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**THE INFLUENCE OF INTERNATIONAL HUMAN RIGHTS LAW ON THE
USE AND ABOLITION OF THE DEATH PENALTY IN SUB-SAHARAN
AFRICA**

A thesis submitted to

Kent Law School

University of Kent

in fulfilment of the requirements for the

degree of LLM Law

by

Oluwatosin Olawale Popoola

June 2018

Thesis word count: 39,852

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LIST OF ABBREVIATIONS

AMERICAN COVENTION - American Convention on Human Rights

AFRICAN CHARTER - African Charter on Human and Peoples' Rights

AFRICAN COMMISSION - African Commission on Human and Peoples' Rights

AHRLJ - African Human Rights Law Journal

AI - Amnesty International

All ER - All England Reports

AU - African Union

CA - Court of Appeal

CC - Constitutional Court

CCPR - UN Human Rights Committee

Comp. & Int'l L.J. S. Afr. - The Comparative and International Law Journal of Southern Africa

CRC - Convention on the Rights of the Child

DOC - Document

ECHR – European Convention on Human Rights

ECOSOC - Economic and Social Council

ECOWAS - Economic Community of West African States

ETS - European Treaties

HRC – Human Rights Council

ICC - International Criminal Court

ICCPR - International Covenant on Civil and Political Rights

ICCPR-OP2 - Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty

ICJ - International Court of Justice

ICTR - International Criminal Tribunal for Rwanda

ICTY - International Criminal Tribunal for the Former Yugoslavia

IGO – Inter-Governmental Organisation

ILM - International Legal Materials

NGO - Non-Governmental Organisation

OAS - Organisation of American States

OAU - Organisation of African Unity

SC - Supreme Court

SPECIAL COURT - Special Court for Sierra Leone

UDHR - Universal Declaration of Human Rights

UN - United Nations

UNCHR - United Nations Commission on Human Rights

UNGA - United Nations General Assembly

UNTS - United Nations Treaty Series

UPR - UN Human Rights Council's Universal Periodic Review

VOL - Volume

ACKNOWLEDGEMENTS

I express my immense gratitude to Professor Nicholas Grief who supervised my writing of the thesis. Professor Grief's expertise, wisdom and care guided me through the study and regularly boosted my morale. Without his support, encouragement and remarkable patience, particularly during difficult personal circumstances, I would not have completed this study. I also acknowledge the valuable feedback of Dr Nicola Barker and Dr Julie McCandless during the writing of the thesis. Finally, I thank my wife, Dr Adetutu Popoola, for her encouragement and support.

CHAPTER 1

Introduction

This study investigates the extent to which international human rights law has influenced the law and practice of sub-Saharan African countries on the death penalty. The study is divided into five chapters with three chapters focusing on three major death penalty thematic areas: imposition of a death sentence, clemency and abolition. The three areas are important elements of the death penalty and are indispensable in the exploration of the subject. Imposition of a death sentence is important because it constitutes the start of the process of the use of the death penalty. Clemency, which provides reprieve in death penalty cases, is a vital connecting theme between the imposition of a death sentence and its implementation. Abolition is an indispensable theme as it deals with the legal prohibition of the death penalty.

The study examines the influence of international human rights law in the context of the absence of an African regional human rights treaty on abolition, the silence of the African Charter on Human and Peoples' Rights (African Charter)¹ on the death penalty and the limited restrictions on the use of the death penalty in existing African human rights instruments.

The fact that a country's law or practice is consistent or aligns with international human rights law does not of itself prove that the latter has influenced the former. Therefore, in this study, 'influence' is taken to mean the discernible effect of international human rights law on sub-Saharan African countries to restrict the use or abolish the death penalty. The 'use of the death penalty' is taken to mean either the imposition of a death sentence or the carrying out of execution, while abolition is taken to mean the legal prohibition of the death penalty.

The study is not a country-by-country analysis of the current situation regarding the death penalty in sub-Saharan Africa, but an exploration of the human rights legal approaches

¹ OAU Doc CAB/LEG/67/3 rev. 5. The African Charter was adopted on 27 June 1981 and entered into force on 21 October 1986, it currently has 53 States Parties. South Sudan is a signatory but not yet a party.

taken by certain African countries to restrict the use or abolish the death penalty. The scope of the study is limited to countries in sub-Saharan Africa² because the region has the potential to completely abolish the death penalty.³ It focuses on the following countries, with reference to the three themes explored in the study: Benin, Ghana, Kenya, Madagascar, Malawi, Nigeria, Rwanda, Sierra Leone, South Africa, Zambia. These countries have been selected because of their developed jurisprudence on human rights and the death penalty; and are representative of the different sub-regions of sub-Saharan Africa. The study critically evaluates executive and legislative decisions and court judgments on the death penalty in the selected countries. Although the study focuses on those countries, reference will be made to examples and practices in other sub-Saharan African countries to support various arguments made in the exploration of the three themes.

1.1 Review of academic literature on the death penalty in Africa

Academic literature on the death penalty in Africa is limited. This study therefore seeks to make a contribution to existing literature by analysing the influence of international human rights law on the use and abolition of the death penalty in sub-Saharan Africa.

There are two main books dealing with the global use of the death penalty: William Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, Cambridge University Press 2003) and Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford University Press 2015). Both texts explore the global use of the death penalty but with limited focus on Africa. While Schabas's work requires updating, the recent edition of Hood and Hoyle's work is relatively up to date on global trends but still lacks an African perspective on the death penalty.

Four main books deal with the death penalty in Africa: Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (Pretoria, Pretoria

² According to the UN, there are 49 countries in sub-Saharan Africa; they exclude North Africa which is comprised of Algeria, Egypt, Libya, Morocco, Tunisia, Western Sahara. <<https://unstats.un.org/unsd/mi/africa.htm>> assessed 20 June 2018.

³ Amnesty International (AI), *Death Sentences and Executions 2017* (ACT 50/7955/2018).

University Law Press 2007); Andrew Novak, *The Death Penalty in Africa: Foundations and Future Prospects* (Palgrave Macmillan 2014); Aime Muyoboke Karimunda, *The Death Penalty in Africa: The Path Towards Abolition* (Routledge 2016); and Andrew Novak, *The African Challenge to the Global Death Penalty Abolition; International Human Rights Norms in Local Perspective* (Intersentia 2016). Nowak's latest work on the death penalty in Africa explores the African contribution to the global death penalty debates and lessons for the international death penalty abolition movement by using eight sub-Saharan African countries as case studies. Karimunda's work discusses the historical and cultural background of the death penalty in Africa. Nowak's earlier work examines the death penalty in Africa within a historical, cultural and political context, devoting only one chapter to the modern use of the death penalty in Africa and with very limited human rights perspective and analysis. Chenwi's work on the death penalty in Africa relies on United Nations (UN) and African regional human rights instruments, national laws and court judgments to analyse an emerging international trend towards the abolition of the death penalty in the African context, with specific focus on history; the right to life and fair trial; and the prohibition of cruel, inhuman or degrading treatment or punishment. However, Chenwi's work is about 11 years old and does not reflect the recent trends on the death penalty in Africa.

In addition, there have been some journal articles written on the death penalty in Africa: Peter Norbert Bouckaert, 'Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa' (1996) 32 *Stan. J. Int'l L.* 287; Dirk van Zyl Smit, 'The Death Penalty in Africa' (2004) 4 *AHRLJ* 3; Lilian Chenwi, 'Breaking New Ground: The Need for a Protocol to the African Charter on the Abolition of the Death Penalty in Africa' (2005) 5 *AHRLJ* 89; Audrey Boctor, 'The Abolition of the Death Penalty in Rwanda' (2009) 10 *Hum Rights Rev* 99; Andrew Nowak, 'The Abolition of the Mandatory Death Penalty in Africa: A Comparative Constitutional Analysis' (2012) *Ind. Intl & Comp. L. Rev.* 267; Lilian Chenwi, 'Initiating Constructive Debate: Critical Reflection on the Death Penalty in Africa' (2012) 38 *Comp. & Int'l L.J. S. Afr.* 474 (2005); and Sigall Horovtiz, 'International Criminal Courts in Action: The ICTR's Effect on Death Penalty and Reconciliation in Rwanda' (2016) 48 *The Geo. Wash. Int'l L. Rev.* 505.

Bouckaert in his article examines the history of the death penalty in South Africa and highlights the process of abolition through judicial review. Van Zyl Smit's article analyses the extent to which the death penalty is an issue to be concerned about in Africa, the restriction on the death penalty and how the restrictions can be strengthened. Chenwi's earlier article addresses the necessity of an African treaty on the abolition of the death penalty considering the international human rights developments and trends towards the abolition of the death penalty. Boctor's article appraises the process of abolishing the death penalty in Rwanda, emphasizing the political and legislative steps taken by the authorities in Rwanda in that regard, and the involvement of the International Criminal Tribunal for Rwanda (ICTR). Nowak's article presents a comparative constitutional analysis of the abolition of the mandatory death penalty by the Constitutional Court of Malawi and the Court of Appeal of Kenya; however, the article requires updating considering recent judicial development in Kenya. Chenwi's latest article considers the need for a constructive debate on the death penalty in Africa. Her article examines the African Commission's stance on the death penalty and evaluates the use of the death penalty in Africa by 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. Lastly, Horovtiz uses qualitative empirical research method in his article to indicate how the ICTR influenced the abolition of the death penalty in Rwanda and reflects on the impact of the abolition on national reconciliation.

1.2 Structure and research methodology

Chapter one is the introduction which lays the foundation of the thesis. It provides a review of academic literature on the death penalty in Africa, states the general plan and methodology of the study, highlights the origin of the death penalty in Africa, explains why the study matters, explores why the African Charter is silent on the death penalty, provides an overview of international human rights law on the death penalty, and traces the progress on the death penalty in the African regional human rights system. Chapter two analyses the influence international human rights law has had on certain countries in sub-Saharan Africa. In Chapter three the study explores clemency, which is the only legal option available after a death sentence has been confirmed by an appellate court, appeal

rights have been exhausted or following a lack of appeal. The chapter determines the extent to which international human rights law has influenced the use of the death penalty through the granting of clemency in sub-Saharan Africa. Chapter four focuses on abolition, a theme which is key to the ultimate prohibition of the death penalty. The chapter demonstrates the extent to which international human rights law has influenced the abolition of the death penalty in sub-Saharan Africa. Chapter five, which is the concluding chapter, sums up the study by evaluating the extent to which international human rights law has influenced the use and abolition of the death penalty in sub-Saharan Africa.

The study adopts a doctrinal legal framework in its examination of the extent to which international human rights law has influenced the use and abolition of the death penalty in sub-Saharan Africa. The framework incorporates human rights arguments and a comparative approach in the context of sub-Saharan Africa. The study will analyse international human rights instruments, the decisions and statements of UN treaty bodies and African regional human rights instruments. The analysis for the thesis will be drawn from books, journal articles, reports of non-governmental organisations (NGOs) and inter-governmental organisations (IGOs), UN documents, relevant national laws and the decisions of national and international courts. The study is limited mostly to materials in English which have been published or are available online; some materials in French have been translated into English.

1.3 Origins of the death penalty in Africa

The use of death as a form of punishment in Africa dates back to pre-colonial times. Sorcery or witchcraft, wilful murder, treason and certain types of political offences were punished with the execution of the ‘guilty’ person.⁴ Over the years, some African legal experts have opined that the use of death to punish crimes in pre-colonial Africa did not constitute the death penalty. They appear to suggest that the use of the death penalty began with the advent of colonialism in Africa. Chenwi has argued that it is problematic to consider the pre-colonial practice as the death penalty because there is no strong evidence

⁴ Taslim Elias, *The nature of African customary law* (Manchester University Press 1956) 260.

to indicate that the death penalty was institutionalised in pre-colonial African society.⁵ She contends that the death penalty system as it exists today was introduced by the colonial powers and is not what was practised in pre-colonial times.⁶ In *S v. Makwanyane and Another*, Justice Sachs argued that the death penalty was not used, at least for murder, in pre-colonial African societies.⁷ Kinemo in his work on Tanzania's penal policy has argued that hanging was not known to Africa and was introduced through colonialism.⁸

These views portray the death penalty as an import of colonialism to Africa. In their assessment, those scholars appear not to consider the main element of the death penalty, which is the use of death by the authorities of a jurisdiction, as punishment for certain crimes. This element remains constant whether or not the authority is colonial. In fact, there is sufficient evidence to indicate that, even before the advent of colonialism, death was used as punishment for certain crimes in Africa.⁹ In pre-colonial North Africa, the death penalty was used against slaves who tried to escape or were disruptive,¹⁰ and in Ancient Egypt death sentences were imposed for murder, violation of tombs, treason and attempting to kill the Pharaoh.¹¹ In pre-colonial sub-Saharan Africa there are also examples of the use of the punishment. In Rwanda, death was used as punishment for incest and murder.¹² The Akan people of Ghana and Cote d'Ivoire, and the Ba-Mbala ethnic group of the Democratic Republic of Congo imposed death sentences for treason.¹³ Among the Nandi people in East Africa, witchcraft was punished with death.¹⁴ The Bira

⁵ Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (Pretoria, Pretoria University Law Press 2007) 19.

⁶ Ibid.

⁷ *S v. Makwanyane and Another* 1995 (3) SA 391 (CC), paras 377-381.

⁸ Ross E.J. Kinemo, 'Contemporary Tanzanian Penal Policy: A Critical Analysis' (Naivasha: British Institute in East Africa) 23-24.

⁹ Elias (n 4); Andrew Novak, *The Death Penalty in Africa: Foundations and Future Prospects* (Palgrave Macmillan 2014) 9-23, Aime Muyoboke Karimunda, *The Death Penalty in Africa: The Path Towards Abolition* (Routledge 2016).

¹⁰ Norman Bennett, 'Christian and Negro Slavery in Eighteenth Century North Africa' (1960) 1 *The Journal of African History* 66,68,80.

¹¹ Karimunda (n 9) 26-28.

¹² Novak (n 9) 16.

¹³ Karimunda (n 9) 17.

¹⁴ Geoffrey S Snell, *Nandi Customary Law* (Nairobi, East African Literature Bureau 1954) 77.

and Mangbetu ethnic groups of the DRC and the Baganda in Uganda imposed death sentences for adultery.¹⁵ The fact that the pre-colonial authorities in African societies used death as punishment in a manner and under a legal system different from the colonialists' should not preclude these pre-colonial practices from being regarded as constituting the death penalty. In effect, the practices in both eras involved the imposition of death sentences and the carrying out of executions for crimes for which a person was adjudged guilty by the authorities of the time.

1.4 The importance of this research

While the origins of the death penalty in Africa may be subject to debate, its use in modern-day Africa cannot be denied. The death penalty remains entrenched in the laws of many sub-Saharan African countries. Of the 49 countries in sub-Saharan Africa 21 have abolished the death penalty for all crime.¹⁶ The remaining 28 countries, a majority (57 per cent), have not abolished the death penalty at all. The fact that the majority of countries in sub-Saharan Africa retain the death penalty in their laws is an issue which one should be concerned about. There are at least three reasons for this and why this research matters. First, the majority of countries in the world have abolished the death penalty for all crimes,¹⁷ yet the majority of countries in sub-Saharan Africa still retain the punishment in law contrary to international trends. Secondly, while people who commit serious crimes in 21 countries in sub-Saharan Africa are completely protected against the death penalty, those in the other 28 countries are not and could be deprived of their lives by law. This creates a kind of lottery with regard to respect for the right to life in sub-Saharan Africa. Thirdly, as Van Zyl Smit has argued, the death penalty may be capriciously applied to people in Africa by the state.¹⁸ The resumption of executions by some countries in sub-Saharan Africa in recent times makes this argument no less valid

¹⁵ Karimunda (n 9) 22-23

¹⁶ Amnesty International (AI), *Abolitionist and Retentionist Countries as of March 2018* (ACT 50/6665/2017); Associated Press, 'Burkina Faso abolishes death penalty in new penal code' AP (Ouagadougou, 31 May 2018) <<https://www.apnews.com/15b6e4f6a4a54af29e74e4e3d45a7bb6>> accessed 26 June 2018. Burkina Faso recently became the 21st country in sub-Saharan Africa to abolish the death penalty when Parliament adopted a new Penal Code on 31 May 2018 which excludes the use of the death penalty as a punishment for crimes.

¹⁷ AI (n 3) 5.

¹⁸ Dirk van Zyl Smit, 'The death penalty in Africa' (2004) 4 *African Human Rights Law Journal* 3.

and relevant today. In the last 7 years, countries like Botswana, Chad, Gambia and Nigeria have suddenly resumed executions of people sentenced to death after a period of not carrying out executions.¹⁹

The African Charter, Africa's main international human rights instrument, appears weak in addressing the highlighted concerns, despite expressly protecting the right to life. Article 4 provides: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'²⁰ However, the African Charter is completely silent on the death penalty. The reasons for this will now be considered, with reference to the Charter's drafting history.

1.4 The African charter and its silence on the death penalty

The African Charter was born out of the desire of African States to establish a regional human rights instrument for Africa.²¹ The momentum that led to the eventual creation of the African Charter began in 1961 when an African Conference on the Rule of Law, comprising legal experts from across Africa, was organised by the International Commission of Jurist in Lagos, Nigeria.²² The Conference passed a resolution known as the Law of Lagos which declared the need to establish a mechanism for the protection of individuals.²³ The resolution also called on African governments to adopt an African convention on human rights with a court and a commission, but unfortunately African governments at the time did not support the idea.²⁴ In addition, in 1969, the UN in collaboration with the United Arab Emirates convened a seminar in Cairo, Egypt to study the feasibility of creating a regional human rights entity with an African mandate.²⁵ In the decade that followed the Seminar, many other fora were facilitated across Africa to

¹⁹ Amnesty International (AI), *Death Sentences and Executions 2015* (ACT 50/3487/2016) 56-58; AI, *Death Sentences and Executions 2016* (ACT 50/5740/2017) 36-38; AI, *Death Sentences and Executions 2012* (ACT 50/001/2013) 41-42.

²⁰ Ibid.

²¹ Richard Gittleman, 'The African Charter on Human and Peoples' Rights: A Legal Analysis' (1982) 22:4 *Virginia Journal of International Law*.

²² Ibid, 668.

²³ International Commission of Jurist, *African Conference on the Rule of Law, Lagos, Nigeria, Jan. 3-7, 1961: A Report on the Proceedings of the Conference* 11 (1961).

²⁴ <<http://www.achpr.org/instruments/achpr/history/>> accessed 27 December 2017.

²⁵ UN Doc ST/TAO/HR/39.

discuss human rights protection mechanisms in Africa.²⁶

By 1979, the desire of African States to establish an African regional human rights instrument had become fully entrenched. In July of that year, during an Organisation of African Unity (OAU) summit of African leaders in Monrovia, Liberia,²⁷ the Assembly of Heads of States and Government of the OAU, through a resolution, requested the Secretary-General of the OAU to convene a committee of experts to draft an Africa regional human rights instrument.²⁸ The resolution stated:

The Assembly reaffirms the need for better international cooperation, respect for fundamental human rights and peoples' rights and in particular the right to development ... The Assembly calls on the Secretary-General to:

(b) organise as soon as possible, in an African capital, a restricted meeting of highly qualified experts to prepare a preliminary draft of an "African Charter on Human and Peoples' Rights" providing inter alia for the establishment of bodies to promote and protect human and peoples' rights.²⁹

In implementation of the resolution, the Secretary-General convened a conference of twenty appointed African legal experts in Dakar, Senegal from 28 November to 8 December 1979. The experts were headed by Honourable Judge Keba Mbaye, then President of the Supreme Court of Senegal.³⁰ The objective of the conference was to prepare a preliminary draft of the African human rights instrument based on an African legal philosophy which is responsive to African needs.³¹ Prior to the conference beginning, Judge Mbaye had produced a first draft of the African Charter (the Mbaye

²⁶ Gittleman (n 21) 671-672.

²⁷ The OAU was the political union of all African States which was established on 25 May 1963 in Addis Ababa, Ethiopia; it was replaced by the African Union on 26 May 2001.

²⁸ Fatsah Ouguergouz, *The African Charter of Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy In Africa* (Martinus Nijhoff Publishers 2003) 38-39; <<http://www.achpr.org/instruments/achpr/history/>> accessed 27 December 2017.

²⁹ Res. AHG/Dec.115 (XVI) Rev. 1 1979.

³⁰ Germain Baricako, 'Introductory Preface: The African Charter and African Commission on Human and Peoples' Rights' in Malcolm Evans and Rachel Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice 1986-2006* (2nd edn, Cambridge University Press 2008).

³¹ Gittleman (n 21) 668.

Draft) which served as ‘a working paper for the experts.’³² The Mbaye Draft was mainly drawn from the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR)³³ and the American Convention on Human Rights (American Covention).³⁴ In the opinion of Judge Mbaye, those two instruments ‘contain provisions which could in substantial parts be applied to the peoples of Africa.’³⁵ After 10 days of work the experts fulfilled their mandate by producing a preliminary draft of the African Charter (the Dakar Draft), containing a Preamble and 65 Articles and guided by the principle that the instrument should reflect the African conception of human rights.³⁶ The Dakar Draft was reviewed by the OAU Ministerial Conference at two separate sessions,³⁷ before being adopted unanimously on 17 June 1981 at the 18th OAU Assembly of Heads of States and Government.³⁸

A number of scholars have written about the African Charter, its drafting history and analyzed its Articles, but have not highlighted the absence of the death penalty in their works.³⁹ Three death penalty scholars have rightly identified that the African Charter is silent on the death penalty, but rather than trying to explain why, they have simply drawn

³² Draft African Charter on Human and Peoples’ Rights, OAU Doc CAB/LEG/67/1; it contained a Preamble and 63 Articles.

³³ 993 UNTS 3. The ICESCR was adopted on 16 December 1966 and came into force on 3 January 1976 and currently as 168 States Parties.

³⁴ OAU Doc CAB/LEG/67/1. American Convention, OAS Treaty Series No 36 was adopted on 22 November 1969 and entered into force on 18 July 1978. It currently has 23 States Parties, two countries – Trinidad and Tobago, and Venezuela – denounced the treaty on 26 May 1998 and 10 September 2012 respectively.

³⁵ Ibid.

³⁶ OAU Doc CAB/LEG/67/3/Rev. 1.

³⁷ The first OAU Ministerial Conference, which comprised of African Ministers of Justice, met in Banjul, Gambia from 8 to 15 June 1980. The Ministerial conference was only able to review and approve 11 Articles of the Dakar Draft. The second OAU Ministerial Conference was held in Banjul, Gambia from 7 to 19 January 1980 where the review of the Dakar Draft was completed.

³⁸ Ouguergouz (n 28) 47-48.

³⁹ Gittleman (n 21); Ouguergouz (n 28); Baricako (n 32); Orji Umozurike, ‘The African Charter on Human and Peoples’ Rights’ (1983) 77 *The American Journal of International Law* 902; H.B. Jallow, *The Law of the African (Banjul) Charter on Human and Peoples’ Rights* (Victoria, 2007); E. Kodjo, ‘The African Charter on Human and Peoples’ Rights’ (1990) 11 *Human Rights Law Journal* 271; Orji Umozurike, *The African Charter on Human and Peoples’ Rights* (M. Nijhoff Publishers, 1997); E. Kannyo, ‘The Banjul Charter on Human and Peoples’ Rights: Genesis and Political Background’ in C. E. Welch Jr and R. I. Meltzer (eds.), *Human Rights and Development in Africa* (Albany, State University of New York Press 1984).

various conclusions on how the Charter's position on the death penalty may be interpreted from Article 4.⁴⁰ In that regard, William Schabas and Lilian Chenwi have both argued that an objective analysis of Article 4 is required to determine the death penalty status of the African Charter, and that such an analysis reveals Article 4 as pointing towards abolition as the goal.⁴¹ They have further argued that that analysis should be done in light of Article 60 of the Charter which allows for the drawing of inspiration from international human rights law.⁴² In contrast, Etienne-Richard Mbaya has argued that Article 4 allows for the use of the death penalty as long as it is done in accordance with the law.⁴³ He based his argument on the fact that Article 4 prohibits the arbitrary deprivation of life in the same way as Article 6 of the International Covenant on Civil and Political Rights (ICCPR),⁴⁴ which allows for the use of the death penalty in limited circumstance.⁴⁵

Schabas has stated that a thorough answer cannot be provided to the question of the African Charter's silence on the death penalty because of the paucity of available materials on its drafting history.⁴⁶ This perhaps explains why Schabas made no reference to the Charter's drafting history in his construction of Article 4. However, contrary to Schabas' claim, the available materials on the drafting history do shed light on the reason for the African Charter's silence on the death penalty.

The Mbaya Draft, which was the working draft used by the Committee of Experts, contained provisions on the right to life and the death penalty. Article 17 stated:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of his birth. No one shall arbitrarily be

⁴⁰ William A. Schabas, *The Abolition of the Death Penalty in International Law* (3rd edn, Cambridge, Grotius 2002) 355-361; Chenwi (n 5) 65-68; Etienne-Richard Mbaya, 'A la recherche du noyau intangible dans la Charte africaine' in P Meyer-Bisch (ed), *Le noyau intangible des Droits de l'homme* (Fribourg Suisse 1991) 207-226.

⁴¹ Schabas (n 40) 355-361; Chenwi (n 5) 65-68.

⁴² Ibid.

⁴³ Mbaya (n 40) 221.

⁴⁴ 999 UNTS 171. The ICCPR came into force in 1976 and currently as 177 States Parties.

⁴⁵ Mbaya (n 40) 221.

⁴⁶ Schabas (n 40) 355-361. Chenwi also alluded to Schabas' point by stating that there is 'little interpretative material to assist in construing article 4 of the African Charter.'

deprived of his life. In no case shall capital punishment be inflicted for political offences or related common crimes. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending for decision by the competent authority.⁴⁷

The above provision echoes Article 4 of the American Convention and is evidence of Keba Mbaye's claim that his draft was inspired by the provisions of the American Convention.⁴⁸ Subsequently, however, following the work of the Committee of Experts, the 'right to life' provision in the Dakar Draft was significantly different from that contained in the Mbaye Draft. The provision in the Dakar Draft stated: 'Human beings are sacred. Every human being shall be entitled to respect for his life and to the physical and moral integrity of his person. No one may be arbitrarily deprived of his right.'⁴⁹ All references to the death penalty had been removed by the Committee of Experts and the paragraph had been reduced to just three sentences. Since the records of the Committee's deliberations are not publicly available, the details of the removal of the death penalty provisions cannot be established. Nevertheless, it seems clear that the Committee of Experts intentionally omitted references to the death penalty from the African Charter. Two factors can be advanced to explain their action.

First, the Committee of Experts were determined that the African Charter should be original, and as such they refused simply to replicate or import death penalty provisions from other international instruments. Secondly, the death penalty was not a human rights priority in Africa at the time the Charter was drafted, so its inclusion was considered unnecessary.

Support for these factors can be found in the principle that governed the drafting of the African Charter, which is expressed in the introductory statement of the Committee of Experts to the Dakar Draft:

⁴⁷ OAU Doc CAB/LEG/67/1.

⁴⁸ Article 17 of the Mbaye Draft is identical to Article 4 of the American Convention except for the replacement of 'from the moment of conception' with 'from the moment of his birth'.

⁴⁹ OAU Doc CAB/LEG/67/3/Rev. 1.

It must be pointed out that the preliminary draft was guided by the principle that the African Charter of Human and Peoples' Rights should reflect the African conception of human rights. It was not therefore necessary to copy simply and purely what was done in other regions or at world level. The African Charter should take as a pattern the African philosophy of law and meet the needs of Africa. This idea led to some originality in the contents and presentation of the Charter.⁵⁰

This statement provides an illuminating insight into what influenced the drafting of the African Charter. In the words of Mr Edem Kodjo, the OAU Secretary-General, to 'distinguish the African Charter on Human and Peoples' Rights from the conventions already adopted in other regions.'⁵¹ At this point, the opening address to the Committee of Experts by Leopold Sedar Senghor, the then President of Senegal, is worthy of mention as it laid down the philosophy and defined the governing principle which guided the work of the experts.⁵² President Senghor, among other things, had urged the experts as follows:

As Africans, we shall neither copy, nor strive for originality, for the sake of originality. We must show imagination and effectiveness. We could get inspirations from our beautiful and positive traditions. Therefore, you must keep constantly in mind our values of civilization and the real needs of Africa.⁵³

President Senghor had also emphasized that Economic, Social and Cultural Rights, peoples' rights, and the duties of the individual were essential to a unique African human rights instrument.⁵⁴ He stressed that if Africans were to develop for the future, they would need to assimilate without being assimilated, borrowing from the modern world only things that do not misrepresent African civilization and nature.⁵⁵ With regard to human

⁵⁰ Ibid.

⁵¹ OAU Doc CM/1149.

⁵² Ouguergouz (n 28) 41.

⁵³ OAU Doc CAB/LEG/67/5.

⁵⁴ Ibid.

⁵⁵ Ibid.

rights, he urged the Experts to carefully avoid libertarian freedom, irresponsibility and immorality.⁵⁶ It is therefore not surprising that the content of the Dakar Draft reflected the calls of President Senghor.

In elaborating the first factor mentioned above, it is vital to emphasize one part of the governing principle which guided the drafting of the Africa Charter: ‘It was not therefore necessary to copy simply and purely what was done in other regions or at world level.’⁵⁷ As the death penalty provisions in the Mbaye Draft replicated those of the American Convention verbatim, it seems reasonable to conclude that retaining those provisions in the Dakar Draft would have conflicted with the governing principle to which the Experts had subscribed, hence their removal.

On the second factor, in light of the governing principle, particularly the requirement that ‘the African Charter should take as a pattern the African philosophy of law and meet the needs of Africa’, it would be fair to argue that regulating the use of the death penalty was not considered a human rights priority in Africa at the time. This is evident from the death penalty status of African countries in 1979, when the Charter was being drafted. At that time, no country in Africa had abolished the death penalty for all crimes.⁵⁸ Having had the benefit of seeing the Mbaye Draft, the fact that the Committee of Experts had the opportunity of including provisions restricting the use of or even abolishing the death penalty in Article 4 yet did not do so gives credence to this argument.

In the same context, it is important to note that when the Dakar Draft was reviewed by the OAU Ministerial Conference, the only change made to the wording of Article 4 was the replacement of ‘sacred’ with ‘inviolable’. No delegate raised concerns about the absence of a reference to the death penalty in an article providing for the right to life.⁵⁹ This indicates the unwillingness of African states to limit the use of the death penalty at a time very few countries in the world had completely abolished it⁶⁰ and the ICCPR, the

⁵⁶ Ibid.

⁵⁷ OAU Doc CAB/LEG/67/3/Rev. 1.

⁵⁸ AI, *Abolitionist and Retentionist Countries as of March 2018* (ACT 50/6665/2017).

⁵⁹ OAU Doc CAB/LEG/67/Draft Rapt. Rpt (II) Rev. 4.

⁶⁰ AI (n 58).

binding UN instrument regulating the death penalty, had had relatively few States Parties.⁶¹

1.5 An overview of international human rights law on the death penalty

This section gives an overview of international human rights law on the death penalty. The overview is particularly important to establish a background to the key international human rights law instruments to which this study will refer.

The right to life is protected under international human rights law. The Universal Declaration of Human Rights (UDHR), adopted on 10 December 1948 by the United Nations General Assembly (UNGA),⁶² proclaims that ‘Everyone has the right to life’ and ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’.⁶³ The UDHR is not a treaty which states can sign or ratify. It is a milestone document which for the first time set out fundamental human rights to be universally protected.⁶⁴ In addition, it is generally accepted as evidence of customary international law.⁶⁵ The UDHR lays the foundation for the protection of the right to life under international human rights law but does not mention the death penalty.

The first ever reference to the death penalty in international human rights law was in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁶⁶ which was the first international instrument to give effect to some of the rights stated in the UDHR and make them legally binding. The ECHR guarantees the right to life but makes the death penalty an exception to it. Article 2 of the ECHR states: ‘Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a

⁶¹ <<https://treaties.un.org/pages/showdetails.aspx?objid=0800000280004bf5>> accessed 27 February 2018.

⁶² UNGA Res 217A (III).

⁶³ UDHR, arts 3 and 5.

⁶⁴ <www.un.org/en/universal-declaration-human-rights/> accessed 25 June 2018.

⁶⁵ Hurst Hannum, ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1996) 25 Ga. J. Int’l & Comp. L. 287.

⁶⁶ ETS No 5. The ECHR has 47 States Parties; it was adopted by the Council of Europe in 1950 and came into force in 1953. Since then it has been supplemented or amended by sixteen Protocols.

crime for which this penalty is provided by law’.

In 1966, the ICCPR was adopted by the UNGA.⁶⁷ Article 6(1) ICCPR states: ‘Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life’. The ICCPR effectively gives recognition to the death penalty, but its use is restricted. Article 6(2) ICCPR states: ‘In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime...’.

In 1989 the UNGA adopted the Second Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty (ICCPR-OP2),⁶⁸ which provides that ‘no one within the jurisdiction of a State Party shall be executed’ and commits each State Party to ‘take all necessary measures to abolish the death penalty within its jurisdiction’.⁶⁹ However, Article 2 allows States Parties to retain the death penalty in time of war if they make a reservation to that effect at the time of ratifying or acceding to the Protocol.⁷⁰

Three international treaties, with regional scope, provide for the abolition of the death penalty. Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty, adopted by the Council of Europe in 1982,⁷¹ provides for the abolition of the death penalty in peacetime. States Parties may retain the death penalty for crimes ‘in time of war or of imminent threat of war’.⁷² Any State Party to the ECHR can become a party to Protocol No. 6.⁷³ Also, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted by the General Assembly of the Organization of American States

⁶⁷ See n 44.

⁶⁸ 1642 UNTS 414. ICCPR-OP2 entered into force on 11 July 1991 and currently has 85 States Parties and two signatories.

⁶⁹ ICCPR-OP2, art 1. Any state which is a party to the ICCPR can become a party to the ICCPR-OP2.

⁷⁰ Ibid, art 2(1). According to Article 2(1)(d) of the Vienna Convention on the Law of Treaties 1969 a reservation is ‘a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’.

⁷¹ ETS No 114. Protocol No 6 came into force on 1 March 1985.

⁷² Protocol No. 6 to the ECHR, arts 1 and 2.

⁷³ Article 7. Protocol 6 to the ECHR has 46 States Parties. Russia has signed but not ratified it.

in 1990, provides for the total abolition of the death penalty but allows States Parties to retain the death penalty in wartime if they make a reservation to that effect at the time of ratifying or acceding to the Protocol.⁷⁴ Any State Party to the American Convention can become a party to the Protocol.⁷⁵ The particular weakness of Protocol No. 6 to the ECHR became evident in the years after its adoption. The fact that Protocol No. 6 did not abolish the death penalty for all crimes in time of war or of imminent threat of war made it problematic.⁷⁶ Accordingly, ‘convinced that everyone’s right to life is a basic value in a democratic society’ and ‘wishing to strengthen the protection of the right to life’, the Member States of the Council of Europe ‘resolved to take the final step in order to abolish the death penalty in all circumstances’.⁷⁷ Protocol No. 13 to the ECHR, concerning the abolition of the death penalty in all circumstances, was adopted by the Council of Europe in 2002.⁷⁸ Protocol No. 13 provides for the abolition of the death penalty in all circumstances, including in time of war or of imminent threat of war.⁷⁹ Any State Party to the ECHR can become a party to it.⁸⁰

1.6 Progress on the death penalty in the African regional human rights system

Despite the silence of the African Charter on the death penalty, notable progress on the restriction of the punishment and towards its abolition has been made under the African regional human rights system. It is essential to highlight that progress in order to put the study of the death penalty in sub-Saharan Africa into context. Since the African Charter

⁷⁴ The Protocol to the American Convention, arts 1 and 2. While a reservation like this appears to be incompatible with the Protocol’s object and purpose and therefore not permitted in international law, the fact that the Protocol expressly allows the reservation makes it permissible. See art 19 Vienna Convention on the Law of Treaties 1969.

⁷⁵ Article 3(1). There are 16 States Parties to the Protocol. Azerbaijan and Russia have signed but not ratified it.

⁷⁶ Jon Yorke, ‘The Evolving Human Rights Discourse of the Council of Europe: Renouncing Sovereign Right of the Death Penalty’ in Jon Yorke (eds) *Against the Death Penalty: International Initiatives and Implications* (Farnham Surrey, Ashgate, 2008) 55.

⁷⁷ Protocol No. 13 to the ECHR, preamble.

⁷⁸ ETS No 187. The treaty came into force on 1 July 2003.

⁷⁹ Protocol No. 13 ECHR, art 2. It provides that no derogation shall be made from the Protocol under art 15 ECHR.

⁸⁰ Protocol No. 13 ECHR, art 6. The Protocol has 44 States Parties. Armenia has signed but not ratified it and Azerbaijan and Russia have not signed it.

came into force in 1986, two African human rights treaties have been adopted which limit the use of the death penalty. However, those instruments do not provide for abolition of the death penalty as such. The first, African Charter on the Rights and Welfare of the Child, prohibits the imposition of death sentences on children, expectant mothers, and mothers of infants and young children.⁸¹ The second, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, prohibits the execution of pregnant or nursing women.⁸²

The African Commission on Human and Peoples' Rights (African Commission), the treaty body of the African Charter which was established in 1989,⁸³ has been instrumental in the progress made on the death penalty under the African regional human rights system. The African Commission has the mandate to promote and protect human and peoples' rights and to interpret the provisions of the Charter.⁸⁴ This role is particularly crucial on the subject of the death penalty in light of the African Charter's silence on it. However, the African Commission was rather slow in engaging on the death penalty. The Commission's exercise of its mandate in respect of the death penalty began twenty years after its creation, when it adopted its first resolution on the death penalty in Kigali, Rwanda on 15 November 1999.⁸⁵ The resolution urged States Parties to the African Charter that still maintained the death penalty to: 'fully comply with their obligations under the treaty'; 'ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter'; 'limit the imposition of the death penalty only to the most serious crimes'; 'consider establishing a moratorium on executions of the death penalty'; and 'reflect on the possibility of abolishing the death penalty'.⁸⁶ This represented a significant first step by the African Commission in providing authoritative guidance on the death penalty to State Parties to

⁸¹ OAU Doc CAB/LEG/24.9/49, arts 5(3) and 30(1). The instrument was adopted in 1990 and entered into force on 29 November 1999, it currently has 41 State Parties.

⁸² art 4(2)(g). The instrument was adopted on 11 July 2003 and entered into force on 25 November 2005, it currently has 36 State Parties.

⁸³ <<http://www.achpr.org/about/>> accessed 27 January 2018.

⁸⁴ African Charter, arts 30 and 45.

⁸⁵ ACHPR /Res.42(XXVI)99.

⁸⁶ Ibid, paras 1 and 2(a)(b)(c).

the African Charter. A second resolution on the death penalty was adopted by the African Commission in 2008 in Abuja, Nigeria, calling on State Parties to the African Charter to observe a moratorium on the death penalty and to ratify ICCPR-OP2.⁸⁷

In 2005, the African Commission established a Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary killings in Africa. The Working Group was mandated, among other things, to monitor the use of the death penalty in Africa, to develop plans for abolition and to carry out a study on the death penalty in the region.⁸⁸ On 19 April 2012, the Working Group published its Study on the Question of the Death Penalty in Africa.⁸⁹ The study analyzed views in favour of and against the use of the punishment. It concluded that the abolitionist case was more compelling than the case for retaining the death penalty, and called on State Parties to the African Charter to: ratify the ICCPR-OP2, establish a moratorium on executions and commute all death sentences to terms of imprisonment.⁹⁰ The study appears to have had an impact on the African Commission which, in the last four years, has moved from a position of urging the restriction of the use of the death penalty to one of urging abolition. The African Commission has entrenched its position on abolition of the death penalty on three fronts.

First, following the conclusion of the Continental Conference on the Abolition of the Death Penalty in Africa in Benin in 2014, the African Commission issued the Cotonou Declaration calling on all African Union Member States which retain the death penalty to abolish it and on those which have already abolished it not to reintroduce it.⁹¹

Secondly, the African Commission initiated and drafted a Protocol to the African Charter

⁸⁷ ACHPR/Res.136 (XXXXIII). Fourteen sub-Saharan African countries are State Parties to ICCPR-OP: Benin, Cape Verde, Djibouti, Gabon, Guinea-Bissau, Liberia, Madagascar, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Seychelles, South Africa and Togo. Two sub-Saharan African countries are signatories: Angola and Gambia.

⁸⁸ < <http://www.achpr.org/mechanisms/death-penalty/> > accessed 9 March 2017.

⁸⁹ African Commission, 'Study on the question of the death penalty in Africa', 10 April 2012, adopted by the African Commission at its 50th Ordinary Session (24 October - 07 November 2011).

⁹⁰ Ibid, 52-54.

⁹¹ Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa (the Cotonou Declaration), 4 July 2014.

on the Abolition of the Death Penalty in Africa (Draft Abolition Protocol).⁹² The first article of the Draft Abolition Protocol, provides that: ‘States Parties shall commit themselves to the abolition of the death penalty by taking appropriate legislative, institutional and other measures.’⁹³ In addition, Draft Article 3 requires that: ‘States Parties shall observe a moratorium on the imposition of death sentence and its execution prior to completion of the national legislative process for its legal abolition.’⁹⁴ In 2015, the African Commission presented the Draft Abolition Protocol to the African Union⁹⁵ for adoption, but it is yet to be adopted because the AU Specialized Technical Committee on Legal Affairs (AU-STC) has declined to consider it, citing the lack of a legal basis for doing so.⁹⁶ This justification is weak because the AU-STC does appear to have a legal mandate to consider the draft Protocol. Article 15 of African Union Constitutive Act provides the AU-STC with the legal power to supervise and evaluate the implementation of decisions taken by AU organs, which include the African Commission. Therefore, the AU-STC should at least have considered the Draft Abolition Protocol under Article 15. Unfortunately, the action of the AU-STC has effectively stalled progress on the adoption of the draft Protocol in the AU and it remains to be seen how the impasse will be resolved.

Thirdly, in 2015, the African Commission adopted General Comment No. 3 on the African Charter on the right to life (Article 4).⁹⁷ The General Comment emphasized that: ‘international law requires those States that have not yet abolished the death penalty to take steps towards its abolition in order to secure the rights to life and to dignity, in addition to other rights such as the right to be free from torture, and cruel, inhuman or degrading treatment’.⁹⁸ In addition, in an unprecedented move, the African Commission

⁹² Final Communiqué of the 56th Ordinary Session of the African Commission, 7 May 2015.

⁹³ Draft Abolition Protocol, art 1(2).

⁹⁴ Ibid, art 3.

⁹⁵ The African Union (AU) is the union of countries on the African continent whose objective includes the achievement of greater unity and solidarity between the African countries and the peoples of Africa. The AU replaced the Organisation of African Unity (OAU) on 26 May 2001.

⁹⁶ Amnesty International (AI), *Death Sentences and Executions 2015* (ACT 50/3487/2016) 57.

⁹⁷ Adopted during the 57th Ordinary Session of the African Commission held from 4 to 18 November 2015 in Banjul, The Gambia.

⁹⁸ General Comment No. 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4), para 22.

declared that the African Charter does not include any provision recognising the death penalty, even in limited circumstances, and emphasized its resolutions calling on abolition of the death penalty in Africa.⁹⁹

Nevertheless, the non-binding nature of African Commission resolutions and the limited African regional human rights instruments regulating the death penalty makes the African human rights system weak in regulating the imposition of death sentences. This makes recourse to international human rights law vital. Consequently, the influence international human rights law has had on the imposition of death sentences in sub-Saharan Africa will be examined in the next chapter.

⁹⁹ Ibid.

CHAPTER 2

The Influence of International Human Rights Law on the Imposition of Death Sentences in sub-Saharan Africa

In the last chapter, the notable progress on the death penalty in the African regional human rights system was discussed. Considering the silence of the African Charter on Human and Peoples' Right (African Charter) on the death penalty, this progress indicates positive momentum towards abolition of the death penalty in Africa. However, the remarkably high number of death sentences imposed in sub-Saharan Africa remains a concern. Between 2008 and 2017, a staggering 5,331 death sentences were recorded in sub-Saharan Africa.¹⁰⁰ In 2017 alone, 15 sub-Saharan African countries imposed 878 death sentences.¹⁰¹ The number of death sentences in the region has more than doubled compared to ten years before when 362 death sentences were recorded.¹⁰²

This chapter seeks to establish the influence international human rights law has had on the imposition of death sentences in sub-Saharan African countries. This is important because the imposition of death sentences constitutes the start of the process of the use of the death penalty; accordingly, it is the first crucial step in investigating the extent to which international human rights law has influenced the law and practice of sub-Saharan African countries on the death penalty.

The chapter begins with the examination of the mandatory imposition of death sentences and how two countries – Malawi and Kenya – in sub-Saharan Africa have prohibited it. Then it discusses the Second Optional Protocol to the International Covenant on Civil

¹⁰⁰ Amnesty International (AI), *Death Sentences and Executions in 2008* (ACT 50/003/2009); AI, *Death Sentences and Executions 2009* (ACT 50/001/2010); AI, *Death Sentences and Executions 2010* (ACT 50/001/2011); AI, *Death Sentences and Executions 2011* (ACT 50/001/2012); AI, *Death Sentences and Executions 2012* (ACT 50/001/2013); AI, *Death Sentences and Executions 2013* (ACT 50/001/2014); AI, *Death Sentences and Executions 2014* (ACT 50/001/2015); AI, *Death Sentences and Executions 2015* (ACT 50/3487/2016); AI, *Death Sentences and Executions 2016* (ACT 50/5740/2017); AI, *Death Sentences and Executions 2017* (ACT 50/7955/2018).

¹⁰¹ AI (n 3) 34. The countries and the number of death sentences imposed are: Botswana (4), Democratic Republic of Congo (22), Equatorial Guinea (2), Gambia (3), Ghana (7), Kenya (21), Mali (10), Nigeria (621), Sierra Leone (21), Somalia (24), South Sudan (16), Sudan (17), Tanzania (5), Zambia (94) and Zimbabwe (11).

¹⁰² AI, *Death Sentences and Executions in 2008* (ACT 50/003/2009) 19.

and Political Rights, aiming at the abolition of the death penalty (ICCPR-OP2) and the restriction of the imposition of death sentences in Benin. This is followed by an analysis of the role of international criminal tribunals in limiting the use of death sentences in Rwanda and Sierra Leone.

2.1 Prohibition of mandatory death sentences

International human rights law prohibits the mandatory imposition of death sentences even for the most serious crimes.¹⁰³ Mandatory death sentences take away the power of the courts to consider significant evidence and potentially mitigating circumstances when an individual is sentenced after conviction.¹⁰⁴ It also makes it impossible for the sentence to reflect the different levels of moral reprehensibility of a capital offence.¹⁰⁵ UN experts and human rights treaty monitoring bodies and the Inter-American Court of Human Rights¹⁰⁶ have observed that mandatory death sentences make it certain that the punishment will be imposed on some people despite it not being commensurate considering the circumstances of the crime, as a result individual sentencing is necessary to avoid the arbitrary deprivation of life.¹⁰⁷ Some countries in sub-Saharan Africa, for example Ghana and Nigeria, regularly impose mandatory death sentences.¹⁰⁸ However, developments in Malawi and Kenya indicate that this trend is changing.

In Malawi, treason, rape, murder, armed robbery and burglary are all punishable by death

¹⁰³ UN Doc A/HRC/14/24, para 51(d); UN Doc A/HRC/4/20, paras 55-66; UN Doc CCPR/C/BWA/CO/1, para 13; UN Doc A/67/279 para 59.

¹⁰⁴ Amnesty International, *Fair Trial Manual* (POL 30/002/2014, Second Edition, Amnesty International Publication 2014) 208.

¹⁰⁵ UN Doc E/CN.4/2005/7, 63.

¹⁰⁶ The Inter-American Court of Human Rights is one of two bodies established by the Organization of American States to monitor human rights in the Americas. The other body is the Inter-American Commission on Human Rights.

¹⁰⁷ Special Rapporteur on Extrajudicial Executions: UN Doc E/CN.4/2005/7, paras 63-64; UN Doc A/HRC/4/20, para 55-66; UN Doc CCPR/C/70/D/806/1998, para 8.2. Human Rights Committee: UN Doc CCPR/C/74/D/845/1998, para 7.3; UN Doc CCPR/C/77/D/1077/2002, para 8.3; UN Doc CCPR/C/87/D/1421/2005, para 7.2; UN Doc CCPR/C/98/D/1520/2006, para 6.3. Inter-American Court: *Hilaire, Constantine, Benjamin et al v Trinidad and Tobago*, paras 84-109; *Boyce et al v Barbados*, paras 47-63; *Raxcacó-Reyes v Guatemala*, paras 73-82.

¹⁰⁸ AI (n 3) 8.

following conviction by the court.¹⁰⁹ However, until 2007 only murder was punishable with a mandatory sentence of death.¹¹⁰ This changed when the High Court of Malawi, sitting in its Constitutional Court capacity, prohibited the mandatory imposition of death sentences for murder in *Kafantayeni and Others v. Attorney General*.¹¹¹ This judgment was a landmark one because it ended a long statute-based tradition of imposing death sentences in Malawi.¹¹² Francis Kafantayeni, the plaintiff, was tried for murder of his two-year-old stepson. He admitted the crime but raised the defence of temporary insanity induced by smoking Indian hemp. He was convicted and sentenced to death pursuant to Sections 209 and 210 of the Penal Code. The plaintiff subsequently petitioned the Constitutional Court seeking a declaration that the mandatory death sentence imposed on him was unconstitutional.¹¹³ He was later joined in the suit by five other prisoners who had also been convicted of murder and had the mandatory death sentence imposed on them.

The Court held that the mandatory imposition of death sentences violated three individual human rights.¹¹⁴ First, the right to be free from cruel, inhuman punishment,¹¹⁵ because of the lack of discretionary sentencing which could lead to people being sentenced to death for a crime that did not deserve the death penalty. Secondly, the right to a fair trial,¹¹⁶ because a defendant in a capital case is not able to present mitigating evidence during judicial proceedings which could prevent the imposition of a death sentence. Thirdly, the

¹⁰⁹ Malawi Law Commission, Discussion Paper No. 1, Human Rights under the Constitution of the Republic of Malawi 2 (2006), <http://www.lawcom.mw/docs/discussion_paper1-human%20rights.pdf> accessed 20 June 2018.

¹¹⁰ Mwiza Jo Nkhata, 'Bidding Farewell to Mandatory Capital Punishment: Francis Kafantayeni and Others v Attorney General' (2007) MALAWI L.J. 103, 110.

¹¹¹ *Kafantayeni v. Attorney-General*, International Legal Materials, Vol. 46, No. 3 (May 2007), 566-571.

¹¹² Nkhata (n 110) 110.

¹¹³ Kafantayeni argued that the mandatory death sentence was unconstitutional on the following grounds: (a) it amounts to arbitrary deprivation of the person's life in violation of section 16 of the Constitution on the right to life in that the mandatory imposition is without regard to the circumstances of the crime and is thus arbitrary; (b) it is inhuman and degrading in violation of section 19(3) of the Constitution which prohibits torture of any kind or cruel, inhuman and degrading treatment or punishment; (c) it violates section 42(2)(f) of the Constitution on the right to a fair trial in denying judicial discretion on sentencing; (d) it violates the principle of separation of powers of State enshrined in the Constitution.

¹¹⁴ *Kafantayeni* (n 111) 567-571.

¹¹⁵ Constitution of the Republic of Malawi 1994 s 19 (1-3).

¹¹⁶ *Ibid*, s 42 (2)(f).

right of access to the court,¹¹⁷ because the system did not enable appeal against guilt and sentencing separately. The three rights in question are provided for in the International Covenant on Civil and Political Rights (ICCPR) to which Malawi is a party.¹¹⁸ However, it is the second violation that is particularly relevant to this chapter, as the court was clearly influenced by international human rights law in establishing it.

The plaintiffs' counsel argued that the mandatory imposition of death sentences as provided by section 210 of the Penal Code contravenes Section 42(2)(f) of the Constitution which guarantees the right of every accused person to a fair trial.¹¹⁹ He contended that section 210 of the Penal Code effectively prevented the courts from determining the sentence for anyone convicted of murder and for having regard to the individual circumstances of either the offence or the offender.¹²⁰ In support of his arguments, counsel cited Article 14(5) ICCPR which provides: 'Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.'¹²¹ He also cited the case of *Edwards v The Bahamas* where the Inter-American Commission on Human Rights held that because the mandatory death sentence is compulsory and automatic it could not be effectively reviewed on appeal.¹²²

The Constitutional Court noted that when an accused person is on trial, the principle of fair trial must be respected at all stages of the trial, including sentencing.¹²³ The Court ruled that the ICCPR forms part of the body of current norms of public international law to which it must have regard in interpreting the provisions of the Constitution and as such it was obliged to apply Article 14(5) ICCPR.¹²⁴ The Court held:

We agree with counsel that the effect of the mandatory death sentence under section

¹¹⁷ Ibid, s 41.

¹¹⁸ ICCPR, arts 7,14. Malawi acceded to ICCPR on 22 December 1993.

¹¹⁹ *Kafantayeni* (n 111) 570.

¹²⁰ Ibid.

¹²¹ Ibid

¹²² *Edwards v The Bahamas*, Report No. 48/01,4 April 2001.

¹²³ *Kafantayeni* (n 111) 570.

¹²⁴ Ibid. S 11(2) of the Malawi Constitution provides that in the interpretation of the provision of the Constitution a court of law shall 'where applicable, have regard to current norms of public international law and comparable foreign case law.'

210 of the Malawi Penal for the crime of murder is to deny the accused as a convicted person the right to have his or her sentence reviewed by a higher court than the court that imposed the sentence; and we hold that this is a violation of the right to a fair trial which in our judgment extends to sentencing.¹²⁵

The Constitutional Court declared Section 210 of the Penal Code invalid insofar as it made the death penalty mandatory for murder, quashed the death sentence imposed on each of the plaintiffs, and ordered that individual resentencing be held for the plaintiffs.¹²⁶

The decision in *Kafantayeni* demonstrates the importance of international human rights law for the interpretation of the Malawian Constitution.¹²⁷ Also, it is significant for prohibiting mandatory death sentences in Malawi. As emphasized by the Court, the effect of the judgment was not to outlaw the death penalty for murder but to give judicial discretion to judges when sentencing for the offence.¹²⁸ Although a person may still be sentenced to death for murder if the court deems it appropriate, the removal of the mandatory sentence effectively restricts the imposition of death sentences in Malawi. As a result of the decision, the 192 prisoners on death row at the time became entitled to re-sentencing.¹²⁹ However, one major drawback since the *Kafantayeni* decision is the slow progress in resentencing the prisoners on death row, a problem which one scholar has attributed to the acute shortage of lawyers and the overwhelmed legal aid scheme in Malawi.¹³⁰ As at April 2015, following resentencing hearings, only 29 prisoners had been given new sentences ranging from immediate release to 24 years imprisonment.¹³¹ The delays experienced by these death row prisoners undermines the success achieved in *Kafantayeni* and arguably constitutes a violation of the right to fair trial which the

¹²⁵ *Kafantayeni* (n 111) 570.

¹²⁶ *Ibid*, 571. Following the decision of the Constitutional Court, the Supreme Court acknowledged the *Kafantayeni* decision in *Jacob v. Republic* (unreported) where it declared that the mandatory imposition of a death sentence breached art 14(5) ICCPR and as such had been abolished in Malawi.

¹²⁷ *Nkhata* (n 110) 111.

¹²⁸ *Ibid*.

¹²⁹ <<http://www.deathpenaltyproject.org/where-we-operate/africa/malawi/>> accessed 20 June 2018.

¹³⁰ Andrew Novak, 'The Abolition of the Mandatory Death Penalty in Africa' (2007) 22:2 IND. INT'L & COMP. L. REV 267, 281.

¹³¹ <<http://www.deathpenaltyproject.org/where-we-operate/africa/malawi/>> accessed 20 June 2018.

Constitutional Court emphasized in the case.

Similarly, in December 2017, the Supreme Court of Kenya considered the validity of the mandatory death sentences for murder in *Muruatetu & another v Republic*.¹³² The major issue for the Court to determine was whether the mandatory imposition of the death sentence for murder provided under Section 204 of the Penal Code was a violation of the right to a fair trial guaranteed under Article 50(2) of the Kenya Constitution.¹³³ The High Court had convicted the petitioners of murder and sentenced them to death as provided by Section 204 of the Penal Code. The petitioner's appeal to the Court of Appeal against both conviction and sentence was dismissed. They subsequently filed two separate appeals at the Supreme Court which were consolidated.

The Supreme Court used Article 14 ICCPR, which also provides for the right to a fair trial, to interpret Article 50(2) of the Constitution and established that, in order for Section 204 to stand, it must accord with the following principles: the rights and fundamental freedoms in the Constitution belong to each individual; the bill of rights in the constitution applies to all law and binds all persons; all persons have inherent dignity which must be respected and protected; the State must ensure access to justice to all; every person is entitled to a fair hearing; and the right to a fair trial is non-derogable.¹³⁴ Article 50(2) of the Constitution and Article 14 ICCPR both provide for the right to a fair trial similarly, it is therefore remarkable that the court used the latter to interpret the former. A probable explanation for this is that the Court used the instrument to justify the Constitutional provisions as it sought to invalidate Section 204. Support for this is evident in the Court's emphasis on the fact that Kenya has been a party to ICCPR since May 1972,¹³⁵ and its declaration that 'a generous and purposive interpretation is to be given to the constitutional provisions that protect human rights'¹³⁶ and the 'court must give life and

¹³² *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

¹³³ The Constitution of Kenya 2010.

¹³⁴ *Ibid*, 46.

¹³⁵ *Muruatetu* (n 132) para 38.

¹³⁶ *Ibid*, para 65.

meaning to the Bill of Rights enshrined in the Constitution.¹³⁷

In addition, the Court declared that the right to a fair trial ‘is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights (UDHR)’¹³⁸ and used that to rationalize why Article 25(c) of the Constitution makes the right one ‘which cannot be limited or taken away from a litigant.’¹³⁹ Thus, it decided that because Section 204 deprives the Court of judicial discretion in sentencing, it failed to meet the fair trial principles that accrue to accused persons under Article 25 of the Constitution.¹⁴⁰ Indeed the preamble of UDHR confirms that all the rights contained in it are inalienable. Nevertheless, the Court’s recourse to UDHR to justify the inalienable nature of the right to a fair trial, even when Article 25 of the Constitution makes it clear that the right cannot be limited, is further evidence of the influence of international human rights law on the Court’s interpretation of the human rights provisions of the Constitution. Although UDHR is not a treaty, the Supreme Court was empowered to apply it because the Constitution makes general rules of international law directly applicable to Kenya.¹⁴¹

Furthermore, the Court relied on Article 26 ICCPR which provides for the right of freedom from discrimination and Article 27 of the Constitution, which equally provides for that right, to declare Section 204 discriminatory, because it ‘gives differential treatment to a convict under that Section, distinct from the kind of treatment accorded to a convict under a Section that does not impose a mandatory sentence.’¹⁴² In that regard, the Court concluded that not allowing convicts facing death sentence the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation was indefensibly discrimination and unfair.¹⁴³ Accordingly, it held that Section 204 violated Article 27 of the Constitution. Again the Court used a provision of ICCPR as an interpretative tool for the Constitution, but it could have done more by also declaring

¹³⁷ Ibid.

¹³⁸ *Muruatetu* (n 132) para 47.

¹³⁹ Ibid. Art 25(c) of the Kenya Constitution provides that the right to fair trial shall not be limited.

¹⁴⁰ Ibid, para 48.

¹⁴¹ The Constitution of Kenya 2010, art 2(5).

¹⁴² *Muruatetu* (n 132) 61.

¹⁴³ Ibid, para 63.

that Section 204 violated Article 26 ICCPR since ICCPR forms part of the laws of Kenya.¹⁴⁴

Lastly, in its consideration of Constitutional provisions in relation to Section 204, the Court referred to the 2005 UN Commission on Human Rights' resolution on the death penalty.¹⁴⁵ The resolution calls on states that still maintain the death penalty not to use the punishment as a mandatory sentence even for the most serious crimes.¹⁴⁶ The Court referred to the resolution to comprehend the position of international human rights law on mandatory death sentences and was persuaded by it in declaring Section 204 invalid.¹⁴⁷ However, the Court did not explain why it was persuaded by it. Such an explanation is particularly important because resolutions of the UN Commission, which was replaced in 2006 by the UN Human Rights Council (HRC), are persuasive and not legally binding on states.¹⁴⁸ Moreover, the UN Commission's resolution did not clarify why states should not impose mandatory death sentences. Therefore, courts in jurisdictions that still use mandatory death sentences may not be so persuaded by the resolution. The authority of the judgment on that point would have been strengthened if the Supreme Court had provided a rationale for relying on the resolution.

Consequently, the Supreme Court declared the mandatory imposition of death sentences as provide under Section 204 of the Penal Code unconstitutional and invalid; however it emphasized that this did not invalidate the use of death sentences as a punishment.¹⁴⁹ In addition, it ordered the remittance of the matter to the High Court for re-hearing on sentencing only; that the appropriate authorities set up within 12 months of the judgement a sentence re-hearing framework for all cases similar to that of the petitioners; and necessary changes are made to legislation to give effect to the judgment.

¹⁴⁴ Constitution of Kenya 2010, art 2(6). It provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.'

¹⁴⁵ *Muruatetu* (n 132) para 39.

¹⁴⁶ UN Doc E/CN.4/RES/2005/59, para 7(f). It urge states that still maintain the death penalty 'to ensure ... the death penalty is not imposed...as a mandatory sentence.'

¹⁴⁷ *Muruatetu* (n 132) paras 39 and 69.

¹⁴⁸ Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Hoboken, Taylor and Francis 2013).

¹⁴⁹ *Muruatetu* (n 132) 112.

Just like in *Kafantayeni* the Supreme Court's decision was clearly influenced by international human rights law. Although the outcomes of *Kafantayeni* and *Muruatetu* are similar, the Court in the latter engaged in more analysis of the Constitution in relation to international human rights law than the former. *Muruatetu* has altered the way death sentences are imposed for murder in Kenya. Judges now have discretion whether to impose death sentences for murder. This will likely result in judges imposing fewer death sentences for murder since they don't have to automatically sentence people to death but must consider mitigating circumstances. The Office of the Attorney-General and Department of Justice has set up a committee to implement the Supreme Court judgment;¹⁵⁰ resentencing hearings are expected to commence after the committee finalises the framework for resentencing. Just like the resentencing hearings that followed *Kafantayeni* resulted in the substitution of death sentences with less severe punishments, it is envisaged that resentencing hearings in Kenya will have the same effect.

2.2 The influence of an abolitionist international human rights instrument

For close to six decades, the law in Benin prescribed death sentences for several offences including aggravated murder, sorcery and magic that led to death, kidnapping that resulted in death, acts of terrorism, espionage and treason.¹⁵¹ However, in the last six years, two landmark judgments by the Constitutional Court of Benin have brought an end to the imposition of death sentences in that country despite the punishment remaining on the statute books. Following the adoption of a new Code of Criminal Procedure by the National Assembly on 30 March 2012,¹⁵² the Constitutional Court was asked by the government to determine the constitutionality of the new law.¹⁵³ The Constitutional Court, among other issues, held that Articles 685(2) and 793 of the new Code, which allowed for the imposition of death sentences for criminal offences, should be deleted by the National Assembly because it conflicted with Article 147 of the Constitution which

¹⁵⁰ <<http://www.statelaw.go.ke/task-force-on-death-penalty-commences-assignment/>> assessed 25 June 2018.

¹⁵¹ Penal Code 1954, arts 301, 304 and 313.

¹⁵² Benin Constitutional Court Decision DCC 12-153 of 4 August 2012.

¹⁵³ Ibid.

gave international treaties precedence over domestic laws.¹⁵⁴ The Court explained that Benin had acceded to ICCPR-OP2,¹⁵⁵ and that the accession had been authorized by the National Assembly through Law No. 2011-11 of 25 August 2011.¹⁵⁶ It emphasized that ICCPR-OP2 was aimed at abolishing the death penalty and that since Benin had become a party to the legal instrument it was obliged to abide by it and as such ‘no legal provision can now mention the death penalty’ in Benin.¹⁵⁷ The National Assembly subsequently complied with the judgment by removing the two provisions from the Criminal Procedure Code.¹⁵⁸

However, although the judgment was significant in its interpretation and use of ICCPR-OP2 to render invalid the new law’s provision for the death penalty, it has two shortcomings. In the first place, the judgment was limited only to the new Code of Criminal Procedure which was swiftly amended by the legislature to implement the judgment. The effect of this was that other laws in Benin which prescribed the death sentence for certain offences remained valid after the judgment. Secondly, the Constitutional Court’s declaration on ICCPR-OP2 was brief and failed to explain how accession to ICCPR-OP2 prevents a State Party like Benin from imposing death sentences in a new law.¹⁵⁹ This is important because, as explained below, ICCPR-OP2 does not expressly prohibit State Parties from imposing death sentences.

In 2016, in a second significant decision, Benin’s Constitutional Court again ruled on the imposition of death sentences.¹⁶⁰ The Court was asked to determine whether Article 302 of the Criminal Code, which prescribes the death sentence for the crime of assassination,

¹⁵⁴ Benin Constitution 1990, art 147 provides: ‘Regularly ratified treaties or agreements have, from the moment of their publication, greater authority than laws.’

¹⁵⁵ 1642 UNTS 414. Benin acceded to ICCPR-OP2 on 5 July 2012.

¹⁵⁶ Benin Constitutional Court Decision DCC 12-153 of 4 August 2012.

¹⁵⁷ Ibid.

¹⁵⁸ AI, *Death Sentences and Executions 2013* (ACT 50/001/2014) 42.

¹⁵⁹ The Constitutional Court stated: ‘Indeed, through Law No. 2011-11 of 25 August 2011 authorizing ratification of the Second Optional Protocol to the International Covenant on Civil and Political Rights adopted in New York on 15 December 1989, Benin undertakes to abide by this legal instrument aiming at abolishing the death penalty. Instruments of ratification were deposited with the United Nations on 5 July 2012. As a result, no legal provision can now mention the death penalty.’

¹⁶⁰ Benin Constitutional Court Decision DCC 16-020 of 21 January 2016.

parricide or poisoning, or murder for the purpose of cannibalism, was contrary to the Benin Constitution and the African Charter which both guarantee the right to life.¹⁶¹ The Constitutional Court affirmed its 2012 decision and went further, declaring:

Whereas it follows that no legal provision contained in the internal legal order can any longer mention the death penalty; that, likewise, no criminal prosecution undertaken by any jurisdiction can have as its legal basis a provision stipulating the death penalty as the punishment for the offence committed, such that no one can now be sentenced to death in Benin.¹⁶²

The second judgment went further than the first by unequivocally prohibiting the imposition of death sentences in Benin in all existing laws, thereby addressing a part of the shortcomings mentioned above. Like the first judgment, however, it still failed to justify its conclusion that accession to ICCPR-OP2 prevents a State Party from imposing death sentences. In addition, the Constitutional Court did not address the question whether Article 302 of the Criminal Code was contrary to the African Charter. A consideration of the question is particularly important in the context of Benin's ratification of the African Charter and in light of the Constitution conferring greater authority (i.e. supremacy) on international instruments Benin has ratified.¹⁶³ It is unclear from the judgment why the court did not address that question; it was a missed opportunity for the Constitutional Court to pronounce on the incompatibility of the imposition of a death sentence with Article 4 of the African Charter. Instead, the Court chose to strike down the imposition of death sentences simply on the grounds of Benin being a State Party to ICCPR-OP2.

The two Constitutional Court judgments are certainly progressive and set new standards for the interpretation and application of ICCPR-OP2. They signaled the first time that a national court of a State Party had used ICCPR-OP2 as grounds for prohibiting the imposition of death sentences in its jurisdiction. However, the fact that the Constitutional Court did not explain how it had arrived at its decisions is not helpful and opens them to

¹⁶¹ Benin Constitution 1990, art 8; African Charter, art 4.

¹⁶² Benin Constitutional Court Decision DCC 16-020 of 21 January 2016.

¹⁶³ Benin ratified the African Charter on 20 January 1986.

criticism. Since ICCPR-OP2 does not expressly prohibit States Parties from imposing death sentences, it is arguable that they are not precluded from imposing such sentences. ICCPR-OP2 imposes two obligations on State Parties. First, it provides that 'no one within the jurisdiction of a State Party shall be executed'; and secondly, it provides that each State Party 'shall take all necessary measures to abolish the death penalty within its jurisdiction.'¹⁶⁴ The wording of these two obligations appears to acknowledge that while the imposition of death sentences is still possible, no executions must be carried out in the jurisdiction of the State Party. Therefore, on the express reading of Article 1 of ICCPR-OP2, it could be argued that Benin's Constitutional Court went too far in its interpretation. However, this position can be countered with two arguments which vindicates the Constitutional Court.

First, the introduction of new laws which impose death sentences by a State Party to ICCPR-OP2 constitutes a violation of the treaty.¹⁶⁵ Liberia's introduction of a new law prescribing death sentences for a range of offences, despite being a State Party to ICCPR-OP2, and the reaction of the international human rights community to it illustrates this point. On 22 July 2008, the then Liberian President, Ellen Johnson-Sirleaf, signed into law a Bill which amended the 1976 Penal Code by providing that death sentences shall be imposed on an offender who, during the commission of the crimes of terrorism or hijacking or armed robbery, causes the death of his victim.¹⁶⁶ Amnesty International criticized the law and 'called on President Johnson-Sirleaf to repeal the law' because it 'directly' violated Liberia's obligations under ICCPR-OP2.¹⁶⁷ William Schabas argued that what the Liberian President had done was a violation of Liberia's obligations under Article 6(1) of the ICCPR and ICCPR-OP2.¹⁶⁸ The UN Human Rights Committee, the treaty enforcement body of ICCPR-OP2, also condemned the action of Liberia and

¹⁶⁴ ICCPR-OP2, art 1.

¹⁶⁵ Jamil Ddamulira Mujuzi, 'High Crime Rate Forces Liberia to Reintroduce the Death Penalty and put International Treaty Obligations Aside: What the Critics Missed' (2009) 17 Afr. J. Int'l & Comp. L. 342.

¹⁶⁶ Ibid, 342.

¹⁶⁷ Amnesty International, 'Liberia: Amnesty International Calls for Repeal of Death Penalty Law Signed by Liberian President' (AFR 34/009/2008, 25 July 2008).

¹⁶⁸ William Schabas, 'Liberian Parliament Attempts to Reinstate Capital Punishment' (8 August 2008) <<http://humanrightsdoctorate.blogspot.co.uk/2008/08/liberian-parliament-attempts-to.html>> accessed 20 June 2018.

emphasized that the new law constitutes a clear breach by Liberia of its international legal obligations under ICCPR-OP2.¹⁶⁹

Secondly, the Constitutional Court, as an organ of the state,¹⁷⁰ was fulfilling the second obligation required by ICCPR-OP2. The Vienna Convention on the Law of Treaties 1969¹⁷¹ supports and strengthens this point. Article 31(1) of the Convention provides that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. Therefore, it can be argued that the Constitutional Court interpreted Article 1(b) of ICCPR-OP2 in good faith, by prohibiting the imposition of death sentences, in order to fulfil the Protocol’s aim of abolishing the death penalty in Benin. The preamble of ICCPR-OP2 notes ‘that Article 6 of the ICCPR refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable’.¹⁷² In addition, not only does the title of the Protocol indicate that abolition of the death penalty was its ‘object and purpose’, the preamble strongly affirms this fact. The preamble makes it clear that States Parties to the Protocol were ‘convinced that all measures of abolition of the death penalty should be considered as progress in the enjoyment of the right to life’ and were ‘desirous to undertake hereby an international commitment to abolish the death penalty’.¹⁷³

The two Constitutional Court judgments illustrate the influence of international human rights law on Benin in restricting the imposition of death sentences despite the punishment remaining in the country’s laws. ICCPR-OP2 was vital in that regard. Without it and Benin’s accession to the instrument, the Constitutional Court could not have restricted the imposition of death sentences in the way it did. In fact, as result of the

¹⁶⁹ 'Rights Panel Concerned by Clear Breach of Law in New Liberia Death Penalty Legislation' (26 August 2008) <<http://www.unhchr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet>> accessed 20 June 2018.

¹⁷⁰ Yearbook of the International Law Commission 2001, Vol. II (Part Two), 26. Art 4(1) provides: ‘The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

¹⁷¹ 115 UNTS 332. The Convention was adopted on 22 May 1969 and entered into force on 27 January 1980.

¹⁷² 1642 UNTS 414, preamble, para. 4.

¹⁷³ Ibid, preamble, paras 5 and 6.

judgments, ICCPR-OP2's influence on the death penalty in Benin has gone beyond the Constitutional Court. As discussed above, the National Assembly was compelled by the 2012 judgment to delete two provisions, entrenching imposition of death sentences, from the Criminal Procedure Code Bill; this would not have happened without the influence of ICCPR-OP2. Moreover, the government has recently informed the HRC of the 2016 judgment and used it as evidence of Benin's fulfilment of the commitment arising from its accession to ICCPR-OP2.¹⁷⁴ In addition, the government stated that, because of its obligations under ICCPR-OP2, it had started the process of reviewing the Criminal Code in order to abolish the death penalty completely in law.¹⁷⁵

2.3 The role of international tribunals

The facts of the Rwandan genocide of 1994 have been well documented and will not be repeated here.¹⁷⁶ Of importance though is the role that the International Criminal Tribunal for Rwanda (ICTR) played in influencing the imposition of death sentences in the country. The ICTR was established by UN Security Council Resolution 955 of 8 November 1994 which was adopted under Chapter VII of the UN Charter.¹⁷⁷ Its purpose was to prosecute persons accused of serious violations of international humanitarian law committed in Rwanda and Rwandan citizens responsible for such violations committed in neighbouring states between 1 January and 31 December 1994.¹⁷⁸ It has been argued that the ICTR was born out of the efforts of the international community to respond to the Rwandan genocide.¹⁷⁹ Although this may be true, the role played by Rwandan authorities in pressing the international community to establish the ICTR must not be underestimated. Security Council Resolution 955 (1994), specifically referred to the

¹⁷⁴ UN Doc A/HRC/WG.6/28/BEN/1, paras 17,18.

¹⁷⁵ Ibid.

¹⁷⁶ See Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* (London, Pluto, 1995); Arthur J. Klinghoffer, *The International Dimension of Genocide in Rwanda* (New York, New York University Press, 1998); and David Scheffer, 'Lessons from the Rwanda Genocide' (2004) 5 *Geo. J. Int'l Aff.* 125.

¹⁷⁷ By virtue of art 25 of the UN Charter, which provides that Member States of the United Nations agree to accept and carry out the decisions of the Security Council, SCR 955 (1994) was binding on Rwanda.

¹⁷⁸ Statute of ICTR, art 1.

¹⁷⁹ G Erasmus & N Fourie, 'The International Criminal Tribunal for Rwanda: Are all issues addressed? How does it compare to South Africa's Truth and Reconciliation Commission?' (1997) 321 *International Review of the Red Cross* 705.

request of the Government of Rwanda, making it clear that the co-operation and consent of Rwanda was received.¹⁸⁰

It is interesting to note that despite having requested the setting up of the ICTR, Rwanda voted against Resolution 955. After the vote, the Rwandan government explained why it had voted against the resolution. First, Rwanda objected to the short jurisdiction of the ICTR, which was restricted from January 1, 1994 to December 31, 1994, arguing that this time period would not cover the planning stages of the genocide.¹⁸¹ Secondly, it felt the staffing plans were inadequate.¹⁸² Thirdly, Rwanda objected to the UN's plan to locate the ICTR outside Rwanda.¹⁸³ Finally, the death sentence was excluded from the punishment that the ICTR could impose.¹⁸⁴ The last reason created a situation in which convicted persons would not have the death sentence imposed on them like their counterparts convicted of similar offences by the national courts in Rwanda. This situation was aptly explained by the Rwandan representative on the Security Council:

Since it is foreseeable that the Tribunal will be dealing with suspects who devised, planned and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence. That situation is not conducive to national reconciliation in Rwanda.¹⁸⁵

Some scholars have commented on the exclusion of the death sentence from the punishments that the ICTR could impose. Jose Alvarez has argued that the exclusion created an anomaly in which the international community conferred mercy on high-level perpetrators of the genocide which it did not accord to the victims of the genocide and that the ICTR could not deliver the 'highest form of justice' if it did not allow the

¹⁸⁰ Kithure Kindiki, 'Prosecuting the Perpetrators of the 1994 Genocide in Rwanda: Its Basis in International Law and the Implications for the Protection of Human Rights in Africa' (2001) 4 African Human Rights Law Journal 64.

¹⁸¹ UN Doc S/PV.3453, paras 13-16.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Ibid.

execution of perpetrators of genocide.¹⁸⁶

Gerard Prunier strongly advocated for the imposition of death sentences on the highest level organizers of the genocide as ‘the only ritual through which the killers can be cleansed of their guilt and the survivors brought back to the community of the living.’¹⁸⁷ He argued that the international community was hypocritical in permitting the death penalty at the Nuremberg Tribunal but not for the ICTR.¹⁸⁸

However, Schraga and Zacklin were sympathetic of the position of the Security Council:

Members of the Security Council, and in particular signatories of the Second Optional Protocol to the International Convention on Civil and Political Rights, who have undertaken to abolish the death penalty within their national jurisdiction, quite obviously could not have supported its introduction in an international jurisdiction.¹⁸⁹

Schraga and Zacklin’s explanation provides a useful insight into why the Security Council could not have supported the introduction of the death penalty for an international tribunal. Indeed, there is evidence which supports this view. At the Security Council meeting on the establishment of the ICTR, the representative of New Zealand expressed disappointment at Rwanda’s position, and explained why the Tribunal could not be allowed to use the death penalty as punishment:

We recall that the Government of Rwanda requested the Tribunal. That is a fact. We are disappointed that it has not supported this resolution. We understand that this is principally because of its desire that those convicted of genocide should be executed. As a State party to the Optional Protocol to the International Covenant on Civil and Political Rights, New Zealand could never support an international tribunal that could impose the death penalty. For over three decades the United

¹⁸⁶ Jose E. Alvarez, ‘Crimes of States/Crimes of Hate: Lessons from Rwanda’ (1999) 24 *Yale J. Int’l L.* 365.

¹⁸⁷ Gerard Prunier, *The Rwanda Crisis: History of a Genocide* (C. Hurst & Co. Publishers, 1995).

¹⁸⁸ *Ibid.*

¹⁸⁹ Daphna Shraga and Ralph Zacklin, ‘The International Criminal Tribunal for Rwanda’ (1996) 7 *Eur. J. Int’l L.* 501.

Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable – and a dreadful step backwards – to introduce it here. Indeed, it would also go against the spirit of the Arusha Agreement, which the Government of Rwanda has said it will honour and which commit all parties in Rwanda to accept international human rights standards.¹⁹⁰

Although international human rights law permits the imposition of death sentences for the most serious crimes, support for the use of death penalty for international crimes has now dwindled. At the time the ICTR was established, international human rights laws restricting the imposition of death sentences had developed and the legal context relating to sentences for international crimes had changed significantly from the Second World War era when the death penalty was applied to serious international crimes.¹⁹¹ This is reflected in the fact that International Criminal Tribunal for the former Yugoslavia (ICTY), which was established by the UN Security Council in 1993, a year before the ICTR, cannot impose death sentences.¹⁹² Since then, a number of other international/internationalised criminal tribunals have also been set up to prosecute the perpetrators of international crimes,¹⁹³ none of which allow for the imposition of death sentences.¹⁹⁴ Despite the opposition of Rwanda, the Security Council persisted and the highest penalty that the ICTR can impose remains imprisonment.¹⁹⁵ This was to have a profound effect on the way in which Rwanda would later use the death penalty.

In 1996 the Rwandan authorities decided to supplement the work of the ICTR by prosecuting those implicated in the 1994 genocide in the domestic courts of Rwanda.¹⁹⁶ The Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990 (1996

¹⁹⁰ UN Doc S/PV.3453, para 5.

¹⁹¹ Steven Freeland, 'No longer acceptable: the exclusion of the death penalty under international criminal law' (2010) 15(2) Australian Journal of Human Rights 1.

¹⁹² Statute of ICTR, art 24.

¹⁹³ These include the Special Court for Sierra Leone, the Extraordinary Chambers for Cambodia, the Serious Crimes Panels for Timor-Leste and, the Special Tribunal for Lebanon.

¹⁹⁴ Freeland (n 194).

¹⁹⁵ Statute of ICTR, 23(1).

¹⁹⁶ Kindiki (n 180) 66.

Organic Law) was enacted.¹⁹⁷ The Law classified accused persons into four categories according to the gravity of the offence and level of the crime.¹⁹⁸

An interesting element of the 1996 Organic Law was that only individuals in Category One were subject to the death sentence.¹⁹⁹ Category Two offenders – perpetrators, conspirators, or accomplices of intentional homicide or of serious assault causing death – were liable to a maximum of life imprisonment. Yet, under the Rwanda Penal Code, persons convicted of murder, which did not fall within the context of the 1994 genocide, still faced the death penalty.²⁰⁰ The restriction of death sentences in the 1996 Organic Law to the ringleaders of the genocide marked a shift in attitude by the Rwanda authorities. It is unclear to what extent the ICTR’s stance on the death penalty influenced the Rwandan authorities to restrict death sentences in the 1996 Organic Law. However, as Van Zyl Smit contends, it is at least plausible to argue that it had a restraining influence.²⁰¹ This influence is evident in the fact that the 1996 Organic Law, which was specifically enacted to supplement the work of the ICTR on genocidal crimes, restricted death sentences but the Penal Code was not amended to incorporate the same restriction.

Stronger evidence of the influence of the ICTR emerged years later when UN Security Council Resolutions 1503 of August 2003²⁰² and 1534 of March 2004²⁰³ requested that the ICTR finish its work in 2010 and transfer cases back to Rwanda. In order to comply with these resolutions, on 10 June 2004 the ICTR amended Rule 11 *bis* of its Rules of Procedure and Evidence to allow the referral of cases to national jurisdictions, stating that ‘the accused will receive a fair trial in the courts of the State concerned and that the death

¹⁹⁷ Organic Law No. 8/96 of 30 August 1996, Official Gazette No. 17 of 1 September 1996.

¹⁹⁸ *Ibid.*, art. 2. Category one were the ‘planners, organizers, instigators, supervisors and leaders’ of genocide or of a crime against humanity, the ‘notorious murderers’ and those who committed ‘acts of sexual torture’; category two were ‘perpetrators, conspirators or accomplices’ of intentional homicide or of serious assault causing death; Category three were persons who committed ‘other serious assaults against the person’; and Category four were persons who committed offences against property.

¹⁹⁹ *Ibid.*, art 14.

²⁰⁰ Rwandan Penal Code 1978, art. 312.

²⁰¹ Van Zyl Smit (n 18).

²⁰² UN Doc S/RES/1503 (2003), paras 6-8.

²⁰³ UN Doc S/RES/1534 (2004), paras 4-7.

penalty will not be imposed or carried out.²⁰⁴ The Rwandan government, which had long been interested in receiving cases from the ICTR due to its policy of maximum accountability for genocide-related crimes, had to legally guarantee that it would not impose the death sentence on any accused persons transferred to it.²⁰⁵ In order to fulfil the ICTR referral requirements, on 16 March 2007 the Rwandan government adopted the Organic Law Concerning Transfer of Cases to the Republic of Rwanda from the ICTR and from Other States.²⁰⁶ Article 21 stipulates: ‘Life imprisonment shall be the heaviest penalty imposed on a convicted person in a case transferred to Rwanda from the ICTR.’²⁰⁷ This law effectively prevented Rwandan courts from imposing death sentences in cases transferred from the ICTR.

The paradox created by excluding the death sentence at the ICTR while Rwandan law allowed it is not unique to Rwanda.²⁰⁸ The Special Court for Sierra Leone (Special Court) created a similar paradox. The Special Court was established in January 2002, in the aftermath of the Sierra Leone civil war, by an agreement between the UN and the Government of Sierra Leone.²⁰⁹ The agreement was pursuant to Security Council Resolution 1315 (2000) of 14 August 2000.²¹⁰ Unlike ICTR, the Special Court is a hybrid institution, in the sense that it was created to try both offences under international criminal law and domestic offences.²¹¹ Also, unlike the ICTR which was established by a Security Council resolution, the Special Court was established by a treaty.²¹² Nonetheless, the

²⁰⁴ ICTR Rules of Procedure and Evidence, 11 bis (C).

²⁰⁵ Sigall Horovitz, ‘International Criminal Courts in Action: The ICTR’s Effect on Death Penalty and Reconciliation in Rwanda’ (2016) 48 *The Geo. Wash. Int’l L. Rev.* 505.

²⁰⁶ Organic Law No. 11/2007 of 16/03/2007 Concerning the Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal for Rwanda and from Other States, Official Gazette Special No. 11 of March 19, 2007.

²⁰⁷ *Ibid.*, art 24 provides: ‘The law applies *mutatis mutandis* where there is a transfer from other states or where Rwanda seeks transfer or extradition from other states.’

²⁰⁸ Audrey Boctor, ‘The Abolition of the Death Penalty in Rwanda’ (2009) 10 *Hum Rights Rev* 99, 114.

²⁰⁹ Robert Cryer, ‘A ‘Special Court’ for Sierra Leone?’ (2001) 50 *International and Comparative Law Quarterly* 435; Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny* (International Center for Transitional Justice, 2016); Statute of the Special Court, preamble.

²¹⁰ UN Doc S/Res/1315.

²¹¹ Van Zyl Smit (n 18) 8.

²¹² *Prosecutor v Charles Taylor: Decision on Immunity from Jurisdiction*, In the Appeals Chamber of the Special Court for Sierra Leone, paras 37-42, < <https://www.eccc.gov.kh/sites/default/files/Taylor.pdf>>

Special Court, like the ICTR, is an international criminal court, not a national court.²¹³ The Special Court cannot impose death sentences, but limited to imposing imprisonment and ordering property forfeiture,²¹⁴ yet under Sierra Leonean law the death sentence is applicable to murder, treason, armed robbery, and robbery with aggravation.²¹⁵ The same international human rights law considerations, discussed above, which precluded the ICTR from imposing death sentences apply to the Special Court, to the extent that the penalties permitted by the Statute establishing the Special Court mirror that of the ICTR.²¹⁶

Van Zyl Smit has argued that since the Special Court, which has equivalent status to the highest domestic court of Sierra Leone, is unable to impose death sentences, the punishment will stop being imposed by the domestic courts for ordinary murder.²¹⁷ Van Zyl Smit argued on the ground that the Special Court is more fully integrated into the legal system of Sierra Leone than the equivalent ICTR was in Rwanda.²¹⁸ Indeed, this ground is valid as the Special Court has the power to prosecute persons who bear the greatest responsibility, not only for serious violations of international humanitarian law, but for crimes committed under Sierra Leonean law and territory since 30 November 1996.²¹⁹ Also, the Special Court has concurrent jurisdiction with the national courts of Sierra Leone, but with primacy over them on matters contained in the Special Court's Statute and the Rules of Procedure and Evidence.²²⁰ However, contrary to Van Zyl Smit's argument, Sierra Leone's national courts have not ceased the imposition of death sentences for murder or other ordinary capital crimes. For example, in November 2017, two men were sentenced to death for murder by the High Court of Freetown;²²¹ and

accessed 25 June 2018.

²¹³ Ibid.

²¹⁴ Statute of the Special Court for Sierra Leone, art 23.

²¹⁵ Thompson Bankole, *The Criminal Law of Sierra Leone* (University Press of America, 1999) 35.

²¹⁶ Ibid; Statute of the ICTR, art 19(1).

²¹⁷ Van Zyl Smit (n 18) 8.

²¹⁸ Ibid.

²¹⁹ Statute of the Special Court, arts 1(1) and 5.

²²⁰ Ibid, art 8.

²²¹ Mohamed J. Bah, 'Sierra Leone News: Death Sentence for Murderers' *Awoko* (1 December 2017) <<https://awoko.org/2017/12/08/sierra-leone-news-death-sentence-for-murderers/>> assessed on 20 June

throughout 2017 Sierra Leone imposed 21 death sentences and by the end of that year 39 prisoners were on death row, an indication that 18 prisoners had been sentenced to death in previous years.²²²

Nevertheless, since the Special Court is not able to impose death sentences, even for crimes that attract the death sentence under Sierra Leonean law,²²³ it is plausible to argue that the Special Court has indeed restricted the imposition of death sentences in Sierra Leone.

2.4 Conclusion

This chapter has demonstrated the influence of international human rights law on the imposition of death sentences in sub-Saharan African countries. The courts in Malawi and Kenya have used the ICCPR and UDHR as tools of interpreting their national Constitutions to prohibit the mandatory imposition of death sentences for murder. Judges in the two countries now have discretionary powers to decide not to impose death sentences for murder after considering the mitigating circumstances of convicts. Consequently, in Malawi, resentencing hearings have resulted in the replacement of some death sentences with less severe punishments. Also, because of Benin's accession to ICCPR-OP2, the Constitutional Court has prohibited the imposition of death sentences by the courts and introduction of death sentences in new laws by the legislature. Furthermore, due to international human rights law, international tribunals established by the UN for Rwanda and Sierra Leone cannot impose death sentences on convicts despite the availability of the punishment under domestic laws. Thus, Rwanda amended its law to exclude the imposition of death sentences in cases transferred from the ICTR to Rwandan courts, and in practice death sentences cannot be imposed by the Special Court even in cases that require them under Sierra Leonean law. International human rights law has effectively restricted the imposition of death sentences in the countries considered. However, restrictions do not necessarily eliminate the use of death sentences. If death

2018.

²²² AI (n 3) 34-39. The last execution in Sierra Leone was carried out in 1998.

²²³ For the archive of cases prosecuted at the Special Court see <<http://www.scsldocs.org/>> assessed on 26 June 2018.

sentences remain lawful the courts may impose them. When death sentences are imposed, clemency becomes an essential factor in preventing executions. Therefore, the right to seek clemency under international human rights law and the extent to which that body of law has influenced the granting of clemency in death penalty cases in sub-Saharan Africa will be explored in the next chapter.

CHAPTER 3

Death Penalty Clemency

As demonstrated in the last chapter, international human rights law has influenced some sub-Saharan African countries to restrict the imposition of death sentences. However, when a death sentence is imposed and a right of appeal has been exhausted or an appeal against conviction and the death sentence has not been pursued, the only remedy available is seeking clemency.

Clemency is an important theme which exists between the imposition of death sentences and their implementation, that is, the carrying out of executions. Without exploration of clemency, there would be a void in the study of the death penalty because the imposition of death sentences does not always result in executions. Therefore, this chapter aims to determine whether, and if so to what extent, international human rights law has influenced the use of the death penalty through the granting of clemency in sub-Saharan Africa.

The chapter is divided into two main parts. First, the status of death penalty clemency in international human rights law is examined. Secondly, there is an analysis of the influence of international human rights law on the grant of death penalty clemency in five significant countries in sub-Saharan Africa.

3.1 Death penalty clemency in international human rights law

Clemency can be described as an act of mercy by the authorities of a state, usually but not exclusively by the Executive, which reduces or completely removes a judicial punishment.²²⁴ Clemency is a term generally used to describe commutation or pardon, or both.²²⁵ It has been described as ‘the last hope for a prisoner under sentence of death’,²²⁶ and ‘the last chance to correct errors’.²²⁷ Clemency effectively prevents the

²²⁴ Amnesty International (AI), *Locked Up and Forgotten: The Need to Abolish The Death Penalty in Ghana* (ACT 50/6268/2017) 4.

²²⁵ Daniel Pascoe, ‘Explaining Death Penalty Clemency in the Socialist Republic of Vietnam from 1986 to 2015’ (2016) 10 *Vienna J. on Int'l Const. L.* 168.

²²⁶ Chenwi (n 5) 184.

²²⁷ Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (5th edn, Oxford

implementation of a death sentence by the state authorities.²²⁸ As Sarat puts it: ‘Executive clemency in capital cases is distinctive in that it is the only power that can prevent death once it has been prescribed and, through appellate review, approved as a legally appropriate punishment.’²²⁹ In most countries clemency is usually granted by the Executive, but in some countries the Legislature and the Judiciary have the power to grant it. The reasons for granting clemency vary and can include doubts about the applicant’s guilt and trial; the convict’s remorse and rehabilitation; government policy changes; public interest in the case; prison decongestion; or even to celebrate a national holiday.²³⁰ However, research has identified two main purposes of clemency. The first is that ‘clemency is the final fail safe to remedy mistakes made by the courts, and, among other possibilities, can be used to commute the sentences of innocent inmates.’²³¹ Secondly, ‘clemency is granted as a showing of mercy due to unique facts or circumstances arising outside of the judicial system.’²³²

The right to seek death penalty clemency is guaranteed under international human rights law. Article 6(4) of the International Covenant on Civil and Political Rights (ICCPR) provides: ‘Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.’²³³ Pardon, commutation and amnesty have different meanings in death penalty cases. Commutation is the replacement of a death sentence with a less severe punishment, such as a term of imprisonment, either by the Judiciary on appeal or by the

University Press 2015) 319.

²²⁸ However, it should be noted that the availability of the right to seek clemency would not preclude a court from ordering temporary remedies or measures in death penalty cases. In its recent order in *Jadhav Case (India v Pakistan) (2017)*, the ICJ stated that with respect to the criteria of irreparable prejudice and urgency, the fact that a person under sentence of death could eventually petition the authorities for clemency, or that the date of his execution had not yet been fixed, were not per se circumstances that should preclude the Court from indicating provisional measures.

²²⁹ Austin Sarat, ‘Toward a New Perspective on Clemency in the Killing State’, in Charles S. Lanier et al. (eds), *The Future of America’s Death Penalty* (Carolina Academic Press 2009).

²³⁰ Penal Reform International, *Death Penalty Information Pack* (2017) 39.

²³¹ Melanie L. Crawford, ‘Losing Battle with the ‘Machinery of Death’: The Flaws of Virginia’s Death Penalty Laws and Clemency Process Highlighted by the Fate of Teresa Lewis’ (2012) Volume 18 *Widener Law Review* 71, 80.

²³² *Ibid.*

²³³ 999 UNTS 171.

Executive.²³⁴ Pardon is the complete exemption of a person under sentence of death from further punishment.²³⁵ Amnesty, on the other hand, constitutes the immediate end to prosecution and punishment for specific crimes.²³⁶

Safeguard 7 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty²³⁷ states: ‘Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment’. It is worth noting that unlike Article 6(4) of the ICCPR, Safeguard 7 does not mention ‘amnesty’. This is because ‘amnesty’ is granted by the state of its own initiative and not applied for by the individual. William Schabas has argued that this is what makes it inappropriate to call ‘amnesty’ a right.²³⁸ There is some credibility in Schabas’s argument. A close inspection of Article 6(4) reveals that the Covenant does not list ‘amnesty’ as a right, alongside ‘pardon’ and ‘commutation’, which a person may seek after being sentenced to death. The first sentence of the paragraph states: ‘Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence.’ Whereas the second paragraph states: ‘Amnesty, pardon or commutation of the sentence of death may be granted in all cases’. The second paragraph indicates that ‘amnesty’ is provided for only as an option, together with ‘pardon’ and ‘commutation’, which may be granted in all death penalty cases.

The UN Human Rights Committee (CCPR), the body of independent experts that monitors the implementation of the ICCPR by States Parties and provides authoritative interpretation of the Covenant’s provisions, has over the years interpreted Article 6(4). However, the interpretations have not provided clarity on the scope of the right to seek

²³⁴ Laura Schaefer, ‘Have Mercy: New Opportunities for Commutations in Death Penalty Cases’ (2016) 42 Human Rights Journal 18.

²³⁵ Ibid.

²³⁶ Mark Freeman and Max Pensky, ‘The Amnesty Controversy in International Law’ in Francesca Lessa and Leigh A. Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspective* (Cambridge 2012).

²³⁷ UN Economic and Social Council Resolution 1984/50. The safeguards were adopted on 25 May 1984. They constitute ‘soft law’ which are quasi-legal instruments that do not have any legally binding force on states but sets standards for conduct.

²³⁸ Schabas (n 40) 133.

death penalty clemency.²³⁹ Nonetheless, two years ago the CCPR began drafting its latest authoritative interpretation of Article 6, General comment No. 36, which provides detailed interpretation and clarity on the scope of the right.²⁴⁰ The CCPR in July 2017 finalised its first reading of the draft General Comment and has invited all interested stakeholders to comment on the draft.²⁴¹ The final document is yet to be issued and it remains to be seen how the General Comment will impact the jurisprudence on death penalty clemency.

Nevertheless, UN bodies and one Special Procedure Mandate have emphasized the importance of the right to seek death penalty clemency. The UN Economic and Social Council has urged UN Member States that still use the death penalty to implement and strengthen Safeguard 7 by ‘providing for mandatory appeals or review with provisions for clemency or pardon in all cases of capital offence.’²⁴² Likewise, the UN Commission on Human Rights has urged all states that maintain the death penalty ‘to ensure...the right to seek pardon or commutation of sentence.’²⁴³ Also, the UN Human Rights Council (HRC) has established that the imposition of a death sentence by the state without the opportunity to seek pardon or commutation is a contravention of the ICCPR.²⁴⁴ In addition, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stressed that ‘there can be no exception to the defendant’s right to seek pardon, clemency or commutation of the sentence’²⁴⁵ and that ‘appeals for clemency should

²³⁹ The CCPR adopted its first General Comment on Article 6, General Comment No. 6: Article 6 (Right to Life), on 30 April 1982 and its second, General Comment No. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life, on 9 November 1984. Neither provided an explanation on the meaning or scope of the right to seek clemency.

²⁴⁰ <<http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>> accessed 20 June 2018. Detailed interpretation of the right to seek clemency in article 4(6) is contained in paragraphs 41, 51 and 54 of the draft General Comment No. 36 on the right to life,

<http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf> accessed 20 June 2018.

²⁴¹ Ibid.

²⁴² UN Safeguards (n 237).

²⁴³ The Question of the Death Penalty, UN Commission on Human Rights Resolution 2005/59 adopted on 20 April 2005.

²⁴⁴ UN Doc CCPR/CO/80/UGA, para 13.

²⁴⁵ UN Doc E/CN.4/2001/9, para 88.

provide effective opportunities to safeguard lives.’²⁴⁶

In addition to the international human rights instruments highlighted, regional human rights treaties also guarantee the right to seek death penalty clemency. Article 4(6) of the American Convention on Human Rights (American Convention)²⁴⁷ states: ‘Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases’. Similarly, Article 10 of the Arab Charter on Human Rights²⁴⁸ provides that ‘anyone sentenced to death shall have the right to seek pardon or commutation of the sentence’.

The right to seek death penalty clemency is not provided for under the African Charter on Human and Peoples’ Rights (African Charter) or any other African regional human rights treaty. The absence of such a provision in the African Charter is understandable. Since the Charter itself is silent on the death penalty, it is inconceivable that it would provide for a right to seek death penalty clemency.

Although the right to seek death penalty clemency is settled in international human rights law, it is important to emphasize that death penalty clemency on its own is not a right. What constitutes the right is the seeking of clemency when a death sentence has been imposed which suggests that a process is required. Article 6(4) does not provide a specific procedure for the exercise of the right to seek pardon or commutation following the imposition of a death sentence. States Parties have the discretion to determine the required procedure.²⁴⁹ Nevertheless, in its recent draft General Comment, the CCPR has emphasized that clemency procedures must be specified in the domestic law and must not give the crime victim’s family ‘a preponderant role’ in the decision-making process.²⁵⁰ The CCPR has further emphasized that clemency procedures must offer safeguards that include: ‘certainty about the processes followed and the substantive criteria applied; a

²⁴⁶ UN Doc E/CN.4/1998/68, para 118.

²⁴⁷ OAS, Treaty Series, No 36.

²⁴⁸ The Arab Charter on Human Rights, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), was adopted on 22 May 2004 and entered into force on 15 March 2008; it currently has 13 States Parties.

²⁴⁹ UN Doc CCPR/C/74/D/845/1998, para 7.4

²⁵⁰ Human Rights Committee (CCPR), Draft General Comment No. 36 on article 6 of ICCPR, on the right to life (Advance Unedited Version), para 51.

right for individuals sentenced to death to initiate pardon or commutation procedures and to make representations about their personal or other relevant circumstances; a right to be informed in advanced when the request will be considered; and a right to be informed promptly about the outcome of the procedure.²⁵¹

3.2 The influence of international human rights law on death penalty clemency in sub-Saharan Africa

In sub-Saharan Africa, the process of seeking death penalty clemency varies from country to country. In some countries in the region, people under sentence of death who seek clemency are required to make an application either themselves or through their representative to the relevant authorities of the state.²⁵² However, there are instances where state authorities, of their own accord, grant clemency. For example, in Mali death sentences are systematically commuted to life imprisonment by the government even when an individual application has not been made.²⁵³ In Tanzania, the clemency process is transparent and prisoners and other people, such as representatives and family members, are allowed to contribute to the process, whereas in neighbouring Kenya the opinions of prisoners are not considered.²⁵⁴ On the other hand, in Botswana the clemency process is plagued by secrecy and no reasons are published for clemency decisions.²⁵⁵

Most sub-Saharan African constitutions establish a procedure for seeking death penalty clemency. In some countries, like Ghana and Botswana, the decision is for the President or Head of State alone.²⁵⁶ Sometimes within the country, the Governor of a state, in the case of Nigeria, or the head of a semi-autonomous region, in the case of Zanzibar in Tanzania, can grant clemency within their jurisdiction.²⁵⁷ Some constitutions create

²⁵¹ Ibid.

²⁵² Gambia, Ghana, Kenya, Liberia, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda, Zambia and Zimbabwe are sub-Saharan African countries where people under the sentence of death who seek clemency are required to make an application. However, this does not preclude the Executive from granting clemency even where no application is made.

²⁵³ Ibid, 45.

²⁵⁴ Hood and Hoyle (n 227) 316.

²⁵⁵ UN Doc A/HRC/23/7.

²⁵⁶ Novak (n 9) 82.

²⁵⁷ Nigerian Constitution 1999, s 212, Andrew Novak, *Comparative Executive Clemency: The Constitutional Pardon Power and the Prerogative of Mercy in Global Perspective* (Routledge 2016) 15.

committees on clemency to review applications, make recommendations and advise the final decision maker in the clemency process. For instance, the Constitution of Botswana creates an Advisory Committee on Prerogative of Mercy whose role is to advise the President on the grant of clemency in death penalty cases.²⁵⁸

Between 2008 and 2017,²⁵⁹ 21 countries granted clemency to individuals under sentence of death in sub-Saharan Africa.²⁶⁰ This number represents 75 per cent of the 28 countries that have not abolished the death penalty in the region. An analysis of the influence of international human rights law on the grant of death penalty clemency in each of the 21 countries is beyond the scope of this study. Instead, the analysis that follows will focus on countries in sub-Saharan Africa that are significant because in the last five years they have consistently granted death penalty clemency, or have granted it to many or all people on death row. Of the 21 countries, Benin, Ghana, Kenya, Nigeria and Zambia are particularly significant. An analysis of the influence of international human rights law on the grant of death penalty clemency in each of the five countries now follows.

3.2.1 Benin

As discussed in the previous chapter, the Constitutional Court in two landmark judgments rendered all laws imposing death sentences in Benin void. Despite this, 14 prisoners who had been under death sentences for between 18 and 19 years at the time of the second judgment remained on death row.²⁶¹ The Court's decisions neither referred to the prisoners nor provided for their clemency. There are two possible reasons for this. First, since clemency was not an issue put before the Court in the two cases, it could not make a declaration on it. Secondly, since only the President has the power to grant clemency,²⁶²

²⁵⁸ Constitution of Botswana 1966, art 54.

²⁵⁹ This is the only period in which comprehensive data on the grant of clemency in sub-Saharan African countries is available. While some human rights and media organisations have reported on the grant of death penalty clemency in some sub-Saharan African countries only Amnesty International has published comprehensive, year-on-year data since 2008.

²⁶⁰ AI (n 100). The 21 countries are: Botswana, Cameroon, Democratic Republic of Congo (DRC), Ethiopia, Gambia, Ghana, Kenya, Liberia, Malawi, Mali, Mauritania, Niger, Nigeria, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Uganda, Zambia, Zimbabwe.

²⁶¹ Amnesty International (AI), *Living in Limbo: Benin's Last Death Row Prisoners* (ACT 50/4980/2017).

²⁶² Constitution of Benin 1990, art 60.

the Court was precluded from granting such relief. Although Benin's accession to the Second Optional Protocol to the ICCPR (ICCPR-OP2)²⁶³ in 2012 effectively protected the prisoners from execution,²⁶⁴ they remained on death row for years after the accession. Nevertheless, the government announced, in February 2018, that the President had commuted the death sentences of all death row prisoners to life imprisonment.²⁶⁵ It emphasized that the decision was a consequence of Benin's position in favour of abolishing the death penalty, the ratification of ICCPR-OP2, fulfilment of Benin's international commitment and promotion of human rights.²⁶⁶

The government's unequivocal confirmation that Benin's accession to ICCPR-OP2 was crucial in its decision to commute the death sentences is incontrovertible evidence of the influence the protocol has had on the country's use of the death penalty following the Constitutional Court judgments. Although ICCPR-OP2 does not expressly oblige a State Party to grant death penalty clemency, Benin's reliance on the protocol to justify the need to commute the death sentences confirms its firm commitment to its international human rights law obligations and the influence of that body of law on its use of the death penalty. Indeed, the case can be made that such grant of clemency, as exemplified by Benin, is an obligation that arises from being a party to ICCPR-OP2 and that keeping prisoners under sentence of death is incompatible with ICCPR-OP2.²⁶⁷

3.2.2 Ghana

In Ghana, only the President has the power to grant clemency, this power being entrenched in the Constitution.²⁶⁸ The clemency power is exercisable by the President 'acting in consultation with the Council of State'.²⁶⁹ For any offence, the President 'may' grant a pardon free or with conditions; grant commutation; suspend implementation of

²⁶³ 1642 UNTS 414.

²⁶⁴ Art 1 ICCPR-OP2 provides that "No one within the jurisdiction of a State Party to the present Protocol shall be executed."

²⁶⁵ *Compte Rendu du Conseil de Ministres*, No. 08/2018/PR/SGG/CM/OJ/ORD, 21 Fevrier 2018.

²⁶⁶ *Ibid.*

²⁶⁷ ICCPR-OP2, art. 1.

²⁶⁸ Ghana Constitution 1992, art 72.

²⁶⁹ *Ibid.*

punishment; or reduce the whole or part of a punishment.²⁷⁰ The use of the word ‘may’ is vital as it reinforces the discretionary nature of the President’s power, making it clear that he is not under a legal obligation to grant clemency. The powers of the President also extend to granting clemency for convictions and punishments imposed by a court martial or other military tribunals.²⁷¹

Ghana’s Constitution sets out a procedure which must be followed in all cases where a person is sentenced to death. A written report containing all relevant information from a case where a person is sentenced to death must be submitted by the trial judge or other judges to the President.²⁷² However, this is where the procedure ends. The Constitution is not clear on why the written report needs to be submitted or what an individual needs to do to seek clemency from the President. However, it can be inferred from Article 72 of the Constitution that the purpose of the requirement to submit a written report is to enable the President to consider whether to grant clemency. This requirement acts as an additional level of safeguard to the court appeal process in death penalty cases. In addition, the Constitution does not preclude an individual from making an application to the President for clemency, which implies that such an application is possible. While some jurisdictions require that the court appeals process must have been exhausted before the Executive can consider a grant of death penalty clemency, this is not the case in Ghana. There is no requirement in the Constitution that a right of appeal must have been exhausted before the report of a death sentence is sent to the President or before he can exercise his clemency powers on it. This is quite remarkable as it means that the right to seek death penalty clemency in Ghana is not curtailed by the need to exhaust court appeal processes.²⁷³

Over the years, Ghanaian Presidents have exercised their constitutional clemency powers in death penalty cases. As part of the celebration of the 50th anniversary of Ghana’s independence in March 2007, then President Kufuor commuted the death sentence of 36

²⁷⁰ Ibid, art 72 (1).

²⁷¹ Ibid, art 72 (3).

²⁷² Ibid, art 72 (2).

²⁷³ In many retentionist countries in sub-Saharan Africa an individual has to exhaust court appeal process before being eligible to seek clemency in death penalty cases.

death row prisoners. Later that year he further commuted seven death sentences to life imprisonment during the 47th anniversary of Ghana's republican status in June 2007.²⁷⁴ Between 2012 and 2016 a total of 72 death sentences were commuted in Ghana.²⁷⁵ In commemoration of Ghana's Republic Day in 2013, 2014, 2015 and 2016, President John Mahama commuted 33, 21, 14 and 4 death sentences to life imprisonment respectively, it is unclear why the number of commutations decreased.²⁷⁶ These commutations were all granted to commemorate one national holiday or another and appear to have become a tradition for the Executive. Two pertinent points arise from the commutations. First, the grant of the commutations made no reference to international human rights law, indicating that they were apparently not influenced by that body of law. Secondly, there is no evidence that the commutations were granted following clemency applications by the prisoners, an indication that the grants were mainly an exercise of prerogative of mercy powers by the Executive with no recognition of the death row prisoner's right to seek clemency.

Ghana is a party to the ICCPR²⁷⁷ and as such is under an obligation to respect and implement Article 6(4) which includes the right to seek clemency.²⁷⁸ Despite a history of granting death penalty clemency, Ghana's disposition towards the right to seek death penalty clemency at the UN is in direct contrast to its practice. In 2012, during the HRC's Universal Periodic Review (UPR), Ghana did not accept the recommendations made to it to commute existing death sentences²⁷⁹ and to continue to grant death penalty clemency.²⁸⁰ No explanation was given for rejecting those recommendations, but ever

²⁷⁴ Amnesty International, *Amnesty International submission to the UN Universal Periodic Review* (AFR 28/001/2008).

²⁷⁵ No death penalty clemency was granted in 2017.

²⁷⁶ Amnesty International (AI), *Death Sentences and Executions 2016* (ACT 50/5740/2017), AI, *Death Sentences and Executions 2015* (ACT 50/3487/2016), AI, *Death Sentences and Executions 2014* (ACT 50/001/2015), AI, *Death Sentences and Executions 2013* (ACT 50/001/2014).

²⁷⁷ Ghana acceded to the ICCPR on 7 September 2000.

²⁷⁸ ICCPR, art. 2(1).

²⁷⁹ UN Doc A/HRC/22/6, para 126.3. Slovakia recommended that Ghana commute 'the existing [death] sentences to life imprisonment terms'.

²⁸⁰ UN Doc A/HRC/22/6, para 126.11 Germany recommended that Ghana 'continue the current practice of granting clemency and commuting death sentences'.

since then Ghana has continued to grant clemency regularly in death penalty cases.

Two arguments can be provided to explain this situation. First, Ghana's rejection of the UPR recommendations was a political stance to indicate to the international community that it was not ready to abolish the death penalty. This argument finds support in the fact that during the UPR, Ghana did not accept any death penalty recommendations made to it, most of which related to abolition of the death penalty.²⁸¹ The second argument is that Ghana considers the granting of clemency in death penalty cases as the fulfilment of a domestic Constitutional requirement or as a Presidential goodwill gesture to commemorate a national day rather than as a fulfilment of its ICCPR obligations. The latter argument is more plausible. This is because in its Article 40 report to the CCPR in 2014,²⁸² Ghana reported on its use of the death penalty but not on its well-established practice of granting death penalty clemency, even though the granting of such clemency constitutes a measure giving effect to the rights recognised in Article 6(4).²⁸³

3.2.3 Kenya

Similar to Ghana, the President in Kenya is empowered by the Constitution to grant clemency for any offence or punishment.²⁸⁴ The clemency power is discretionary and exercised in accordance with the advice of an Advisory Committee, which comprises the Attorney-General, the Cabinet Secretary responsible for correctional service and at least five other members as prescribed by law.²⁸⁵ However, unlike in Ghana, Kenya's Constitution expressly provides for how an individual can seek clemency. A petition for clemency can be made by 'any person' to the President.²⁸⁶ The 'any person' provision is unique because a person other than the prisoner or his representative can petition for clemency. This is an important intervention tool, which could be employed by interested parties to ensure that the right to seek clemency is enjoyed in Kenya. However, one

²⁸¹ UN Doc A/HRC/22/6, para 126.

²⁸² Every State Party to the ICCPR is required by art 40 'to submit reports of the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights'.

²⁸³ UN Doc CCPR/C/GHA/1.

²⁸⁴ The Constitution of Kenya 2010, s 133(1).

²⁸⁵ Ibid, s133(2).

²⁸⁶ Ibid, s 133(1).

shortcoming of the Kenyan clemency constitutional provisions is that the Advisory Committee is permitted to consider the views of the victims of the offence in respect of which it is considering making recommendations to the President.²⁸⁷ This could potentially lead to clemency requests being influenced, to the detriment of the applicant, by victims of the offence who are still aggrieved, rather than the request being considered wholly on its merits.

Scholars have written extensively on the role of victims in the criminal justice process.²⁸⁸ For instance, Edwards has identified two types of victim participation in the criminal justice process: dispositive and non-dispositive.²⁸⁹ While dispositive participation involves the victim as the decision-maker, non-dispositive participation acknowledges the victim's input in the process but without powers to override the decision.²⁹⁰ Nevertheless, Manikis has argued for the expansion of Edwards' model of victim participation by involving the victim as an agent of accountability.²⁹¹ While the models put forward by Edwards and Manikis may be ideal during a criminal trial, including the conviction and sentencing process, it is not ideal during the clemency process in death penalty cases as it may defeat the essence of the process, which is to prevent the execution of the prisoner.

The CCPR has gone some way towards addressing this issue in its recent draft General Comment on the right to life, where it emphasized that clemency procedures 'should not afford the families of crime victims a preponderant role in determining whether the death sentence should be carried out.'²⁹² However, what constitutes 'a preponderant role' may vary from country to country where culture and religion may constitute a factor. It is

²⁸⁷ Ibid, s 133(4).

²⁸⁸ Debra Patterson and Brenda Tringali, 'Understanding How Advocates Can Affect Sexual Assault Victim Engagement in the Criminal Justice Process' (2015) 30 *Journal of Interpersonal Violence* 1987; Luke Moffet, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court' (2015) 26 *Criminal Law Forum* 255; Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20 *Criminal Law Forum* 395.

²⁸⁹ Ian Edwards, 'An Ambiguous Participant: the Crime Victim and Criminal Justice Decision-Making' (2004) 44 *Brit. J. Criminol* 967.

²⁹⁰ Ibid.

²⁹¹ Marie Manikis, 'Expanding participation: Victims as agents of accountability in the criminal justice process' (2017) 1 *Public Law* 63.

²⁹² CCPR (n 250), para 51.

therefore important for the CCPR to specify more precisely in its General Comment what role, if any, crime victims or their families should play in the determination of clemency. While the views of victims or their families may be valuable in clemency procedures, the decision to grant clemency should be based solely on the merits of the application.²⁹³

Kenya being a party to the ICCPR has the obligation to give effect to Article 6(4).²⁹⁴ In the last decade it has done so by establishing itself as a leading death penalty clemency country in sub-Saharan Africa through the grant, on two occasions, of mass commutations to everyone on death row. In August 2009, the then President, Mwai Kibaki, granted the largest mass commutations in modern history when he commuted the death sentence of over 4,000 people to life imprisonment; this represented one fifth of the world's death row population at that time.²⁹⁵ The President's reason for the commutations was that the long period of time of waiting on death row to be executed caused 'undue mental anguish and suffering, psychological trauma and anxiety.'²⁹⁶ The last execution in Kenya was carried out in 1987,²⁹⁷ since then there had been a significant increase in the death row population with many prisoners spending several years awaiting execution.

At the time of the mass commutations, the London-based Death Penalty Project queried the President's reason for the commutations. The organisation argued that the major underlying factor for the decision to commute the death sentences were the various legal challenges to the constitutionality of the mandatory death penalty in Kenya, which were before the domestic courts at the time.²⁹⁸ The Death Penalty Project, which had supported

²⁹³ This is the approach taken by the International Criminal Court. Art 68(3) of the Rome Statute of the International Criminal Court provides: 'Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered ... in a manner which is not prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial...'.

²⁹⁴ Kenya acceded to the ICCPR on 1 May 1972. It was the second country in sub-Saharan Africa to become a party to the treaty.

²⁹⁵ Novak (n 9) 2; Andrew Novak, *The African Challenge to Global Death Penalty Abolition; International Human Rights Norms in Local Perspective* (Intersentia 2016) 159.

²⁹⁶ Hood and Hoyle (n 227) 94; Matt Clarke, '4,000 Kenyan Death Sentences Commuted to Life' (*Prison Legal News*, December 2009) <<https://www.prisonlegalnews.org/news/2009/dec/15/4000-kenyan-death-sentences-commuted-to-life/>>;

World Coalition Against the Death Penalty, '4,000 death sentences commuted in Kenya' (6 August 2009) <<http://www.worldcoalition.org/4000-death-sentences-commuted-in-Kenya.html>> accessed 11 September 2017.

²⁹⁷ AI (n 58); Clarke (n 296).

²⁹⁸ The Death Penalty Project, 'Kenya commutes the death sentences of more than 4,000 prisoners' (5

and assisted in the filing of those cases, expressed the view that if the legal challenges had been successful, the Kenyan government would have had to hold resentencing hearings for each of the over 4,000 prisoners under sentence of death.²⁹⁹ This argument is speculative as there is no evidence to indicate that the mass commutations were granted because of those legal challenges. Moreover, the death row population in Kenya at that time was one of the largest in the world. This was so much a concern to the CCPR that it had called on Kenya to commute death sentences.³⁰⁰ The facts that Kenya had not executed anyone since 1987,³⁰¹ the death row population was growing and Kenya did not wish to resume executions are plausible underlying factors for the mass commutations.

President Kibaki's rationale for granting the mass commutations is worth exploring because it is plausible to argue that it is rooted in the 'death row phenomenon' which has now become a doctrine of international human rights law in death penalty cases.³⁰² The doctrine has its origins in the landmark case of *Soering v UK* which was decided by the European Court of Human Rights in 1989.³⁰³ The Court decided that the extradition by the United Kingdom of a prisoner to face the death sentence in Virginia, USA, would breach Article 3 of the European Convention on Human Rights because his inevitable long wait on death row would amount to inhuman and degrading treatment and punishment. Before this case was decided, there had been no international case which expressly recognised the death row phenomenon as cruel or inhuman punishment.³⁰⁴ The judgment set a benchmark and a precedent for future cases, proof of its strong and continued relevance in international law.³⁰⁵

Hudson has defined the death row phenomenon as 'prolonged delay under the harsh

August 2009) <<http://www.deathpenaltyproject.org/news/1089/kenya-commutes-the-death-sentences-of-more-than-4000-prisoners/>> accessed 11 September 2017.

²⁹⁹ Ibid.

³⁰⁰ UN Doc CCPR/CO/83/KEN, para 13.

³⁰¹ UN Doc CCPR/C/KEN/CO/3, para 10.

³⁰² The 'death row phenomenon' is also referred to as 'death row syndrome'.

³⁰³ *Soering v. United Kingdom* (1989) 11 EHRR 439.

³⁰⁴ Patrick Hudson, 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?' (2000) 11 EJIL (2000) 833, 838.

³⁰⁵ Ibid.

conditions of death row’, while emphasizing that neither prolonged delays or harsh conditions on their own are sufficient to constitute the phenomenon and that a combination of both is required.³⁰⁶ He opined that harsh conditions alone are not sufficient because they may be justified for security reasons and that prolonged delays may not necessarily have an adverse effect on the prisoner.³⁰⁷ However, by limiting the death row phenomenon to a combination of just two factors, Hudson’s definition runs the risk of overlooking the single impact of only one of the factors or other relevant factors which may well be important in establishing the phenomenon. Other relevant factors which should be considered include: uncertainty of the exact date of the impending execution; alternating hope and despair; and the feeling of isolation which may subject a prisoner to the death row phenomenon.³⁰⁸

Since *Soering*, the death row phenomenon has been recognized as a violation of human rights by international and domestic tribunals. In 1993, the Judicial Committee of the Privy Council in *Pratt and Morgan v. Jamaica*³⁰⁹ applied the doctrine and went further by establishing the length of time on death row which will violate international human rights law. The Privy Council held that to execute a prisoner after a five-year wait would amount to inhuman and degrading punishment. This decision, especially the five-year rule, has also been applied in Belize in *Mejia v Attorney General*³¹⁰ where the Supreme Court held that death sentences must be commuted to life imprisonment after the prisoner had been on death row for five years. In Uganda, with the same common law tradition as Kenya, the doctrine was recognised and applied in 2005 by the Constitutional Court in *Kigula and 416 Others v. The Attorney General*.³¹¹ The Court held that a ‘delay beyond 3 years after the highest appellate court has confirmed the sentence’ constitutes cruel, inhuman or degrading treatment which is prohibited by the Ugandan Constitution.³¹²

³⁰⁶ Ibid, 836.

³⁰⁷ Ibid.

³⁰⁸ Kealeboga N Bojosi, ‘The death row phenomenon and the prohibition against torture and cruel, inhuman or degrading treatment’ (2004) 4 AHRLJA 303.

³⁰⁹ *Pratt v. Attorney General for Jamaica* [1993] 4 All ER 769.

³¹⁰ *Mejia v Attorney General*, Action No 296 of 2000, Supreme Court of Belize, 11 June 2001.

³¹¹ *Kigula and Others v The Attorney-General* (2005) 197 AHRLR.

³¹² Ibid, paras 120,125.

Seven years after the first mass commutations, a second one was granted by the current President, Uhuru Kenyatta. On 24 October 2016, he commuted the death sentence of all death row prisoners, a total of 2,747 at the time, to life imprisonment.³¹³ Unlike the Kibaki mass commutations, no official reason was given for the Kenyatta mass commutations. Some analysts have argued that they may have been granted to make the President appear more compassionate ahead of the forthcoming Presidential election.³¹⁴ The fact that no official reason was given for the commutations and that 102 other prisoners serving terms of imprisonment were pardoned at the same time gives this argument some credibility.

However, a more compelling reason is that Kenya was again addressing the death row phenomenon by using mass commutations, which had been used previously to solve the same problem. Kenya was faced with the same issues as in 2009 when President Kibaki granted the first mass commutations – the death row population was growing, executions had not resumed, and hundreds of prisoners had already started spending long years on death row. In fact, in 2012, just five years after the first mass commutations, the death row population in Kenya had gone up from zero to 1,582.³¹⁵ For the second time, the growing death row population gave the CCPR cause for concern and it reiterated its recommendation to Kenya to commute death sentences.³¹⁶ The rapid rise in the death row population in Kenya over the years can be attributed to two factors. The first is that until December 2017, the death penalty was mandatory for murder,³¹⁷ that meant judges had no discretion and were bound to impose death sentences when a person was found guilty of offences carrying the death penalty. Secondly, there is a high rate of ‘aggravated robbery’ and ‘attempted robbery with violence’ which are capital crimes.³¹⁸

³¹³ Amnesty International, *Death Sentences and Executions 2016* (ACT 50/5740/2017)38.

³¹⁴ Jeffrey Gettleman, ‘Kenya Spares the Lives of Everyone on Its Death Row’ *The New York Times* (24 October 2016) <[https://www.nytimes.com/2016/10/25/world/africa/kenya-kenyatta-death-penalty-
reprieve.html](https://www.nytimes.com/2016/10/25/world/africa/kenya-kenyatta-death-penalty-reprieve.html)>.

³¹⁵ UN Doc CCPR/C/KEN/CO/3, para 10.

³¹⁶ Ibid.

³¹⁷ See Chapter 2.1.

³¹⁸ Position Paper No. 2 on the Abolition of the Death Penalty, Kenya National Commission on Human Rights, 2007, para 14.

3.2.4 Nigeria

Nigeria has consistently granted clemency to death row prisoners every year for the last 10 years. The powers to grant clemency in Nigeria are vested in the President and the Governors of the 36 states that make up the Nigerian federation. The power and the procedure for granting clemency are provided in the Constitution.³¹⁹ The President and the Governors are empowered to: grant a pardon, either free or subject to lawful conditions of any offence under the law; grant any person a temporary or permanent respite from the execution of a punishment and substitute a punishment with a less severe one and cancel the whole or part of punishment imposed on any person.³²⁰

The grant of clemency to death row prisoners has been a common practice in Nigeria since the country returned to democratic rule in May 1999. In 2000, then President Olusegun Obasanjo pardoned all prisoners who had been on death row for 20 years and commuted to life imprisonment the sentences of prisoners who had been on death row for between 10 and 20 years.³²¹ The clemencies were granted pursuant to Section 175 of the 1999 Constitution which had been promulgated a few months earlier,³²² but no official reason was given for the grant and the number of beneficiaries was not provided by the government. One commentator had suggested that the clemencies were granted by the government in the spirit of the new millennium.³²³ This may be the case as the clemencies were granted in January 2000. Nevertheless, they appeared to be an act of mercy to death row prisoners by a new President who himself had been convicted and sentenced to death in 1995 for a 'coup d'état' against the then military government.³²⁴

Although these clemencies are laudable for saving some death row prisoners from

³¹⁹ Constitution of the Federal Republic of Nigeria 1999, ss 175 and 212.

³²⁰ Ibid.

³²¹ Amnesty International, *Nigeria: Time for justice and accountability* (ACT 50/5740/2017) 13.

³²² The 1999 Constitution came into force on 28 May 1999.

³²³ Toye Olori, 'Rights-Nigeria: Death Row Convicts Pardoned' *Inter Press Service* (7 January 2000) <<http://www.ipsnews.net/2000/01/rights-nigeria-death-row-convicts-pardoned/>>.

³²⁴ Dimeji Kayode-Adedeji, 'Obasanjo reveals 'saddest day' of his life' *Premium Times* (7 January 2000) <<https://www.premiumtimesng.com/news/more-news/223539-obasanjo-reveals-saddest-day-life.html>>.

The death sentence imposed against Olusegun Obasanjo by a Military Tribunal was later commuted to 15 years imprisonment. Following the advent of a new military regime in Nigeria 1998, Mr Obasanjo was granted pardon and he contested and won the Presidential election in 1999.

execution, their limitation to two categories of prisoners constitutes a breach of international human rights law. This is because Article 6(4) confers the right to seek clemency on ‘anyone sentenced to death’ and stipulates that clemency ‘may be granted in all cases’.³²⁵ In other words, the right and benefit of clemency should be applied to all without limitation or exception. In this case the clemency effectively excluded prisoners who had been on death row for less than 10 years. It also created unfairness, releasing completely from prison people who had spent more than 20 years on death row, while confining those who had spent between 10 and 20 years to a lifetime in prison and putting those who had spent less than 10 years on death row at risk of execution. The CCPR has declared that situations like this constitute deprivation of an effective remedy with respect to the right to seek clemency as protected by Articles 2 and 6(4) ICCPR.³²⁶ In an attempt to address this issue, the CCPR has stressed in its draft General Comment No. 36 that in respect of pardon and commutation for people sentenced to death, ‘no category of sentenced persons can be a priori excluded from such measures of relief, nor should the conditions for attainment of relief be ineffective, unnecessarily burdensome, discriminatory in nature or applied in an arbitrary manner.’³²⁷ It is therefore submitted that in cases where States Parties wish to grant death penalty clemency of their own initiative, rather than in response to request by a death row prisoner, the grant should be made to everyone on death row. Such an action, as exemplified in Kenya with the mass commutations, ensures that Article 6(4) is respected and fairness is upheld.

Between 2008 and 2017, at least 365 death sentences were commuted and 148 pardons were granted to death row prisoners in Nigeria.³²⁸ The clemencies have been granted regularly every year across different states, mainly to commemorate two significant national holidays – Independence Day and Democracy Day.³²⁹ The consistent grant of clemencies is an indication that Nigeria’s clemency laws are being implemented, but this

³²⁵ In addition, it is worthy of note that art. 2 imposes an obligation on a State Party to ensure that all the rights contained in ICCPR, including the right to seek clemency, are accorded to all individuals within its territory.

³²⁶ UN Doc CCPR/C/85/D/1132/2002, para. 7.5.

³²⁷ CCPR (n 250), para 51.

³²⁸ AI (n 100).

³²⁹ *Ibid.* Independence Day is commemorated on 1 October and Democracy Day on 29 May.

does not necessarily mean that the implementation has been influenced by international human rights law. Nigeria's clemency laws existed before the ICCPR was adopted in 1966 and long before Nigeria acceded to the Covenant in 1993.³³⁰ The laws date back to the 1963 Constitution of Nigeria, the country's first post-independence constitution. Section 101 of that Constitution provided for the clemency powers of the President with the same wording used in the 1999 Constitution. The original clemency provisions were also repeated in the 1979 Constitution, Nigeria's second post-independence constitution.³³¹ As the examples given above show, death penalty clemency in Nigeria is routinely granted pursuant to the country's clemency laws, as an act of mercy by the Executive and in keeping with the tradition of granting them to mark national holidays and events.

Nevertheless, there have been two instances where international human rights law has influenced the grant of death penalty clemency in Nigeria. In *ThankGod Ebhos v Federal Republic of Nigeria*, the plaintiff had been convicted of armed robbery and sentenced to death in Kaduna State in 1995 by a tribunal established during military rule in Nigeria.³³² He was not allowed to appeal against his sentence or conviction. In 2013, the Nigeria Prisons Service, based on the 1995 conviction and death sentence, scheduled the execution of the plaintiff, alongside four other death row prisoners. While the prison authorities executed the other four prisoners on the appointed day, they could not hang the plaintiff because they discovered that his execution warrant had specified death by firing squad as the mode of execution. Subsequently, he filed a motion for an extension of time to submit an appeal to the Court of Appeal and followed that with an application for interim relief to the Court of Justice of the Economic Community of West African States (ECOWAS). The plaintiff in his ECOWAS suit argued that the denial of his right to appeal in 1995 and the attempt to execute him without allowing him to exhaust his right of appeal constituted a breach of Nigeria's international obligations on the right to a fair trial and the prohibition of arbitrary deprivation of life under Articles 4 and 7 of the African Charter respectively. On 31 January 2014 the Court declared: 'Where an

³³⁰ Nigeria acceded to the ICCPR on 29 July 1993.

³³¹ Nigeria Constitution 1979, ss 161 and 192 were repeated in ss 175 and 212 Nigeria Constitution 1999.

³³² *ThankGod Ebhos v Federal Republic of Nigeria* (ECOWAS) (Unreported). Nigeria was under military rule from 1966 to 1979 and from 1983 to 1999.

applicant is deprived of the process of an appeal after conviction and sentence of death, it may be an action of arbitrary deprivation of the right to life as envisaged by Article 4 of the said Charter.³³³ The Court also held that the plaintiff's right of appeal guaranteed by Article 7 of the African Charter had been violated since he was denied a right to appeal against his conviction and death sentence.³³⁴ The Court ordered Nigeria to suspend the plaintiff's death sentence and remove him from death row, pending the determination of the substantive court case.³³⁵

In its address to the HRC on 20 March 2014, during the UPR, the Nigerian Government rejected all recommendations made to it concerning the death penalty, but in reference to the *ThankGod Ebhos* case stated that it would respect the ECOWAS Court order.³³⁶ Some months after the statement, ThankGod Ebhos was released from prison pursuant to the clemency powers under section 212 of the Nigerian Constitution.³³⁷

The statement of the Nigerian authorities during the UPR was significant. First, it was an acceptance of both the judgment and the international human rights law grounds on which the Court order was premised. Secondly, it represented an international commitment to implement the Court order. Although the Court judgment did not expressly order the grant of clemency, it is submitted that the grant of clemency to the plaintiff was an implementation of the judgment. This is because the only way, under Nigerian law, in which the Nigerian authorities could have removed the plaintiff from death row, without a court quashing the death sentence, was through the grant of clemency. Therefore, it seems clear that the ECOWAS Court's findings of a violation of the African Charter influenced the Nigerian authorities to grant clemency to ThankGod Ebhos.

In another case Moses Akatugba, at the age of 16, was arrested for stealing mobile phones in an armed robbery in 2005. After an eight-year trial, he was convicted and sentenced to

³³³ *Ebhos* (n 332) para 51.

³³⁴ *Ibid*, para 52.

³³⁵ *Ibid*, para 53.

³³⁶ UN Doc A/HRC/25/2, 468.

³³⁷ Mohammed Shosanya, 'Freedom for Thankgod Ebhos after 19 years on death row' *Daily Trust* (Lagos, 21 October 2014) <<http://thenationonlineng.net/pdps-call-for-national-conference-insincere-says-fayemi/>> accessed 11 September 2017.

death by the High Court of Delta State, Nigeria.³³⁸ He maintained his innocence and alleged that he had been tortured by the police to make him sign two confessional statements.³³⁹ The case attracted the interest of Amnesty International, which launched a global petition for him.³⁴⁰ Over 36,000 Amnesty International members and activists petitioned the Governor of Delta State arguing, *inter alia*, that Moses Akatugba should not have been sentenced to death as he was a child at the time of his arrest and calling on the Governor to grant him clemency.³⁴¹ Amnesty International argued that the death sentence imposed on Moses Akatugba was a breach of Nigeria's obligations under Article 6(5) of the ICCPR³⁴² and Article 37(a) of the Convention on the Rights of the Child (CRC).³⁴³ Nigeria is a party to both treaties and those provisions strictly prohibit the use of the death penalty against persons below the age of 18 at the time of the offence.³⁴⁴ On 1 October 2014, some nine months after Amnesty International's global petition was launched, the then Governor of Delta State, Emmanuel Uduaghan, publicly acknowledged the petitions at a state event and accepted that Moses Akatugba was a child at the time of the offence and that he was considering the case.³⁴⁵ On 28 May 2015, a day before leaving office and on the eve of the Democracy Day commemoration, the Governor granted Moses Akatugba a full pardon.³⁴⁶

The Governor's public response to the case suggests the impact of the thousands of petitions he had received. The Governor's public acknowledgement that Moses Akatugba was 16 years old at the time of the crime was particularly vital to the case because it made it impossible for the government to deny a breach of Article 6(5) ICCPR and Article 37(a)

³³⁸ *The State v Moses Akatugba*, Nigeria (Unreported).

³³⁹ Amnesty International, *Death Sentences and Executions 2015* (ACT 50/3487/2016) 62.

³⁴⁰ <<https://www.thepetitionsite.com/takeaction/447/217/902/?src=referrer&campaign=http%3A%2F%2Fafrikanorbit.com%2Fnews%2F304%2Fsign-the-petition-moses-akatugba-24-year-old-student-to-die-by-hanging-for-stealing-mobile-phone-and-recharge-cards.html>> accessed 16 November 2017.

³⁴¹ <<https://www.amnesty.org.uk/nigeria-moses-akatugba>> accessed 7 September 2017.

³⁴² 999 UNTS 171.

³⁴³ 1577 UNTS 3.

³⁴⁴ Nigeria acceded to the ICCPR on 29 July 1993 and the CRC on 19 April 1991.

³⁴⁵ <<https://www.youtube.com/watch?v=z0BtxvkUpcM>> accessed 20 June 2018.

³⁴⁶ AI (n 96) 62; Michelle Faul, 'Nigeria torture victim to be free after decade on death row' *AP* (Lagos, 1 June 2015) <<https://www.apnews.com/ca4298f61d9e48acbce77c8ecd97e83c>> accessed 11 September 2017.

CRC, while at the same time strengthening the case for clemency. It is submitted that this fact would have crossed the mind of the Governor and, considering the petitions he had received, influenced his decision to grant clemency. This case highlights the important role human right organisations play in holding states accountable to their international human rights obligations. It also shows how specific provisions of international human rights law have influenced the decision to grant clemency. Without the ICCPR and the CRC's prohibition on the use of the death penalty against people who were below 18 years old at the time of the crime, the case for granting clemency to Moses Akatugba would certainly have been weaker and more difficult to justify.

3.2.5 Zambia

As the UN body that monitors the implementation of the ICCPR by States Parties, the role of the CCPR is significant because each State Party to the ICCPR is under the obligation to regularly submit reports to the CCPR on how it has implemented the rights contained in the Covenant, including the right to seek clemency under Article 6(4).³⁴⁷ The CCPR reviews each report, expresses its concerns and makes recommendations to States Parties in the form of a 'concluding observation'.³⁴⁸ Since Zambia's accession to the ICCPR,³⁴⁹ it has submitted three periodic reports to the CCPR on the measures it has taken to implement its obligations.³⁵⁰ Although Zambia has a tradition of commuting death sentences, which has been enabled by the clemency provisions of its constitution³⁵¹ and 'noted with appreciation' by the CCPR,³⁵² the examination of Zambia's last report by the CCPR has had a remarkable influence on the frequency and number of death

³⁴⁷ ICCPR, art. 40.

³⁴⁸ Civil and Political Rights: The Human Rights Committee, Facts Sheet No 15 (Rev. 1). Concluding observations are consensus comments on positive and negative aspects of a State party's implementation of the ICCPR.

³⁴⁹ Zambia acceded to the ICCPR on 10 April 1984.

³⁵⁰ UN Doc CCPR/C/ZMB/CO/3, para 1.

³⁵¹ Constitution of Zambia 1991 (Amended 2016), s 97. This provision empowers the President to grant clemency to people sentenced to death. He is required to seek the advice of the Advisory Committee on Prerogative of Mercy in the exercise of those powers. A person who is sentenced to death is also entitled to request a pardon

³⁵² UN Doc CCPR/C/ZMB/CO/3, para 17.

penalty clemencies granted.

During the examination, the CCPR expressed concerns about the high number of people on death row in 2007. As a result, it recommended that Zambia ‘consider the commutation of the death sentences of all those currently on death row’.³⁵³ Since that recommendation in 2007, successive Zambian Presidents have granted clemency to an unprecedented high number of people on death row, and on one occasion to everyone on death row. President Levy Mwanawasa granted 124 clemencies,³⁵⁴ while President Rupiah Bwezani Banda granted 80.³⁵⁵ In May 2013, President Michael Sata commuted the death sentences of 113 people to life imprisonment, and 10 more death sentences were commuted to life imprisonment, and one pardon granted, the following December.³⁵⁶ In July 2015, President Edgar Lungu commuted the death sentences of 332 people, the entire death row population at the time, to life imprisonment.³⁵⁷ From the time the recommendation was made until President Lungu’s mass commutation, 660 death penalty clemencies were granted in Zambia, compared to just 46 in the 10 year period before the recommendation was made.³⁵⁸

Although Zambia is yet to submit its fourth periodic report indicating how it has implemented the CCPR recommendation, the increase in the grant of death penalty clemencies can be attributed to the latter’s influence. There are four indicators that support this conclusion. First, Zambia has an obligation as a State Party to the ICCPR to implement CCPR recommendations.³⁵⁹ The implementation of ICCPR rights constitutes the measures a State Party has adopted to give effect to provisions which it has agreed to

³⁵³ Ibid.

³⁵⁴ UN Doc A/HRC/WG.6/28/ZMB/1, para 32. President Levy granted 97 commutations and 7 pardons in July and November 2007 respectively. He granted 20 more commutations in 2008.

³⁵⁵ UN Doc A/HRC/WG.6/28/ZMB/1, para 32; Amnesty International, ‘Fifty-three death sentences commuted in Zambia’ (16 January 2009) <<https://www.amnesty.org/en/latest/news/2009/01/fifty-three-death-sentences-commuted-zambia-20090116/>> accessed 22 April 2018. President Banda granted 53 commutations in January 2009; and one pardon and 26 commutations in May and June 2011 respectively.

³⁵⁶ UN Doc A/HRC/WG.6/28/ZMB/1, para 32.

³⁵⁷ Ibid.

³⁵⁸ UN Doc A/HRC/WG.6/28/ZMB/1, para 32; UN Doc CCPR/C/ZMB/3, para 150. Only 46 death penalty clemencies were granted between 1997 and July 2007 when the recommendation was made; 24 pardons and 22 commutations were granted in 2002 and 2004 respectively.

³⁵⁹ ICCPR, art. 40.

respect and fulfil, and shows the progress made in the enjoyment of those rights which is then reported to the CCPR pursuant to Article 40. In addition, the CCPR has emphasized that a State Party is required to take remedial action on its recommendations contained in concluding observations and that such recommendations constitute an authoritative guide for future laws, decisions and policies by that State Party.³⁶⁰

Secondly, Zambia has a good record of implementing CCPR recommendations. A study by Heyns and Viljoen which investigated the impact that UN human rights treaties, including the ICCPR, have had on the realisation of human rights in States Parties found many examples of the recommendations of the CCPR ‘leading, directly or indirectly, to positive changes to law, policy and practice.’³⁶¹ In the case of Zambia, the study reveals that in the only three communications where the CCPR found violations of the ICCPR against the country, the recommendations of the treaty body were implemented by Zambia and that the violations against affected individuals were redressed.³⁶²

Thirdly, Zambia has strengthened the right to seek clemency in its domestic law. In its last report to the CCPR in 2006, Zambia explained that the clemency provision in its Constitution was the legislative measure it had adopted to give effect to the right to seek clemency under Article 6 ICCPR.³⁶³ Indeed, the Constitution which was adopted in 1991 has been amended three times and the clemency provision has survived each amendment.³⁶⁴ The last amendment even witnessed a strengthening of the clemency provision. Prior to that amendment, the right to seek clemency was not expressly provided for but could only be inferred from the powers of the President to grant clemency.³⁶⁵ However, following the 2016 amendment, the right to seek clemency from the President

³⁶⁰ Fact Sheet No 15 (n 348).

³⁶¹ Christof Heyns and Frans Viljoen, ‘The Impact of the United Nations Human Rights Treaties on the Domestic Level’ (2001) 23 Human Rights Quarterly 483; Fact Sheet No 15 (n 348).

³⁶² Ibid 516-517. A communication is an official complaint filed with the CCPR alleging violations of the rights set forth in the ICCPR by States parties to the First Optional Protocol to the International Covenant on Civil and Political Rights. Under the ICCPR an individual or a State Party can submit a communication.

³⁶³ UN Doc CCPR/C/ZMB/3, 37.

³⁶⁴ Since the current *Zambian Constitution* was adopted on 24 August 1991 it has been amended three times through the Amendment Act No. 18 of 1996, Constitution of Zambia (Amendment) Act 2009 and the Constitution of Zambia (Amendment) Act 2016.

³⁶⁵ Constitution of Zambia 1991, s 59.

was expressly included in the Constitution.³⁶⁶ In addition, Zambia recently reported to the HRC that its ‘commitment to uphold the protection and promotion of [international] human rights’ had motivated the 2016 amendment of the Constitution.³⁶⁷

Lastly, ahead of its 2017 UPR, Zambia declared in its national report to the HRC that the mass commutations granted by President Sata and President Lungu were some of the progressive steps it had taken on the death penalty.³⁶⁸ This declaration was made in light of Zambia’s previous UPR in 2012 in which a recommendation on death penalty clemency was addressed to Zambia by the United Kingdom.³⁶⁹ By making the declaration, Zambia was demonstrating to the HRC and the international community that it had implemented the 2012 recommendation and had made progress in the enjoyment of the right to seek death penalty clemency.

3.3 Conclusion

This chapter has established that international human rights law has, to a large extent, influenced the use of the death penalty through the granting of clemency in the significant sub-Saharan African countries considered. Ghana’s law and practice of granting death penalty clemency clearly aligns with international human rights law, particularly, its obligations under Article 6(4) ICCPR; but there is no evidence to indicate that they were influenced by international human rights law. In contrast, the practice of granting death penalty clemency in Benin, Kenya, Nigeria and Zambia has been influenced by international human rights law in various ways and to different degrees. The most discernible influence is evident in Benin where the government has acknowledged that ICCPR-OP2 caused it to commute the death sentences of all prisoners on death row. In Kenya, the death sentences of thousands of prisoners were commuted because of a doctrine of international human rights law. In addition, Zambia has remarkably increased the grant of death penalty clemency in response to the recommendations of the CCPR and

³⁶⁶ Constitution of Zambia (as amended 2016), s 97(2).

³⁶⁷ UN Doc A/HRC/WG.6/28/ZMB/1, para 2.

³⁶⁸ Ibid, para 30-36.

³⁶⁹ UN Doc A/HRC/22/13, para 103.42. During the UPR in 2012 Zambia noted a recommendation made to it by the United Kingdom to ‘...commute to custodial sentences those death sentences that have already been handed down.’

in fulfilment of its obligations under Article 6(4) ICCPR. While Nigeria has a good practice of granting death penalty clemency, the influence of international human rights law is evident only in two cases. Since the grant of death penalty clemency is discretionary, it may not always be granted to death row prisoners. The only guarantee against the use of the death penalty is its abolition which is the subject of the next chapter.

CHAPTER 4

Abolition of the Death Penalty

The grant of death penalty clemency, which was discussed in the last chapter, tends to obscure the fact that people sentenced to death often get executed. Every year, death row prisoners who have failed in their bid for clemency or been denied the right to seek it are executed in sub-Saharan Africa.³⁷⁰ For instance, at the end of 2017, 28 executions were recorded in sub-Saharan Africa – 24 in Somalia and 4 in South Sudan – and at least 4,187 people were known to be under the sentence of death in the region.³⁷¹ As long as the death penalty remains lawful, death row prisoners will remain at risk of being executed by the state. The only assurance against imposition of death sentences and executions is abolition of the death penalty. The abolition movement is now gaining momentum globally with an increasing number of countries prohibiting capital punishment.

This chapter aims to demonstrate the extent to which international human rights law has influenced the abolition of the death penalty in sub-Saharan Africa. Abolition is an important death penalty theme because it addresses all concerns about the use of capital punishment through its legal prohibition. Thus, its exploration is essential in investigating the extent to which international human rights law has influenced the law and practice of sub-Saharan African countries on the death penalty.

There are two main sections in this chapter. The first section examines the death penalty abolition status of different countries and the criteria used in classifying them. The second section analyses the influence of international human rights law on the abolition of the death penalty in sub-Saharan Africa using four countries as case studies; and highlights countries in the region whose laws on abolition aligns with international human rights law but have not been influenced by it.

³⁷⁰ AI (n 100). According to data from Amnesty International, in sub-Saharan Africa, 28 executions were recorded in 2017; 22 in 2016; 43 in 2015; 46 in 2014; and 64 in 2013.

³⁷¹ AI (n 3).

4.1 Classification of death penalty status

In terms of their death penalty status, countries around the world are usually classified into four main categories – ‘abolitionist for all crimes’, ‘abolitionist for ordinary crimes only’, ‘abolitionist in practice’/ ‘abolitionist de facto’ and ‘retentionist’.³⁷² Classification of the death penalty status of countries globally is important for this study on sub-Saharan Africa, not only as part of the wider context but also because it helps to understand the global trend towards abolition and determine whether a country has attained death penalty abolition status. It also serves as a useful tool for the purpose of advocacy against use of the death penalty. Therefore, it is not uncommon for international human rights organisations, the UN and other inter-governmental organisations to refer to these classifications in their discourse on the abolition of the death penalty.

‘Abolitionist for all crimes’ are countries whose laws do not provide for the death penalty for any crime.³⁷³ In 1966, when the ICCPR was adopted by the UN General Assembly, only 26 countries had abolished the death penalty for all crimes;³⁷⁴ today there are 107.³⁷⁵

‘Abolitionist for ordinary crimes only’ are countries whose laws provide for the death penalty only for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances such as wartime.³⁷⁶ Seven countries – Brazil,

³⁷² Amnesty International, *When the State Kills: The Death Penalty v Human Rights* (United Kingdom, Amnesty International 1989).

³⁷³ AI (n 58). The UN also uses this classification (UN doc E/2015/49).

³⁷⁴ Roger Hood and Carolyn Hoyle, ‘Abolishing the Death Penalty Worldwide: The Impact of a “New Dynamic”’ (2009) 38 *Crime and Justice* 1.

³⁷⁵ AI (n 17). These countries are: Albania, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Benin, Bhutan, Bolivia, Bosnia-Herzegovina, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Cape Verde, Colombia, Congo (Republic of), Cook Islands, Costa Rica, Cote D'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Estonia, Finland, Fiji, France, Gabon, Georgia, Germany, Greece, Guinea, Guinea-Bissau, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Kiribati, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malta, Marshall Islands, Mauritius, Mexico, Micronesia, Moldova, Monaco, Mongolia, Montenegro, Mozambique, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niue, Norway, Palau, Panama, Paraguay, Philippines, Poland, Portugal, Romania, Rwanda, Samoa, San Marino, Sao Tome And Principe, Senegal, Serbia (including Kosovo), Seychelles, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Suriname, Sweden, Switzerland, Timor-Leste, Togo, Turkey, Turkmenistan, Tuvalu, Ukraine, United Kingdom, Uruguay, Uzbekistan, Vanuatu, Venezuela. Note that Burkina Faso is the newest country to abolish the death penalty, Associated Press (n 17).

³⁷⁶ AI (n 58); Schabas (n 40) 363. The UN also uses this classification and considers it to mean countries where the death penalty has been abolished for all ordinary offences committed in peacetime, such as those

Chile, El Salvador, Guatemala, Israel, Kazakhstan, Peru – currently belong in this category.³⁷⁷ It may seem that there is not much difference, in reality, between ‘abolitionist for all crimes’ and ‘abolitionist for ordinary crimes only’;³⁷⁸ perhaps because countries in the latter category have not used the death penalty for any crime in a long time and, in any case, can use it only for exceptional crimes, which rarely happens.³⁷⁹ However, as long as the death penalty remains in law, the possibility of its use cannot be ruled out. As Schabas notes: ‘Indeed, it is in time of war when the greatest abuse of the death penalty occurs. Criteria of expediency and State terror stampede panicked governments towards inhumane excesses unthinkable in time of peace.’³⁸⁰ This was certainly the case in Rwanda which vigorously used the death penalty against perpetrators of crimes committed during the 1994 Rwandan war and genocide.³⁸¹ Rwanda and the use of the death penalty is considered in more detail below.

‘Abolitionist in practice’, according to Amnesty International, ‘are countries which retain the death penalty for ordinary crimes such as murder but can be considered abolitionist in practice because they have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions; this category also includes countries which have made an international commitment not to use the death penalty.’³⁸² However, the UN uses the term ‘abolitionist de facto’ instead, defining this group as:

States and territories in which the death penalty remains lawful and death sentences may still be pronounced but executions have not taken place for 10 years. States and territories that have carried out executions within the previous 10 years but have

contained in the criminal code or those recognized in common law (for example, murder, rape and robbery with violence) and that the death penalty is retained only for exceptional circumstances, such as military offences in time of war, or crimes against the State, such as treason, terrorism or armed insurrection.

³⁷⁷ AI (n 58).

³⁷⁸ Eric Neumayer, ‘Death Penalty: The Political Foundations of the Global Trend Towards Abolition’ (2008) 9 *Hum Rights Rev* (2008) 241.

³⁷⁹ For instance, the last time Brazil carried out an execution was in 1855 and the death penalty has only been used once in Israel, against Adolf Eichmann in 1962 for his role in the Holocaust.

³⁸⁰ Schabas (n 40) 369.

³⁸¹ Kindiki (n 180).

³⁸² *Ibid.*

made an international commitment through the establishment of an official moratorium are also designated as ‘de facto abolitionist’.³⁸³

Superficially, it appears that these two terminologies are the same because the criteria for both require the retention of the death penalty and the fulfilment of a 10-year rule. However, closer examination reveals certain differences.

First, ‘abolitionist in practice’ is restricted to countries which retain the death penalty for ordinary crimes, thereby excluding countries that retain the death penalty for exceptional crimes. Whereas ‘abolitionist de facto’ is open to more countries, that is, all countries in which the death penalty remains in law and death sentences may be imposed. Secondly, in the ‘abolitionist in practice’ category the 10-year rule is qualified but this is not the case for ‘abolitionist de facto’. To qualify as ‘abolitionist in practice’, a country must, in addition to fulfilling the 10-year rule, be believed to have a policy or established practice of not carrying out executions. This additional requirement seems difficult to ascertain objectively since what constitutes a policy or established practice may vary from country to country, resulting in inconsistency in the classification of countries in this category. Thirdly, although both categories recognise, as an exception, countries that do not fulfil the 10-year rule but have made an international commitment against the death penalty, there is no clarity in the ‘abolitionist in practice’ criteria on what constitutes ‘international commitment’. The scope of ‘international commitment’ is essential in this context because the term is quite broad and may consist of the official pronouncement of a high-ranking state official at an international event, an official report or response by a government before the UN or a regional inter-governmental organisation, or even an official declaration made internally but intended for the international community. For this reason, the ‘abolitionist de facto’ approach is preferred as it expressly specifies that the required international commitment must be made through the establishment of an official moratorium on executions.

These differences explain why there is an inconsistency between the lists of ‘abolitionist in practice’ states and ‘abolitionist de facto’ states. While Amnesty International classify

³⁸³ UN Doc E/2015/49, 2.

29 countries as ‘abolitionist in practice’,³⁸⁴ the UN considers 51 as ‘abolitionist de facto’.³⁸⁵ This also explains perhaps why many writers on the death penalty prefer to use the ‘abolitionist de facto’ classification.³⁸⁶

‘Retentionist’ countries are those which retain the death penalty in their law.³⁸⁷ Of all the categories, this is the easiest to ascertain. The main criterion is that the death penalty is a lawful punishment in the country. Amnesty International considers 56 countries as retentionist.³⁸⁸ The number of countries in this category can be used as a measure of progress on the global abolition of the death penalty, and advocates of abolition can rely on this when they state that only a minority of countries use of the death penalty.

Despite the advantages of classifying the death penalty status of countries, however, the current classification is problematic. In all the abolitionist categories, only ‘abolitionist for all crimes’ can be considered truly abolitionist. ‘Abolitionist for ordinary crimes only’ and ‘abolitionist in practice’/ ‘abolitionist de facto’ still retain the death penalty in law to some degree, and to all intents and purposes either use or may use the death penalty - hence the retention of the punishment in law. This raises serious concerns about the commitment of countries in these categories to full abolition of the death penalty. ‘Abolitionist for ordinary crimes only’ states, in reality, have not abolished the death penalty for exceptional crimes such as genocide, crimes against humanity and crimes committed in war time, and still have the potential to use the death penalty in those contexts.

In addition, the classification of countries as ‘abolitionist in practice’/ ‘abolitionist de facto’ ignores the first fundamental element of the death penalty – imposition of death

³⁸⁴ AI (n 58).

³⁸⁵ UN Doc. E/2015/49, 12.

³⁸⁶ Many death penalty writers, including Roger Hood, Carolyn Hoyle, William Schabas, Christof Heyns, Thomas Probert, Eric Neumayer, Dongwook Kim and Lilian Chenwi, use ‘abolitionist de facto’ (sometime written as ‘de facto abolitionist’). The ‘abolitionist in practice’ classification is commonly used by organisations that advocate for the global abolition of the death penalty. Those organisations include Amnesty International, Death Penalty Information Center, *Ensemble contre la peine de mort* (Together against the Death Penalty – ECPM), World Coalition Against the Death Penalty and Reprieve. However, Hands Off Cain prefer ‘abolitionist de facto’.

³⁸⁷ AI (n 58).

³⁸⁸ Ibid.

sentences, and focuses too much on the second element – carrying out of executions. The 10-year rule of both categories illustrates this point. Countries that have not carried out executions in the last 10 years and even those that have executed within that time frame but have made an international commitment to stop executing qualify as ‘abolitionist in practice’ and ‘abolitionist de facto’. The fact that the laws of these countries permit the use of the death penalty and the countries may or do impose death sentences is surprisingly not considered.³⁸⁹ These criteria appear to give more importance to executions over death sentences when in fact international human rights law provides equal safeguards to protect people facing both elements of the death penalty.³⁹⁰

The retention of death penalty laws with the potential to invoke them or the act of imposing death sentences is anathema to the abolition of the death penalty even if no executions are carried out. This, coupled with the death row phenomenon and the real possibility of these countries resuming executions, is an anomaly which renders their classification as ‘abolitionist in practice’ or ‘abolitionist de facto’ flawed. As Amnesty International rightly stated in its 1979 seminal work on the death penalty, ‘there is good reason for caution in classifying as abolitionist in practice any country which keeps the death penalty in law.’³⁹¹ This position was borne out by examples at that time of countries which had not executed in a long time but subsequently resorted to the death penalty through the expansion of the scope of the punishment, the imposition of death sentences or the resumption of executions.³⁹² In the context of sub-Saharan Africa, Cameroon is just one example, out of many in the region, of the problematic nature of classifying countries in this way.³⁹³

³⁸⁹ The UN apparent relaxed approach to the 10-year rule is particularly concerning. In 2015 the UN Secretary-General while reporting to the Economic Social Council on the death penalty stated: ‘A State that has not executed anyone for 10 years is deemed abolitionist de facto, regardless of whether the State acknowledges that there is a moratorium in place.’ (UN doc E/2015/49, 12).

³⁹⁰ UN Economic and Social Council Resolution 1984/50; ICCPR, arts 6 and 14.

³⁹¹ Amnesty International, *The Death Penalty* (London, Amnesty International 1979) 104.

³⁹² The countries cited included Belgium, Ireland, Cyprus and Greece.

³⁹³ Other examples in sub-Saharan Africa include: (a) Sierra Leone, classified abolitionist in practice/abolitionist de facto, but regularly imposes death sentences. In 2014 the country made an international commitment to the UN Committee Against Torture to abolish the death penalty in a matter of weeks but in 2016 serviced its gallows with a view to resuming execution and in 2017 rejected the recommendation of its own Constitutional Review Committee to abolish the death penalty. (b) Liberia, classified abolitionist in practice/abolitionist de facto, and despite acceding to the ICCPR-OP2 in 2005

Cameroon is currently classified as ‘abolitionist in practice’, following its reclassification from ‘retentionist’ in 2008.³⁹⁴ However the country’s abolitionist credentials are questionable. Cameroon has consistently abstained from voting on the bi-annual UN General Assembly resolution on a moratorium on the use of the death penalty.³⁹⁵ Although an abstention is a less strong signal of disapproval than a ‘no’ vote,³⁹⁶ Cameroon’s consistent abstentions indicate that it does not approve of the resolutions which are ultimately geared towards abolition of the death penalty. Also, Cameroon has rejected recommendations made to it on the abolition of the death penalty during two review cycles of the UN Human Rights Council’s Universal Periodic Review (UPR).³⁹⁷ On one occasion it strongly defended its retention of the death penalty, stating: ‘It [the death penalty] remains in the country’s legal armoury because of its dissuasive effect and public support for its retention. Cameroon rejects this [abolition] recommendation.’³⁹⁸ On another occasion it noted that the retention of the death penalty reflected the will of the people of the country which the government wanted to respect.³⁹⁹ Although the last execution in Cameroon occurred in 1997,⁴⁰⁰ the authorities have continued to impose death sentences. In the last few years the number of death sentences imposed has reached an unprecedented high level. Between 2015 and 2016 alone, 251 people were sentenced to death.⁴⁰¹ This followed Parliament’s expansion of the scope of the death penalty to

introduced the death penalty for armed robbery in 2008 and has regularly imposed death sentences ever since.

³⁹⁴ Amnesty International, *List of Abolitionist and Retentionist Countries (31 December 2008)* (ACT 50/002/2009) 1. The UN currently classifies Cameroon as abolitionist de facto (UN Doc E/2015/49, 17).

³⁹⁵ The first resolution was adopted by the UNGA in 2007 (UN doc A/RES/62/149). Since the second resolution was adopted in 2008 (UN Doc A/RES/63/168) four more resolutions have been adopted bi-annually ever since (UN Doc A/RES/65/206, UN Doc. A/RES/67/176, UN Doc A/RES/69/186, UN Doc A/RES/71/187). The voting record of Cameroon for the resolutions was accessed at <<http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=152R91O829144.405159&profile=voting&lang=en&logout=true&startover=true>> 12 May 2018.

³⁹⁶ Erik Voeten, ‘Data and analysis of voting in the United Nations General Assembly’ in Bob Reinalda (ed), *Routledge Handbook of International Organization* (Routledge 2013).

³⁹⁷ UN Doc A/HRC/11/21/Add.1; UN Doc A/HRC/24/2.

³⁹⁸ UN Doc A/HRC/11/21/Add.1.

³⁹⁹ UN Doc A/HRC/24/15, para 58.

⁴⁰⁰ AI (n 58).

⁴⁰¹ AI, *Death Sentences and Executions 2015* (ACT 50/3487/2016) 57; AI, *Death Sentences and Executions 2016* (ACT 50/5740/2017) 37.

include terrorism-related crimes.⁴⁰²

One important fact is clear from the above analysis: states have either abolished the death penalty for all crimes in their law or still retain the death penalty in their law in one form or another. Against this background, it is arguably more appropriate to classify the death penalty status of countries into just two main categories – ‘abolitionist’ and ‘retentionist’.⁴⁰³ Abolitionist can easily be categorized on the basis that only countries where the death penalty does not exist are truly abolitionist; and should not be further divided. Therefore, ‘abolitionist’ can be defined as countries where the death penalty is not lawful. The ‘retentionist’ category, however, requires further division and elaboration. It is essential to recognise that retentionist countries retain and engage with the death penalty in different ways. Some countries retain the death penalty in law but do not use it at all, some impose death sentences but do not implement them, while others impose death sentences and carry out executions. In that regard, retentionist countries can be divided into the following sub-categories: (1) Non-active retentionist: countries that retain the death penalty in law but have not used the death penalty in the past 10 years. (2) Non-executing retentionist: countries that retain the death penalty in law and have imposed a death sentence but have not carried out an execution in the past 10 years. (3) Active retentionist: countries that retain the death penalty in law, have imposed a death sentence and carried out an execution in the past 10 years, and do not have an official moratorium on executions or use of the death penalty.⁴⁰⁴

The classification of the death penalty status of countries into ‘abolitionist’ and ‘retentionist’ is particularly helpful, in the next section, to determine whether a sub-

⁴⁰² AI, *Death Sentences and Executions 2014* (ACT 50/001/2015) 55.

⁴⁰³ Hood and Hoyle (n 227) 503-515, list countries under a broad heading of ‘retentionist and abolitionist countries’ but go further to classify countries as ‘actively retentionist’, ‘completely abolitionist’, ‘abolitionist for ordinary crimes only’ and abolitionist *de facto*’.

⁴⁰⁴ Hood and Hoyle recognise an ‘actively retentionist’ category and define it as ‘countries that still retained the death penalty on 30 April 2014 and have carried out at least one judicial execution within the past 10 years and have not announced a moratorium (2004-2014)’; Hood and Hoyle (n 227) 502. However, the ‘active retentionist’ category proposed in this study differs slightly from that of Hood and Hoyle in that it includes countries that have imposed death sentences in the last 10 years and expands the scope of the moratorium criteria beyond executions to include moratorium on the general use of the death penalty (that is death sentences and executions). While many countries tend to establish an official moratorium on executions, some countries also establish an official moratorium on both the imposition of death sentences and executions.

Saharan African country has attained death penalty abolition status.

4.2 The influence of international human rights law on abolition in sub-Saharan Africa

This section analyses the influence of international human rights law on the abolition of the death penalty in sub-Saharan Africa, using four countries – South Africa, Rwanda, Madagascar and Benin – as case studies. Those countries were selected because they offer the best examples of the subject matter, are unique in the ways in which they achieved abolition and are representative of the two largest language blocs – Anglophone and Francophone – in the region.

Of the 49 countries in sub-Saharan Africa, 21 have abolished the death penalty for all crimes while the remaining 28 still retain the death penalty in law. The 21 abolitionist countries and their year of abolition are: Angola (1992), Benin (2016), Burkina Faso (2018), Burundi (2009), Cape Verde (1981), Congo (Republic of) (2015), Cote D'Ivoire (2000), Djibouti (1995), Gabon (2010), Guinea (2017), Guinea-Bissau (1993), Madagascar (2015), Mauritius (1995), Mozambique (1990), Namibia (1990), Rwanda (2007), Sao Tome And Principe (1990), Senegal (2004), Seychelles (1990), South Africa (1995) and Togo (2009).⁴⁰⁵

The first set of countries in sub-Saharan Africa to abolish the death penalty were five former Portuguese colonies – Angola, Cape Verde, Guinea Bissau, Mozambique and São Tomé and Príncipe.⁴⁰⁶ By 1993, when abolition of the death penalty was still a rare occurrence in sub-Saharan Africa, all the Lusophone countries had outlawed the punishment. Cape Verde was the first to abolish the death penalty in the region. It achieved this through the promulgation of a new Constitution in 1981.⁴⁰⁷ In 1990, Mozambique and São Tomé and Príncipe also abolished the death penalty in their Constitutions.⁴⁰⁸ In 1992, Angola abolished the death penalty with the promulgation of

⁴⁰⁵ AI and Associated Press (n 16).

⁴⁰⁶ AI (n 58).

⁴⁰⁷ Constitution of the Republic of Cape Verde 1981, art 26 (2) states: ‘...in no case will there be the death penalty.’

⁴⁰⁸ Constitution of the Republic of Mozambique 1990, art 70 states: ‘(1). All citizens shall have the right to life. All shall have the right to physical integrity and may not be subjected to torture or to cruel or inhuman

Constitutional Revision Law No. 23/92 of 16 September on the Prohibition of the Death Penalty.⁴⁰⁹ Guinea-Bissau completed this series of abolitions when it amended its Constitution in 1993.⁴¹⁰

Before considering the four case studies, it is important to explore what influenced the abolition of the death penalty in the five Lusophone countries because they pioneered abolition of the punishment in sub-Saharan Africa.

4.2.1 The Lusophone countries

A review of the constitutional reforms and political history of the five Lusophone countries does not reveal any influence of international human rights law on their abolition of the death penalty.⁴¹¹ A credible explanation is that the abolitions came at a time when abolition of the death penalty was not firmly rooted in international human rights law. By July 1991 when ICCPR-OP2 came into force, Cape Verde, Mozambique and São Tomé and Príncipe had already abolished the death penalty. Although four of the countries are now parties to ICCPR-OP2 and Angola is a signatory, this occurred long after they had abolished the death penalty.⁴¹² Rather, abolition in these countries has been attributed to Portuguese colonial influence⁴¹³ and there is evidence which supports this point. Since the middle ages, Portugal had rarely used the death penalty and usually only for treason.⁴¹⁴ It last carried out an execution in 1849, abolishing the death penalty for

treatment. (2) In the Republic of Mozambique there shall be no death penalty.’; Constitution of the Republic of Sao Tomé and Príncipe 1990, Art. 21 states: ‘(1) Human life is inviolable. (2) In no case will there be the death penalty.’

⁴⁰⁹ Also, the Constitution of the Republic of Angola 2010, art 59 provides: ‘The death penalty shall be prohibited.’

⁴¹⁰ Constitution of the Republic of Guinea-Bissau 1984 (amended in 1991, 1993 and 1996), art 36 states: ‘In the Republic of Guinea-Bissau the death penalty shall not be applied in any cases.’

⁴¹¹ Research was conducted on the constitutional reforms which led to abolition in the five countries relying on available literature on the drafting history of the constitutional amendments. For example, in the case of Mozambique the draft of the 1990 Constitution did not initially include an abolition clause, but the Drafting Committee received some guidance from the drafters of the Namibian Constitution, which contained an abolition clause (Millard Arnold, ‘Remarks: Constitutional Development in Southern Africa’ (1991) 85 Proceedings of the Annual Meeting of the American Society of International Law 310).

⁴¹² Cape Verde (19 May 2000), Guinea Bissau (24 Sep 2013), Mozambique (21 Jul 1993) and São Tomé and Príncipe (10 Jan 2017). Angola signed ICCPR-OP2 on 24 Sep 2013.

⁴¹³ Chenwi (n 5) 30.

⁴¹⁴ Timothy Coates, *Convict Labour in the Portuguese Empire: 1740-1932* (Leiden, The Netherlands: Brill,

ordinary crimes in 1867 and for all crimes in 1976.⁴¹⁵ Because of this, Portugal did not use the death penalty in its five African colonies.⁴¹⁶ Following independence, Cape Verde did not include the death penalty in its criminal law.⁴¹⁷ However, Angola, Guinea-Bissau and Mozambique did introduce the death penalty,⁴¹⁸ and São Tomé and Príncipe was known to have carried out executions.⁴¹⁹ Since the death penalty was not entrenched in the criminal systems of these countries throughout decades of Portuguese rule and was only used briefly by the post-independence regimes of four of the countries, it could be argued that there was no real appetite in the five countries to retain the death penalty. Therefore, when the opportunity of constitutional reform came, it was easy for them to expressly abolish the death penalty in law.

4.2.2 South Africa

In the landmark case of *S v Makwanyane and Another*,⁴²⁰ the Constitutional Court of South Africa considered the constitutionality of the death penalty following a referral by the Appellate Division which had upheld the death sentences imposed on two accused persons for murder. The Constitutional Court had to decide whether the imposition of death sentences for murder was cruel, inhuman and degrading, contrary to section 11(2) of the Interim South African Constitution 1993.⁴²¹ Following a detailed consideration of the case, it held that the imposition of the death sentence as provided by Section 277 of the Criminal Procedure Act No. 51 of 1977,⁴²² was unconstitutional because it was

2014).

⁴¹⁵ Hood and Hoyle (n 227) 505.

⁴¹⁶ Chenwi (n 5) 30.

⁴¹⁷ Amnesty International (AI), *West Africa: Time to abolish the death penalty* (London, Amnesty International 2003) 7.

⁴¹⁸ Andrew Novak, *The African Challenge to the Global Death Penalty Abolition; International Human Rights Norms in Local Perspective* (Intersentia 2016) 34-35; AI (n 421) 13.

⁴¹⁹ Hood and Hoyle (n 227) 504-505.

⁴²⁰ *S v Makwanyane and Another* 1995 (3) SA 391.

⁴²¹ Interim Constitution of the Republic of South Africa Act 200 of 1993, s 11(12) provides: 'No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.'

⁴²² s 277 provides that the sentence of death may be passed by a superior court only and only in the case of a conviction for: (a) murder; (b) treason committed when the Republic is in a state of war; (c) robbery or attempted robbery, if the court finds aggravating circumstances to have been present; (d) kidnapping; (e)

inconsistent with the fundamental human rights provisions – on the freedom from cruel, inhuman or degrading treatment or punishment,⁴²³ the right of equality,⁴²⁴ the right to life⁴²⁵ and the right to human dignity⁴²⁶ – of the Constitution.⁴²⁷ The Court declared all laws imposing death sentences in South Africa unconstitutional and invalid. It ordered the government not to execute any person already under sentence of death and that their sentences be set aside and substituted with lawful punishments.⁴²⁸ The judgment, which effectively abolished the death penalty in South Africa, was implemented by the Criminal Law Amendment Act 1997, which repealed section 277 and provided for resentencing.⁴²⁹

The *Makwanyane* judgment was novel and marked the first time in sub-Saharan Africa that a court had abolished the death penalty. In addition, the case is very significant for this study because of the clear influence of international human rights law on the abolition of the death penalty in South Africa. Indeed, it appears to be the first time that such an influence was recorded in sub-Saharan Africa. South Africa did not have a tradition of judicial review and there was limited domestic precedent on how to interpret the human rights enshrined in Chapter Three of the Interim Constitution.⁴³⁰ This difficulty was partly addressed in the Interim Constitution itself,⁴³¹ which had already paved the way for the Constitutional Court to have recourse to international human rights law in the interpretation of the human rights provisions. Section 35 (1) stated:

child-stealing; (f) rape.

⁴²³ Interim South Africa Constitution 1993, s 11(2).

⁴²⁴ *Ibid*, s 8.

⁴²⁵ *Ibid*, s 9.

⁴²⁶ *Ibid*, s 10.

⁴²⁷ *Makwanyane* (n 420), para 146. It should be noted that the Constitutional Court considered the right of equality, right to life, and right to human dignity together as giving meaning to the freedom from cruel, inhuman or degrading treatment or punishment.

⁴²⁸ *Ibid*, para 151.

⁴²⁹ Criminal Law Amendment Act 1997 (Act No. 51 of 1977). In July 2006, the Constitutional Court completed its supervision of the process of substituting death sentences with alternative sentences in *Sibiya and Others v Director of Public Prosecutions and Others 2007* (1) SACR 347 (CC) (UN Doc CCPR/C/ZAF/1).

⁴³⁰ Peter Norbert Bouckaert, 'Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa' (1996) 32 *Stan. J. Int'l L.* 287, 304.

⁴³¹ The final version of the constitution, known as The Constitution of the Republic of South Africa 1996, was adopted on 8 May 1996.

In interpreting the provisions of this chapter, a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law.⁴³²

The Constitutional Court clarified the scope of its reliance on international human rights law in *Makwanyane*, stating:

In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.⁴³³

In arriving at its decision, the Constitutional Court relied on the jurisprudence of the UN Human Rights Committee, although it noted that the Committee was prevented from declaring the death penalty to be a violation of the right to life because of Article 6(2) ICCPR.⁴³⁴ The Court specifically cited the Committee's declaration in *Chitat Ng v. Canada* that 'by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of Article 7 of the Covenant

⁴³² Interim South African Constitution 1993, s 35(1). This provision remained in the 1996 final version of the constitution under s 39(1).

⁴³³ *Makwanyane* (n 420), para 35. It is remarkable that an African Court was prepared to consider the human rights jurisprudence of the American and European human rights systems. The Constitutional Court's clarification of the scope of public international law within the context of section 35(1) of the Interim Constitution was particularly helpful to the court in its analysis of death penalty under international human rights law.

⁴³⁴ *Kindler v. Canada*, CCPR Communication No. 470/1991; *Ng v. Canada*, CCPR Communication No. 469/1991.

[ICPPR].⁴³⁵ On that basis it concluded that the taking of life ‘under such deliberate and calculated circumstances’ is a violation of the right to life because it constitutes cruel and inhuman treatment within the meaning of Article 7.

It is important to note that although Article 6(2) ICCPR allows the death penalty in certain circumstances for the ‘most serious crimes’, unlike the Committee the Constitutional Court did not allow itself to be constrained by that provision. Rather, it invoked Article 6(6) of the ICCPR, which states that ‘nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant’, as justification for its ground-breaking decision. In addition, in a manner which appears to justify why it took that approach, the Court stated that the ICCPR ‘tolerates but does not provide justification for the death penalty’ and therefore the Covenant’s provision on the death penalty had to be seen in that context.⁴³⁶ In that regard, the Court again found that the death penalty constitutes a violation of the right to life. It concluded that the death penalty violates the essential content of the right to life enshrined in the Interim South African Constitution in the sense that it extinguishes life itself.⁴³⁷ The Constitutional Court established that the right to life is a prerequisite for all other rights, since without life, in the sense of existence, it would be impossible to exercise other human rights or to be the bearer of them.⁴³⁸ It stressed that the purpose of the imposition of death sentences is to kill convicted criminals and that this amounts to the deprivation of existence which inevitably results in the denial of human life.⁴³⁹ As Obeng Mireju points out, the Constitutional Court effectively established that at the core of the constitutional right to life is an injunction against the state not to put anyone to death.⁴⁴⁰

The approach taken by the Constitutional Court can be criticized for being subjective

⁴³⁵ *Ng* (n 434), para 16.2.

⁴³⁶ *Makwanyane* (n 420), para 66.

⁴³⁷ *Ibid*, para 327.

⁴³⁸ *Ibid*, paras 326-327.

⁴³⁹ *Ibid*, paras 334-335. The Court concluded that ‘life by its very nature cannot be restricted, qualified or abridged, limited or derogated from’ since one is either alive or dead (para 353).

⁴⁴⁰ Obeng Mireku, ‘Shutting Down the Death Factory in South Africa: The Normative Role of the Twin Rights of Human dignity and Life’

<https://www.biicl.org/files/2312_mireku_shutting_down_death_factory.pdf> accessed 25 June 2018.

because of the selective way in which it interpreted the international human rights law jurisprudence it relied on. For example, when considering the cases of *Ng* and *Kindler*, the Court singled out the Committee's acknowledgement that the death penalty may constitute cruel and inhuman punishment to justify its decision. Yet it refused to follow and apply the conclusion of the Committee that the use of the death penalty in accordance with the requirements of the ICCPR does not constitute a breach of a country's obligations. In addition, while the Court acknowledged that Article 6(2) to (5) of the ICCPR permits the imposition of death sentences for the most serious crimes, it did not apply those provisions in *Makwanyane*, in which the accused were guilty of grievous murders. Rather, it chose to apply Article 6(6) of the ICCPR, on the desirability of abolition, to support its decision. Such criticism was perhaps anticipated by the Court as Justice Mokgoro stated that, because court judgments are articulated and available for criticism and are based on acceptable sources in the form of applicable international and foreign precedent, the interpretation is not subjective.⁴⁴¹ However, Abraham Klaasen considered that this argument was not entirely accurate. He pointed out that although the Court considered applicable international law and foreign law, it rejected sources that argued that the death penalty was an appropriate penalty.⁴⁴² While this does not make the decision wrong or arbitrary, it is an indication of the role interpretative choice plays in choosing the sources of international law that will support a particular view.⁴⁴³

The decision of the Constitutional Court in *Makwanyane* had the strong potential to become a persuasive authority for national courts in other parts of sub-Saharan Africa, particularly in countries with similarly framed right to life provisions.⁴⁴⁴ However, over two decades since *Makwanyane*, the Court's decision is yet to serve as persuasive authority for national courts to abolish the death penalty in retentionist countries in sub-Saharan Africa. At least two reasons can be given for this.

First, there are no retentionist countries in sub-Saharan Africa with similar right to life

⁴⁴¹ *Makwanyane* (n 420), para 304.

⁴⁴² Abraham Klaasen, 'Constitutional Interpretation in the So-Called Hard Cases: Revisiting *S v Makwanyane*' (2017) 50 *De Jure* 1.

⁴⁴³ *Ibid.*

⁴⁴⁴ *Chenwi* (n 5) 89.

provisions to those in the then South African Interim Constitution. The constitutions of most retentionist countries in the region specifically allow for the use of the death penalty as an exception to the right to life. Secondly, the fact that the ICCPR expressly permits retentionist countries to use the death penalty for the most serious crimes weakens the persuasive authority of *Makwanyane*, thereby making it less convincing for a national court. Nevertheless, the *Makwanyane* decision shows that a national court can indeed be influenced by international human rights law when interpreting the prohibition of cruel, inhuman, and degrading punishment.⁴⁴⁵ In this light, Chenwi has argued that such interconnection between the international and domestic jurisprudence could be useful for African lawyers and courts in dealing with the death penalty.⁴⁴⁶

Similarly, Nowak has stated that *Makwanyane* may serve as a precedent for the interpretation of Article 4 of the African Charter as an abolitionist provision.⁴⁴⁷ His argument is premised on the fact that the African Charter, like the then Interim South African Constitution, does not expressly recognise the death penalty as an exception to the right to life. However, there has not yet been any evidence of *Makwanyane* serving as a precedent for interpreting Article 4. No national or regional African court has relied on the decision to interpret Article 4. In addition, the African Commission on Human and Peoples' Rights (African Commission), which has the mandate of interpreting the African Charter, has not used *Makwanyane* in its construction of Article 4. It was only in 2015 that the African Commission, for the first time, interpreted Article 4 with reference to the death penalty. It declared that the African Charter does not include any provision recognising the death penalty, even in limited circumstances, but did not refer to *Makwanyane*.⁴⁴⁸ Nevertheless, it should be noted that the African Commission's Working Group on the Death Penalty has referred to *Makwanyane* in its Study on the Question of the Death Penalty in Africa.⁴⁴⁹ The Working Group identified the case as a precedent for

⁴⁴⁵ R Keightley, 'Torture and cruel, inhuman and degrading treatment or punishment in the UN Convention against Torture and other instruments of international law: Recent developments in South Africa' (1995) 11 *South African Journal on Human Rights* 400.

⁴⁴⁶ Chenwi (n 5) 89.

⁴⁴⁷ Manfred Nowak 'Is the death penalty an inhuman punishment?' in TS Orlin, A Rosas & M Scheinin (eds) *The jurisprudence of human rights law: A comparative interpretative approach* (2000) 42–43.

⁴⁴⁸ General Comment No. 3 (n 98).

⁴⁴⁹ African Commission Death Penalty Study (n 89) 41.

abolitionists to argue that the death penalty is inconsistent with the right to freedom from cruel, inhuman and degrading treatment or punishment.⁴⁵⁰

It could be argued that *Makwanyane* has not served as a precedent for the interpretation of Article 4 because there is no direct similarity between the right to life provisions of the African Charter and those in the then Interim South African Constitution. It is for this reason that Van Zyl Smit contends that Nowak goes too far by drawing a direct parallel between Article 4 and the South African constitutional provision.⁴⁵¹ He argues that although neither the African Charter nor the Interim Constitution refers directly to the death penalty, the latter is even more succinct than the former. Van Zyl Smit is of the view that ‘had the South African provision paralleled the African Charter more closely, some South African Constitutional Court judges may well have found that provision for the non-arbitrary deprivation of the right to life allowed the retention of the death penalty.’⁴⁵² This is a plausible argument because unlike the South African right to life provision which is absolute and provides without qualification that ‘every person shall have the right to life,’⁴⁵³ Article 4 qualifies the right to life by stating: ‘No one may be arbitrarily deprived of this right.’⁴⁵⁴ The use of the term ‘arbitrary’ is vital as it indicates that a person may be deprived of life as long as it is not arbitrary.

4.2.3 Rwanda

As already discussed in Chapter 2, following the 1994 genocide, the International Criminal Tribunal for Rwanda (ICTR) and international human rights law influenced Rwanda to restrict the imposition of death sentences.⁴⁵⁵ Despite the enactment of the 1996 Organic Law,⁴⁵⁶ which made some restrictions possible, Rwanda continued to rigorously

⁴⁵⁰ Ibid.

⁴⁵¹ Van Zyl Smit (n 18) 6.

⁴⁵² Ibid, 7.

⁴⁵³ Interim South Africa Constitution 1993, s 9.

⁴⁵⁴ African Charter, art 4.

⁴⁵⁵ Chapter 2.3.

⁴⁵⁶ Organic Law No. 8/96 (n 197).

use the death penalty. Twenty-two convicts were executed in 1998,⁴⁵⁷ and between that year and 2006 1,365 people were sentenced to death by the domestic courts.⁴⁵⁸ However, following the enactment of Organic Law Concerning Transfer of Cases to the Republic of Rwanda from the ICTR and from Other States (the Transfer Law) in March 2007,⁴⁵⁹ the attitude of the Rwandan authorities to the use of the death penalty completely changed. On 25 July 2007, Parliament passed the Organic Law Relating to the Abolition of the Death Penalty (the Abolition Law).⁴⁶⁰ The Abolition Law abolished the death penalty for all crimes and replaced it with life imprisonment.⁴⁶¹

Considering the influence of international human rights law on the UN Security Council's decision not to allow ICTR use the death penalty, and the ICTR's subsequent requirement that the punishment could not be used for cases transferred to Rwanda, it is plausible to conclude that Rwanda's complete abolition of the death penalty was a result of the trickle-down influence of international human rights law. The following arguments support this conclusion.

First, there was a domino effect. The UN Security Council's exclusion of the death penalty from the ICTR's jurisdiction caused the ICTR to include a no-death penalty condition in Rule 11*bis*, which then triggered Rwanda's enactment of the Transfer Law and eventually led to a complete abolition of the punishment. Since the ICTR had no power to use the death penalty, and in light of the UN Security Council's stance against the use of the death penalty during the negotiations to establish the ICTR, it was inconceivable that the Tribunal would have transferred cases to a country that used the death penalty. The ICTR's concerns about Rwanda's use of the death penalty impeding the transfer of cases had been quite evident some years before the enactment of the

⁴⁵⁷ Boctor (n 208).

⁴⁵⁸ Peterson Tumwebaze, 'Death row: Over 1300 survive gallows' *The New Times* (27 August 2007) <<http://www.newtimes.co.rw/section/read/988>>.

⁴⁵⁹ Chapter 2.3.

⁴⁶⁰ Organic Law No. 31/2007 of 25/07/2007 relating to the abolition of the death penalty, art 2 states: 'The death penalty is hereby abolished.'

⁴⁶¹ Abolition Law, art 2 states: 'The death penalty is hereby abolished'; art 3 substitutes the death penalty by life imprisonment or life imprisonment with special provisions; and art 4 defines life imprisonment with special provisions as imprisonment in solitary confinement without the possibility of clemency or rehabilitation unless the convict spends at least 20 years in prison.

Transfer Law. The ICTR President, Judge Erik Mose, in his first report to the UN Security Council on the implementation of Resolution 1503, stated that the ICTR had identified cases to transfer to Rwanda for trial but that ‘at the moment, transfer is made difficult by the fact that Rwandan law prescribes the death penalty as a sentence for certain crimes.’⁴⁶² In his second report, he again noted that: ‘Transfer of cases to Rwanda raises several issues. One involves the death penalty, which is applicable in genocide cases, though only rarely implemented.’⁴⁶³ Nevertheless, Judge Erik Mose’s acknowledgement of Rwanda’s initiation of a proposal, in 2006, to abolish the death penalty following the amendment of Rule 11*bis*,⁴⁶⁴ was a strong indication that the ICTR’s requirement had begun to influence Rwanda’s attitude towards abolition. Rwanda had always insisted that high-level persons accused of the 1994 genocide should be transferred and tried in Rwandan courts,⁴⁶⁵ so it stood to gain from fulfilling the ICTR’s requirement. If the country had not fulfilled the ICTR’s requirement, the ICTR would have been obliged under Rule 11*bis* to transfer the cases to another country.⁴⁶⁶

Secondly, records of deliberations on the Abolition Law in the Rwanda Parliament indicate that the ICTR requirement influenced Members of Parliament (MPs) to eventually vote in favour of abolition.⁴⁶⁷ Two debates were held on 16 March and 7 June 2007 before the Abolition Bill was enacted. The first was held on the same day that Parliament adopted the Transfer Law.⁴⁶⁸ The timing implies that the preparedness of Parliament to consider complete abolition of the death penalty was connected to the exclusion of the death penalty from cases transferred from the ICTR.⁴⁶⁹ Support for this conclusion is found in the records of the Parliamentary debate that day, which show that

⁴⁶² UN Doc S/2003/946, para 23.

⁴⁶³ UN Doc S/2006/951, para 36.

⁴⁶⁴ *Ibid.*

⁴⁶⁵ Boctor (n 208).

⁴⁶⁶ *Ibid.*

⁴⁶⁷ Parliament of Rwanda, *Minutes of Parliamentary Debates on the Abolition of the Death Penalty*, 16 March 2007 and Parliament of Rwanda, *Minutes of Parliamentary Debates on the Abolition of the Death Penalty*, 8 June 2007 in Horovtiz (n 205) 525-527; Amnesty International (AI), *Rwanda: Suspects Must not be Transferred to Rwandan Courts for Trial Until it is Demonstrated that Trials will Comply with International Standards of Justice*, (AFR 47/013/2007).

⁴⁶⁸ Abolition Debates of 16 March 2007 (n 467); Organic Law No. 11/2007 of 16/03/2007.

⁴⁶⁹ Horovtiz (n 205).

the Minister of Justice, Tharcisse Karugarama, cited the exclusion of the death penalty from transferred cases as an argument in favour of complete abolition.⁴⁷⁰ The Minister stated that the adoption of the Transfer Law had created a contradiction in which the death penalty was not applicable to genocide-related cases transferred from the ICTR and other states, yet the punishment was applicable in domestic cases.⁴⁷¹

At the second debate, in a move that appeared to have persuaded MPs opposed to abolition, the Minister emphasized to Parliament that, after abolition, the worst genocide perpetrators, who would have been subjected to the death penalty under domestic law, would still be liable to severe punishment but in the form of life imprisonment with special provisions.⁴⁷² In addition, the government pushed further on the need to resolve the contradiction by arguing that it was not equitable to use the death penalty against people who had committed less serious offences while those who had committed genocide would not be subject to the same punishment.⁴⁷³ That was a valid argument. If the contradiction had not been addressed through complete abolition, the worst perpetrators of the genocide transferred from the ICTR and other states would have escaped the death penalty, while perpetrators whose cases had originated in Rwanda and even those convicted of lesser, ordinary crimes would have had the death penalty used against them.

Thirdly, the Explanatory Note to the Draft Law Relating to the Repeal of the Death Penalty cited the right to life contained in the UDHR to justify abolition.⁴⁷⁴ In addition, it stated that there was ‘a push towards abolition from the UN and the African Commission on Human and Peoples’ Rights, and the fact that a large proportion of UN Member States have already repealed the death penalty.’⁴⁷⁵

Fourthly, a 2016 qualitative empirical study which investigated post-genocide

⁴⁷⁰ Abolition Debates of 16 March 2007 (n 467), Statement of Justice Minister.

⁴⁷¹ Ibid.

⁴⁷² Ibid.

⁴⁷³ Explanatory Note to the Draft Law Relating to the Repeal of the Death Penalty in Bector (n 208).

⁴⁷⁴ Bector (n 208).

⁴⁷⁵ Ibid.

reconciliation in Rwanda and the domestic effects of the ICTR found that the ICTR's referral requirements had indeed influenced the abolition of the death penalty in Rwanda.⁴⁷⁶ People interviewed for the study, including Rwandan members of the ICTR, Rwandan lawyers and scholars, and foreign legal experts based in Rwanda all explicitly endorsed the view that Rwanda had abolished the death penalty to satisfy the ICTR's referral conditions.⁴⁷⁷ One foreign legal expert, who was very much involved in Rwanda's legal reforms of 2007, confidently stated that Rwanda had abolished the death penalty in order to meet the ICTR's requirements and live up to all the international standards which the ICTR demands of a country to which genocide perpetrators are extradited.⁴⁷⁸ This opinion is corroborated by a Rwanda news report published shortly after the death penalty was abolished. The report stated:

Sentencing convicts to death ended after the abolition of the death penalty, which was largely motivated by the government's desire to have Genocide suspects extradited and be tried here. In February, Rwanda assured the international community that the death penalty will no longer be applied.⁴⁷⁹

In addition, Stephen Rapp, a senior trial lawyer at the ICTR, was reported to have said that outlawing the death penalty considerably improved the chances of ICTR transferring cases to Rwanda. He had noted that 'If Rwanda had not passed the law, it would not be possible [transferring suspects] because we could not send people knowing that they would face the death penalty.'⁴⁸⁰

4.2.4 Madagascar

The death penalty was introduced in Madagascar in 1958 by the French colonial authorities who carried out an execution in the same year.⁴⁸¹ After independence, death

⁴⁷⁶ Horovtiz (n 205).

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Tumwebaze (n 458).

⁴⁸⁰ Ibid.

⁴⁸¹ Death Penalty Worldwide (DPW), *Pathways to Abolition of the Death Penalty* (Cornell Law School, 2016) 21; UN Doc A/HRC/WG.6/7/MDG/1, para 46.

sentences were imposed but no executions were ever carried out.⁴⁸² Abolition of the death penalty was considered by the government for many years but it never materialised.⁴⁸³ Between 2005 and 2006 two abolition bills introduced in the National Assembly were rejected.⁴⁸⁴ There were security challenges and high level criminality in the south of the country due to an increase in the theft of cattle.⁴⁸⁵ Consequently, MPs from the south were persistently opposed to abolition and some had even called for the death penalty for the rape of minors.⁴⁸⁶ Madagascar's reservations about abolition were evident at its first UPR where it rejected all recommendations to abolish the death penalty, stating: 'the conditions for the immediate abolition of capital punishment do not yet exist. A significant proportion of the population and a majority of Members of Parliament believe that the deterrent effect of maintaining the death penalty is still a useful means of combating insecurity.'⁴⁸⁷

However, after some years of political crisis following a 2009 coup d'état, the transitional government of President Rajoelina began to show an increased enthusiasm to consider abolition of the death penalty.⁴⁸⁸ This was most likely encouraged by the need to re-establish relations with the international community, following the latter's disapproval of the coup d'état, and the aspiration that human rights should be promoted in the country.⁴⁸⁹ The country's engagement with UN human rights mechanisms began to positively influence its attitude to abolition.

In 2010, for the first time, Madagascar co-sponsored the UNGA death penalty moratorium resolution, and for the second time voted in favour of it.⁴⁹⁰ Co-sponsors of

⁴⁸² UN Doc A/HRC/WG.6/7/MDG/1, para 46.

⁴⁸³ DPW (n 481) 21.

⁴⁸⁴ Ibid.

⁴⁸⁵ UN Doc A/HRC/WG.6/20/MDG/3, para C(2). Murder committed during cattle theft was the only offence that was punished by a mandatory death penalty (Penal Code of Madagascar, art 304 (amended 28 January 2005)).

⁴⁸⁶ Ibid.

⁴⁸⁷ UN Doc A/HRC/14/13/Add.1., para 18.

⁴⁸⁸ DPW (n 481) 21.

⁴⁸⁹ Ibid.

⁴⁹⁰ UN Doc A/RES/65/206.

UNGA resolutions are primarily co-authors of it and co-sponsorship signifies strong agreement with the substance of the resolution.⁴⁹¹ Therefore, Madagascar's action indicated its agreement with the abolition calls contained in the resolution.⁴⁹² In addition, on 24 September 2012 President Rajoelina signed ICCPR-OP2.⁴⁹³ Although simply signing a human rights treaty which, like ICCPR-OP2, requires ratification does not express the state's consent to be bound,⁴⁹⁴ it demonstrates the state's intent to examine the instrument with a view to ratifying it.⁴⁹⁵ In this context, Madagascar was arguably signalling its eventual commitment to abolition. More importantly, by becoming a signatory to ICCPR-OP2, Madagascar was obliged, in the period between signature and ratification, to refrain from acts that would defeat the object and purpose of the Protocol.⁴⁹⁶ Furthermore, in December 2012 Madagascar again co-sponsored and voted in favour of the third UNGA death penalty moratorium resolution,⁴⁹⁷ a further sign of its commitment to abolition. At the time of its second UPR, on 3 November 2014, the influence which UN human rights mechanisms had had on Madagascar's attitude to abolition was evident. For the first time, it accepted all recommendations to abolish the death penalty,⁴⁹⁸ had no reservations about abolition and did not seek to justify retention of capital punishment despite continued opposition to abolition in the south of the country.⁴⁹⁹

A few weeks later, a short Abolition Bill, containing only four sections, was personally

⁴⁹¹ A. Glenn Mower Jr, 'The Sponsorship of Proposals in the United Nations General Assembly' (1962) 15 *Western Political Quarterly* 661, 662.

⁴⁹² UNGA Resolution 65/206 'calls upon all States to establish a moratorium on executions with a view to abolishing the death penalty.'

⁴⁹³ DPW (n 481) 21; <<https://treaties.un.org/doc/Publication/CN/2012/CN.511.2012-Eng.pdf>> accessed 28 April 2018.

⁴⁹⁴ Vienna Convention on the Law of Treaties 1969 (VCLT), art 14(1)(a).

⁴⁹⁵ United Nations, *Treaty Handbook* (United Nations Publications 2012), 3.1.

⁴⁹⁶ VCLT, art 18.

⁴⁹⁷ UN Doc A/RES/67/176;

<<http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=1527J9NK38798.49061&menu=search&aspect=power&npp=50&ipp=20&spp=20&profile=voting&ri=1&matchopt=0%7C0&source=~%21horizon&index=.VM&term=A%2FRES%2F67%2F176&x=15&y=15&aspect=power>> accessed 28 April 2018.

⁴⁹⁸ UN Doc A/HRC/28/13, 108.

⁴⁹⁹ UN Doc A/HRC/WG.6/20/MDG/1; UN Doc A/HRC/WG.6/20/MDG/2; UN Doc A/HRC/28/13.

introduced in Parliament by Jean Max Rakotomamonjy, President of the National Assembly.⁵⁰⁰ The influence of international human rights law in the drafting of the bill was obvious. The explanatory statement accompanying the Bill began with a reference to key provisions of the UDHR: Article 3, the right to life, and Article 5, the right to freedom from torture or cruel, inhumane or degrading treatments.⁵⁰¹ The statement ended:

Any country committed to liberty and ethics must pronounce itself, without any ambiguity, against the death penalty. Madagascar has already demonstrated this willingness by signing in September 2012 the Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. It is time to translate this willingness into law. This is the purpose of the present Bill.⁵⁰²

The anticipated opposition from southern MPs was apparent during the Parliamentary committee's consideration of the Bill. However, the fact that these MPs were in a minority appeared to have eliminated the opposition.⁵⁰³ When the Bill was put to a plenary vote on 10 December 2014, the National Assembly unanimously adopted it.⁵⁰⁴ On 9 January 2015, the Bill was signed into law by the President.⁵⁰⁵ Article 1 provides: 'The death penalty is abolished. No-one can be executed.'⁵⁰⁶ The punishment was replaced by life imprisonment with hard labour.⁵⁰⁷ Subsequently, Madagascar ratified ICCPR-OP2 on 21 September 2017.

4.2.5 Benin

The influence of ICCPR-OP2 on the Constitutional Court's restriction of death sentences and the government's grant of clemency to all death row prisoners in Benin is well

⁵⁰⁰ Bill No. 2014-035 on the Abolition of the Death Penalty.

⁵⁰¹ *Ibid*, Explanatory Statement.

⁵⁰² *Ibid*.

⁵⁰³ DPW (n 481) 23.

⁵⁰⁴ *Ibid*.

⁵⁰⁵ Law No. 2014-035 on the Abolition of the Death Penalty.

⁵⁰⁶ *Ibid*, art 1.

⁵⁰⁷ *Ibid*, art 2.

established.⁵⁰⁸ However, a major question which these developments pose is: what is the death penalty status of Benin?

Hood and Hoyle have opined that Benin effectively abolished the death penalty when it acceded to ICCPR-OP2 in 2012.⁵⁰⁹ They do not provide further reasoning for their opinion. However, subsequent proponents of this view have argued that abolition occurred because Benin is a monist state,⁵¹⁰ and as such ICCPR-OP2 was automatically incorporated and took effect in the country's national law upon accession.⁵¹¹ In addition, they rely on the 2012 Constitutional Court decision in support of their position.⁵¹² Benin is indeed a monist state and this status is confirmed in the Constitution which gives treaties, lawfully ratified by Benin, superior authority over national laws.⁵¹³ Nevertheless, the conclusion that Benin's accession to the ICCPR-OP2 abolished the death penalty in the country is legally flawed.

First, as already discussed in Chapters 1 and 2, ICCPR-OP2 does not actually abolish the death penalty but sets abolition as its goal. Article 1(1) provides that 'no one in the jurisdiction of a State Party to the Protocol shall be executed', while Article 1(2) stipulates: 'Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.' This clearly indicates that ICCPR-OP2 imposes an obligation on a State Party to ensure abolition of the death penalty and does not automatically abolish the death penalty in its jurisdiction. One probable reason for the assumption that ICCPR-OP2 abolishes the death penalty on ratification or accession is that 81, a clear majority,

⁵⁰⁸ Chapters 2.2 and 3.2.1.

⁵⁰⁹ Hood and Hoyle (n 227) 89-9, 504-505.

⁵¹⁰ A state that adopts the monist theory 'has a unitary perception of the 'law' and understands both international and municipal law as forming part of one and the same legal order.' Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn, New York, Routledge 1997) 63-67. In a monist state, treaties do not need to be translated into national law but take effect immediately upon ratification.

⁵¹¹ DPW (n 481) 3-5; Zorah Blok and Ciarán Suter, *Triggers for abolition of the death penalty in Africa: A Southern African perspective* (FIDH, 2017) 14,17; African Commission on Human and Peoples' Rights, *Working Group on The Death Penalty in Africa* (2012), 7; Alice Mogwe, 'The Death Penalty in Botswana: Barriers to Equal Justice' in Ivan Simonovic (eds), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations 2014) 154; Novak (n 9) 4.

⁵¹² Ibid; Benin Constitutional Court Decision DCC 12-153 of 4 August 2012.

⁵¹³ Constitution of Benin 1990, art 147.

of the current 85 States Parties are abolitionist.⁵¹⁴ However, it must be emphasized that many of these states became parties to the Protocol after abolition had already taken place in their countries.⁵¹⁵

Secondly, analysis of the 2012 Constitutional Court judgment indicates that it applies only to the adoption of the Criminal Procedure Code and not to the general use of the death penalty in Benin.⁵¹⁶ The case arose from the request of the President to the Constitutional Court to determine whether the new Criminal Procedure Code passed by the National Assembly was compliant with the Constitution. Consequently, the Constitutional Court, among other things, declared Articles 685(2) and 793, which provided for death sentences, unconstitutional because they were incompatible with Benin's accession to ICCPR-OP2. Thus, the contravening provisions of the law were removed by the National Assembly, but provisions on the death penalty remained in the Criminal Code.⁵¹⁷

Nevertheless, an examination of the 2016 Constitutional Court decision sheds light on the current abolitionist status of Benin. The decision went further in scope than the 2012 one, unequivocally declaring that Benin's accession to ICCPR-OP2 'now renders inoperative **all legal provisions** stipulating the death penalty as a punishment...such that no one can now be sentenced to capital punishment in Benin.'⁵¹⁸ By virtue of the Constitutional Court being the highest court and authority on constitutional matters,⁵¹⁹ this decision is final and binding in Benin. Therefore, it can be concluded that the death penalty is no longer lawful in Benin and the country is an abolitionist state. Furthermore, since the Constitutional Court premised its 2016 decision on Benin's accession to the ICCPR-OP2, it is reasonable to conclude that international human rights law influenced Benin's

⁵¹⁴ <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-12&chapter=4&clang=en> assessed on 28 May 2018. Brazil, Chile, El Salvador and Liberia (retentionist) are States Parties to the ICCPR-OP2 but have not abolished the death penalty for all crimes.

⁵¹⁵ Ibid.

⁵¹⁶ Chapter 2.2.

⁵¹⁷ AI (n 261).

⁵¹⁸ Emphasis added. See Chapter 2.2.

⁵¹⁹ Constitution of Benin 1990, arts 114 and 117.

abolition of the death penalty.

5.3 Conclusion

The aim of this chapter was to demonstrate the extent to which international human rights law has influenced the abolition of the death penalty in sub-Saharan Africa. The chapter has demonstrated that international human rights law influenced abolition of the death penalty in South Africa, Rwanda, Madagascar and Benin. However, as the analysis of the Lusophone countries in the region indicate, abolition of the death penalty in some sub-Saharan African countries only aligns with international human rights law and the influence of that body of law is not evident. In those Lusophone countries, Portuguese colonialism influenced abolition. Thus, international human rights law has influenced abolition of the death penalty in sub-Saharan Africa to some extent. Nevertheless, the extent of that influence is significant. The ICCPR and the jurisprudence of the CCPR provided the Constitutional Court of South Africa with grounds it needed to declare the death penalty unconstitutional. In this regard, Article 6(6) ICCPR was a useful tool for the Court. This also proves that although the Covenant allows for the death penalty in limited circumstances, it is a progressive abolition instrument which could be relied on to achieve abolition of the death penalty. The influence of ICCPR-OP2 on the Benin Constitutional Court's decisions shows the effectiveness of the instrument in having far-reaching positive outcomes for abolition in the jurisdiction of States Parties. As the case of Madagascar shows, even when a country is simply a signatory, ICCPR-OP2 can still inspire abolition. It is hoped that the 2016 decision of the Benin Constitutional Court will serve as precedent in other countries that become a party to ICCPR-OP2 but delay in fulfilling their obligations to take all necessary measures to abolish the death penalty. International human rights law's relationship with the abolition of the death penalty is dynamic. Beyond the obligations it directly imposes on States Parties to abolitionist instruments, its general application by states in the context of UN mechanisms and institutions can influence countries to abolish the death penalty, as was the case in Rwanda and Madagascar.

CHAPTER 5

Conclusion

The aim of this study has been to investigate the extent to which international human rights law has influenced the law and practice of sub-Saharan African countries on the death penalty. This study is important because the death penalty remains lawful in the majority – 28 of 49 – countries in sub-Saharan Africa contrary to international trends which indicate that 107 countries – a majority – in the world have abolished the punishment. Also, the lives of convicts are protected against the death penalty in 21 sub-Saharan African countries but could be lawfully taken in 28 others, creating a kind of lottery with regard to respect for the right to life in sub-Saharan Africa. Furthermore, the propensity of sub-Saharan African countries to implement death sentences makes the situation even more concerning.

5.1 Principal findings of the study

Why the African Charter, Africa's main human rights instrument, is silent on the death penalty is an important question in the study of the death penalty; but one which scholars have not yet been able to properly explain. Rather than provide reasons for the silence, scholars have simply been using Article 4 of the African Charter, which prohibits the arbitrary deprivation of life, to draw inferences on the Charter's position on the death penalty. Indeed, William Schabas was right in observing that there is paucity of available materials on the drafting history of the African Charter.⁵²⁰ This makes it difficult, but not impossible, to understand the Charter's silence on the death penalty. This study has shown that the available drafting history sheds light on the Charter's silence. The drafters of the Africa Charter were determined to make the instrument unique, hence they did not simply replicate provisions from the other international human rights instruments. They had the opportunity to include a provision on the death penalty, in fact the first draft contained such a provision, but they intentionally left it out of the final draft. Besides, no country in Africa had abolished the death penalty for all crimes in 1979, when the Charter was being

⁵²⁰ Schabas (n 40) 355-361.

drafted, so the restriction or abolition of the punishment was not a major human rights priority for Africa at that time.

What emerged out of a desire to be original has turned out to be a flaw. The African Charter's failure to regulate the use of the death penalty has made the instrument weak in addressing concerns about the punishment. In particular, at a time when international human rights law is moving towards abolition of the death penalty, the African human rights system is lagging behind. A human rights system must be relevant and continuously adapt to match changing conditions,⁵²¹ but the African human rights system has been slow to do this with regard to the death penalty. An instrument which comprehensively addresses the question of the death penalty in Africa is urgently required. To this end, the African Union should without further delay consider and adopt the draft Protocol to the African Charter on the Abolition of the Death Penalty, which has been pending before it since 2015.

This study has found that international human rights law has influenced the law and practice of sub-Saharan African countries on the death penalty to a large extent in three distinct ways: restricting the imposition of death sentences, preventing executions through the grant of clemency and abolishing the death penalty.

The mandatory imposition of death sentences has been declared unconstitutional by national courts in Malawi and Kenya using international human rights law as tools for interpreting the Constitution.⁵²² Constitutional provisions on the right to equality before the law, freedom from discrimination and the right to a fair trial have all been construed with reference to the International Covenant on Civil and Political Rights (ICCPR)⁵²³ and the Universal Declaration of Human Rights (UDHR)⁵²⁴ in order to invalidate laws which provided for the mandatory imposition of death sentences. Consequently, in these countries, judges now have the discretion not to impose death sentences and are permitted to take into consideration mitigating circumstances during sentencing in individual

⁵²¹ Lilian Chenwi, 'Breaking new ground: The need for a protocol to the African Charter on the abolition of the death penalty in Africa' (2005) 5 AHRLJ 89.

⁵²² Chapter 2.1.

⁵²³ 999 UNTS 171.

⁵²⁴ UNGA Res 217A (III).

capital cases. Although the death penalty remains a lawful punishment there, the prohibition of mandatory death sentences has resulted in the courts ordering the establishment of resentencing hearings to review all death sentences. In Malawi, the resentencing hearings have led to the substitution of death sentences with prison terms and in some cases the immediate release of prisoners. The sentencing discretion that judges now have would arguably reduce the number of death sentences imposed.

In Benin, an examination of two landmark Constitutional Court judgments has shown how the Second Optional Protocol to the ICCPR (ICCPR-OP2)⁵²⁵ was used to justify restricting the imposition of death sentences.⁵²⁶ Although ICCPR-OP2 does not expressly preclude State Parties from imposing death sentences, it was initially used by the Constitutional Court to nullify a section of a new law providing for death sentences. The same instrument was subsequently used by the Court as ground for invalidating all existing death penalty laws in Benin, to the extent that prosecutors can no longer request the courts to impose death sentences in criminal cases and all courts have been banned from imposing such sentences.

The International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone, both set up by the UN, have played significant roles in restricting the imposition of death sentences in Rwanda and Sierra Leone respectively.⁵²⁷ The ICTR could not impose death sentences for crimes, even though such crimes were punishable with the death sentence under Rwandan law.⁵²⁸ Similarly, the Special Court cannot impose death sentences despite the availability of the punishment in Sierra Leonean law. The UN's resolve to exclude the death sentence from the punishments the ICTR and Special Court could use stemmed from international human rights law which unequivocally no longer permits the imposition of death sentences for international crimes.

In addition, the study has found that the right of people under sentence of death to seek

⁵²⁵ 1642 UNTS 414.

⁵²⁶ Chapter 2.2.

⁵²⁷ Ibid.

⁵²⁸ The ICTR was officially closed by the UN on 31 December 2015.

clemency is well established in international human rights law.⁵²⁹ UN and regional human rights instruments, UN bodies and experts and international human rights tribunals have all contributed significantly to entrenching the right in the jurisprudence of international human rights law.

Countries across sub-Saharan Africa have established a practice of granting death penalty clemency. The common feature of the five significant countries examined in this study is that they have provisions in their domestic law which facilitate the grant of death penalty clemency and have consistently granted it to many or all people on death row.⁵³⁰ In many cases the clemency granted to death row prisoners has been influenced by international human rights law. The extent of that influence has been diverse across the five countries examined. At one end of the spectrum is Ghana, which has a good record of granting clemency to death row prisoners but has done so in fulfilment of its own clemency laws and its tradition of granting clemency to commemorate national days, with no discernible influence of international human rights law. At the other end of the spectrum are Benin, Kenya and Zambia that have clearly been influenced by international human rights treaties, doctrine and treaty implementation review mechanisms in granting death penalty clemency.⁵³¹ Nigeria falls in the middle of this influence spectrum, while it has regularly granted clemency to death row prisoners, its decisions have largely been influenced by the discretion of the executive to show mercy to death row prisoners; although international human rights law has played a major role in influencing the decision to grant clemency in two cases.⁵³²

The influence of international human rights law on the grant of death penalty clemency in sub-Saharan Africa has been quite remarkable, resulting in thousands of people being spared death. It has also altered the way in which some countries in sub-Saharan Africa use the death penalty; that is, it has prevented them from implementing death sentences. In the absence of clemency, it is undeniable that in sub-Saharan Africa many people sentenced to death who have exhausted or been denied their right of appeal would

⁵²⁹ Chapter 3.1.

⁵³⁰ Ibid.

⁵³¹ Ibid.

⁵³² Ibid.

languish on death row always at risk of execution.

Of the 21 abolitionist countries in sub-Saharan Africa, South Africa, Rwanda, Madagascar and Benin offer the best examples of the influence of international human rights law on abolition. The South African case of *Makwanyane*⁵³³ has been groundbreaking in sub-Saharan Africa on two fronts. First, it marked the first time a court in the region had abolished the death penalty. Prior to *Makwanyane*, abolition had only been achieved in 9 countries in the region, but through direct legislative changes.⁵³⁴ Secondly, it marked the first discernible influence of international human rights law on abolition in sub-Saharan Africa. The Constitutional Court in *Makwanyane* was faced with the dilemma of interpreting the human rights provisions of the Constitution with regards to its law on the death penalty but had very limited domestic precedent to rely on. International human rights law became the interpretative tool which enabled the Court to abolish the death penalty. At that time, South Africa's law on the death penalty was quite clear on the validity of the punishment. It is inconceivable that the Constitutional Court would have had the legal justification to interpret the Constitution to abolish the death penalty without Article 6(6) ICCPR and the jurisprudence of the UN Human Rights Committee.

ICCPR-OP2 has proved to be an effective abolitionist instrument in sub-Saharan Africa. It has been unique in influencing the abolition of the death penalty in three sub-Saharan African countries. The entry into force of ICCPR-OP2 in 1991 set international human rights law on a trajectory towards the abolition of the death penalty. The implications of this for the ICTR and Rwanda have already been noted. Also, the abolition of the death penalty in Madagascar on account of it being a signatory to ICCPR-OP2 shows how influential the instrument can be even in a signatory state.⁵³⁵ For Benin, accession to ICCPR-OP2 was the impetus that made abolition possible.⁵³⁶ The Constitutional Court's use of ICCPR-OP2 as the sole justification for the effective abolition of the death penalty

⁵³³ *Makwanyane* (n 420); Chapter 4.2.

⁵³⁴ Chapter 4.2. Cape Verde (1981), Mozambique (1990), Namibia (1990), Sao Tome and Principe (1990), Angola (1992), Guinea Bissau (1993) Seychelles (1990).

⁵³⁵ Chapter 4.2.

⁵³⁶ Chapter 2.2 and 4.2.

in Benin was unprecedented and has established a persuasive legal precedent which may influence the national courts of other States Parties.

The general classification of the death penalty status of countries is particularly useful in understanding the global trend towards abolition and determining whether a country has attained death penalty abolition status. However, the way in which scholars and anti-death penalty organizations classify countries as ‘abolitionist for all crimes’, ‘abolitionist for ordinary crimes only’, ‘abolitionist in practice’/ ‘abolitionist de facto’ and ‘retentionist’ has been challenged in this study. The classification is subjective, inconsistent and appears to give more importance to executions over imposition of death sentences. To rectify these flaws, the classification of countries into just two main categories – ‘abolitionist’ and ‘retentionist’ – was considered to be more appropriate.⁵³⁷ Furthermore, three new sub-categories and definitions for the ‘retentionist’ category were proposed: (1) Non-active retentionist: countries that retain the death penalty in law but have not used the death penalty in the past 10 years. (2) Non-executing retentionist: countries that retain the death penalty in law and have imposed a death sentence but have not carried out an execution in the past 10 years. (3) Active retentionist: countries that retain the death penalty in law, have imposed a death sentence and carried out an execution in the past 10 years, and do not have an official moratorium on executions or the use of the death penalty.⁵³⁸

5.2 Influence versus alignment

The fact that a country’s law or practice on the death penalty aligns with international human rights law does not of itself prove that the latter has influenced the former. International human rights law must have had a discernible effect on a country’s decision to restrict or prohibit the use of the death penalty for influence to be established. Besides finding clear evidence of influence, this study has found instances of the death penalty law or practice of sub-Saharan African countries merely aligning with international human rights law but with no discernible evidence of the latter influencing the former. For instance, in Zimbabwe, the Constitution prohibits the imposition of a death sentence

⁵³⁷ Chapter 4.1; See text to n 403.

⁵³⁸ Chapter 4.1; See text to n 404.

on a person below 21 years old when the offence was committed.⁵³⁹ This clearly aligns with Zimbabwe's obligations under Article 6(5) ICCPR and Article 37(a) Convention on the Right of a Child,⁵⁴⁰ which strictly prohibits the imposition of death sentences for crimes committed by persons below 18 years of age.⁵⁴¹ However, there is no evidence in the drafting history of the Zimbabwe Constitution that international human rights law influenced that provision.⁵⁴² On the contrary, Zimbabwe has a legal history and practice of not imposing death sentences against juveniles, and this precedes its accession to the ICCPR and the CRC. The juvenile age had long been set at 18 in the laws of Zimbabwe until the 2013 Constitution increased it to 21.⁵⁴³

Similarly, the right to seek death penalty clemency had been established in the 'prerogative of mercy' law of Ghana before the ICCPR came into force in 1976.⁵⁴⁴ Moreover, the practice of granting death penalty clemency in Ghana, already discussed in chapter 3, is further evidence of alignment with international human rights law rather than influence by it.⁵⁴⁵

Since international human rights law sets abolition of the death penalty as a goal, it could be argued that the death penalty abolition status of the 21 sub-Saharan African abolitionist countries aligns with international human rights law. However, of these 21 countries, this study found discernible influence of international human rights law on death penalty abolition in Benin, Madagascar, Rwanda and South Africa. It has been shown that Portuguese colonialism influenced abolition in the five Lusophone sub-Saharan African countries.⁵⁴⁶ With regard to Namibia, the only other Anglophone abolitionist country in sub-Saharan Africa besides South Africa, death penalty abolition occurred on

⁵³⁹ Zimbabwe Constitution 2013, s 48 (2)(C). This provision has been replicated in the Criminal Procedure and Evidence Act Chapter 9:07, s 338.

⁵⁴⁰ 1577 UNTS 3.

⁵⁴¹ Zimbabwe acceded to the ICCPR and CRC on 13 May 1991 and 11 May 1990 respectively.

⁵⁴² Parliament of Zimbabwe, *Report of the Constitution Parliamentary Select Committee (on the new Constitution for Zimbabwe)* (COPAC 2013).

⁵⁴³ Criminal Procedure and Evidence Act 1927 (Amended), s 228.

⁵⁴⁴ Constitution of Ghana 1957, s 23.

⁵⁴⁵ Chapter 3.2.2.

⁵⁴⁶ Chapter 4.2.

independence from apartheid South Africa. The arbitrary and repressive use of the death penalty during apartheid colonial rule in Namibia influenced the abolition of the death penalty in the independence Constitution.⁵⁴⁷ The death penalty was clearly a serious concern shortly before independence as it was one of the main matters debated by the drafters of the Constitution.⁵⁴⁸ This concern became apparent in 1994, four years after independence, during a UN General Assembly debate on the death penalty. Namibia's representative, while emphasizing that Namibians consider the right to life to be the most important human right, stated that 'the historical perspective and the social, cultural and political reality of Namibia prior to independence had played a major role in shaping its Constitution... Capital punishment was therefore clearly and expressly banned by the Constitution.'⁵⁴⁹ The emphatic words used to abolish the death penalty in the Namibian Constitution undoubtedly confirm this point and indicate the determination of the drafters to rid Namibia of the punishment.⁵⁵⁰

In the remaining 11 countries (all Francophone),⁵⁵¹ there is no clear indication that international human rights law influenced abolition of the death penalty. Factors that influenced abolition appear to include a strong political will of the government – characterized by Presidential opposition to the death penalty; grant of mass death penalty clemency; rare use of the death penalty; establishment of moratoria against executions; post-conflict resolution mechanisms and antipathy towards executions.⁵⁵²

5.3 Limitations of this research

Although this study has achieved its aim, it has certain limitations. In particular, it was

⁵⁴⁷ J. Hatchard and S. Coldham 'Commonwealth Africa' in Hodgkinson P & Rutherford A (eds) *Capital punishment: Global issues and prospects* (Winchester: Waterside Press 1996), 161.

⁵⁴⁸ Ibid.

⁵⁴⁹ UN Doc. A/C.3/49/SR.43, para. 68.

⁵⁵⁰ Constitution of Namibia 1990, art 6 provides: 'No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.'

⁵⁵¹ Burkina Faso, Burundi, Congo (Republic of), Cote D'Ivoire, Djibouti, Gabon, Guinea, Guinea-Bissau, Mauritius, Senegal, Togo.

⁵⁵² DPW (n 481); Blok and Suter (n 511); International Commission Against the Death Penalty, *How States Abolish the Death Penalty: 29 Case Studies* (2nd edn, 2018); Chenwi (n 5) 29-32.

based on a selection of countries in sub-Saharan Africa; it was restricted by the paucity of published official documents of sub-Saharan African countries on the death penalty; and it has mainly been conducted in English in a region with multiple official languages.

An analysis of every country in sub-Saharan Africa is beyond the scope of this study. The study focused mainly on 10 countries in that region. As a result, not all the trends in the law or practice of all 49 countries in sub-Saharan Africa could be considered and analysed. Thus, there is a risk that the influence that international human rights law has had on the death penalty in countries other than those considered has been missed. In addition, the paucity of published official documents on the death penalty in sub-Saharan Africa made the evaluation of a wider pool of countries impossible. Official government documents on the death penalty, for example the record of legislative proceedings and executive decisions, are quite important in understanding a country's law and practice. Unfortunately, many sub-Saharan African countries have not made these documents publicly and widely available. Also, they do not always fulfil their obligations to report their practice concerning the death penalty to the UN as required under Article 40 of the ICCPR.⁵⁵³ Furthermore, this study was primarily conducted in English in a region with multiple official languages which include English, French, Portuguese, Spanish and Arabic. Except for some sources in French which were translated into English, the study examined only literature in English. Considering that the majority of countries in sub-Saharan Africa are not Anglophone, there may well be literature in other official languages which has not been accessed but which could shed more light on the research question. For future research on the death penalty in sub-Saharan Africa, an examination of literature written in the official language(s) of the countries of study and an in-country sourcing of official government documents on the subject are recommended. This will ensure that the research limitations highlighted above are surmounted.

5.4 Suggestions for future research

Although ICCPR-OP2 has been influential in restricting and abolishing the death penalty in sub-Saharan Africa, the extent of ratification of / accession to this important instrument in the region is still low. Only 14 countries – 28 per cent – in sub-Saharan Africa are

⁵⁵³ Chenwi (n 5).

parties to the Protocol and seven countries that have already abolished the death penalty are not parties.⁵⁵⁴ It is important for countries that have already abolished the death penalty to become parties to the ICCPR-OP2 because it indicates a firm commitment of those countries to abolition and not to re-introduce the death penalty since ICCPR-OP2 does not provide for the withdrawal of States Parties. Moreover, an increase in the number of States Parties strengthens the abolition movement's position that support for abolition is increasing globally. Therefore, future researchers could examine the factors preventing sub-Saharan African countries, particularly those that have already abolished the death penalty, from becoming parties to the ICCPR-OP2.

Also, only 2 Anglophone countries – Namibia and South Africa, both of which have a history of apartheid – have abolished the death penalty in sub-Saharan Africa.⁵⁵⁵ This is concerning because people in Anglophone sub-Saharan Africa are less protected against the death penalty than people from other major language blocs in the region. This provides an opportunity for research on why the Anglophone countries are lagging behind and insights from the Francophone and Lusophone countries that could be useful in abolishing the death penalty in Anglophone sub-Saharan Africa.

More broadly, it can be seen from this study that the UN is opposed to the death penalty. Nearly three decades since ICCPR-OP2 was adopted by the UN General Assembly, however, the death penalty has not been completely abolished in international law. Further research is needed on why the UN has not yet adopted a treaty on the complete abolition of the death penalty.

5.5 Practical implication of the research

This study provides a contribution to existing knowledge of the death penalty in sub-Saharan Africa, particularly on the influence of international human rights law on the use of the death penalty in that part of the world. The study has proved that international human rights law is effective against the death penalty in sub-Saharan Africa. Human rights scholars, anti-death penalty advocates, campaigning organisations, lawyers and

⁵⁵⁴ The seven countries are Angola (currently a signatory to ICCPR-OP2); Burundi; Congo (Republic of); Cote d'Ivoire; Guinea; Mauritius and Senegal.

⁵⁵⁵ Five Lusophone and 14 Francophone countries are abolitionist.

governments will benefit from the additional insights this research provides. The research will serve as a useful authority to human rights scholars on the arguments, trends and developments on the death penalty in sub-Saharan Africa which will inform and shape scholarly discourse and literature. Also, it will serve as resource for anti-death penalty advocates and campaign organisations in developing effective strategies against the death penalty. In death penalty cases, lawyers can replicate the successful international human rights law arguments highlighted in this study. Furthermore, courts and other government authorities in retentionist countries can rely on the various court judgments and government decisions examined in this study as precedent for restricting the use or abolishing the death penalty.

Sub-Saharan Africa has the potential to become completely free of the death penalty. In this regard, increased adherence to international human rights law by retentionist countries in the region, the adoption of an African regional abolitionist instrument by the African Union, and strategic litigation with recourse to international human rights law are all vital.

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