

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 or 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.