

CHAPTER ONE

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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); Seleokane (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.