

Initiating constructive debate: a critical reflection on the death penalty in Africa*

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Abstract

For the first time in the agenda of the African Commission on Human and Peoples' Rights, during the 36th Ordinary Session (2004), the death penalty was one of the issues discussed. Commissioner Chirwa initiated debate on the death penalty in Africa, urging the commission to take a clear position on the subject. She recommended that in view of the international and human rights developments and trends, it is necessary for the continent to initiate constructive debate on the question of the death penalty in Africa. It is against this background that this article is written, with the aim of showing that there is a need for constructive debate on the death penalty in Africa. Considering that the African Commission is encouraging such a debate, the article begins with an examination of its stance on the subject. This is followed by a brief evaluation of the use of the death penalty in Africa, highlighting some areas of concern. The death penalty in Africa is then considered from a human rights perspective, focusing mainly on the possibility of relying on constitutional provisions on the right to life and the prohibition of cruel, inhuman and degrading treatment to challenge the death penalty.

Introduction

The African Charter on Human and Peoples' Rights (African Charter)¹ makes no mention of the death penalty or the need to abolish it.² Different reasons

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¹Adopted on 27 June 1981 and entered into force on 21 October 1986 (OAU Doc CAB/LEG/67/3 rev 5 (1982) 21 ILM 58).

²Article 4 prohibits the 'arbitrary' deprivation of life, which some could interpret as permitting the death penalty. 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), 1990 (arts 5(3) & 30(e)) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol), 2003 (art 4(2)(j)) place restrictions regarding the imposition of the death penalty on certain categories of persons — persons below eighteen years of age and expectant mothers

have emerged which make recourse to the death penalty appear necessary.³ Conversely, its use in Africa is increasingly becoming an obstacle to the realisation of justice and the development of human rights.⁴ With the debate on the death penalty in Africa still emerging, in comparison with the international debate, studies on the death penalty in Africa are relevant. This article seeks to contribute to this emerging debate by evaluating the death penalty situation in Africa and providing the basis for any constructive debate.

The stance of the African Commission

The position of the African Commission on Human and Peoples' Rights (African Commission), set up as a monitoring mechanism under the African Charter, with regard to the death penalty is central to any constructive debate on the death penalty in Africa. Though the African Commission is encouraging debate on the question, it is disturbing that its position remains unclear and that it has not pronounced on the death penalty as such. This could mainly be attributed to the fact that it has not been presented with a direct challenge to the death penalty.

Nevertheless, some Commissioners have openly stated their opposition to the death penalty or that they favour its abolition. For example, at the commission's 12th Session (1992), the late Commissioner Beye openly and explicitly identified himself as an abolitionist by stating that he was personally opposed to the death penalty.⁵ Also, Commissioner Umozurike has, though not explicitly, indicated his interest in the abolition of the death penalty.⁶ At the commission's 36th Ordinary Session (2004),⁷ Commissioner Chirwa made it clear that she favours abolition of the death penalty and urged the commission to take a stance on the issue.

In November 1999, the African Commission passed a resolution urging states to consider a moratorium on the death penalty, to limit the imposition of the death penalty to the 'most serious crimes',⁸ and to reflect on the possibility of abolishing it.⁹ The adoption of this resolution was intended to encourage the trend towards abolition of the death penalty. However, it seems to have had relatively little effect, considering the current status of the death penalty

or mothers of infants and young children.

³These reasons 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 that the prison as a rehabilitative environment is ineffective.

⁴As discussed subsequently in this article, the death penalty conflicts with, for example, the right to life, and the right not to be subjected to cruel, inhuman and degrading treatment or punishment.

⁵*Examination of State Reports vol 3* (1995) 32 & 79.

⁶F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human rights law in Africa* (2004) 400.

⁷Held in Banjul, The Gambia from 6–20 November 2003.

⁸Unfortunately, this phrase has been left open-ended, without any indications of what the most serious offences are.

⁹Resolution Urging States to Envisage a Moratorium on the Death Penalty' *Thirteenth Annual Activity Report* (1999–2000) Annex IV.

in Africa¹⁰ and the fact that, as noted below, the death penalty is still being imposed in some African states for crimes that cannot be considered as most serious.

Although the African Commission's stance on the death penalty remains ambiguous, it has come close to addressing the abolition of the death penalty in Africa generally, for the second time, in its recent decision in *Interights et al (on behalf of Bosch) v Botswana*.¹¹ The commission acknowledged the evolution of international law, and the trend towards the abolition of the death penalty.¹² It further conceded its support for this trend by its adoption of the 1999 resolution.¹³ In view of this, the commission encouraged all states party to the African Charter to take all measures to refrain from exercising the death penalty.¹⁴ It could be said that the commission tactfully concedes that the abolition of the death penalty in Africa is desirable.

In earlier capital cases in which the issue of the death penalty was raised, not only in the context of fair trial rights, but also in the context of the right to life, the commission found a violation of the above rights. In *Forum of Conscience v Sierra Leone*,¹⁵ for example, the commission found the execution of twenty-four soldiers after a trial that was in breach of due process of law (right to appeal) as guaranteed in article 7(1)(a) of the African Charter, to constitute an arbitrary deprivation of life under article 4 of the African Charter.¹⁶ The commission has had more impact where the issue of the death penalty was

¹⁰At present, only twelve African states have abolished the death penalty in law and practice. These countries are: Cape Verde (1981); Mozambique (1990); Namibia (1990); São Tomé and Príncipe (1990); Angola (1992); Guinea Bissau (1993); Seychelles (1993 but 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 but for ordinary crimes in 1995); Côte d'Ivoire (2000); and Senegal (2004).

¹¹Communication 240/2001 *17th Annual Activity Report: 2003–2004* (African Commission). This Report was adopted by the Assembly of the African Union during its 4th Ordinary Session, held in Abuja, Nigeria from 30–31 January 2005 (Assembly/AU/Dec 56(IV)).

¹²*Id* at par 52.

¹³*Ibid*.

¹⁴In terms of art 62 of the African Charter, the measures taken have to be reported back to the commission.

¹⁵Communication 223/98 *14th Annual Activity Report: 2000–2001*; (2000) AHRLR 293 (ACHPR 2000).

¹⁶*Id* at par 20. For other cases in which the commission arrived at a similar decision, see *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* Communications 137/94, 139/94, 154/96 and 161/97; *Twelfth Annual Activity Report: 1998–1999* (2000) AHRLR 212 (ACHPR 1998); *Amnesty International and Others v Sudan* Communications 48/90, 50/91, 52/91, 89/93; *Thirteenth Annual Activity Report: 1999–2000*; (2000) AHRLR 297 (ACHPR 1999); *Amnesty International (On behalf of Orton and Vera Chirwa) v Malawi* Communications 68/92 & 78/92; *Eighth Annual Activity Report: 1994–1995*; *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* Communication 87/93; *Eighth Annual Activity Report: 1994–1995*; (2000) AHRLR 183 (ACHPR 1995); *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* Communication 60/91; *Eighth Annual Activity Report: 1994–1995*; (2000) AHRLR 180 (ACHPR 1995). For a discussion of the above cases, see L Chenwi 'The African Commission and the death penalty' (2005) 11 *Amicus Journal* 13.

raised on procedural grounds, than on the right to life. Its decisions on fair trial rights have been progressive, and can be seen as procedural benchmarks in capital cases.

In its jurisprudence, the African Commission has taken an approach similar to that of the United Nations (UN) Human Rights Committee, with regard to the relation between the right to life and fair trial rights. The Human Rights Committee is of the view that imposition of the death penalty following an unfair trial is a breach not only of procedural standards but also of the right to life.¹⁷ Similarly, the commission is of the opinion that an execution after an unfair trial also constitutes a breach of article 4 of the African Charter. Considering the above, one could say that the African Commission's stance points towards the abolition of the death penalty in Africa on grounds of human rights violations. The commission has subsequently (after the 36th Ordinary Session), included the death penalty in its agenda.¹⁸

The use of the death penalty in Africa: Some areas of concern

With the current 'war' on terrorism in general, and the alarming increase in terrorist activities in Africa, discourses on the death penalty in Africa are becoming even more relevant. The war on terrorism in some African states has led to an increase in the number of offences punishable by death. For instance, 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.¹⁹

Most African states still retain the death penalty despite the growing international human rights standards in general,²⁰ and standards on the abolition or limitation of the death penalty in particular. International human rights standards, including those on the abolition or limitation of the death penalty, have therefore not impacted on most African states. The impact of these norms has been limited partly by the general perception of international law — as a threat to sovereignty in African states. Governments guard their sovereignty closely²¹ and retentionist governments view such standards as a threat to their sovereignty, and are therefore hesitant to implement them.

The discrepancies between international law and domestic law as regards the death penalty, are very apparent and disturbing in some African countries. In

¹⁷For a discussion of the decisions of the Human Rights Committee, see W Schabas *The abolition of the death penalty in international law* (2002) 112–113.

¹⁸See the agenda of the 37th Ordinary Session of the African Commission, from 27 April to 11 May 2005, Banjul, The Gambia, available at www.achpr.org.

¹⁹'Hands off Cain' *The death penalty worldwide: 2004 Report* (2004) 109.

²⁰Generally, the above standards are relevant as most African states are parties to major international human rights instruments, some of which aim at limiting the imposition of the death penalty. For the status of ratification of international and regional (African) human rights instruments by African states, see Heyns, n 6 above 48 & 106.

²¹C Heyns & F Viljoen, *The impact of the United Nations Human Rights Treaties on the domestic level* (2002) 31.

Rwanda and Sierra Leone, for instance, those charged with the most heinous crimes by national courts can be sentenced to death, while similar persons cannot be sentenced to death under international criminal tribunals.²²

What is more, the classification of some African states as *de facto* abolitionist²³ is an area of concern, necessitating a debate on the death penalty in Africa. These states still retain the death penalty in their statutes, which raises doubts as to their commitment to their *de facto* abolitionist status. It would appear that the fact that the death penalty is in their statutes signals their intention of resuming executions at some future time.²⁴ Some African states have been previously *de facto* abolitionists for more than ten years, but are now retentionists.²⁵ Further, some current abolitionists had, in practice 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.²⁶ The question then is why did the governments in these states resume executions? For some of the states, part of the reasons for the resumption of executions is 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.²⁷ 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.'²⁸ In Libya, the resumption of execution could be attributed to political reasons as the first executions after

²²The penalties to be imposed by the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) is limited to imprisonment (see art 23 of ICTR Statute and art 19 of SCSL Statute). However, the national courts of both countries can impose the death penalty, as it is retained in their respective penal statutes.

²³*De facto* abolitionist states are those that have not carried out executions for ten years or more.

²⁴This 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.

²⁵Current retentionist African states that have previously been *de facto* abolitionists include the following: Libya for twenty-three years, but resumed executions in 1977; Cameroon for eleven years (1988–1997); Comoros for twenty-two years (1975–1997); Guinea for seventeen years (1984–2001); and lastly, Burundi for twelve years (1981–1993).

²⁶These *de facto* abolitionist countries include: Benin, which had stayed for twelve years without carrying out executions, but resumed in 1986. The last execution in Benin was carried out in 1989, and there have been no executions up to the present date. The Gambia too, had not carried out any executions for sixteen years, but resumed in 1981. Since its last execution in 1981, no executions have been carried out up to the present date. Moreover, The Gambia abolished the death penalty in April 1993 but it was reinstated by the military regime in August 1995.

²⁷Amnesty International *Death penalty/fear of imminent execution/unfair trial* AI Index: AFR 16/07/00, 13 April 2000.

²⁸Amnesty International *Africa: a new future without the death penalty* AI Index: AFR 01/003/1997, 1 April 1997.

23 years were for political offences.²⁹ 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 leading to the manipulation of justice to hide the reality of crime and the identity of the authors.³⁰

For other states, it is not clear why they resumed executions after a long break. This is due to the lack of information on the subject, which is as a result of the fact that states do not take their obligations to report their practices on the death penalty to the UN seriously.³¹ Moreover, due to the veil of secrecy under which death penalty matters are handled, such reasons are usually regarded as state secrets and are not made public.

Nevertheless, the resumption of executions could be attributed to the following: First, the symbolic nature of the death penalty or political reasons. 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.³² A state that is not able to execute those it condemns to death could be seen as almost overly impotent to carry out just about any policy. Second, the different reasons that have emerged which make recourse to the death penalty appear necessary.³³ Third, the retention of the death penalty in their penal statutes provides the possibility of resuming executions. As long as the death penalty remains in the statutes of *de facto* abolitionist states, there is a possibility of their resuming executions at any time. The fact that only six 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,³⁴ reveals this possibility. What is more, a 'practice'³⁵ does not exist that

²⁹ Amnesty International *When the state kills ... the death penalty v human rights* (1989) 168-169.

³⁰ International Federation of Human Rights *Death penalty: ending a moratorium, between security opportunism and settling of scores* September 2004, available at http://www.fidh.org/article.php?id_article=1976.

³¹ R Hood *The death penalty: a worldwide perspective* (2002) 3.

³² A Sarat 'Capital punishment as a legal, political, and cultural fact: an introduction' in A Sarat (ed) *The killing state: capital punishment in law, politics and culture* (1999) 5.

³³ See n 3 above.

³⁴ Adopted by the UN General Assembly on 15 December 1989, entered into force on 11 July 1991. The African countries that have ratified this Protocol are: Mozambique (21 July 1993); Namibia (28 November 1994); Seychelles (15 December 1994); Cape Verde (19 May 2000); South Africa (28 August 2002); and Djibouti (5 February 2003). It should be noted that São Tomé and Príncipe (6 September 2000); and Guinea-Bissau (12 September 2000) are signatories to the Protocol.

³⁵ '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 J Dugard *International law: a South African perspective* (2000) 28.

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.³⁶ The fact that there is no 'practice' to commute death sentences in all abolitionist in practice states also goes to show that these states could resume executions at anytime. A constructive debate is therefore necessary in order to address the above.

In practice, the death penalty is either mandatory or discretionary and is currently imposed in a number of African states for murder,³⁷ crimes against property,³⁸ political offences,³⁹ economic crimes,⁴⁰ drug related offences,⁴¹ sexual offences,⁴² and religious dissent.⁴³ The fact that the death penalty is still being imposed for offences such as apostasy, committing a third homosexual act and illicit sex — which cannot be characterised as the most serious of offences — is problematic. Further, the possibility of the death penalty being imposed on persons below eighteen years of age in countries like Nigeria, for example, is a matter for concern.⁴⁴

Also challenging is the question of a mandatory death penalty. It is obviously one of the reasons for the on-going imposition of death sentences in the African continent. The death penalty is mandatory for offences such as treason and murder in Kenya and Malawi, aggravated robbery in Zambia, and murder in Tanzania.⁴⁵ 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, since it is the only punishment the law permits for the criminal offence in question. Mandatory death penalty for certain crimes has not been the main subject of challenges to the death penalty in Africa. Among the few

³⁶For example, in Uganda as of December 2004, there were 525 inmates on death row. In Kenya and Burundi, there were 946 and 533, respectively (see generally, *Amnesty International Report* (2005)).

³⁷Zambia, Cameroon and Sudan.

³⁸Ethiopia, Ghana, Kenya, Malawi, Nigeria, Sudan, Uganda and Zambia.

³⁹Botswana, Cameroon, Ghana, Sierra Leone, Uganda, Zambia, and Zimbabwe, Egypt, the DRC, Ghana and Nigeria.

⁴⁰The DRC, Mali, Niger, Somalia, Sudan, and Uganda, Ghana, Nigeria and Algeria.

⁴¹Mostly in North African countries.

⁴²Sudan, Egypt, Lesotho, Malawi, Nigeria, Uganda, Tunisia, Morocco and Zimbabwe.

⁴³Egypt, Libya and Sudan.

⁴⁴Section 39(1) of the Criminal Code Act 1990 and section 363 of the Criminal Procedure Act 1990 of Nigeria prohibit the use of the death penalty for persons below seventeen years of age. This falls short of international standards (for example, in the Convention on the Rights of the Child, 1989, and 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.

⁴⁵Stated in the country reports of Kenya, Malawi, Tanzania and Zambia, 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.

cases in which the issue has been raised, the judgment in *Susan Kigula and 416 Others v The Attorney General* is worthy of note.⁴⁶ The petitioners in this case challenged, in the alternative, the mandatory death penalty in Uganda. The Constitutional Court found the various provisions of the law that prescribe mandatory death sentence unconstitutional as the individuals concerned are not accorded the opportunity to mitigate their death sentences.⁴⁷

Though the mandatory death penalty for certain crimes has not been the main subject of challenges to the death penalty in Africa,⁴⁸ its constitutionality has been subject to worldwide judicial scrutiny and consideration, resulting in virtually unanimous condemnation of statutes providing for mandatory death sentences. For instance, in the Commonwealth Caribbean, the most recent series of legal challenges to the death penalty deal with the mandatory nature of the death penalty for murder.⁴⁹ In addition, 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.⁵⁰

With regard to capital trials in Africa, initiating a debate on the death penalty is vital, considering that, more often than not, the law is not properly applied. Although fair trial rights have been enumerated in the national constitutions of most African states,⁵¹ some of the provisions are very inadequate, or not in conformity with the norms and standards of the relevant UN instruments⁵²

⁴⁶Constitutional Petition No 6 of 2003, judgment delivered in June 2005.

⁴⁷*Id* at 40. The Constitutional Court went further to provide the government with a two-year period to give effect to the judgement, after which all death sentences will be set aside. It also held that the prisoners who have been on death row for more than three years are entitled to have their death sentences commuted to life imprisonment.

⁴⁸Currently in Uganda, a legal challenge to the death penalty has been brought before the Constitutional Court. The petitioners are also challenging, in the alternative, the mandatory death penalty in Uganda (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).

⁴⁹J Harrington 'The challenge to the mandatory death penalty in the Commonwealth Caribbean' (2004) 98 *American Journal of International Law* 126.

⁵⁰The ICCPR was adopted by the UN General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force on 23 March 1976 (GA res 2200A (XXI), UN Doc A/6316 (1996), 999 UNTS 171).

⁵¹For example, arts 1 & 3 of the Constitutions of Central African Republic 1994; art 10 of the Constitution of Djibouti 1992; art 19 and 20 of the Constitution of Ethiopia 1995; sec 32 of the Constitution of the Republic of Sudan 1998; art 13 of the Constitution of Tanzania 1995; art 18 of the Constitution of Zambia 1996; the Preamble of the Constitution of the Republic of Cameroon 1996; secs 35 and 36 of the Constitution of the Federal Republic of Nigeria 1999; sec 19 of the Constitution of Ghana 1996; sec 28 of the Constitution of Uganda 1995; and sec 23 of the Constitution of Sierra Leone 1996. The Constitution of Morocco 1996 is silent on fair trial rights. The years referred to are the years the constitutions were last amended as at March 2005.

⁵²A Adeyemi 'United Nations human rights instruments and criminal justice norms and standards' in M Bassiouni & Z Motala (eds) *The protection of human rights in African criminal proceedings* (1995) 4.

or those at the regional level. Also, investigations in the pre-trial phase are hampered by lack of resources and training.⁵³ As a result, pre-trial detention becomes longer than required by the law. In Nigeria, for example, the pre-trial time in detention is rarely less than five years in some states, and in some cases over ten years.⁵⁴ This definitely has a negative bearing on the efficiency of the criminal justice system in dispensing justice. Furthermore, some African states have empowered special or military courts to pass death sentences without affording full fair trial safeguards.⁵⁵ The African Commission has found such tribunals to be in violation of article 7 (fair trial rights) of the African Charter.⁵⁶ The UN Human Rights Committee has expressed concern over such courts in Egypt on the ground that it is not possible for defendants before them to have a fair trial.⁵⁷

Consideration of evidence, its admissibility, and the weight of such evidence are 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. For example, 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 judgments in their favour'.⁵⁸ Corrupt practices in the criminal justice system have also been reported in Ghana and Nigeria.⁵⁹

Also having a bearing on the administration of justice in capital trials, is the clemency process which is the last hope for a person sentenced to death, and is seen as the last means of correcting judicial errors. However, in most African states the process is shrouded in secrecy which allows for arbitrariness in the

is the case in, for example, Cameroon, Kenya, Lesotho, Ghana, Uganda and Zambia.

⁵⁴Amnesty International, 'Nigeria: the death penalty and women under the Nigerian penal systems' *AI Index* AFR 44/007/2004 10 February 2004.

⁵⁵This is the case in Sudan, Tunisia, Egypt and Eritrea.

⁵⁶See for example, *Amnesty International and Others v Sudan*, Communications 48/90, 50/91, 52/91, 89/93 (2000) AHRLR 297 (ACHPR 1999) paras 68-69; *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria*, Communication 60/91 (2000) AHRLR 180 (ACHPR 1995) para 13.

⁵⁷Concluding observations of the Human Rights Committee on the third and fourth periodic reports of Egypt submitted under art 40 of the ICCPR, UN Doc CCPR/CO/76/EGY, 28 November 2002, para 16(b).

⁵⁸Opening address of the president of the Republic of Tanzania, His Excellency Benjamin William Mkapa, at the Judges and Magistrates Seminar, Dar es Salaam, 16 December 1996.

⁵⁹Report of the national coordinator of Ghana, Kristine Larrey, 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; and E Anaba 'Law and human rights: death penalty: options for the government — study group' *Vanguard* (Lagos) 5 November 2004.

exercise of clemency and disparity in the granting of pardon or clemency.⁶⁰

The death penalty in Africa and human rights

The death penalty is one of the most divisive human rights issues throughout the world.⁶¹ Its application cannot be separated from the issue of human rights.⁶² Defining the death penalty as a human rights issue has been resisted by some countries that retain and use the death penalty, as they reject the argument that judicial execution violates basic human rights, and regard their criminal justice system as a matter of national sovereignty reflecting their cultural and religious values.⁶³ At the 57th Session of the UN Commission on Human Rights (UNCHR), a Libyan representative stated that 'the death penalty concerns the justice system and is not a question of human rights'.⁶⁴

Although the abolition of the death penalty has not been accepted worldwide as an international human rights norm, for an increasing number of countries, the death penalty is a critical human rights issue. This view has been supported by the UNCHR, which has expressed its conviction that 'abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights'.⁶⁵ Further, at the 36th Ordinary Session (2004) of the African Commission Commissioner Chirwa openly stated that the death penalty was a human rights issue. Moreover, human rights instruments call for its abolition or restriction.⁶⁶

The right to life

The African Commission has emphasised the importance of the right to life in the following words: 'The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life'.⁶⁷ All human

⁶⁰The Inter-American Commission on Human Rights has found a right to life in a case where the applicant was not given an effective and adequate opportunity to participate in the mercy process (*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.

⁶¹T Fine 'Moratorium 2000: an international dialogue toward a ban on capital punishment' (1999) 30 *Columbia Human Rights Law Review* 421.

⁶²G Devenish *The application of the death penalty in South Africa: its historical and jurisprudential evolution and background and its relationship with constitutional and political reform* (1990) 17.

⁶³Hood n 31 above at 18.

⁶⁴*Id* at 17. Similarly, Singapore, Trinidad and Tobago have asserted that the death penalty is not a human rights issue.

⁶⁵This conviction was expressed in the UNCHR resolution 1997/12 of 3 April 1997 and has been reiterated by the UNCHR in resolution 1998/8 of 3 April 1998. The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, in support of the above conviction, has emphasised that 'the abolition of capital punishment is most desirable in order fully to respect the right to life' (see Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc E/CN.4/1997/60 24 December 1996 par 79).

⁶⁶For example, the African Children's Charter, African Women's Protocol, ICCPR, the Second Optional Protocol to the ICCPR.

⁶⁷*Forum of Conscience v Sierra Leone* n 15 above par 20.

rights are of no significance without the right to life as 'life' is a prerequisite for the enjoyment of any other human rights. Accordingly, 'the right to life has been properly characterised as the supreme human right, since without effective guarantee of this right, all other rights of a human being would be devoid of meaning'.⁶⁸ Recognising the death penalty would, arguably, be denying the essence of this right, as the death penalty rejects the value of the convicted person's life.

The right to life is guaranteed in article 4 of the African Charter. It allows for the death penalty only if substantive and procedural safeguards, and the restrictions on its imposition, are respected. Otherwise, its imposition will be in violation of article 4 of the Charter.⁶⁹ Although there is little interpretative material to assist in construing article 4, this article has to be interpreted in the light of international law on human and peoples' rights.⁷⁰ The African Commission is yet to adopt an interpretation of article 4 in the context of the death penalty.

Constitutional protection of the right to life falls under two categories: qualified and unqualified right to life provisions. However, a few constitutions do not have a right to life provision.⁷¹ As it is usually more cumbersome to amend the constitution than other laws, an explicit constitutional provision on the death penalty or a qualified right to life provision makes it difficult to challenge the constitutionality of the death penalty. Where the qualification is not clear, the possibility of relying on the provision to challenge the constitutionality of the death penalty would depend on the interpretation given to such a provision by the courts. The right to life is qualified, either by providing that it may not be deprived arbitrarily or other than in accordance with a sentence of a court of law, or by expressly stating the legality of the death penalty under the right to life provision.⁷²

Some judges have taken the view that it is difficult to rely on clearly qualified right to life provisions to challenge the constitutionality of the death penalty.

⁶⁸See S Carlson & G Gisvold *Practical guide to the International Covenant on Civil and Political Rights* (2003) 67.

⁶⁹See the jurisprudence of the African Commission discussed in Chenwi n 16 above.

⁷⁰Article 60 of the African Charter.

⁷¹These are the Constitutions of Gabon (1997), Egypt (1980), Libya (1977), Madagascar (1998) and Morocco (1996). Also, there are no constitutional provisions on the right to life in Somalia, as the constitution was suspended on 27 January 1991 and in Swaziland, as the country presently has no constitution. It should be noted that the dates of the constitutions referred to in this article are the dates on which they were last amended.

⁷²Qualified right to life provisions are contained in the constitutions of Botswana (1999 art 4); Equatorial Guinea (1999 art 13(a)); Eritrea (1997 art 15(1)), Ethiopia (1995 art 15); The Gambia (2001 art 18(1)); Ghana (1996 art 13(1)); Kenya (1999 art 17(1)); Lesotho (2001 art 4 and 5); Liberia (1984 art 11); Malawi (2001 art 16); Mauritius (2001 art 4(1)); Niger (1999 art 33(1)); Nigeria (1999 art 33(1)); Rwanda (1991 art 12); Sierra Leone (1996 art 16(1)); Sudan (1998 art 20); Tanzania (1995 art 14); Togo (1992 art 13); Tunisia (1991 art 5); Uganda (1995 art 22(1)); Zambia (1996 art 12(1)); and Zimbabwe (2000 art 12(1)).

For example, in *Kalu v The State*,⁷³ Iguh J pointed out that one of the fundamental basis upon which the South African Constitutional Court pronounced the death penalty unconstitutional is 'on account of the vital fact that the right to life in the relevant Constitution was unqualified'.⁷⁴ He therefore implied that it is difficult to challenge the constitutionality of the death penalty in Nigeria as the right to life in section 30(1) of the Constitution of Nigeria, 1979, was provided for in clearly qualified terms. Also, an attempt to have the death penalty declared unconstitutional in Botswana was unsuccessful because of the qualification in the Botswana Constitution.⁷⁵ Therefore, challenging the constitutionality of the death penalty is problematic in African states in which the right to life is qualified in their constitutions. The approach adopted in *Kalu* has been endorsed by the Ugandan Constitutional Court in *Susan Kigula and 416 Others v The Attorney General*.⁷⁶ As a result, the Court found the death penalty to be constitutional, stating that it is an exception to the right to life, which is not included under the non-derogable rights.⁷⁷

Furthermore, in countries where the death penalty is explicitly provided for in the constitution under a right to life provision, relying on the right to life to challenge the death penalty would be impossible, unless the constitution is amended or the provision on cruel, inhuman and degrading treatment, if not qualified, is used. In Equatorial Guinea, The Gambia, Lesotho, Malawi and Sudan, for example, it would be difficult for the death penalty to be challenged based on their right to life provisions, as the constitutions of these countries endorse the death penalty.

This notwithstanding, the Hungarian Constitutional Court found the death penalty to be in violation of the right to life in *Jones v Wittenberg*,⁷⁸ in which the court had to decide on the constitutionality of the death penalty within the qualified right to life provision of the Hungarian Constitution. Section 54(1) of the Hungarian Constitution states that 'every one has the right to life and to human dignity and no one shall arbitrarily be deprived of this right'. In interpreting this provision, the court found the death penalty to be an arbitrary deprivation of life, by holding that the death penalty was unconstitutional on the ground that it is inconsistent with the right to life and dignity under section 54 of the Constitution.⁷⁹ This decision is very instructive for Africa, considering that the African Charter prohibits the 'arbitrary' deprivation of life.

While it is difficult to rely on qualified right to life provisions to challenge the death penalty, it is possible to challenge the constitutionality of the death

⁷³(1998) 13 NWLR 53.

⁷⁴As above, par 590.

⁷⁵See *State v Ntesang* 1995 (4) BCLR 426.

⁷⁶*Susan Kigula* n 46 above at 48.

⁷⁷*Id* at 22–23.

⁷⁸Decision 23/1990, 24 October 1990.

⁷⁹As above.

penalty in countries where the right to life is provided for in clearly unqualified terms.⁸⁰ This was the situation in South Africa. In both the interim Constitution Act 200 of 1993 and the final Constitution Act 108 of 1996, the right to life is textually unqualified. In *S v Makwanyane*,⁸¹ which addressed the question of the constitutionality of the death penalty, eight of the eleven judges considered the death penalty a violation of the right to life. The unqualified nature of the right to life was referred to by several judges and was used to support an argument that the right to life is given stronger protection in the South African Constitution.⁸² The court went further to use the qualifications of the right to life in other jurisdictions to explain why challenges to the death sentence have failed in those jurisdictions.⁸³

From this, it is clear that African states such as Cameroon,⁸⁴ in which the constitutionality of the death penalty has not yet been challenged and the right to life has no qualification, may follow the South African example. This is because the absence of qualification indicates that the drafters of the constitution in question intended the court, and not the executive, to decide whether or not the death penalty should be retained.⁸⁵

Whether or not a constitution has a limitation clause would affect the possibility of relying on the right to life provision in that constitution to challenge the constitutionality of the death penalty, irrespective of whether the provision is qualified or unqualified. This is because the death penalty could be saved by the limitation clause. For example, this was the situation in Tanzania when the constitutionality of the death was challenged. In *Mbushuu and Another v Republic*,⁸⁶ the derogation from the qualified right to life provision (including the provision prohibiting inhuman and degrading punishment) in the Tanzanian Constitution, with regard to the use of the death penalty, was saved by article 30(2) of the Constitution.⁸⁷ Article 30(2) allows derogation from basic rights of the individual in public interest. The Tanzanian Court of Appeal found the death penalty to be in the public's interest, as it was reasonably necessary to protect the right to life.⁸⁸ However,

⁸⁰The right to life is unqualified in the constitutions of the following African states: Algeria (1996, art 34); Benin (1990, art 15); Burkina Faso (2000, art 2); Burundi (2001, art 21); Cameroon (1996, Preamble); Chad (1996, art 17); Congo (2001, art 7); Guinea (1990, art 6); Mali (1993, art 1); Mauritania (1991, art 13); and Senegal (2001, art 7).

⁸¹1995 (3) SA 391 (CC), hereafter referred to as *Makwanyane*.

⁸²As above, par 85.

⁸³As above, par 38.

⁸⁴The Preamble of the Constitution of the Republic of Cameroon (1996) guarantees the right to life in clearly unqualified terms. However, it is unfortunate that at present, the justiciability of the rights in the Preamble has not been tested, as the Constitutional Council, which has jurisdiction in matters pertaining to the Constitution, is yet to be established.

⁸⁵This was the interpretation adopted in *Makwanyane*, par 25 and footnote 33. See also the judgment of O'Regan J, par 324.

⁸⁶(1995) 1 LRC 216, hereafter referred to as *Mbushuu* (CA).

⁸⁷As above, 232.

⁸⁸As above.

the fact that in interpreting the above provision, the Tanzanian High Court arrived at a different conclusion, implies that the success of such challenges would depend on how a court interprets the relevant provision. For example, although the Interim Constitution of South Africa had a limitation clause, the death penalty was not saved by that clause because the requirements for limitation of rights provided under the limitation clause were not met.⁸⁹

Nevertheless, it should be noted that the appropriate approach to the interpretation of a limitation clause, as pointed out by Justice Chaskalson, must be found in the language of the text itself, construed in the context of the constitution as a whole.⁹⁰ This echoes the Inter-American Court on Human Rights' opinion,⁹¹ to the effect that objective criteria of interpretation that look to the text themselves are more appropriate than subjective criteria that seek to ascertain only the intention of the parties. If courts adopt such an approach to interpretation of limitation clauses, the basic rights of individual human beings would be protected.

The prohibition of cruel, inhuman or degrading treatment or punishment
'Cruel, inhuman and degrading treatment or punishment' has not been defined in human rights instruments. However, different bodies have established the various components of this prohibition.⁹² A plethora of international human rights instruments and national constitutions prohibit 'torture or cruel, inhuman and degrading treatment or punishment'. Article 5 of the African Charter prohibits all forms of cruel, inhuman or degrading punishment and treatment.⁹³

Most African national constitutions prohibit cruel, inhuman or degrading treatment or punishment. However, some do not have such provisions.⁹⁴ Therefore, in Madagascar and Morocco, where the above provision does not exist in their respective constitutions (and with no right to life provision), and in Senegal, where the right to life is unqualified, with no provision on the above prohibition, there is a possibility to challenge the death penalty by relying on the above two rights.⁹⁵ Also, there is a possibility to challenge the death penalty on the ground that it is cruel, inhuman and degrading in Liberia and Tunisia for example, since it is difficult to rely on the qualified right to life

⁸⁹*Makwanyane*, par 146. It should be noted that the onus is on the state to show that legislation meets the requirements in the limitation case, which it failed to do in the *Makwanyane* case.

⁹⁰As above, par 115.

⁹¹Advisory Opinion OC-3/83 of 8 September 1983, Restrictions to the death penalty (arts 4(2) and 4(4) American Convention on Human Rights) Ser A No 3 par 50.

⁹²See the European Commission on Human Rights' decision in the *Greek case*, discussed in J Cooper *Cruelty: an analysis of article 3* (2003) 3.

⁹³The right to respect of one's dignity is the only right in the African Charter described as 'inherent in a human being'.

⁹⁴These include the constitutions of Equatorial Guinea (1991); Liberia (1984); Madagascar (1998); Rwanda (1991); Senegal (2001); Tanzania (1995) and Tunisia (1991).

⁹⁵The right not to be subjected to cruel, inhuman and degrading treatment or punishment and the right to life.

provision in their constitutions. However, this is restricted in countries where the constitution has a limitation or derogation clause.

Similar to the right to life provisions in African national constitutions, the prohibition of cruel, inhuman or degrading treatment is either qualified or unqualified. This prohibition is qualified either by subjecting it to the law or exempting the death penalty from the provision. Examples of constitutions subjecting the above provision to the law include article 7 of the Constitution of Botswana 1999, article 74 of the Constitution of Kenya 1999, article 8(1) and (2) of the Constitution of Lesotho 2001, and article 20(1) and (2) of the Constitution of Sierra Leone 1996. The Constitution of Zimbabwe 2000 is the only African constitution that explicitly exempts the method of execution and delay in the execution of the death sentence from the prohibition of inhuman and degrading treatment or punishment.⁹⁶ This presents an obstruction to challenges to the death penalty in Zimbabwe, with regard to the constitutionality of the death penalty or method of execution, based on the prohibition of cruel, inhuman and degrading treatment or punishment.

Furthermore, as stated earlier, some national constitutions prohibit cruel, inhuman or degrading treatment in clearly unqualified terms, thus making it possible to rely on the provisions to challenge the death penalty.⁹⁷ However, reliance on the prohibition of cruel, inhuman or degrading treatment or punishment is restricted by the presence of a limitation or derogation clause in some national constitutions. For example, article 24 of the Constitution of Uganda, 1995, provides in clearly unqualified terms that no person shall be subjected to any form of cruel, inhuman or degrading treatment or punishment.

Article 44(a) further provides that notwithstanding anything in this Constitution there shall be no derogation from the enjoyment of the freedom from cruel, inhuman or degrading treatment or punishment. However, article 43 provides for the limitation of fundamental rights and freedoms in the public interest.⁹⁸ This appears to place a restriction on relying on article 24 to challenge the constitutionality of the death penalty in Uganda. However, the Supreme Court of Uganda, acting as a Constitutional Court of Appeal in *Attorney General v Abuki*,⁹⁹ unanimously held that the right to dignity and the right not to be subjected to inhuman treatment or punishment, when read

⁹⁶See art 15(1), (4), (5) and (6). Article 15(4) and (5) was drafted in this manner due to some of the (successful) challenges to the death penalty, in which the challenge was based on art 15(1) of the Constitution of Zimbabwe. See *Chibeya v S* (1990) SC 64/90 (unreported) and *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others* 1993 1 ZLR 242.

⁹⁷See for example, the constitutions of Algeria (1996 art 34); Benin (1990 art 18); Cameroon (1996, preamble); Chad 91996 art 18), Congo (2001 art 9); Libya (1977 art 31(c)); Mali (1993 art 3); and Togo (1992 art 21).

⁹⁸With regard to limitations of (restrictions on), and derogations from rights, see also the constitutions of Burundi (2001 art 50); Eritrea (1997 arts 26 & 27); The Gambia (2001 arts 17(2) & 35); Ghana (1996 art 31(10)); Guinea (1990 art 22); Malawi (2001 art 44); and Nigeria (1999 art 45).

⁹⁹(2001) 1 LRC 63.

with article 44(a) are 'absolute and unqualified'.¹⁰⁰ The Supreme Court was therefore of the opinion that there were no conceivable circumstances that would justify a derogation from the above right.

Regrettably, in *Susan Kigula and 416 Others v The Attorney General*,¹⁰¹ the Constitutional Court found the imposition of the death penalty not to constitute cruel, inhuman or degrading punishment.¹⁰² It seems awkward that the Court, in determining whether the death penalty was cruel, inhuman and degrading punishment under article 24 of the Constitution, relied heavily on the qualified right to life provision (article 22(1)), arguing that the right to life is not included in article 44 on the list of the non-derogable rights and accordingly, articles 24 and 44 could not have been intended to apply to the death penalty permitted in article 22(1) of the Constitution. The Court further noted that, if the framers of the Constitution wanted to take away, by article 24, the rights recognized in article 22(1), they would have done so in clear terms not by implication.¹⁰³ The Court's interpretation of the relationship between the respective articles is clearly restrictive.

Also, the Constitution of Tanzania, 1995, has an unqualified provision on cruel, inhuman or degrading treatment but has a limitation clause, which restricts any challenges to the death penalty on the ground that it is cruel, inhuman or degrading. Article 30(2) of the Constitution allows derogation from basic rights of the individual in public interest. In the case of *Republic v Mbushuu and Another*,¹⁰⁴ the constitutionality of the death penalty has been raised with regard to the right to life, right to dignity and right not to be subjected to cruel, inhuman and degrading punishment.¹⁰⁵ The High Court found the death penalty to be inherently cruel, inhuman and degrading and also that it offends the right to dignity in the course of executing the sentence.¹⁰⁶ Based on the High Court's interpretation of article 30(2), it found the death penalty not to be in the public interest and therefore unconstitutional.¹⁰⁷

On appeal, the Court of Appeal agreed that the death penalty was inherently inhuman, cruel and degrading punishment,¹⁰⁸ but declared it constitutional as it was saved by article 30(2) of the Constitution.¹⁰⁹ The Tanzanian case illustrates the restriction placed on challenges to the death penalty by limitation or derogation clauses. However, the extent to which a limitation

¹⁰⁰*Id* at 88.

¹⁰¹*Susan Kigula* n 46 above at 48.

¹⁰²*Id* at 24.

¹⁰³*Ibid.*

¹⁰⁴(1994) 2 LRC 335, hereafter referred to as *Mbushuu* (HC).

¹⁰⁵*Id* at 340.

¹⁰⁶*Id* at 351. The court noted that it is not just the final act of stringing up the prisoner that is an ugly matter but also the protracted torment to which he is subjected before execution.

¹⁰⁷*Id* at 358.

¹⁰⁸*Mbushuu* (CA) n 86 above at 228.

¹⁰⁹*Id* at 232.

clause will affect a constitutional challenge to the death penalty would depend largely on the way the courts interpret and apply the limitation provision.¹¹⁰ It is important for courts, when interpreting limitation or derogation clauses, to have in mind the underlying object of the provision guaranteeing the right in question, as it was adopted to protect against a violation of the particular right. The fact that the prohibition of cruel, inhuman or degrading treatment or punishment is seen in most jurisdictions as non-derogable, should also be borne in mind.

As noted earlier, the cruelty of the death sentence is manifested both in the death row phenomenon (prolonged stay on death row under difficult conditions) and methods of execution. Therefore, the death row situation and methods of execution in Africa should be considered in any constructive debate on the question of the death penalty in Africa.¹¹¹ The death sentence, in most cases in Africa, is usually preceded by long confinement under difficult conditions, waiting to be executed. In the nineteenth 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.¹¹² In Kenya for example, death row inmates have spent twenty years or more in jail.¹¹³ Some prisoners have spent over ten years on death row in Ghana,¹¹⁴ and some prisoners served at least eighteen years on death row before being pardoned in Swaziland.¹¹⁵

The methods of execution in Africa are also a matter of concern in that they can be considered as cruel, inhuman and degrading. For instance, hanging has been described by Mwalusanya J as not only sordid and debasing, but also generally brutalising, thus defeating the very purpose it claims to be pursuing.¹¹⁶ The most common methods of execution in Africa include hanging,¹¹⁷ shooting (usually by firing squad)¹¹⁸ and stoning.¹¹⁹ There

¹¹⁰See for example, the case of *S v Makwanyane*.

¹¹¹The need for such a protocol has been discussed in L Chenwi 'Breaking new ground: the need for a protocol to the African Charter on the abolition of the death penalty in Africa' (2005) 5 *African Human Rights Law Journal* 89 (2005).

¹¹²P Hudson 'Does the death row phenomenon violate a prisoner's human rights under international law?' (2000) 11 *European Journal of International Law* 833, 834.

¹¹³See G Munene 'Plan to release death row prisoners' <http://allafrica.com/stories/200307150153.html> (accessed 22 July 2003).

¹¹⁴See 'President grants amnesty to prisoners' <http://allafrica.com/stories/printable/200306300853.htm> (accessed 4 July 2003).

¹¹⁵Hood n 31 above at 111.

¹¹⁶*Mbusuu* (HC), n 104 above at 343.

¹¹⁷Hanging 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.

¹¹⁸Execution 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.

also exist extra-legal methods of execution in Africa, as a result of the fact that people resort to informal justice. Informal justice has manifested itself in the African continent in genocide,¹²⁰ mass executions and brutal killings, including political assassinations. Extra judicial executions by security forces in many African states and elsewhere are a matter of concern.

Furthermore, the cruelty of the death penalty extends beyond the prisoner to the prisoner's family, to the prison guards and to the officials who have to carry out the execution. With regard to the impact of executions on the executioner, information shows that the role of the executioner can be very disturbing, even traumatic. Judges, prosecutors and other officials may also experience difficult moral dilemmas if the roles they are required to play in administering the death penalty conflicts with their own ethical views. A former prison warder in South Africa, Chris, is an emotional wreck today and suffers from severe post-traumatic stress, although it is years since he witnessed an execution.¹²¹

Conclusion

The death penalty in Africa is an issue that one should be particularly concerned about.¹²² In highlighting some areas of concern with regard to the use of the death penalty in Africa, this article has validated the need for constructive debate on its abolition. The article has, therefore, laid the basis for such a debate. For a debate on the death penalty in Africa to have more force, the African Commission has to take a clear stance on the subject, by, for instance, initiating the adoption of a protocol to the African Charter on the abolition of the death penalty in Africa.¹²³

¹¹⁹Stoning is mostly occurs in states that apply the *Sbari'a* law, and is generally used for offences such as adultery. This method is employed in Mauritania, Nigeria and Sudan.

¹²⁰In Liberia, Rwanda and Sierra Leone.

¹²¹Chris witnessed only a few hangings but they affected him in such a way that he assaults his wife as a result of his constant nightmares and stress. He stated this during a discussion on death and democracy broadcast on South African television ('Special assignment' SABC 3 at 21h30 on 9 March 2004).

¹²²D van Zyl Smit 'The death penalty in Africa' (2004) 4 *African Human Rights Law Journal* 1, 2.

¹²³The need for such a protocol has been discussed in I. Chenwi 'Breaking new ground: the need for a protocol to the African Charter on the abolition of the death penalty in Africa' (2005) 5 *African Human Rights Law Journal* 89.