

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

LILIAN CHENWI\*

### I. INTRODUCTION

A fair trial is a basic element of the notion of the rule of law,<sup>1</sup> and the principles of 'due process' and 'the rule of law' are fundamental to the protection of human rights.<sup>2</sup> At the centre of any legal system, therefore, must be a means by which legal rights are asserted and breaches remedied through the process of a fair trial in court, as the law is useless without effective remedies.<sup>3</sup> The fairness of the legal process has a particular significance in criminal cases, as it protects against human rights abuses. Hence, constitutional due process and elementary justice require that the judicial functions of trial and sentencing be conducted with fundamental fairness, especially where the irreversible sanction of the death penalty is involved.<sup>4</sup>

To a great extent, increased concern about the use of the death penalty in Africa is as a result of the death penalty being imposed after trials that do not conform to international and national fair trial standards. For instance, as discussed below, trials are conducted after excessive delay and, in some cases, defendants have no access to legal assistance and lack proper defence. Adherence to fair trial (due process) rights in death penalty cases is essential. The United Nations (UN) General Assembly has pointed out in some of its resolutions the importance of fair trial standards being respected by all countries in death penalty cases.<sup>5</sup> This is imperative, as the non-existence of due

\* Researcher, Community Law Centre, University of the Western Cape, and Research Associate of the Centre for Human Rights, University of Pretoria, South Africa. This article is partly based on research conducted for my doctoral thesis titled 'Towards the abolition of the death penalty in Africa: A human rights perspective' (2005) University of Pretoria, South Africa.

<sup>1</sup> C Ovey and R White *The European Convention on Human Rights* (OUP New York 2002) 139.

<sup>2</sup> R Clayton and H Tomlinson *Fair Trial Rights* (OUP New York 2001) 2.

<sup>3</sup> H Davis *Human Rights and Civil Liberties* (Willan Publishing Devon 2003) 146.

<sup>4</sup> American Civil Liberty Union 'The case against the death penalty' <<http://www.aclu.org/deathpenalty/deathpenalty.cfm?ID=9082&c=17>>.

<sup>5</sup> UNGA Res 2393 (XXIII) (26 Nov 1968) and UNGA Res 35/172 (15 Dec 1980). The European Court of Human Rights has also emphasized how imperative it is to respect fair trial rights. In *Delcort v Belgium* (1970) 1 EHRR 355, the Court stated that 'in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Art 6(1) would not correspond to the aim and purpose of that provision' (para 25). The Court has, in subsequent cases, pointed out the imperative nature of fair trial rights (see for example *Öcalan v Turkey* (2003) 7 Amicus Journal 24; and *Soering v United Kingdom* ECHR (1989) Series A, No 161).

process of law within the jurisdiction of a State weakens the efficacy of the remedies provided under domestic law to protect the rights of individuals.<sup>6</sup> In addition, in Resolution 1996/15 of 23 July 1996, the UN Economic and Social Council (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.

Considering the above, it is imperative that fair trial standards for the imposition of the death penalty are met. Failure to respect fair trial standards in capital trials increases the likelihood of innocent defenders being sentenced to death, and subsequently executed. Moreover, it can also lead to abuse of the whole trial process. This article provides an overview of fair trial rights in relation to the death penalty in Africa. It begins with a discussion of fair trial standards at the regional level, including the African Charter on Human and Peoples' Rights 1981 (African Charter), and their interpretation by the African Commission on Human and Peoples' Rights (African Commission). Subsequently, some of the fair trial rights with regard to capital trials in African States are examined.

## II. THE AFRICAN CHARTER

Procedural safeguards for a fair trial have been enumerated in Article 7 of the African Charter.<sup>7</sup> The due process rights provided for in Article 7 are, first, the right to an appeal to competent national organs against acts violating fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force (Article 7(1)(a)). Secondly, the right to be presumed innocent until proved guilty by a competent court or tribunal (Article 7(1)(b)). Thirdly, the right to defence, including the right to be defended by counsel of the defendant's choice (Article 7(1)(c)). Lastly, the right to be tried within a reasonable time by an impartial court or tribunal (Article 7(1)(d)).

The fair trial (due process) rights provided for in Article 7 are not as exhaustive as those, for example, in Article 14 of the International Covenant on Civil and Political Rights 1966 (ICCPR). The right to an interpreter, which is an aspect of a fair trial, is omitted. Nevertheless, as seen below, this has been stated in some of the African Commission's resolutions on the right to a fair trial. Article 6 of the African Charter, dealing with the right to liberty and

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

<sup>7</sup> It should be noted that Arts 3 and 5 of the African Charter are also relevant to the right to a fair trial. Art 3 guarantees equality before the law and Art 5 provides for the right to the respect of the dignity inherent in a human being and to recognition of his legal status.

security of the person, is also of relevance with regard to the pre-trial phase in ensuring a fair trial. It prohibits arbitrary arrests and detentions. However, Article 6 has been criticized as not having sufficiently dealt with the pre-trial phase of the criminal process, and Article 7 as being incomplete.<sup>8</sup>

### III. OTHER FAIR TRIAL STANDARDS AT THE REGIONAL LEVEL

The African Commission has adopted some resolutions on fair trial rights, which incorporate and expand on the fair trial rights contained in the African Charter. They supplement the provisions of the African Charter.<sup>9</sup> In 1992 the Commission adopted its Resolution on the Right to Recourse and Fair Trial.<sup>10</sup> The Commission's adoption of this resolution was aimed at deepening the understanding of substantive rights guaranteed by the African Charter.<sup>11</sup> The preamble highlights the imperative nature of fair trial rights in the words 'the right to a fair trial is essential for the protection of fundamental human rights and freedoms'. This resolution restates the fair trial rights contained in Articles 6 and 7, and the right to equality before the law provided for under Article 3 of the African Charter. The resolution goes further to provide for fair trial rights that are not contained in the African Charter, for example, the right of individuals to have the free assistance of an interpreter if they cannot speak the language used in court, and the right of individuals to have adequate time and facilities for the preparation of their defence.<sup>12</sup>

In 1999 the African Commission adopted 'Resolution on the Right to a Fair Trial and Legal Assistance in Africa'.<sup>13</sup> As can be deduced from the preamble of this resolution, its adoption was a means to emphasize the importance of the right to a fair trial and the need to strengthen the provisions of the African Charter relating to this right. This resolution adopts the Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa, which states that

the right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore, the right to a fair trial is a non-derogable

<sup>8</sup> F Viljoen 'Introduction to the African Commission and the regional human rights system' in C Heyns (ed) *Human Rights Law in Africa* (Martinus Nijhoff Publishers Leiden 2004) 404. Generally, detention and trial, which are often the areas where systematic violations of civil and political rights occur, are not dealt with adequately in the African Charter (C Heyns 'Civil and political rights in the African Charter' in M Evans and R Murray (eds) *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000* (CUP Cambridge 2002) 155.

<sup>9</sup> Art 66 of the African Charter provides that, if necessary, special protocols or agreements may supplement the provisions of the Charter.

<sup>10</sup> Adopted at its Eleventh Session held in Tunis, Tunisia, 2–9 Mar 1992; reproduced in C Heyns (ed) *Human Rights Law in Africa* (Martinus Nijhoff Publishers Leiden 2004) 526.

<sup>11</sup> *Fifth Annual Activity Report: 1991–1992* para 22.

<sup>12</sup> Para 2(e)(I) & (IV) of the Resolution.

<sup>13</sup> Adopted at its Twenty-sixth Session held in Kigali, Rwanda, 1–15 Nov 1999; reproduced in Heyns (n 10) 584.

right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines.<sup>14</sup>

In addition, in 2003, the Commission adopted ‘Principles and Guidelines on the Right to a Fair Trial and Legal Aid in Africa’.<sup>15</sup> The general principles include the right to a fair and public hearing by a legally constituted competent, independent and impartial judicial body. The above principles and guidelines identify essential elements of a fair hearing, which include: equality of all persons before any judicial body; the right to consult and be represented by a legal representative or other qualified persons of one’s choice at all stages of the proceedings; the right to the assistance of an interpreter if a defendant cannot understand the language used; the right to a determination of the defendant’s rights and obligations without undue delay; and the right to an appeal to a higher judicial body. Thus, the principles and guidelines incorporate fair trial standards in the ICCPR and the African Charter and elaborate on them.

#### IV. JURISPRUDENCE OF THE AFRICAN COMMISSION

Although the African Commission’s position with regard to the death penalty remains unclear,<sup>16</sup> it has addressed the issue of fair trial rights in a number of death penalty cases, in which the issue of the death penalty was raised in the context of the deprivation of fair trial rights during the trial process. The Commission has had more impact where the issue of the death penalty was raised on procedural grounds, than on the right to life. Its decisions on fair trial rights have been progressive, and can be seen as procedural benchmarks in capital cases.<sup>17</sup> In *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*,<sup>18</sup> the African Commission found a violation of Article 7(1)(c), the right to defence, on the ground that the trial of the Chirwas took

<sup>14</sup> Heyns (n 10) 585.

<sup>15</sup> Adopted at its 33rd Ordinary Session held in Niamey, Niger in May 2003, *Final Communiqué* of the Session and *Seventeenth Annual Activity Report: 2003–2004* (hereinafter referred to as African Commission’s principles and guidelines). The Preamble points out the need for these fair trial standards to become known to everyone in Africa, and urged that these standards be promoted and protected by civil society organizations, judges, lawyers, prosecutors, academics, and be incorporated into domestic legislation by state parties to the African Charter and respected by them.

<sup>16</sup> The Commission has not pronounced itself on the death penalty as such. However, some Commissioners have openly stated their opposition to the death penalty or that they favour abolition (see L Chenwi ‘The African Commission and the death penalty’ (2005) 11 *Amicus Journal* 13). Recently, the death penalty has been included in the Commission’s agenda.

<sup>17</sup> However, implementation of its decisions depends largely on the political will of African States.

<sup>18</sup> Communications 68/92 and 78/92 *Eighth Annual Activity Report: 1994–1995*, para 10. In this case, the Southern Regional Traditional Courts had sentenced Orton and Vera Chirwa to death, after a trial that did not meet fair trial standards. After international protest, the sentences were commuted to life imprisonment (paras 1–5).

place before a Traditional Court consisting of five chiefs who had no legal training, and the Chirwas were tried without being defended by counsel.

The Commission has subsequently elaborated on the meaning of the right to defence. The right to defence, including the right to be defended by counsel of one's choice, guaranteed under Article 7(1)(c), as seen in the Commission's decision in *Constitutional Rights Project (in respect of Lekwot) v Nigeria*,<sup>19</sup> requires that the counsel representing the accused should not be intimidated or harassed during the trial. Intimidation and harassment of counsel to the extent that they withdraw from a case would amount to a violation of this right. If after such withdrawal, the accused is not given the opportunity to procure the services of another counsel; his right to be represented by counsel of his choice is violated.<sup>20</sup>

Further, the severity of sentence (the death sentence) is a relevant consideration in establishing whether denial of the right to appeal constitutes a violation, as was the Commission's position in *Constitutional Rights Project (in respect of Akamu) v Nigeria*.<sup>21</sup> The Commission found a violation of Article 7(1)(a) in this case on the ground that special tribunals created in 1984 in Nigeria foreclosed any avenue of appeal to 'competent national organs' in criminal cases bearing such penalties.<sup>22</sup> The Commission further found a violation of Article 7(1)(d) due to the fact that an appearance of partiality had been created by the composition of the special tribunals.<sup>23</sup> The character of the individual members of the tribunal was immaterial in deciding whether the right to be tried by an impartial court or tribunal has been violated.

Similarly, in *International Pen (on behalf of Saro-Wiwa) v Nigeria*,<sup>24</sup> the

<sup>19</sup> Communication 87/93 *Eighth Annual Activity Report: 1994–1995*; (2000) AHRLR 183 (ACHPR 1995) para 12. In this communication, the individuals concerned had been sentenced to death under the Civil Disturbances (Special Tribunal) Decree No 2 of 1987. The decree does not provide for any judicial appeal against the decisions of the Special tribunals and prohibits the courts from reviewing any aspect of the operation of the tribunal. The Communication also alleged that the accused and their counsels were constantly harassed and intimidated during the trial, ultimately forcing the withdrawal of the defence counsel (paras 1 and 2).

<sup>20</sup> *ibid.*

<sup>21</sup> Communication 60/91 *Eighth Annual Activity Report: 1994–1995*; (2000) AHRLR 180 (ACHPR 1995).

<sup>22</sup> *ibid.*, para 13. The individuals in this communication had been sentenced to death under the Robbery and Firearms (Special Provision) Decree No 5 of 1984, which created special tribunals, composed of one serving or retired judge, one member of the armed forces and one member of the police force. The Decree does not provide for any appeal of sentences, but merely subjects them to confirmation or disallowance by the Governor of the state (para 1).

<sup>23</sup> *ibid.*, para 12. Similarly, the Inter-American Commission on Human Rights has found the appearance of impartiality to constitute a violation of the right to be tried by an impartial tribunal in, eg, *Andrews v United States* Case 11.139, Report No 57/96 (6 Dec 1996); OEA/Ser.L/V/II.98 Rev 6 (13 Apr 1998).

<sup>24</sup> Communication 137/94, 139/94, 154/96, and 161/97 *Twelfth Annual Activity Report: 1998–1999*; (2002) AHRLR 212 (ACHPR 1998) paras 90 and 95. The case concerned the detention and trial of Mr Saro-Wiwa and the human rights violations suffered by him. During detention, he was denied access to a lawyer. The trial took place before a tribunal established under the Civil Disturbances Act. He was later sentenced to death together with his co-defendants. Although the African Commission requested a stay of execution, he was executed together with the others in secret (paras 1–10).

Commission found special tribunals with an appearance of partiality to be in violation of Article 7(1)(d), and consequently, Article 26 of the African Charter, as the Government did not guarantee the independence of the judicial bodies in question. As well, Article 7(1)(a) would be violated if accused persons have no possibility of appealing their sentences to competent national organs.<sup>25</sup> Also, to openly pronounce an accused guilty prior to and during the trial, will constitute a violation of the accused's right to be presumed innocent.<sup>26</sup>

In *Amnesty International v Sudan*,<sup>27</sup> the Commission found a violation of Article 7(1)(d); first, as the composition of special courts in Sudan create the impression, or indicate the reality, of lack of impartiality (the courts consisted of 'three military officers or other persons of integrity and competence' appointed by the president, his deputies and senior military officers); second, on the basis that the Government dismissed judges opposed to the formation of these courts. The Commission saw the dismissal as depriving courts of the personnel qualified to ensure that they operate impartially, thus denying individuals the right to have their case heard by such body.<sup>28</sup> Further, giving a tribunal the power to veto the choice of counsel of defendants is an unacceptable infringement of the right to freely choose one's counsel under Article 7(1)(c), which is essential to the assurance of a fair trial.<sup>29</sup>

The African Commission, in the recent case of *Interights (on behalf of Bosch) v Botswana*,<sup>30</sup> did not find a violation of fair trials rights. One of the issues raised was whether the misdirection of the trial judge with regard to the onus of proof was so fatal as to negate the right to a fair trial in the circumstances of the case, amounting to a violation of Article 7(1)(b) of the African Charter, which guarantees the right of every individual to be presumed innocent until proved guilty by a competent court or tribunal. The Commission noted that there is no general rule or international norm to the effect that any

<sup>25</sup> *ibid*, para 93.

<sup>26</sup> *ibid*, para 96.

<sup>27</sup> Communications 48/90, 50/91, 52/91, 89/93 *Thirteenth Annual Activity Report: 1999–2000*; (2000) AHRLR 297 (ACHPR 1999), para 68. In this communication, it was alleged that in Sudan, legal representation is denied at new trials and there is no appeal of a death sentence (see paras 1–20 for a summary of the facts).

<sup>28</sup> *ibid*, para 69.

<sup>29</sup> *ibid*, para 64 and 66.

<sup>30</sup> Communication 240/2001 *Seventeenth Annual Activity Report: 2003–2004* (African Commission). The High Court of Botswana convicted Mariette Bosch of murder on 13 Dec 1999 and sentenced her to death. An appeal to the Court of Appeal of Botswana in 2001 was unsuccessful (para 2). A petition was submitted on her behalf to the Commission alleging violations of her rights in the African Charter. The Chairman of the African Commission, after receiving the petition, wrote to the President of Botswana on 27 Mar 2001, appealing for a stay of execution pending consideration of the communication by the Commission (paras 7–10). The President did not respond to the appeal, and Bosch was executed by hanging on 31 Mar 2001 (para 11). For an evaluation of this case, see L Chenwi 'What future for the death penalty in Africa? An appraisal of the case of *Interights et al (on behalf of Mariette Sonjaleen Bosh) v Botswana*' (2005) 12 *Amicus Journal* 13.

misdirection by itself vitiates a verdict of guilt, and that a breach of Article 7(1) would only arise if the conviction had resulted from such misdirection.<sup>31</sup> Drawing inspiration from, inter alia, the case law of the European Court of Human Rights, and based on the fact that Bosch's conviction for murder did not result from the misdirection but from the evidence presented, the Commission concluded that there had not been a violation.<sup>32</sup>

According to the Commission's decision, there could be a basis for finding a violation of Articles 4 and 7(1) of the African Charter, if it is shown that the Courts' (the High Court and Court of Appeal of Botswana) evaluation of the facts was manifestly arbitrary or amounted to a denial of justice.<sup>33</sup> However, this was not the case. A reversal of the presumption of innocence is a fundamental violation of Article 7(1)(b) of the African Charter. The presumption of innocence is essential to ensure a fair trial. Since, as seen from the jurisprudence of the African Commission, the rights under Article 7 are mutually dependent, the Commission should have been bold enough in finding a violation of Article 7(1), as there was a clear violation of Article 7(1)(b)—presumption of innocence—by placing the burden of proof on Bosch.<sup>34</sup>

Nevertheless, with the exception of the *Bosch* case, the jurisprudence of the African Commission shows that the mere appearance of partiality alone would suffice to find a violation of Article 7(1)(d). It is also clear from the Commission's jurisprudence that where the right to be heard is infringed, other violations may occur, such as an execution becoming arbitrary (thus, a violation of Article 4), and violations of Article 26, as governments have a duty to provide structures necessary for the exercise of the right to be tried by an independent (and impartial) court. The Commission has therefore taken an approach similar to that of the UN Human Rights Committee, with regard to the relation between the right to life and fair trial rights. The Human Rights Committee is also 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.<sup>35</sup> The Inter-American Commission on Human Rights has adopted a similar position with regard to the relationship between fair trial rights and the right to life.<sup>36</sup>

<sup>31</sup> *ibid.*, paras 24 and 26.

<sup>32</sup> *ibid.*, paras 27 and 28.

<sup>33</sup> *ibid.*, para 29.

<sup>34</sup> Notwithstanding, the Commission acknowledged the evolution of international law and the trend towards abolition of the death penalty. It further conceded its support of this trend by its adoption of the 1999 resolution, and encouraged all states party to the African Charter to take all measures to refrain from exercising the death penalty (para 52).

<sup>35</sup> For a discussion of the Committee's jurisprudence, see W Schabas *The Abolition of the Death Penalty in International Law* (CUP Cambridge 2002) 112–13.

<sup>36</sup> It is clear from the Inter-American Commission's jurisprudence that since a violation of due process invalidates a conviction and sentence, an execution pursuant to flawed criminal proceedings would amount to an arbitrary deprivation of life, thus a violation of the right to life under Article I of the American Declaration (see, eg, *Graham v United States* Case 11.193, Report No 97/03 (29 Dec 2003)). Similarly, the Inter-American Court of Human Rights has adopted the same approach, finding the imposition of capital punishment without respect for due process to constitute an 'arbitrary' deprivation of life (see Inter-American Court of Human Rights Advisory Opinion OC-16/99 (1 Oct 1999)).

## V. RESPECT FOR FAIR TRIAL RIGHTS IN CAPITAL TRIALS

As long as the reality pertains that the death penalty exists in Africa, it is imperative that it is imposed only in exceptional circumstances, and that fair trial standards for its imposition are met so as to undo or mitigate its possible effects, such as conviction of the innocent. If such fair trial standards cannot be met, the death penalty should not be imposed since, as mentioned above, constitutional due process and elementary justice require that the judicial functions of trial and sentencing be conducted with fundamental fairness, especially where the irreversible sanction of the death penalty is involved.

Fair trial rights have been enumerated in the national constitutions of most African States.<sup>37</sup> However, some of the provisions are very inadequate, or not in conformity with the norms and standards of the relevant UN instruments<sup>38</sup> or those at the regional level. For example, despite the fact that Sierra Leone has ratified the ICCPR and African Charter, accused persons have no right to a lawyer at the appeal stage of the trial.<sup>39</sup>

*A. The right to be tried within a reasonable time*

The purpose of the right of an accused to be tried within a reasonable time is to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend him or herself.<sup>40</sup> The object of this right therefore is to give effect to the principal right to a substantively fair trial, thus preventing injustice resulting from delays. The

<sup>37</sup> eg Arts 1 and 3 of the Constitutions of Central African Republic 1994; Art 10 of the Constitution of Djibouti 1992; Arts 19 and 20 of the Constitution of Ethiopia 1995; s 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; ss 35 and 36 of the Constitution of the Federal Republic of Nigeria 1999; s 19 of the Constitution of Ghana 1996; s 28 of the Constitution of Uganda 1995; and s 23 of the Constitution of Sierra Leone 1996. It should be noted that the Constitution of Morocco 1996 has nothing on fair trial rights. Somalia and Swaziland have no constitution at present. The Constitution of Somalia was suspended on 27 Jan 1991. For the sections of the various African constitutions that deal with fair trial rights, see Heyns (n 11) 854–5. Further, the years of the constitutions referred to in this article are the years the constitutions were last amended as at Mar 2005.

<sup>38</sup> A Adeyemi 'United Nations human rights instruments and criminal justice norms and standards' in M Bassiouni and Z Motala (eds) *The Protection of Human Rights in African Criminal Proceedings* (Martinus Nijhoff Publishers Dordrecht 1995) 4.

<sup>39</sup> 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 to 11 May 2004. The reports presented at this conference are available at web site <<http://www.biiicl.org/deathpenalty>>.

<sup>40</sup> M Code *Trial Within a Reasonable Time: A short history of recent controversies surrounding speedy trial rights in Canada and the United States* (Carswell Thomson Professional Publishing Scarborough Ontario 1992) 9; N Steytler *Constitutional Criminal Procedure: A commentary of the Constitution of the Republic of South Africa* (Butterworths Durban 1998) 272.

right of an accused to be tried within a reasonable time runs through the pre-trial, trial and post-trial phases of a trial. That is, this right relates not only to the time by which a trial should commence, but also the time by which it should end and judgment be rendered; and all stages must take place 'without undue delay' (within a reasonable time).<sup>41</sup> For this right to be effective, a procedure must be available in order to ensure that the trial will proceed 'without undue delay' both in the first instance and on appeal.<sup>42</sup>

In establishing whether this right has been violated (or whether there has been undue delay), factors such as the nature and complexity of the case, the availability of state resources with regard to the investigation or prosecution of the case, and the kind of prejudice suffered by the accused, have to be considered.<sup>43</sup> The above factors have to be taken into account as it is difficult to establish undue delay, for example, where there are insufficient resources to carry out investigations, or the case is very complex, or the accused has not suffered any prejudice. For example, a case in which an accused had not been brought to trial two years after his first appearance was held not to constitute a violation of the right to a trial within a reasonable time.<sup>44</sup>

The right to be tried within a reasonable time is a constitutional value of supreme importance that must be interpreted in a broad and creative manner.<sup>45</sup> Trials held within a reasonable time have an intrinsic value. If innocent, the accused should be acquitted with a minimum disruption to his social and family relationships. If guilty, the accused should be convicted and an appropriate sentence be imposed without unreasonable delay.<sup>46</sup> Regrettably, most capital trials in Africa take many years, as accused persons are not brought before a court within a reasonable time. In Sierra Leone, for example, the main problem with capital trials is that of massive pre-charge and pre-trial delays, and moreover, suspects are most often, not informed of the reasons for their arrest until they are about to be charged in court, contrary to Section 17(2)(a) of the Constitution of Sierra Leone 1996.<sup>47</sup> In Zambia, trials take very long,

<sup>41</sup> UN Human Rights Committee, General Comment No 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art 14 of the ICCPR) (13 Apr 1984) para 10.

<sup>42</sup> *ibid.*

<sup>43</sup> The Inter-American Commission on Human Rights has laid down, in a case against Argentina, three criteria to be used to determine what constitutes a reasonable time, namely: the duration of imprisonment; the nature of the acts that led to criminal proceedings; and the difficulties or judicial problems encountered when conducting trials (Davidson (n 6) 288). In this case, the Inter-American Commission relying on these criteria, found a pre-trial detention period of four years in this case not to be unjustifiable delay in the administration of justice (*Case 10.037 v Argentina* (1989) IAYHR 52, 100). This goes to show that there is no set period of time to be considered as unreasonable, as this will depend on the circumstances of each case.

<sup>44</sup> *Sanderson v A-G* [1997] 12 BCLR 1675.

<sup>45</sup> *Smyth v Uhsewokunze* [1998] 4 LRC 120, 129b.

<sup>46</sup> *Re Mlambo* (1993) 2 LRC 28, 34e-f (Supreme Court of Zimbabwe).

<sup>47</sup> A person arrested for treason, murder or robbery with aggravation may spend an average between three and six months in police custody despite the fact that s 17(3) of the Constitution of Sierra Leone 1991 specifically states that persons arrested for capital offences have to be brought

often more than three years from the date of arrest.<sup>48</sup> In Nigeria, the pre-trial time in detention for capital offenders, which is rarely less than five years in some states and in some cases over 10 years, has been a matter of serious concern.<sup>49</sup> Also in Lesotho, although Section 12(1) of the Constitution provides that the accused person be afforded hearing within a reasonable time, the law enforcement agencies more often than not, do not comply with this provision.<sup>50</sup>

Trials that take too long can lead to injustice, as it becomes difficult to procure the presence of witnesses due to the long trials. This has been the case in Cameroon where capital trials take a very long time. Some lawyers in Cameroon have stated that one of the difficulties they face with regard to capital trials is the fact that the trials are lengthy, with many adjournments; and that the consequence of trials not done within a reasonable time is that it makes it difficult to secure the presence of witnesses.<sup>51</sup> It is difficult to guarantee a fair hearing under such circumstances.

Such delays above are clearly in violation of fair trial rights in the ICCPR, African Charter, national constitutions of the above States, and other UN and African Commission standards for a fair trial. The African Commission held in *Pagnouille (on behalf of Mazou) v Cameroon*<sup>52</sup> that two years without any hearing or projected trial date constitutes a violation of Article 7(1)(d) of the African Charter dealing with the right to be tried within reasonable time. The Commission's finding was based on the fact that no reason had been given for the delays. Although the case was not related to the death penalty, it sets precedence for capital cases.<sup>53</sup>

It is worth noting that some of the delays are caused by deficiencies in the criminal justice systems of some African States. In Ghana, for example, the

before a court of law within 10 days from the date of arrest (Report of the national coordinator of Sierra Leone (n 39)).

<sup>48</sup> International Commission of Jurists 'Zambia: Attacks on Justice' <<http://www.icj.org/news>>.

<sup>49</sup> Amnesty International 'Nigeria: The death penalty and women under the Nigerian penal systems' AI Index: AFR 44/007/2004 (10 Feb 2004).

<sup>50</sup> Initial report of Lesotho submitted under Art 40 of the ICCPR, UN Doc CCPR/C/81/Add 14 (16 Jan 1998) para 101.

<sup>51</sup> The author is from Cameroon, and became aware of these difficulties from a discussion with some defence lawyers in Apr 2004 in Cameroon, in which I asked them of the difficulties they experience in preparing capital cases.

<sup>52</sup> Communication 39/90 *Tenth Annual Activity Report: 1996–1997*; (2000) AHRLR 57 (ACHPR 1997) para 19. See also the following cases involving African States: *Birindwa and Tshisekedi v DRC*, Communication 241/1987, UN Doc CCPR/C/37/D/241/1987 (29 Nov 1989) para 13, in which the Human Rights Committee found a violation of Art 9(3) of the ICCPR because Tshisekedi was not brought before a judge within a reasonable time and consequently, not tried within reasonable time; *Muteba v DRC* Communication 124/1982, UN Doc CCPR/C/22/D/124/1982 (24 July 1982), in which the Committee found a violation of the right to be brought promptly before a judge and to be tried within reasonable time.

<sup>53</sup> As can be deduced from the above case, the burden is on the State to justify lengthy detentions or delays in bringing an accused before a court within reasonable time. Otherwise such detentions will amount to a violation of the right to be tried within a reasonable time.

police service is ill equipped and lacks adequate training, coupled with corruption impacting negatively on the pre-trial phase of the criminal justice system.<sup>54</sup> In Lesotho, delays are as a result of the lack of resources and shortage of qualified staff particularly at the investigative and preparatory stages.<sup>55</sup> The justice system in Burundi suffers from inadequate resources and training, corruption, lack of belief in the rule of law and a lack of political will to end impunity.<sup>56</sup> The difficulty with respecting the right to be tried within a reasonable time in Uganda is that

[t]he administration of justice in Uganda is painfully slow. The Judiciary...[is] understaffed and under funded. It cannot effectively respond to the rising rate of crime. Courts of judicature are understaffed. . . . This problem is compounded by irregular High Court sessions. The Director of Public Prosecutions, which is responsible for prosecuting cases, is inadequately staffed and under funded which has contributed to the delay of [j]justice.<sup>57</sup>

When the human rights of individuals are at stake, deficiencies in the criminal justice system cannot be used to justify violations of such rights. It is clear from the UN Human Rights Committee's decision in *Lubuto v Zambia* that a State cannot use its economic situation to justify violations of minimum human rights standards (including violations of fair trial rights).<sup>58</sup> It is imperative that accused persons be tried within a reasonable time. Delays must not exceed a few days;<sup>59</sup> otherwise, it will constitute a violation of the above right. Nonetheless, as long as these deficiencies continue to exist in some African states, it is without doubt that accused persons in such states would not receive a fair trial.

#### *B. The right to be presumed innocent until proven guilty by a court of law*

In any system of criminal justice, the presumption of innocence is fundamental to the protection of human rights.<sup>60</sup> The right to be presumed innocent until proven guilty by a court of law is directly linked to the right to be tried within

<sup>54</sup> 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'.

<sup>55</sup> 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'.

<sup>56</sup> *Amnesty International Report* (Amnesty International Secretariat London 2005) <<http://web.amnesty.org/report2005>>.

<sup>57</sup> Initial report of Uganda submitted under Art 40 of the ICCPR, UN Doc CCPR/C/UGA/2003/1 (25 Feb 2003) para 242.

<sup>58</sup> Communication 390/1990, UN Doc CCPR/C/55/D/390/1990/Rev 1 (31 Oct 1995) para 7.3. In this case, the Human Rights Committee found a period of eight years between arrest and final decision of the court to be incompatible with the requirements of Art 14(3)(c) of the ICCPR.

<sup>59</sup> See UN Human Rights Committee, General Comment No 8: Right to liberty and security of persons (Art 9 of the ICCPR), 30 June 1982, paras 2–3. The Human Rights Committee is of the opinion that pre-trial detention should be an exception and as short as possible, thus ensuring conformity with the right 'to trial within a reasonable time or to release'.

<sup>60</sup> General Comment No 13 (n 41) para 7.

a reasonable time, because to give effect to the former, an accused has to be tried within a reasonable time. Respect for the latter right mitigates the tension between the presumption of innocence and the publicity of the trial, thus rendering the criminal justice system more coherent and fair.<sup>61</sup> Unfortunately, as seen above, the right to be tried without undue delay has not been respected in some African States. Consequently, the presumption of innocence of an accused person is not upheld in such cases.

The right to be presumed innocent is not respected in, for example, Nigeria, Cameroon and other Commonwealth African States, as suspects are tortured and treated by the police and the society at large as guilty before the trial.<sup>62</sup> Non-respect for the right to be presumed innocent in a country like Morocco could be attributed to the fact that there is no provision on this right in the Constitution or the Code of Criminal Procedure.<sup>63</sup> The UN Human Rights Committee has expressed concern over this, and recommended that the Government adopt appropriate legislation so as to guarantee the presumption of innocence, as required under Article 14(2) of the ICCPR.<sup>64</sup>

Since the burden is generally on the prosecution to prove the guilt of an accused person, a court has to conduct the trial without previously forming an opinion on the guilt or innocence of the accused. It, therefore, follows that the right to be presumed innocent by a court of law requires that the prosecution or respondent State should not make open statements prior to and during the trial in press conferences or public gatherings pronouncing an accused guilty of the crime. In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*, the African Commission found the Government of Nigeria to be in violation of the right to be presumed innocent under Article 7(1)(b) of the African Charter because the Government pronounced the accused guilty of the crimes in question at various press conferences and before the UN.<sup>65</sup>

In addition, the requirement that an accused be released on bail pending trial is important, as it gives effect to the right of every accused to be presumed innocent until proven guilty according to law.<sup>66</sup> Yet, the most restriction placed upon a pre-trial defendant is the requirement of bail. Generally speaking, 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.<sup>67</sup> In Uganda, it is

<sup>61</sup> Steytler (n 40) 273.

<sup>62</sup> Country reports presented at the 'First International Conference on the Application of the Death Penalty in Commonwealth Africa'.

<sup>63</sup> Concluding observations of the Human Rights Committee on the fourth periodic report of Morocco submitted under Art 40 of the ICCPR, UN Doc CCPR/C/79/Add 113 (1 Nov 1999) para 18.

<sup>64</sup> *ibid.*

<sup>65</sup> (n 24) para 96.

<sup>66</sup> Art 7(1)(b) of the African Charter.

<sup>67</sup> This was brought to the author's attention during a research conducted by the author in Apr 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.

rare for those accused of capital offences to get bail.<sup>68</sup> 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 case.<sup>69</sup> This amounts to a violation of the right to liberty of accused persons and their right to be presumed innocent. 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.<sup>70</sup> However, it is not clear what is considered to be in the ‘interest of justice’ and the criteria used to determine this.

Further, bail can be refused to persons charged with murder and treason in Ghana.<sup>71</sup> 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*,<sup>72</sup> 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*,<sup>73</sup> 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.<sup>74</sup>

In other 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.<sup>75</sup> In Sudan, bail is prohibited for crimes punishable with the death penalty,

<sup>68</sup> 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’.

<sup>69</sup> Initial report of Uganda (n 57) para 296.

<sup>70</sup> Criminal Procedure and Evidence Act No 10 of 2002.

<sup>71</sup> Section 96(7)(a) of the Criminal Procedure Code of Ghana (Act 30) 1960. Murder and treason are punishable by death under ss 46 and 180 of the Criminal Code of Ghana 1960 respectively. See also Art 21(d)(i) of the Constitution of Liberia 1984.

<sup>72</sup> (1982–3) GLR 249.

<sup>73</sup> (1976) 2 GLR 278.

<sup>74</sup> *ibid*; *Dogbe v The Republic* (1976) 2 GLR 82, with regard to bail in murder cases.

<sup>75</sup> Report of the national coordinator of Sierra Leone (n 39).

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.<sup>76</sup> This provision is open to abuse, as it does not specify a list of the appropriate measures that could be made.

In a nutshell, the refusal of bail to accused persons in capital cases could impact negatively on the right of accused persons to be presumed innocent. The situation is exacerbated by the deficiencies in criminal justice systems, such as the manner an investigation is carried out.

### *C. The right to have adequate time for the preparation of his or her defence*

The right of an accused to have adequate time for the preparation of his or her defence implies that an accused should have access to materials necessary for the preparation of his or her defence.<sup>77</sup> It should be noted that what is adequate time depends on the circumstances of each case, but the facilities must include access to documents and other evidence that the accused requires to prepare his or her case, as well as the opportunity to engage and communicate with counsel.<sup>78</sup> However, this has not been the case in some African States. In Nigeria, for example, the prosecution is always reluctant to share information with the defence lawyers, and in some cases there have been allegations of the prosecution suppressing information favourable to the accused.<sup>79</sup>

Implicit in this right is the need for an accused to be notified of the date and place of the trial, if the accused is going to be tried in absentia. In *Mbenge v Zaïre*, no steps were taken to inform the accused before hand of the proceedings against him, as required under Article 14(3)(a) of the ICCPR.<sup>80</sup> It was alleged that the accused learned of the death sentences through the press.<sup>81</sup> The Human Rights Committee held that judgment in absentia requires that, despite the absence of the accused, all due notification has to be made to inform the accused of the trial date and place and to request the accused's attendance. Otherwise, it amounts to a violation of Article 14(3)(b) of the ICCPR as the accused, in particular, is not given adequate time and facilities for the preparation of his or her defence.<sup>82</sup>

Furthermore, the right of an accused to have adequate time for the preparation of his or her defence is also related to the right to be tried within a reason-

<sup>76</sup> Section 106(1) of the Criminal Procedures Act of 1991.

<sup>77</sup> Guideline N(3) of the African Commission's principles and guidelines.

<sup>78</sup> General Comment No 13 (n 41) para 9.

<sup>79</sup> 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'.

<sup>80</sup> Communication 16/1977, UN Doc CCPR/C/18/D/16/1977 (25 Mar 1983).

<sup>81</sup> *ibid*, para 2.2.

<sup>82</sup> *ibid*. The HRC also found the above circumstance to be in violation of Art 14(3)(d), as the accused cannot defend himself through legal assistance of his choice and Art 14(3)(e), as the accused does not have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf.

able time. The fact that an accused has to be tried without undue delay, does not mean that the accused should not be given adequate time to prepare his or her defence or does not preclude the carrying out of a full investigation. In Uganda, in 2002, two soldiers were executed after an Emergency Field Court Martial, which reportedly lasted just 2 hours and 36 minutes, and did not allow for a full investigation of the circumstances surrounding the case.<sup>83</sup> It cannot be said that the trial of the soldiers was fair, without a full investigation into the circumstances of the case, which could have revealed information that could have been relevant in deciding the case.

*D. The right to a fair hearing by an independent and impartial court established by law*

The right to a fair hearing by an independent and impartial court established by law means that all parties before the court have to be subjected to the same standards of hearing. This will enable everyone before a court to have a fair hearing, without any discrimination. Nevertheless, it should be noted that the true test of fair hearing in a given case is whether from the observation of a reasonable person present at the trial, justice has been done.<sup>84</sup>

In order to clarify the above right, provided for under Article 7(1)(d) of the African Charter, the African Commission adopted 'Resolution on the Respect For and Strengthening of the Independence of the Judiciary'.<sup>85</sup> In addition, most jurisdictions in Africa have constitutional provisions that guarantee anyone charged with a criminal offence, the right to a fair hearing by an independent and impartial court established by law.<sup>86</sup>

However, with regard to military and other special tribunals, it is questionable whether these tribunals can be independent and impartial. The UN Human Rights Committee has noted that the existence of military and special courts that try civilians in many countries could present problems as far as the equitable, impartial and independent administration of justice is concerned.<sup>87</sup> Further, the African Commission's principles and guidelines provides that if such tribunals do not use the duly established procedure of the legal process, they shall not be created to displace the jurisdiction of the ordinary judicial bodies.<sup>88</sup>

<sup>83</sup> *Amnesty International Report* (Amnesty International Secretariat London 2003) 258.

<sup>84</sup> M Owode 'Some aspects of human rights and the administration of criminal justice in Nigeria' in M Bassiouni and Z Motala (n 38) 181.

<sup>85</sup> Adopted at its Nineteenth Session held in Ouagadougou, Burkina Faso, 26 Mar–4 Apr 1996 *Ninth Annual Activity Report: 1995–1996* Annex V, 5; reproduced in Heyns (n 10) 558.

<sup>86</sup> eg Art 4 of the Constitution of Burkina Faso 2000, Art 42(2)(f)(i) of the Constitution of Nigeria 1999, Art 19 of the Constitution of Togo 1992, and Art 18(2) of the Constitution of Zimbabwe 2000.

<sup>87</sup> General Comment No 13 (n 41) para 4. The Committee's doubt about the impartiality and independence of these courts stems from the fact that quite often, the reason for their establishment is to enable exceptional procedures to be applied that do not comply with normal standards of justice.

<sup>88</sup> Guideline A(4)(e).

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

Special Criminal Courts in the Darfur region, Sudan, continue to impose death sentences after summary trials that failed to meet fair trial standards.<sup>89</sup> The fact that the Special Courts were created by presidential decree raises questions regarding their independence. This raises questions regarding the Sudanese Government's commitment to respecting its duties under Article 26 of the African Charter, which gives state parties the duty to guarantee the independence of courts. As discussed above, the African Commission in *Amnesty International and Others v Sudan*, has found such tribunals to be in violation of Article 7(1)(d), first, by reason of their composition, and second, on the basis that the Government's dismissal of judges opposed to the formation of these courts deprives courts of the personnel qualified to ensure that they operate impartially, thus denying individuals the right to have their case heard by such a body.<sup>90</sup> Similarly, as discussed above, the African Commission has found the establishment of military courts and special tribunals in Nigeria, to be in violation of Article 7(1)(d) of the African Charter due to their composition.<sup>91</sup>

Furthermore, capital trials take place in Egypt before exceptional courts such as state security courts, established under emergency legislation, in which trial procedures fall short of international and regional fair trial standards.<sup>92</sup> For example, it is not possible for defendants before such courts to have a fair trial as they do not have the right to a full review before a higher tribunal, amounting to a violation of Article 14(5) of the ICCPR, which Egypt has ratified. The fact that these courts are established by emergency decree casts doubts on their independence. The Human Rights Committee has noted that the independence of military and state security courts in Egypt is not guaranteed.<sup>93</sup>

<sup>89</sup> Amnesty International (n 56). It should be noted that the imposition of the death sentences by the Special Courts is a violation of Art 4 of the African Charter, especially if they are, or were, subsequently executed.

<sup>90</sup> *Amnesty International and Others v Sudan* (n 27) paras 68–9.

<sup>91</sup> For further discussion of this right and how it has been addressed by the African Commission and the Inter-American Commission, see R Barnidge 'The African Commission on Human and Peoples' Rights and the Inter-American Commission on Human Rights: Addressing the right to an impartial hearing on detention and trial within a reasonable time and the presumption of innocence' (2004) 4 AHRLJ 108.

<sup>92</sup> Amnesty International (n 56).

<sup>93</sup> Concluding 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 Nov 2002) para 16(b). Also in Eritrea, trials before Special Courts are unfair, with the accused having

Generally, the independence of the judiciary is questionable in some African countries. For example, the Human Rights Committee has expressed concern at the judiciary's lack of independence in the Republic of Congo, due to first, the lack of any independent mechanism responsible for the recruitment and discipline of judges, and second, the many pressures and influences, including those of the executive branch, to which judges are subjected.<sup>94</sup> The Committee found this to be in violation of Article 14(1) of the ICCPR and recommended that the government take appropriate steps to ensure the independence of the judiciary, in particular, by amending the rules concerning the composition and operation of the Supreme Council of Justice and its effective establishment.<sup>95</sup> The Committee has also expressed concern over the independence of the judiciary in Sudan, stating that

the Committee is concerned that in appearance as well as in fact the judiciary is not truly independent, that many judges have not been selected primarily on the basis of their legal qualifications, that judges can be subject to pressure through supervisory authority dominated by the Government. . . .<sup>96</sup>

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

#### *E. The right to be present at the trial*

Every accused person has the right to be present at his or her trial. Although the African Charter makes no reference to this right, Guideline N(6)(c) of the African Commission's principles and guidelines provides that in criminal proceedings, the accused has the right to be tried in his or her presence. In most African States, for example in Egypt, Gabon, and Sudan, there is provision for an accused to be present at the trial.<sup>97</sup> Generally, an accused person can be removed from the courtroom during trial, due to misconduct on the part

no right to defence counsel. It is also unlikely that such special courts could be independent, competent, and impartial due to the presence of military judges, which is exacerbated by the fact that they have little or no legal training (see *Amnesty International Report* (2003) 100).

<sup>94</sup> Concluding observations of the Human Rights Committee on the second periodic report of Congo submitted under Art 40 of the ICCPR, UN Doc CCPR/C/79/Add 118 (27 Mar 2000) para 14.

<sup>95</sup> As above.

<sup>96</sup> Concluding observations of the Human Rights Committee on the second periodic report of Sudan submitted under Art 40 of the ICCPR, UN Doc CCPR/C/79/Add 85 (19 Nov 1997) para 21.

<sup>97</sup> Combined third and fourth periodic reports of Egypt submitted under Art 40 of the ICCPR, UN Doc CCPR/C/EGY/2001/3 (15 Apr 2002) para 404(d); Second periodic report of Gabon submitted under Art 40 of the ICCPR, UN Doc CCPR/C/128/Add 1 (14 June 1999) para 32, hereinafter referred to as second periodic report of Gabon; and second periodic report of Sudan submitted under Art 40 of the ICCPR, UN Doc CCPR/C/75/Add 2 (13 Mar 1997) para 115(h).

of the accused, and the court can proceed with the trial in his or her absence.<sup>98</sup> An accused person may, however, voluntarily waive the right to be present at his or her hearing.<sup>99</sup>

Although an accused person may not be tried in absentia,<sup>100</sup> the UN Human Rights Committee has noted that proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his or her right to be present) permissible in the interest of proper administration of justice.<sup>101</sup> Where an accused person does not waive this right, any trial in absentia would not only be a violation of the right to be tried in his or her presence, but also a violation of the right to have adequate time for the preparation of his or her defence, the right to legal representation, and the right to examine witnesses. Accordingly, in *Mbenge v Zaïre*, where no steps were taken to inform the accused before hand of the proceedings against him as required under Article 14(3)(a) of the ICCPR, the Human Rights Committee held:

Judgment in absentia requires that, notwithstanding the absence of the accused, all due notification has to be made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14 (3) (b)), cannot defend himself through legal assistance of his own choosing (art. 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14 (3) (e)) . . . In the view of the Committee, therefore, the State party has not respected D. Monguya Mbenge's rights under article 14 (3) (a), (b), (d) and (e) of the Covenant.<sup>102</sup>

#### F. The right to legal assistance and proper defence

The right to legal assistance (representation) and proper defence is central to the realization of a fair trial; it is a fundamental pillar of the administration of justice.<sup>103</sup> It guarantees an accused person three rights: to defend himself or herself in person, to defend themselves through legal assistance of their choice, and on certain conditions, to be given free legal assistance. Generally, free legal assistance is dependent on the interest of justice and insufficient means to procure the services of counsel. However, the term 'interest of justice' is vague and there are no generally accepted established criteria to determine if it is in the interest of justice that an accused person be given legal aid; thus, leaving the right to legal assistance open to abuse.

<sup>98</sup> eg this is the case in Kenya (W Mutunga *The Rights of an Arrested and an Accused Person* (OUP Press Nairobi 1990) 57).

<sup>99</sup> Guideline N(6)(c)(3), African Commission's principles and guidelines.

<sup>100</sup> Guideline N(6)(c)(2), African Commission's principles and guidelines.

<sup>101</sup> *Mbenge v Zaïre* (n 80) para 14.1.

<sup>102</sup> *ibid*, paras 14.1–14.2.

<sup>103</sup> M Finkelstein *The Right to Counsel* (Butterworths Toronto 1988) 1-1.

The constitutions of some African States explicitly provide that an accused person be provided with legal representation at State or public expense if he or she cannot afford one. For example, Article 20(5) of the Constitution of Ethiopia 1995 provides that if an accused cannot afford legal counsel and miscarriage of justice will result, the accused has to be provided with legal representation at the expense of the State.<sup>104</sup> Article 24(3)(d) of the Constitution of The Gambia 2001 is more specific as it states that if an accused is charged with a capital offence, the accused shall be entitled to legal representation at the expense of the State.<sup>105</sup>

In addition, the UN Human Rights Committee has stated that in capital trials 'unavailability of legal aid amounts to a violation of Article 6 *juncto* Article 14 of the Covenant'.<sup>106</sup> Unavailability of legal aid will also amount to a violation of Article 7(1)(c) of the African Charter. However, as seen below, capital trials have been conducted in some African States in which the accused had no legal representation, was refused one, or was provided with inadequate defence counsel.

It is undisputable that capital trials are very expensive and that most people charged with capital offences cannot afford the fees of experienced counsel. As a result, they are assigned inexperienced counsel or article clerks who are not well versed with the issues in capital trials. Without effective representation, an accused can hardly be said to have had a fair trial.<sup>107</sup> For example, in 2003 in Sudan, 24 people were sentenced to death by a Special Court, in which they were tried without adequate legal representation.<sup>108</sup> This constitutes a violation of Articles 6 and 14 of the ICCPR and Article 7(1)(c) of the African Charter.

Furthermore, the right of an accused person to legal assistance entitles the accused to proper defence. The African Commission's principles and guidelines provide that the lawyer appointed shall be qualified to represent and defend the accused and shall have the necessary training and experience corresponding to the nature and seriousness of the matter.<sup>109</sup> The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has reiterated

<sup>104</sup> See also, Art 42 (2)(f)(v) of the Constitution of Malawi 2001.

<sup>105</sup> Upon ratification of the ICCPR, The Gambia entered a reservation in respect of Art 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' (Heyns (n 10) 53. Art 28(3)(e) of the Constitution of Uganda 1995 has a similar provision with regard to capital offences.

<sup>106</sup> Concluding observations of the Human Rights Committee on the second periodic report of Jamaica submitted under Art 40 of the ICCPR, UN Doc CCPR/C/79/Add 83 (19 Nov 1997) para 14.

<sup>107</sup> J Hatchard and S Coldham 'Commonwealth Africa' in P Hodgkinson and A Rutherford (eds) *Capital Punishment: Global Issues and Prospects* (Waterside Press Winchester 1996) 164.

<sup>108</sup> Amnesty International 'Sudan: 24 sentenced to death after unfair trial' AI Index: AFR 54/027/2003 (29 Apr 2003). Also, in Nigeria, a *Shari'a* court in Bauchi sentenced Jibrin Babaji to death by stoning on 14 Sept 2003 after a trial in which he was not represented by a lawyer (*Amnesty International Report* (Amnesty International Secretariat London 2004) 68).

<sup>109</sup> Guideline H(e)(1) and (2), African Commission's principles and guidelines.

that 'all defendants facing the imposition of capital punishment have to benefit from the services of a competent defence counsel at every stage of the proceedings'.<sup>110</sup> However, in some African States like Botswana and Malawi, as seen below, inexperienced lawyers have defended capital offenders.

In Botswana, for example, Kobedi, a South African, was sentenced to death and executed in July 2003 after a trial that did not meet the standards for a fair trial.<sup>111</sup> Kobedi was represented, in his original hearing, by a lawyer who was unfamiliar with trying death penalty cases, and who failed to raise important legal and factual issues on his behalf. Due to the fact that his lawyer did not have the necessary training and experience corresponding to his case, Kobedi could, therefore, not be said to have benefited from the services of a competent defence counsel at every stage of the proceedings as required under international human rights law.

Likewise, in Malawi, some defence lawyers are inexperienced, and lack the necessary resources to enable them prepare their cases. By 2002 the Malawi Legal Aid Department had seven lawyers, including three new graduates with no experience in handling capital cases.<sup>112</sup> The lawyers lack up to date law books, have problems with transport, and have neither the time nor budget for tracing and interviewing witnesses.<sup>113</sup> These lawyers cannot be said to be in a position to offer proper defence.

In addition, the remuneration given to some defence lawyers affects their ability and commitment to effectively defend an accused person, thus not fully affording an accused person the right to legal assistance and proper defence. In *Republic v Mbushuu and Another*, it was stated that most poor persons in Tanzania do not obtain good legal representation, as lawyers on dock briefs who are paid very little defend them. As a result of such poor remuneration, the defence counsel may not exert enough effort in such a case.<sup>114</sup> Thus, it is likely that most poor persons in Tanzania charged with a capital offence will get the death sentence. In such cases, the defendants' right to legal assistance and proper defence is violated. Similarly, due to resource constraints in Botswana, the amount paid to state-funded lawyers is minimal, and often, the result is that lawyers who lack the skills, resources and commitment to handle such serious matters handle most *pro deo* cases.<sup>115</sup>

<sup>110</sup> Report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN Doc E/CN.4/1997/60 (24 Dec 1996) para 81.

<sup>111</sup> Hands Off Cain *The Death Penalty Worldwide: 2004 Report* (Quaderni Radicali Rome 2004) 37–8.

<sup>112</sup> 'The quality of justice: Trial observations in Malawi' <[http://www.penalreform.org/english/dp\\_malawi.htm](http://www.penalreform.org/english/dp_malawi.htm)>.

<sup>113</sup> *ibid.*

<sup>114</sup> *Republic v Mbushuu and Another* (1994) 2 LRC 349, 353.

<sup>115</sup> 'Death penalty in Botswana' <<http://www.ditshwanelo.org/bw>>.

*G. The right to appeal to a higher judicial body*

An accused person has the right to appeal against his or her conviction or sentence or both. The right to appeal is provided for in Article 7(1)(a) of the African Charter and Article 14(5) of the ICCPR. ECOSOC safeguard No 6 requires that anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals become mandatory. This right is also provided for in the national constitutions of most African States.<sup>116</sup> The right to appeal or review to a higher court at the minimum implies the opportunity to have adequate re-appraisal of every case and an informed decision on it.<sup>117</sup> Of relevance in deciding whether denial of the right to appeal constitutes a violation of Article 7(1)(a) of the African Charter, is the severity of the sentence.<sup>118</sup> Thus, denial of the right to appeal in capital trials will amount to a violation of the above provision due to the severity of the death sentence.

Despite the above provisions, in some African States, there is no automatic right of appeal, while in others, there is no provision in some cases for a formal appeal with sentences merely being confirmed or otherwise by a higher body.<sup>119</sup> As noted above, the African Commission has found the procedure in special tribunals in Nigeria, where sentences are subject to confirmation or disallowance by the governor of a state, with no provision for judicial appeal against the decisions of the tribunals or where courts are prohibited from reviewing any aspect of the operation of such tribunals, to constitute a violation of the African Charter.<sup>120</sup> From the Commission's decision, it is clear that the governor of a state is not a higher judicial body or 'competent national organ' (as used in the African Charter). Thus, subjecting sentences to confirmation by such a body or others of similar character cannot be seen as a genuine appeal procedure.

The right to appeal is denied to those convicted of capital offences in other African States. Those who face trial in Egypt before exceptional courts, such as State Security Courts, established under emergency legislation do not have the right to a full review of their sentence before a higher tribunal.<sup>121</sup> In Sierra Leone, people have been tried, convicted and executed after being denied the right to appeal to a higher tribunal, which the African Commission has found to be in breach of Article 7(1)(a) of the African Charter.<sup>122</sup> For instance, in

<sup>116</sup> See eg Art 17(7) of the Constitution of Eritrea 1997, Art 20(6) of the Constitution of Ethiopia 1995, and Art 42(2)(f)(VIII) of the Constitution of Malawi 2001.

<sup>117</sup> *S v Ntuli* (1996) 1 BCLR 141.

<sup>118</sup> *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (n 21) para 13.

<sup>119</sup> Hatchard and Coldham (n 107) 168.

<sup>120</sup> *Constitutional Rights Project (in respect of Akamu and Others) v Nigeria* (n 21) para 13; and *Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria* (n 19) para 11.

<sup>121</sup> Amnesty International (n 56).

<sup>122</sup> Communication 223/98, *14th Annual Activity Report: 2000–2001*; (2000) AHRLR 293 (ACHPR 2000) para 20.

*Forum of Conscience v Sierra Leone*, the execution of 24 soldiers by a Court Martial without the right to appeal was found to be in violation of Article 7(1)(a) of the African Charter, which provides for the right to appeal.<sup>123</sup> Generally, the Commission's decisions emphasize that the right to appeal must be respected in cases involving serious offences.

Furthermore, the death sentence cannot be carried out until the expiration of the time for appeal in some African States, for example, Sierra Leone.<sup>124</sup> In others, despite the existence of a provision for the right to appeal, those convicted of capital offences have been executed without given adequate time to appeal, or despite the fact that they were still trying to appeal, or their appeals were still pending. The above amounts to a violation of the right to appeal. In *Mansaraj and Others v Sierra Leone*,<sup>125</sup> the Human Rights Committee found a violation of Article 14(5) of the ICCPR because the complainants did not have a right to appeal the conviction by a court martial, *a fortiori* in a capital case. ECOSOC safeguard No 8 prohibits execution where an appeal against the death sentence is pending or an appeal for pardon or commutation of sentence is pending. Yet, in Chad, for example, four men sentenced to death on 25 October 2003 after a three-day trial, were executed while the defence counsel was trying to appeal the sentence.<sup>126</sup> This does not only amount to a denial of the right to appeal, but also a violation of the right to a fair trial.

#### *H. The right to seek pardon or commutation*

Pardon (clemency) or commutation is the last hope for a prisoner under sentence of death. It 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.

In most States, pardon or commutation is 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.<sup>127</sup> In Libya, general amnesties are

<sup>123</sup> *ibid.* See also, *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (n 24) para 93.

<sup>124</sup> Report of the national coordinator of Sierra Leone (n 39).

<sup>125</sup> Communications 839/1998, 840/1998, and 841/1998, UN Doc CCPR/C/72/D/839/1998 (30 July 2001) para 5.6.

<sup>126</sup> 'Chad: First executions by firing squad in more than a decade' <[http://www.irinnews.org/report.asp?ReportID=37687&SelectRegion=West\\_Africa&SelectCountry=CHAD](http://www.irinnews.org/report.asp?ReportID=37687&SelectRegion=West_Africa&SelectCountry=CHAD)>.

<sup>127</sup> Initial report of Zimbabwe submitted under Art 40 of the ICCPR, UN Doc CCPR/C/74/Add 3 (29 Sept 199), paras 68–70.

proclaimed by the 'General People's Congress'.<sup>128</sup> 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.

The right to seek pardon or commutation is guaranteed under Article 6(4) of the ICCPR and ECOSOC safeguard No 7. Furthermore, 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'.<sup>129</sup> This right is also provided for in national constitutions and laws of African States. In Congo, a person sentenced to death may not be executed unless the president has refused to grant a pardon.<sup>130</sup> 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.<sup>131</sup> Also, Article 121(4) of the Constitution of Uganda 1995, dealing with the prerogative of mercy, gives the president the power, on the advice 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.<sup>132</sup> 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.<sup>133</sup> The extent to which this discretion is exercised is questionable. Further, 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, for example in Zambia, the president controls the whole process. He appoints

<sup>128</sup> Third periodic report of Libya submitted under Art 40 of the ICCPR, UN Doc CCPR/C/102/Add 1 (15 Oct 1997) para 129.

<sup>129</sup> ECOSOC Res 1989/64, 24 May 1989, Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, para 1(b).

<sup>130</sup> Second periodic report of Congo submitted under Art 40 of the ICCPR, UN Doc CCPR/C/63/Add 5 (5 May 1997) para 19.

<sup>131</sup> Third periodic report of Tanzania submitted under Art 40 of the ICCPR, UN Doc CCPR/C/83/Add 2 (7 Oct 1997) para 49.

<sup>132</sup> The only successful appeal during the past five years is that of Nassur, who had been on death row for 20 years, and was pardoned by the president in 2001. Initial report of Uganda (n 57) para 139–40.

<sup>133</sup> 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 (Third periodic report of Libya (n 128) para 129. 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 (s 38(1) of the Penal Code of Sudan 1991).

members of the Advisory Committee on the prerogative of mercy, is entitled to preside at its meetings and determine the procedure.<sup>134</sup> 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.<sup>135</sup> 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.<sup>136</sup>

Respect for the right to pardon or clemency ensures that any possible errors in the trial are corrected, thus, reducing the risk of executing the innocent. However, in practice, there is very little information as to the extent to which the prerogative is exercised, since the process is shrouded in secrecy. Reports prepared are confidential in, for example, Zimbabwe, Zambia and other countries in southern Africa.<sup>137</sup> Such secrecy allows for arbitrariness in the exercise of clemency and disparity in the granting of pardon or clemency. It is possible that innocent persons that are convicted and sentenced to death may not be able to exercise this right to correct such wrong conviction due to the arbitrariness and disparity in the whole process. There is, therefore, the need for the clemency process to be more accountable.

#### VI. CONCLUSION

Fair trial rights have, observably, been provided for at the international and national levels. Their imperative nature has been emphasized by various human rights bodies—the UN Human Rights Committee, the European Court, the Inter-American Commission and Court, and the African Commission. The above bodies have also adopted a similar approach with regard to the relation between fair trial rights and the right to life, finding the imposition of the death penalty after an unfair trial to constitute a violation of the right to life.

Considering the irreversible nature of the death penalty, it is of grave concern that the death penalty is continuously being used without respect for fair trial rights, without any guarantee that judicial error or arbitrariness in its imposition can be eliminated. There have been reports of persons from countries in Africa, for example, Malawi, being released from prison, sometimes after many years in custody, on the grounds of their innocence.<sup>138</sup> Also, persons have been sentenced to death in Uganda and released after many years on grounds of their innocence. For example, Mpagi was on death row for 19 years in Luzira Maximum Security Prison for murder. It later turned out that the man he was accused of murdering was alive. Mpagi said court officials

<sup>134</sup> Hatchard and Coldham (n 107) 169. Also in Kenya and Tanzania.

<sup>135</sup> *ibid* 169. See also Initial report of Zimbabwe (n 127) para 68–71.

<sup>136</sup> Third periodic report of Togo submitted under Art 40 of the ICCPR, UN Doc CCPR/C/TGO/2001/3 (5 July 2001) para 110.

<sup>137</sup> Hatchard and Coldham (n 107) 169.

<sup>138</sup> R Hood *The Death Penalty: A worldwide perspective* (OUP New York 2002) 132.

refused to try him in the district where the murder was alleged to have been committed. His conviction was the result of an irresponsible justice system and indifferent investigators.<sup>139</sup>

Notwithstanding, due to the imperfections inherent in criminal trials, it is difficult or almost certainly not possible to design a system that avoids arbitrariness, judicial error and delays in carrying out the death sentence. These imperfections include the lack of rights consciousness among lawyers, the public at large and, in some instances, in the judiciary and the state organs, inadequate training of police officers, lawyers and judges, lack of resources to carry out proper and swift investigations, understaffed and under funded courts, and failure of the legal system as a whole. In *S v Makwanyane*, Justice Chaskalson acknowledged the fact that such arbitrariness cannot be eliminated completely, as it is difficult or almost certainly not possible to design a system that avoids arbitrariness and delays in carrying out the sentence.<sup>140</sup>

Therefore, African States have to take steps to remedy shortcomings in the administration of justice. Judges and lawyers have to be given effective legal training, so that they can apply and use fair trial standards appropriately. The Human Rights Committee, noting that the provisions of the ICCPR have not been invoked in any case before the Constitutional Court or ordinary courts in Togo, recommended that training be provided for judges, lawyers and court officers concerning the content of the ICCPR and other human rights instruments.<sup>141</sup> Availability of resources for the conduction of investigations will help prevent delays in capital trials. It is also important that national fair trial standards that are not in conformity with international standards be revised so as to ensure such conformity. Overall, there is the need for empirical research to establish not only the nature and magnitude of the problems but, more importantly, to find solutions based on a thorough research leading to a political decision on the abolition of the death penalty.

<sup>139</sup> 'Foes of death penalty making gradual gains in Africa' *The New York Times* (New York 20 Oct 2004).

<sup>140</sup> *Makwanyane* 1995 (3) SA 391 (CC) paras 54–5.

<sup>141</sup> Concluding observations of the Human Rights Committee on the third periodic report of Togo submitted under Art 40 of the ICCPR, UN Doc CCPR/CO/76/TGO (28 Nov 2002) para 7.

