Rights, and the Constitutional Council, which has jurisdiction in matters pertaining to the Constitution, is yet to be established.

intended the court, and not parliament, to decide whether or not the death penalty should be retained.⁹⁸

Whether or not a constitution has a limitation clause would affect the possibility of relying on the right to life provision in that constitution, qualified or unqualified, to challenge the constitutionality of the death penalty. This is because the death penalty could be saved by the limitation clause. For example, this was the situation in Tanzania when the constitutionality of the death penalty was challenged. In *Mbushuu and Another v Republic* (discussed below), the derogation from the qualified right to life provision (including the provision prohibiting inhuman and degrading punishment) in the Tanzanian Constitution, with regard to the use of the death penalty, was saved by article 30(2) of the Constitution.⁹⁹ Article 30(2) allows derogations from basic rights of the individual in public interest. It states:

It is hereby declared that no provision contained in this Part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for –

- (a) ensuring that the right and freedoms of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms;
- (b) ensuring the interests of defence, public safety, public order, public morality, public health ...
- (c) ensuring the execution of the judgment or order of a court given or made in any civil or criminal proceedings ...
- (d) enabling any other thing to be done which promotes, enhances or protects the national interest generally.¹⁰⁰

⁹⁸ This was the interpretation adopted in *Makwanyane* (1995) para 25 and footnote 33. See also the judgment of O'Regan J, para 324.

⁹⁹ *Mbushuu and Another v Republic* (1995) 1 LRC 216, 232, hereinafter referred to as *Mbushuu* (1995).

¹⁰⁰ Cited in *Mbushuu* (1995) 228; and also in *Republic v Mbushuu and Another* (1994) 2 LRC 335, 337-338, hereinafter referred to as *Mbushuu* (1994).

In the light of the above provision, the Tanzanian Court of Appeal found the death penalty to be in the public's interest, as it was reasonably necessary to protect the right to life.¹⁰¹ However, the fact that the Tanzanian High Court, in interpreting the above provision, arrived at a different conclusion implies that the success of such challenges would depend on how a court interprets the relevant provision. For example, although the Interim Constitution of South Africa had a limitation clause, the death penalty was not saved by that clause because the requirements for limitation of rights provided under the limitation clause were not satisfied.¹⁰²

Nevertheless, it should be noted that the appropriate approach to the interpretation of a limitation clause, as pointed out by Justice Chaskalson, must be found in the language of the text itself, construed in the context of the constitution as a whole.¹⁰³ This echoes the Inter-American Court's opinion,¹⁰⁴ which is to the effect that objective criteria of interpretation that look to the text themselves are more appropriate than subjective criteria that seek to ascertain only the intent of the parties. If courts adopt such an approach to interpretation of limitation clauses, the basic rights of individual human beings would be protected. Accordingly, the death penalty would not be saved by limitation clauses, as it violates the most important of all human rights, the right to life.

The same as it is difficult to challenge the death penalty in cases in which it is explicitly provided for in the constitution, enshrining the abolition of the death penalty in a constitution fortifies abolition by establishing an additional legal basis that can serve as barrier to any hasty attempt to reinstate the death penalty. For example, seven of the twelve African states that have abolished the death penalty prohibit it on human rights grounds in their constitutions, thus providing no chance for any hasty attempt to reinstate the death penalty. The following are the respective provisions in the constitutions of the seven African states.

¹⁰¹ *Mbushuu* (1995) 232. See 4.5.3 below for further discussion of the case.

¹⁰² *Makwanyane* (1995) para 146. See 4.5.4 below for further discussion of this case.

¹⁰³ *Makwanayane* (1995) para 115.

¹⁰⁴ Advisory Opinion OC-3/83, para 50.

Article 22 of the Constitutional Law of the Republic of Angola 1992:

- (1) The State shall respect and protect the life of the human person.
- (2) The death penalty is prohibited.

Article 27 of the Constitutional Law of the Republic of Cape Verde 1999:

- (1) Human life and the physical and spiritual integrity of people shall be inviolable.
- (2) No one may be subjected to torture, or cruel, degrading or inhuman punishment or treatment, and in no case shall there be the death penalty.

Article 2 of the Constitution of Côte d'Ivoire 2000:

The individual is sacred. All human beings are born free and equal before the law. They enjoy inalienable rights, namely the right to life, freedom, the development of their personality and respect for their dignity. The rights of the individual are inviolable. Public authorities have the obligation to respect, protect and promote the individual. *Any sanction leading to the deprivation of human life is forbidden.*¹⁰⁵

Article 36(1) of the Constitution of the Republic of Guinea-Bissau 1996:¹⁰⁶

In the Republic of Guinea-Bissau in no circumstances shall there be the death penalty.

Article 70 of the Constitution of the People's Republic of Mozambique 1990:

- (1) All citizens shall have the right to life. All shall have the right to physical integrity and may not be subjected to torture or to cruel or inhuman treatment.
- (2) In the Republic of Mozambique there shall be no death penalty.

Article 6 of the Constitution of the Republic of Namibia 1990:

The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

¹⁰⁵ Emphasis added.

¹⁰⁶ Article 36 is included under Part II (Fundamental Rights and Duties) of the Constitution.

Article 21 of the Political Constitution of São Tomé and Príncipe 1990:

- (1) Human life is inviolable.
- (2) In no case shall there be the death penalty.

Article 15 of the Constitution of the Republic of Seychelles 1996:

- (1) Everyone has the right to life and no one shall be deprived of life intentionally.
- (2) A law shall not provide for a sentence of death to be imposed by any court.

As seen in the provisions above, it would be difficult to reintroduce the death penalty, as it would require that the constitutions be amended. Therefore, it is imperative that African states that abolish the death penalty should enshrine such abolition in their constitutions, since as noted above, it fortifies the abolition, thus establishing an additional legal basis that can serve as a barrier to any hasty attempts to reinstate the death penalty.

4.5 Jurisprudence of African national courts

This section examines the jurisprudence of African national courts on the death penalty in relation to the right to life. The section does not only focus on cases in which the challenge to the death penalty, in relation to the right to life, was successful, but also those in which the challenge was not successful. The unsuccessful cases are examined, with the aim of identifying what caused obstruction to these challenges, so that the shortcomings would be taken into consideration when bringing future challenges.

4.5.1 The Court of Appeal of Botswana

The constitutionality of the death penalty was challenged in Botswana in the case of *S v Ntesang*.¹⁰⁷ In this case, the High Court had convicted the appellant of murder and,

¹⁰⁷ *Ntesang* (1995).

after finding that there were no extenuating circumstances, sentenced the appellant to death in accordance with section 203(1) of the Penal Code of Botswana.¹⁰⁸

The appellant appealed against the sentence, contending that the provisions of the Penal Code, which permitted the state to intentionally take away the life of an individual, were *ultra vires* the Constitution since the right to life was enshrined by section 3 thereof.¹⁰⁹ The Court found the death penalty to be constitutional as it is preserved by section 7(2) of the Constitution that saves any law, which “authorises the infliction of any description of punishment that was lawful in the country immediately before the coming into operation” of the Constitution.¹¹⁰

The Court of Appeal focussed mainly on the right to life provision in section 4(1) of the Constitution, which is qualified, giving little or no attention to the right to life provision in section 3, which is unqualified. Section 3 of the Constitution of Botswana enshrines the fundamental right to life of the individual in unqualified terms. However, section 4(1) provides: “No person shall be deprived of his life intentionally save in the execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.” To substantiate the fact that it cannot sever all the words beginning with “save” to the end of the provision in section 4(1) above as submitted by counsel for the appellant, the Court cited White J of the Supreme Court of the United States in *South Dakota v North Carolina*, in which he stated the following:

I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all others, and to be considered alone, *but that all the*

¹⁰⁸ *Ntesang* (1995) 338 & 341-342. Section 203(1) of the Penal Code states that “[s]ubject to the provisions of subsection (2), any person convicted of murder shall be sentenced to death”.

¹⁰⁹ *Ntesang* (1995) 338. The appellant further submitted that hanging as a method of execution contravened section 7(1) of the Constitution in that it was subjection “to torture or to inhuman or degrading punishment”. However, the Court of Appeal did not address the constitutionality of hanging as a method of execution in itself, but noted that what has to be answered is whether or not the provisions of the Penal Code that prescribe the death penalty by hanging is *ultra vires* the Constitution (*Ntesang* (1995) 346).

¹¹⁰ *Ntesang* (1995) 347.

*provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument.*¹¹¹

It is my view that the Court could not agree with the submission of counsel for the appellant that the words beginning with “save” to the end of the provision should not be given effect because the Court ignored section 3 of the Constitution. The above statement by White J states that “all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument”. From my understanding, the statement implies that the Court of Appeal should have considered section 3 together with section 4(1) in deciding whether or not the words beginning with “save” to the end of the provision should be given effect. This is because sections 3 and 4(1) both have a bearing on the subject in question (the constitutionality of the death penalty). Unfortunately, less attention was given to section 3, which guarantees the right to life in unqualified terms.¹¹² However, because of the presence of a limitation clause in the Constitution (section 7(2)), arriving at a different result is challenging.

Furthermore, in this case, the appellant drew the attention of the Court to the practices in a number of other countries as well as the views and opinions of some writers and some international organisations and bodies concerning the death penalty in general.¹¹³ The Court of Appeal was of the view that this was not one of the matters that must be decisive of the issue before the Court.¹¹⁴ Nevertheless, the Court took judicial notice of developments at the international level to abolish the death penalty and hoped that it will engage the attention of parliament, which has responsibility of effecting changes to the statutes.¹¹⁵

¹¹¹ Emphasis added. *South Dakota v North Carolina* (1904) 192 US 268, 328; 48 L Ed 448, 465. See also *Ntesang* (1995) 347.

¹¹² The problems with this challenge were, first, section 4(1) was qualified. But, its effect would have been minimised if the Court considered section 4(1) together with section 3 of the Constitution in its interpretation, as both provisions relate to the subject in question. Second, the prohibition of cruel, inhuman and degrading punishment or treatment was also qualified, thus saving the provisions in the Penal Code that provided for the death penalty.

¹¹³ *Ntesang* (1995) 346.

¹¹⁴ *Ntesang* (1995) 346.

¹¹⁵ *Ntesang* (1995) 348.

It would appear from the Court's decision not to attach much importance to worldwide progressive movements or practices towards abolition, and its opinion that it has no power to rewrite the Constitution, that the Court was delegating its duty to interpret the constitution and to uphold its provisions without fear or favour to parliament. This case illustrates the difficulties with relying on qualified right to life provisions to challenge the death penalty. In other words, what caused obstruction to the above challenge were the qualified nature of the right to life provision and the existence of a limitation clause in the Constitution.

4.5.2 The Supreme Court of Nigeria

The death penalty has also been challenged in Nigeria in *Kalu v The State*.¹¹⁶ The appellant in this case was convicted of murder by the High Court of Justice, Lagos State, and sentenced to death pursuant to the mandatory provision of section 319(1) of the Criminal Code Law of Lagos.¹¹⁷ After an unsuccessful appeal to the Court of Appeal, the appellant further appealed to the Supreme Court.¹¹⁸ In the Supreme Court, the appellant raised the constitutionality of the death penalty as a mandatory punishment for the offence of murder in Nigeria. The question raised was whether the provisions of section 319(1) of the Criminal Code which prescribe the death penalty in relation to the offence of murder are not contrary to and inconsistent with section 31(1)(a) of the Constitution of the Federal Republic of Nigeria 1979, and therefore unconstitutional.¹¹⁹

Although, section 31(1)(a) prohibits torture, inhuman or degrading treatment, the Supreme Court was of the opinion that the right to life provision (section 30(1)) is a relevant provision in determining whether the death penalty is a constitutionally valid and recognised form of punishment in Nigeria.¹²⁰ Section 30(1) provides that “Every

¹¹⁶ *Kalu* (1998).

¹¹⁷ *Kalu* (1998) 533-534.

¹¹⁸ *Kalu* (1998) 534.

¹¹⁹ *Kalu* (1998) 575 & 585.

¹²⁰ *Kalu* (1998) 587.

person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria”. Thus, the right to life provision is qualified.

The Supreme Court used the qualified word “save” as the key to construing the right to life provision. The Court noted that although the right to life is fully guaranteed, it is nevertheless subject to the execution of a death sentence of a court of law in respect of a criminal offence of which one has been found guilty in Nigeria.¹²¹ The Court looked at jurisprudence from other jurisdictions on the question of the death penalty, in relation to the right to life, which showed that if the right to life provision is qualified, the death penalty was, in most of the decisions, held to be constitutional; if unqualified, the death penalty was declared to be unconstitutional.¹²² The Court concluded that the right to life under section 30(1) is clearly a qualified right, thus, the death penalty could not be said to be inconsistent with the Constitution.¹²³

Similar to the Botswana case above, what caused obstruction to this challenge was, the qualified nature of the right to life provision. The Supreme Court relied heavily on authorities that show that where the right to life is qualified, the constitutionality of the death sentence is affirmed. However, the decision of the Hungarian Constitutional Court (discussed below) reviewed by the Supreme Court of Nigeria showed that the death penalty could be found to be unconstitutional where the right to life is qualified. However, little weight was attached to this decision. Since the right to life is the most fundamental of all human rights, recognising the death penalty would be denying the essence of this right. Therefore, courts have to be bold enough, like the Hungarian Constitutional Court, to find their way round obstacles to the abolition of the death

¹²¹ *Kalu* (1998) 537 & 587.

¹²² *Kalu* (1998) 538 & 590. The Court looked at, amongst others, cases in India (*Bacan Singh v State of Punjab* (1983) 2 SCR 583), Tanzania (*Mbushuu* (1994) and *Mbushuu* (1995)), and South Africa (*Makwanyane* (1995)).

¹²³ *Kalu* (1998) 544, 551 & 593. It should be noted that the question of whether the execution of the appellant would infringe his constitutional rights not to be subjected to torture or to inhuman or degrading treatment was seen by the Court to be a matter for determination by the High Court in a separate action or proceeding instituted by the appellant for that purpose (*Kalu* (1998) 596)). This was because the case concerned the sentence itself and not the manner of carrying out the death sentence.

penalty, such as qualified right to life provisions, as abolition is most desirable in order fully to respect the right to life.

4.5.3 The High Court and Court of Appeal of Tanzania

The Tanzanian High Court and Court of Appeal have been faced with the issue of the constitutionality of the death penalty, in the context of infringement of the rights to life, to dignity in the execution of the sentence, and to protection against cruel, inhuman or degrading treatment. This section examines the part of the judgments dealing with the right to life. In *Republic v Mbushuu and Another*, the two accused had been convicted of murder and sentenced to death.¹²⁴ The defence counsel then raised the question whether the death penalty was unconstitutional. It was argued that the death penalty infringed the provisions of the Constitution guaranteeing, amongst others, the right to life provided for in article 14 of the Tanzanian Constitution.¹²⁵ Article 14 provides that “[e]very person has the right to live and subject to the law, to protection of his life by society”.

The defence counsel submitted that the first part “every person has the right to life” is absolute and not governed by the qualification (claw-back clause) “subject to law”; and went further to state that what is subject to law is the right of an individual to the protection of his life by society.¹²⁶ The High Court held that the right to life is not absolute as both the right to life and the right to protection of one’s life by society are subject to the claw-back clause.¹²⁷ Nevertheless, Mwalusanya J stated:

The petitioners have only an evidentiary burden to show that the right to life has been infringed. And that much they have succeeded to show. What remains then is for the Republic to prove on a balance of probabilities that the law prescribing the death penalty (the Penal Code) is ‘lawful’ and that it is saved under article 30(2) of our Constitution.¹²⁸

¹²⁴ *Mbushuu* (1994) 335.

¹²⁵ *Mbushuu* (1994) 335.

¹²⁶ *Mbushuu* (1994) 351.

¹²⁷ *Mbushuu* (1994) 352.

¹²⁸ *Mbushuu* (1994) 352.

The Court held that the death penalty was not in the public interest and not a punishment that is prescribed by a lawful law, and therefore unconstitutional, as it is not saved by article 30(2) of the Constitution (quoted above).¹²⁹ Although the English version of the right to life provision is unqualified,¹³⁰ the Court in its judgment relied on the Swahili version of the right to life provision, which is qualified. Thus, if the Court had relied on the unqualified English version, the death penalty would have been inconsistent with the right to life provision. The language of the Constitution, therefore, influenced the Court's interpretation of the right to life provision. However, it is clear that the High Court, adopting a generous and purposive interpretation, found a way round article 30(2), in finding the death penalty to be unconstitutional.

The High Court, after finding the death sentence to be unconstitutional, replaced the death sentences of the two accused with life imprisonment.¹³¹ They then appealed to the Court of Appeal against their conviction for murder in the High Court.¹³² The Court of Appeal, after quashing the sentences, raised the question of whether the sentence of life imprisonment for murder was proper (in other words, whether the death sentence was unconstitutional).¹³³

With regard to the right to life, the Court of Appeal also relied on the Swahili version of the Constitution, noting that the translation in English is misleading.¹³⁴ Although the Court noted that article 14 does not expressly provide for the deprivation of life, it

¹²⁹ *Mbushuu* (1994) 358. The High Court also found the death penalty to be cruel, inhuman and degrading both inherently and in the manner of its execution, and also that it offends the right to dignity of man in the process of execution of the sentence.

¹³⁰ The English version read: "Every person has the right to live and subject to law, to protection of his life by the society" (*Mbushuu* (1994) 337). Accordingly, it was submitted that it merely prescribed the right to life and enjoins the law to protect that right, and does not expressly provide for the deprivation of life. (*Mbushuu* (1995) 225) The Court of Appeal noted that the English version was misleading, and proposed another translation - "Every person has a right to life and to receive from the society the protection of his life, in accordance with law" (*Mbushuu* (1995) 225), which has now been retained in the Tanzanian Constitution, 1995. Article 14 now reads: "Every person has the right to live and to the protection of his life by the society in accordance with law" (see Heyns (2004) 1599).

¹³¹ *Mbushuu* (1994) 358.

¹³² *Mbushuu* (1995).

¹³³ *Mbushuu* (1995) 222.

¹³⁴ *Mbushuu* (1995) 225.

went further to state that the right to life is not absolute but qualified, meaning that it can be denied by due process of law.¹³⁵ The Court of Appeal then had to decide whether the death penalty was one of such instances where the due process of law will deny a person his right to life and its protection.¹³⁶ Since the Constitution allows derogations from basic rights for legitimate purposes, the legitimate purpose to which the death sentence was directed, as noted by the Court, was a constitutional requirement that everyone's right to life shall be protected by law.¹³⁷ The Court found the death penalty to be reasonably necessary in order to protect life by stating that

we have already made a finding that the death penalty is cruel, inhuman and degrading... But the crucial question is whether or not the death penalty is reasonably necessary to protect the right to life. For this we say it is the society which decides. The trial judge acknowledges that presently the society deems the death penalty as reasonably necessary. So, we find that although the death penalty as provided by s 197 of the Penal Code offends art 13(6)(a) of the Constitution it is not arbitrary, hence a lawful law, and it is reasonably necessary and it is thus saved by art 30(2). Therefore, it is not unconstitutional.¹³⁸

As seen from the above judgment, and as Justice Chaskalson rightly stated in *S v Makwanyane*, the issues concerning the limitation of basic rights in the above case appears to have been influenced by the language of the Constitution and the rules of interpretation developed by the courts to deal with the language.¹³⁹

The Court also seems to have relied heavily on the protection of the right to life of everyone, with the exclusion of that of murderers. As noted above, human life has infinite value or worth and so must be respected and protected accordingly, which therefore follows that even murderers have to be treated in light of the value of their lives, a value not erased by the harm or injustice their lethal violence has caused the

¹³⁵ *Mbushuu* (1995) 226.

¹³⁶ *Mbushuu* (1995) 226. In its determination, the Court considered whether the death penalty was cruel, inhuman and degrading, and agreed with the trial judge that it is inherently inhuman, cruel and degrading punishment. But the crucial matter was whether it was saved by the limitation clause (*Mbushuu* (1995) 228)).

¹³⁷ *Mbushuu* (1995) 231.

¹³⁸ *Mbushuu* (1995) 232.

¹³⁹ See *Makwanyane* (1995) para 115.

innocent.¹⁴⁰ Thus, the right to life of a murderer has to be respected and protected in the same way as the right to life of a non-murderer is respected and protected. But the Court of Appeal seems to have given less weight to the right to life of murderers, in interpreting and applying the limitation clause.

In addition, since the court's duty is to interpret the constitution and uphold its values, it is for the court and not society or parliament to decide whether the death penalty is justifiable under a limitation clause or whether it is reasonably necessary in order to protect life. Justice Chaskalson has expressed his disagreement with the decision of the Tanzanian Court of Appeal, in so far as it is inconsistent with the above.¹⁴¹ Thus, it would have been proper for the Court of Appeal to decide what was reasonably necessary to protect the right to life, and not subject such a decision to the society, whose opinion is usually uninformed and fluctuates.

4.5.4 The Constitutional Court of South Africa

The South African Constitutional Court addressed the issue of the constitutionality of the death penalty in the landmark judgment of *S v Makwanyane*, in which it declared the death penalty unconstitutional.¹⁴² The two accused in the case were convicted on four counts of murder, one count of attempted murder and one count of robbery with aggravating circumstances, and sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts.¹⁴³ The case before the Constitutional Court dealt with the constitutionality of section 277(1)(a) of the Criminal Procedure Act 51 of 1977, prescribing the death penalty as a competent sentence for murder.¹⁴⁴ The Constitutional Court had to decide whether the death

¹⁴⁰ Bedau (1999) 40.

¹⁴¹ *Makwanyane* (1995) para 115.

¹⁴² *Makwanyane* (1995).

¹⁴³ *Makwanyane* (1995) para 1. The two accused appealed against the convictions and sentences to the Appellate Division of the Supreme Court, which dismissed the appeals against the convictions and concluded that the circumstances of the murderers were such that the accused should receive the heaviest sentence permissible according to law.

¹⁴⁴ *Makwanyane* (1995) para 2.

penalty was cruel, inhuman and degrading within the meaning of section 11(2) of the Interim Constitution Act 200 of 1993.¹⁴⁵

One of the contentions of the counsel of the accused in support of the argument that the death penalty was cruel, inhuman or degrading punishment, was that the death penalty was inconsistent with the unqualified right to life entrenched in the South African Interim Constitution, and that it negates the essential content of the right to life and other rights that flow from it.¹⁴⁶ Eight of the eleven judges considered the death penalty as a violation of the right to life. The subsequent paragraphs discuss the views of some of the judges.

Justice Chaskalson stated that the unqualified right to life vested in every person by section 9 of the Interim Constitution is another factor crucially relevant to the question whether the death sentence is cruel, inhuman or degrading punishment within the meaning of section 11(2) of the Interim Constitution.¹⁴⁷ According to the finding of the Constitutional Court, capital punishment imposed a limitation on the essential content of the fundamental rights to life and dignity, contrary to section 33 of the Interim Constitution, which provides that laws shall not impose any limitations on the essential content of fundamental rights.¹⁴⁸ Therefore, the fact that the person sentenced to death is denied his or her right to life is of great importance.¹⁴⁹

¹⁴⁵ *Makwanyane* (1995) para 26. It was argued that section 277(1)(a) infringed sections 8 (right to equality), 9 (right to life), 10 (right to dignity) and 11 (prohibition of cruel, inhuman or degrading treatment or punishment) of the Interim Constitution. The Court focussed on section 11(2) prohibiting cruel, inhuman or degrading punishment. However, the rights to life and dignity were relevant in determining whether section 11(2) had been infringed.

¹⁴⁶ *Makwanyane* (1995) para 27. The drafters of the South African Interim Constitution opted for the “Solomnic solution”, entrenching a simple right to life provision, leaving it to the judiciary to pronounce on the constitutionality of capital punishment (see Du Plessis & Corder (1994) 146-147. See also Du Plessis (1994) 95).

¹⁴⁷ *Makwanyane* (1995) para 80.

¹⁴⁸ The Constitutional Court’s judgement emphasises the relationship between the rights to life and dignity and the importance of these rights taken together. The Court stated that the rights to life and dignity taken together are the source of all other rights. They are the essential contents of all other rights under the Constitution, as the ultimate limit of all other rights is to be found in the preservation of the twin rights of life and dignity. Take them away and all other rights cease (see *Makwanyane* (1995) para 84). Therefore, the right to life is conceptually interrelated, and mutually reinforcing to the constitutional protection of human dignity.

¹⁴⁹ *Makwanyane* (1995) para 140.

Though Justice Chaskalson based his conclusions on the prohibition of cruel, inhuman and degrading punishment, he stated in his conclusion concerning the right to life that

[t]he rights to life and dignity are the most important of all human rights, and a source of all other personal rights ... By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others. And this must be demonstrated by the state in everything that it does, including the way it punishes criminals. This is not achieved by objectifying murderers and putting them to death to serve as an example to others in the expectation that they might possibly be deterred thereby.¹⁵⁰

The above conclusion emphasises that the right to life is supreme and, therefore, should be valued above all others. Didcott J agrees with Justice Chaskalson and states as one of his grounds for believing the death penalty to be unconstitutional, the fact that “capital punishment violates the right to life of every person” that is protected by the South African Constitution.¹⁵¹ He concludes as follows:

South Africa has experienced too much savagery. The wanton killing must stop before it makes a mockery of the civilised, humane and compassionate society to which the nation aspires and has constitutionally pledged itself. *And the state must set the example by demonstrating the priceless value it places on the lives of all its subjects, even the worst.*¹⁵²

Some public commentators on the question before the Constitutional Court stated that any doubts about the constitutionality of the death penalty was foreclosed by section 9 of the Constitution, which proclaims the right to life in unqualified terms, read with section 33(1)(b) of the limitation clause, which provides that no limitation shall negate the essential content of the right in question.¹⁵³ Langa J also agreed with Justice Chaskalson’s conclusions, including the conclusion that the death sentence, in terms of the provisions of section 277 of the Criminal Procedure Act, is unconstitutional,

¹⁵⁰ *Makwanyane* (1995) 144.

¹⁵¹ *Makwanyane* (1995) para 174.

¹⁵² Emphasis added. *Makwanyane* (1995) para 190.

¹⁵³ *Makwanyane* (1995) para 193.

violating as it thus, the right to life, which is guaranteed to every person by section 9 of the Interim Constitution.¹⁵⁴ He stated the following:

The emphasis I place on the right to life is, in part, influenced by recent experiences of our people in this country. The history of the past decades has been such that the value of life and human dignity have been demeaned. Political, social and other factors created a climate of violence, resulting in a culture of retaliation and vengeance. In the process, respect for life and for the inherent dignity of every person became the main casualties. The State has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify to a high regard for the dignity of the person and the value of every human life. The primacy of the right to life and its relationship to punishment needs to be emphasised ...¹⁵⁵

He goes further to note that the concept of *ubuntu* adds value on life and dignity, implying that the life of another person is at least as valuable as one's own.¹⁵⁶ It therefore follows that, as a "punishment" the death penalty is a violation of the right to life,¹⁵⁷ as the death penalty rejects the value of the convicted person's life.

Mohamed J adopted a different approach in determining whether the death penalty is a violation of the right to life. He approaches the constitutionality of the death sentence with a sharper and narrower focus, by asking the following question:

Does the right to life, guaranteed under s 9, include the right of every person not to be deliberately killed by the State through a systematically planned act of execution sanctioned by the State as a mode of punishment and performed by an executioner remunerated for this purpose from public funds?¹⁵⁸

He answers this question in the affirmative, stating the following:

¹⁵⁴ *Makwanyane* (1995) para 215-216.

¹⁵⁵ *Makwanyane* (1995) paras 218-219.

¹⁵⁶ *Makwanyane* (1995) para 225.

¹⁵⁷ *Makwanyane* (1995) para 234.

¹⁵⁸ *Makwanyane* (1995) para 269.

The deliberate annihilation of the life of a person, systematically planned by the State as a mode of punishment, is wholly and qualitatively different. It is not like the act of killing in self-defence, an act justifiable in the defence of the clear right of the victim to the preservation of his life. It is not performed in a state of sudden emergency, or under the extraordinary pressures which operate when insurrections are confronted or when the State defends itself during war. It is systematically planned long after – sometimes years after – the offender has committed the offence for which he is to be punished, and whilst he waits impotently in custody for his date with the hangman. *In its obvious and awesome finality it makes every other right, so vigorously and eloquently guaranteed by chap 3 of the Constitution, permanently impossible to enjoy ... [It does not permit] the slightest possibility that [the offender] might one day successfully and deservedly be able to pursue and to enjoy the great rights of dignity and security and the fundamental freedoms in chap 3 of the Constitution, the exercise of which is possible only if the 'right to life' is not destroyed ...*¹⁵⁹

Mohamed J provides a clear distinction between taking life in the act of self-defence, which is justifiable, and taking life by the imposition of the death penalty, which is not justifiable. As seen above, he was of the view that the death penalty destroys the right to life, thus destroying other rights that can only be enjoyed if the right to life is protected. This emphasises the imperative nature of the right to life.

Mokgoro J and O'Regan J also found the death penalty to constitute a violation of the right to life. Mokgoro J was of the opinion that the death penalty violates the essential content of the right to life embodied in the South African Constitution in that it extinguishes life itself.¹⁶⁰

O'Regan J emphasised the relationship between the right to life and dignity, noting that the right to life is antecedent to all other rights, since without life, in the sense of existence, it would be impossible to exercise rights or to be the bearer of them.¹⁶¹ Further, O'Regan J in answering the question whether the right to life and dignity are breached by the death penalty, states:

¹⁵⁹ Emphasis added. *Makwanyane* (1995) paras 270-271.

¹⁶⁰ *Makwanyane* (1995) paras 313 & 317.

¹⁶¹ *Makwanyane* (1995) paras 326 & 327.

The purpose of the death penalty is to kill convicted criminals. Its very purpose lies in the deprivation of existence. Its inevitable result is denial of human life. It is hard to see how this methodical and deliberate destruction of life by the Government can be anything other than a breach of the right to life. The implementation of the death penalty is also a denial of the individual's right to dignity ...¹⁶²

As seen under the ICCPR and other regional human rights instruments, and the jurisprudence of the Human Rights Committee (discussed above), the right to life cannot be derogated from. Thus, the above conclusion could be insightful for jurisdictions in which the right to life is qualified or could be derogated from.

Overall, the above decision of the South African Constitutional Court is very significant because it could act as persuasive authority for national courts in Africa that still uphold the death penalty, especially those with similarly framed right to life provision. The decision indicates that the Constitutional Court is committed to both the persuasive authority of international sources and the specific requirements of South Africa and its Constitution.¹⁶³ Therefore, the interplay between the international and domestic jurisprudence could be useful for African lawyers and courts in dealing with the death penalty.

Also, as stated above and as Nowak rightly points out, it might serve as precedent for the interpretation of the African Charter.¹⁶⁴ This is because the African Charter, similar to the then Interim Constitution, does not explicitly mention the death penalty as an exception to the right to life. In addition, the evolution of human rights law has continuously moved to the direction that every instance in which the death penalty is applied should be regarded as a violation of human rights (including the right to life) as it is inhuman, which has also been portrayed by the decision of the South African Constitutional Court in *Makwanyane*.

¹⁶² *Makwanyane* (1995) para 334-335. He then concluded that “life by its very nature cannot be restricted, qualified or abridged, limited or derogated from” as you are either alive or dead (para 353).

¹⁶³ Keightley (1995) 400.

¹⁶⁴ Nowak (2000) 42-43.

Furthermore, as seen above, a state has been held to infringe the right to life of an accused where the state extradites an accused without obtaining an assurance that the accused will not be subjected to the death penalty. Similarly, the South African Constitutional Court has found a violation of the right to life in relation to the death penalty, in the context of international judicial extradition.

In *Mohamed v President of the Republic of South Africa and Others*, the first applicant, Mohamed (a Tanzanian national), who had been sought by the United States as a suspect on capital charges, was handed over to American authorities by South African immigration authorities without seeking an assurance that the death sentence would not be imposed on him.¹⁶⁵ One of the issues the Constitutional Court had to decide was whether the handing over of Mohamed for removal to the United States, as well as the subsequent removal, breached his constitutional right to life. The Court had to decide this issue as it was contended that Mohamed's constitutional right to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment has allegedly been infringed.¹⁶⁶

After finding that the South African authorities were not empowered to deport Mohamed to the United States,¹⁶⁷ the Court went further to consider the practice of different countries, for example Canada and Germany, with regard to deportation or extradition and the death penalty. The practice followed by countries that have abolished the death penalty is that, the governments seek and secure an assurance from the requesting state that the death sentence would not be imposed on the person being deported or extradited.¹⁶⁸ The Court then held that in handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, *the immigration authorities failed to give value to Mohamed's right to life*, his

¹⁶⁵ *Mohamed v President of the Republic of South Africa and Others* 2001 (7) BCLR 685 (CC) para 2, hereinafter referred to as *Mohamed* (2001).

¹⁶⁶ *Mohamed* (2001) para 3 & 23. In addition, the Court had to decide whether the above was also in breach of the Aliens Control Act 96 of 1991.

¹⁶⁷ *Mohamed* (2001) para 36.

¹⁶⁸ *Mohamed* (2001) para 44.

right to have his dignity respected and protected.¹⁶⁹ In arriving at this conclusion, the Court also took into account the statement of Justice Chaskalson in *Makwanyane* that, by committing ourselves to a society founded on the recognition of human rights we are required to value the rights to life and dignity, and that this must be demonstrated by the state in everything that it does.¹⁷⁰

It is worth noting that in the above case, the Constitutional Court, adopting an approach similar to that of the European courts, made it clear that whether Mohamed was deported or extradited is of no relevance, as deportation or extradition of a person to face an unacceptable form of punishment (the death penalty) is prohibited.¹⁷¹ It should also be noted that in due course, Mohamed was convicted of a capital offence, but the jury in New York did not impose the death penalty.¹⁷²

4.6 Jurisprudence of other national courts

The jurisprudence of other national courts is examined as African courts, as seen above, make reference to the case law of these courts. Some constitutions allow expressly for courts' consideration of foreign case law.¹⁷³ The jurisprudence of two national courts are discussed under this section, that of the Canadian Supreme Court in *Canada (Minister of Justice) v Burns and Another* and the Hungarian Constitutional Court Decision 23/1990.¹⁷⁴ The decision of the Canadian Supreme Court is important, as it is an example of changing views, furthering the course of abolition, on the question of extradition of persons to countries with the death penalty to face capital charges. It has been a source of reference to some African national courts, for example the South African Constitutional Court, and it could serve as

¹⁶⁹ *Mohamed* (2001) para 48. See also, para 73. The Constitutional Court also found the handing over of Mohamed to be in violation of his right not to be subjected to cruel, inhuman or degrading punishment.

¹⁷⁰ As above.

¹⁷¹ *Mohamed* (2001) para 59. European courts draw no distinction between deportation and extradition in the application of article 3 of the European Convention on Human Rights.

¹⁷² Hood (2002) 22, footnote 47.

¹⁷³ See, for example, section 39(1) of the Constitution of South Africa Act 108 of 1996.

¹⁷⁴ See 4.6.1 and 4.6.2 below.

persuasive authority in cases alleging a violation of the right to life in relation to the death penalty, in the context of international judicial extradition.

The Hungarian Constitutional Court's decision is discussed because, as noted above, it can serve as precedent for the interpretation of the African Charter. Both the Hungarian Constitution and the African Charter guarantee the right to life in similar terms, as they both prohibit the arbitrary deprivation of life.

4.6.1 The Supreme Court of Canada

The Canadian Supreme Court has also dealt with the death penalty as a violation of the right to life. In *Canada (Minister of Justice) v Burns and Another*,¹⁷⁵ the Supreme Court had occasion to reconsider its position with regard to the extradition of fugitives to a country where they would face the death penalty. In this case, the respondents (Burns and Rafay), whose extradition was sought, were wanted for murder in Washington State, where they will, if found guilty, face either life imprisonment without parole or the death penalty.¹⁷⁶ After evaluating the respondents' particular circumstances, the Minister of Justice of Canada ordered their extradition without seeking or obtaining assurances from the United States, as required under article 6 of the Extradition Treaty between the two countries that the death penalty would not be imposed, or if imposed, would not be carried out.¹⁷⁷ The respondents appealed against

¹⁷⁵ *Canada (Minister of Justice) v Burns and Another* (2001) SCC 7; (2001) 5 LRC 19, hereinafter referred to as *Burns* (2001). See also (2001) 2 *Amicus Journal* 16 & (2002) 3 *Commonwealth Human Rights Law Digest* 324. Ten years earlier, the majority of the Court held, in *Kindler v Canada (Minister of Justice)*, that it was not unconstitutional for the Canadian government to extradite a person accused of capital murder to the state of Pennsylvania, without an assurance that the death penalty would not be imposed (*Kindler v Canada (Minister of Justice)* (1993) 4 LRC 85, 130-132). However, it should be noted that the minority in this case found the extradition to be in violation of the Canadian Charter, as the death penalty did constitute cruel and unusual punishment. See also, *Reference re Ng Extradition (Canada)* (1993) 4 LRC 133.

¹⁷⁶ *Burns* (2001) paras 9-13.

¹⁷⁷ *Burns* (2001) paras 14-19. Article 6 of the Extradition Treaty provides as follows: "When the offense for which extradition is requested is punishable by death under the laws of the requesting State and the laws of the requested State do not permit such punishment for that offense, extradition may be refused unless the requesting state provides such assurances as the requested State considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be carried out."

the Minister's decision and the Court of Appeal set aside the extradition order on the ground that it was unconstitutional.¹⁷⁸

The Minister then appealed to the Supreme Court contending that he was not required to seek the relevant assurances as a condition of extradition.¹⁷⁹ The outcome of the appeal was governed by section 7 of the Canadian Charter of Rights and Freedoms 1982 (Canadian Charter), which states as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Since, as noted by the Court, the extradition puts the lives of the respondents at risk, it had to decide whether the threatened deprivation was in accordance with the principles of fundamental justice.¹⁸⁰

The Supreme Court, after weighing the factors for and against extradition without assurances, held unanimously that the unconditional extradition of the respondents to the State of Washington for the crime of murders, without an assurance that the death penalty will not be imposed, would violate their rights (right to life, liberty and security of the person) under section 7 of the Canadian Charter.¹⁸¹

The Court then had to decide whether the violation of the respondents' section 7 rights, that would occur if they were extradited to face the death penalty, was reasonable and demonstrably justifiable in a free and democratic society under section 1 of the Canadian Charter.¹⁸² Section 1 provides:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society...

¹⁷⁸ *Burns* (2001) para 20.

¹⁷⁹ *Burns* (2001) para 32.

¹⁸⁰ *Burns* (2001) para 59.

¹⁸¹ *Burns* (2001) paras 130-132.

¹⁸² *Burns* (2001) para 133.

As the Minister's refusal to ask for assurances serves no pressing and substantial purpose, the Court held that the infringement of the respondent's rights cannot be justified under section 1 of the Canadian Charter.¹⁸³ Thus, the Supreme Court found a way round the qualification or limitation in article 1 in finding the extradition without assurances that the death penalty would not be imposed to be unconstitutional, by applying the principles of fundamental justice to factual developments, many of which are of far-reaching importance in death penalty cases. The balancing of these tilted against the constitutionality of extradition without assurances. Consequently, once the State of Washington, which had sought the extradition, had given assurances, Burns and his associate were surrendered to face trial in the United States.¹⁸⁴

4.6.2 The Constitutional Court of Hungary

As noted above, the Hungarian Constitutional Court has addressed the issue of the death penalty, in relation to the right to life, which could be instructive in interpreting article 4 of the African Charter. The Hungarian Constitutional Court has found the death penalty to be in violation of the right to life, when it had to decide on the constitutionality of the death penalty within the right to life provision of the Hungarian Constitution.¹⁸⁵

Section 54(1) of the Hungarian Constitution states that "every one has the right to life and to human dignity and no one shall arbitrarily be deprived of this right". In interpreting this provision, the Court found the death penalty to be an arbitrary deprivation of life, by holding that the death penalty was unconstitutional on the ground that it is inconsistent with the right to life and dignity under section 54 of the Constitution.¹⁸⁶

¹⁸³ *Burns* (2001) para 143.

¹⁸⁴ *Hood* (2002) 22, footnote 46.

¹⁸⁵ Decision 23/1990 of 24 October 1990 (Hungarian Constitutional Court). Also referred to in *Kalu* (1998) 592 & *Makwanyane* (1995) paras 38 & 327.

¹⁸⁶ Decision referred to in *Kalu* (1998) 592. One of the limitations of this study, with regard to this case, is the difficulty in obtaining an English version of the above decision. The author therefore had to rely on secondary sources, which explains the case is not discussed in detail.

As seen above, although the right to life provision in section 54 is qualified, the Court still found the death penalty to be unconstitutional, as it constituted a violation of the above section. Similar to section 54, the African Charter prohibits arbitrary deprivation of life. Thus, if the African Commission and the future African Court on Human and People's Rights adopt a similar approach, the death penalty would certainly be an arbitrary deprivation of life under the African Charter, especially bearing in mind the fact that the African Charter does not have a derogation clause. Moreover, the death penalty would be an arbitrary deprivation of life under similar provisions in African national constitutions. The Hungarian Constitutional Court's decision can, therefore, serve as precedent for the interpretation of the African Charter and some African national constitutions, considering the fact that the evolution of human rights law has continuously moved to the direction that every instance in which the death penalty is applied should be regarded as a violation of human rights as it is inhuman, as has been pointed out by the South African Constitutional Court in *S v Makwanyane* (discussed above).

4.7 Conclusion

In human rights law, it is unquestionable that the right to life is highly respected and viewed as a fundamental and non-derogable right. Also, the right to life is not accorded the status of an absolute right, as self-defence, for example, justifies the taking of life, and some human rights treaties, such as the ICCPR, make provision for the death penalty as a limitation to the right to life. However, as seen above, certain safeguards or conditions have to be met if the death penalty has to be imposed as an exception to the right to life. Under international human rights law, these conditions, as seen in the previous chapter and this chapter, have slowly but surely assisted the evolution towards the abolition of the death penalty.

This chapter has examined the death penalty in relation to the right to life, which has shown that the death penalty (in Africa) is a violation of the right to life. As seen in this chapter, some human rights treaties are silent on the death penalty while others provide it as an exception to the right to life. The silence of some instruments has been seen to imply that they envisage abolition. In instruments where it is provided as an exception to the right to life, the *travaux préparatoires* and subsequent

interpretations of these instruments provide a strong evidence of a growing trend in favour of abolition of the death penalty. In addition, the move towards abolition of the death penalty is even more evident with the universal growing practice by countries not to extradite an accused person to a state that still has the death penalty without seeking an assurance that it would not be imposed. The contrary would amount to a violation of the right to life of the accused person.

The African Charter does not express the death penalty as an exception to the right to life, but prohibits arbitrary deprivation of life in article 4. As mentioned earlier, some have seen this as allowing for the death penalty as long as it is not arbitrary. But an objective interpretation of article 4 of the African Charter, in the light of international human rights law and jurisprudence on the death penalty as a violation of the right to life, could point towards abolition. Moreover, the inherently arbitrary nature of the death penalty implies that respect for rights, such as the right to equality before the law, relevant to the exercise of due process rights, cannot be guaranteed. The death penalty can, therefore, not be saved by article 4 of the African Charter, if interpreted objectively, bearing in mind the above.

When dealing with the death penalty as a violation of the right to life in Africa, as seen in this chapter, certain difficulties arise. These include the fact that the right to life provisions in most jurisdictions are qualified, and in addition, some constitutions have limitations clauses, allowing for the limitation of basic rights. These cause obstruction to constitutional challenges to the death penalty. In some African states with qualified right to life provisions or limitation clauses as seen above, it has been difficult to rely on the right to life to challenge the constitutionality of the death penalty. As seen in the decisions of African national courts discussed above, the success of such challenges would depend on the approach to the interpretation of the limitation clauses or qualified right to life provisions. To find a way round the qualified right to life provision and limitation clauses, in finding the death penalty to be unconstitutional, African Courts have to adopt a bold approach, like that adopted by the Hungarian Constitutional Court.

The jurisprudence of African national courts with regard to challenges to the death penalty examined in this chapter, illustrate that the death penalty is a violation of the

right to life. The South African Constitutional Court found the death penalty to constitute a violation of the right to life. Though the challenges to the death penalty were unsuccessful in Nigeria, Botswana and Tanzania, the decisions of the courts did not dispute the fact that the death penalty was a violation of the right to life. The High Court of Tanzania, as seen above, explicitly stated that the right to life has been infringed by the death penalty. The main problem with the challenges was that the right to life was qualified or that its violation was saved by the limitation clause in their constitutions.

Therefore, it is not disputable that the death penalty in Africa violates the right to life. As seen in this chapter, even the African Commission, which has not pronounced on the death penalty as such, has found a violation of the right to life (and fair trial rights) in the majority of the cases in which the issue of the death penalty was raised in relation to the right to life or in the context of the deprivation of due process rights. It is thus clear from the aforementioned that the application of the death penalty in Africa violates the right to life, even more so as the very purpose of the death penalty lies in the deprivation of life.

African states with qualified right to life provisions or limitation clauses in their constitutions, should, therefore, consider changing their constitutions, to exclude the right to life provision from the limitation clauses, having in mind the goal of abolition. This will ensure compatibility of their constitutions with human rights treaties, such as the UDHR. States with unqualified right to life provisions should reconsider their application of the death penalty, since the right to life cannot be limited or derogated from as one is either alive or death, and it is the most fundamental of all human rights, the deprivation of which makes it permanently impossible to enjoy other rights.

CHAPTER FIVE

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

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5.1 Introduction

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

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

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

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

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

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

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

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

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

⁴ Schabas (1996) 21.

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

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

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

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

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

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

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

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

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

5.2.1 The Universal Declaration of Human Rights

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

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

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

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

5.2.2 The International Covenant on Civil and Political Rights

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

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

¹⁰ Schabas (2002) 42.

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

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

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

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

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

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

¹⁵ CCPR General Comment No. 20, para 5.

¹⁶ CCPR General Comment No. 20, para 6.

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

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

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

5.2.4 Other United Nations standards

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

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

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

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

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

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

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

5.3.1 The African Charter on Human and Peoples' Rights

Article 5 of the African Charter provides that

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

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

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

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

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

5.3.2 The African Commission on Human and Peoples' Rights

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

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

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

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

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

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

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

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

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

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

²⁸ As above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³⁶ Hudson (2000) 817.

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

Article 7 of the Constitution of Botswana 1999:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴⁴ *Mbushuu* (1994) 358.

⁴⁵ *Mbushuu* (1994) 342-351.

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

⁴⁷ *Mbushuu* (1995) 232.

⁴⁸ *Mbushuu* (1995) 229.

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

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

5.5 The death row phenomenon

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

⁴⁹ *Mbushuu* (1995) 230

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

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

⁵² Amnesty International (1989) 61.

⁵³ For example, see Johnson (1990) ix.

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

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

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

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

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

⁵⁵ Hudson (2000) 836.

⁵⁶ Hudson (2000) 836.

⁵⁷ Amnesty International (1989) 62-63.

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

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

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

⁵⁸ Schmidt (2000) 47-48.

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

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

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

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

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

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

⁶² Schmidt (2000) 71.

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

⁶⁴ Schabas (2002) 390-394.

5.5.1 Main elements of the death row phenomenon

5.5.1.1 Prolonged delay

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

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

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

⁶⁵ Hood (2002) 109.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.5.1.2 Conditions on death row

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

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

⁷² Amnesty International (1989) 62-63.

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

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

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

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

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

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

⁷⁵ Hood (2002) 110-111.

⁷⁶ Hood (2002) 111.

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

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

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

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

5.5.2 Jurisprudence of the United Nations Human Rights Committee

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

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

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

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

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

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

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

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

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

⁸³ As above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.5.3 Comparative jurisprudence: The European Court of Human Rights

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

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

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

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

¹⁰² *Soering* (1989) para 11.

¹⁰³ *Soering* (1989) para 12.

¹⁰⁴ *Soering* (1989) para 14.

¹⁰⁵ *Soering* (1989) para 15.

¹⁰⁶ *Soering* (1989) para 16.

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

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

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

¹⁰⁷ *Soering* (1989) para 20.

¹⁰⁸ *Soering* (1989) para 24.

¹⁰⁹ *Soering* (1989) paras 76-78.

¹¹⁰ *Soering* (1989) para 88-91.

¹¹¹ *Soering* (1989) para 93-99.

¹¹² *Soering* (1989) para 101-103.

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

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

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

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

¹¹³ *Soering* (1989) para 106.

¹¹⁴ *Soering* (1989) para 107.

¹¹⁵ As above.

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

¹¹⁷ *Soering* (1989) para 110.

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

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

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

¹¹⁸ *Soering* (1989) para 111.

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

¹²⁰ As above, para 200 & 207.

¹²¹ As above, para 207.

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

5.5.4 Jurisprudence of African national courts

5.5.4.1 The Supreme Court of Zimbabwe

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

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

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

¹²³ As above.

¹²⁴ As above, at 157A-C.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³⁴ *Catholic Commission* (1993) 251.

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

¹³⁶ *Catholic Commission* (1993) 269.

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

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

5.5.4.2 The Constitutional Court of South Africa

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

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

¹³⁷ *Catholic Commission* (1993) 282.

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

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

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

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

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

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

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

¹⁴¹ *Makwanyane* (1995) para 26.

¹⁴² *Makwanyane* (1995) paras 63-69.

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

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

¹⁴⁵ *Makwanyane* (1995) paras 70-79.

¹⁴⁶ *Makwanyane* (1995) para 38.

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

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

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

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

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

¹⁴⁸ *Makwanyane* (1995) para 26.

¹⁴⁹ *Makwanyane* (1995) para 153.

¹⁵⁰ *Makwanyane* (1995) para 174.

¹⁵¹ *Makwanyane* (1995) para 178.

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

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

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

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

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

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

¹⁵³ *Makwanyane* (1995) para 196.

¹⁵⁴ Schmidt (2002) 59.

¹⁵⁵ *Makwanyane* (1995) paras 216 & 234

¹⁵⁶ *Makwanyane* (1995) para 234

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

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

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

5.5.5 Jurisprudence of other national courts and their relevance to Africa

5.5.5.1 The Judicial Committee of the Privy Council

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

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

¹⁵⁹ See chapter six of this thesis.

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

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

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

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

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

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

¹⁶² As above, at 1348.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁶⁹ As above.

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

¹⁷¹ As above.

¹⁷² Hudson (2000) 849.

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

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

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

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

¹⁷³ Schmidt (2000) 62.

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

¹⁷⁵ *Guerra* (Privy Council) 16.

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

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

5.5.5.2 The Supreme Court of India

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

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

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

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

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

¹⁸⁰ *Vatheeswaran* (1983) 363.

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

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

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

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

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

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

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

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

5.5.5.3 The position in the United States of America

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

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

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

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

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

¹⁸⁷ As above, at 894-895.

¹⁸⁸ As above.

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

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

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

5.6 Methods of execution as cruel and inhuman

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

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

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

¹⁹⁰ As above, at 1283.

¹⁹¹ Nowak (2000) 34.

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

5.6.1 The United Nations Human Rights Committee

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

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

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

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

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

¹⁹⁵ As above, para 16.4.

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

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

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

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

¹⁹⁶ As above, para 16.2-16.4.

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

¹⁹⁸ As above.

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

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

5.6.2 The High Court and Court of Appeal of Tanzania

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

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

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

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

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

feet with a rope around his neck. The intention is to break his neck so that he dies quickly ... If the hangman gets [the length of the drop wrong] and the prisoner is dropped too far, the prisoner's head can be decapitated or his face can be torn away. If the drop is too short then the neck will not be broken but instead the prisoner will die of strangulation ... There are a few cases in which hangings have been messed up and the prison guards have had to pull on the prisoner's legs to speed up his death or use a hammer to hit his head. The shock to the system causes the prisoner to lose control over his bowels and he will soil himself.²⁰²

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

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

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

²⁰² *Mbushuu* (1994) 343.

²⁰³ As above.

²⁰⁴ *Mbushuu* (1994) 351.

²⁰⁵ *Mbushuu* (1995) 228.

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

5.6.3 The Supreme Court of the United States of America

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

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

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

²⁰⁶ Discussed above (see 5.4).

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

²⁰⁸ As above, at 701.

²⁰⁹ As above, at 716-717.

²¹⁰ As above, at 700.

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

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

5.7 Conclusion

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

²¹¹ As above, at 683.

²¹² As above, at 708.

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

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

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

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

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

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

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

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

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

²¹⁶ As above.

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

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

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

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

²²⁰ Nowak (2000) 44.

CHAPTER SIX

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

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 - 6.2.1 The Universal Declaration of Human Rights
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 - 6.6.1 Discriminatory and disproportionate use
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- 6.7 Conclusion

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 Ghandhi (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.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

- 7.1 Introduction
- 7.2 The abolition movement
- 7.3 International abolition trends
 - 7.3.1 Abolition trends in the United Nations human rights system
 - 7.3.1.1 United Nations human rights instruments
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7.1 Introduction

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

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

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

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

¹ Banditer (2004) 11.

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

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

7.2 The abolition movement

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

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

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

⁴ Hood (2002) 9.

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

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

⁷ Schabas (1997) 6.

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

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

7.3 International abolition trends

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

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

⁹ Amnesty International (1989) 1.

¹⁰ Schabas (2002) 1 & 20.

¹¹ Schabas (2002) 364-365.

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

7.3.1 Abolition trends in the United Nations human rights system

7.3.1.1 United Nations human rights instruments

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

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

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

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

7.3.1.2 United Nations resolutions

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

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

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

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

¹⁶ See generally, Fine (1999) 421.

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

7.3.1.3 United Nations sponsored tribunals

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

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

7.3.2 Abolition trends in the African human rights system

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

¹⁸ Schabas (1996) 29.

¹⁹ Article 24 of the ICTY Statute

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

²¹ Article 19 of SCSL Statute.

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

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

7.3.2.1 African human rights instruments

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

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

7.3.2.2 African Commission on Human and Peoples’ Rights policies

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

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

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

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

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

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

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

²⁷ As above, para 52.

²⁸ As above.

7.3.2.3 Commutation of death sentences and other recent developments

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

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

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

³⁰ Hands Off Cain (2004) 51.

³¹ As above.

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

³³ As above.

³⁴ Hands Off Cain (2004) 50.

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

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

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

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

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

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

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

⁴⁰ As above.

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

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

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

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

⁴² As above.

⁴³ Hands Off Cain (2004) 55.

⁴⁴ As above, 56.

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

⁴⁶ As above.

7.3.3 Abolition trends in the European human rights system

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

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

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

⁴⁷ See chapter three of this thesis.

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

⁴⁹ As above.

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

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

7.3.4 Abolition trends in the Inter-American human rights system

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

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

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

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

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

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

7.4 Conclusion

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

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

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

⁵⁶ See chapter five of this thesis.

⁵⁷ See chapter two of this thesis.

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

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

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

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

⁵⁸ See chapter three of this thesis.

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

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

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

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

⁶⁰ Sarat (1999) 11.

⁶¹ Kahan (2000) 715.

⁶² As above.

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

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

⁶³ As above.

⁶⁴ See chapter three of this thesis.

⁶⁵ Kahan (2000) 715.

⁶⁶ Van Rooyen (1991b) 84.

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

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

7.5 Recommendations

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

7.5.1 Recommendation to the African Union

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

⁶⁸ Orlin (2000) 1.

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

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

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

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

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

⁷⁰ Nsibirwa (2001) 40.

⁷¹ Heyns (2001) 156.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁷⁵ See 7.3.4 above.

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

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

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

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

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

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

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

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

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

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

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

⁷⁹ Hands Off Cain (2004) 157.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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