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STUDY ON THE QUESTION OF THE DEATH PENALTY IN AFRICA



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African Commission on Human and Peoples' Rights
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THE DEATH PENALTY IN AFRICA**

Submitted by the
Working Group on the Death Penalty in Africa
in accordance with Resolution ACHPR/Res.79 (XXXVIII) 05

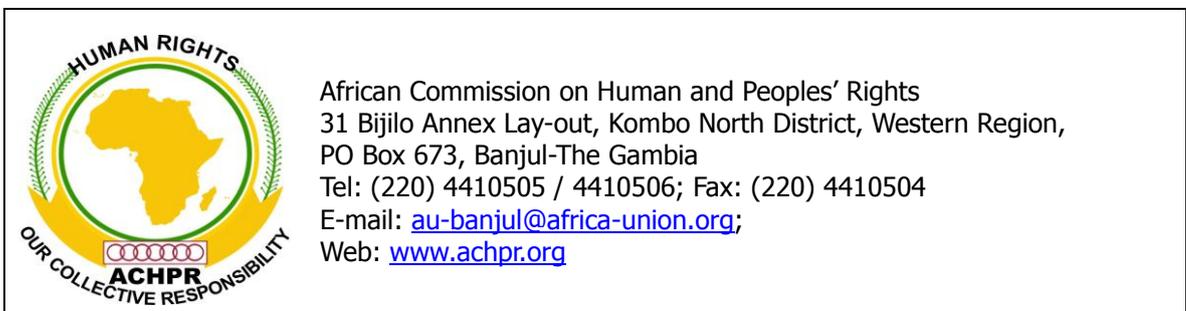
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EXECUTIVE SUMMARY

The death penalty has been with humanity since time immemorial. It appears to have been universally accepted without question. From about the 19th century, however, the death penalty began to be questioned by 'abolitionists'. Since then, abolitionists and retentionists have been engaged in a death-penalty debate fraught with emotions, complexities, controversies and contention. Today, some countries retain the death penalty and readily execute criminals sentenced to death by their courts; others have abolished the penalty altogether; while others still have in place, formally or informally, a moratorium on the execution of death row prisoners.

Many African countries retain capital punishment. Three main reasons are advanced in justification for so doing. It is said that the continent is in the throes of political, economic, social and ethnic instability. It is further said that there is strong public belief in retributive justice and that this cannot be ignored. Moreover, it is said, the continent is afflicted by deep religious, cultural, and legal diversity denying it a sense and feeling of common shared values.

While international human rights standards in general strongly affirm the desirability of the abolition of the death penalty, the African Charter on Human and Peoples' Rights does not speak unequivocally to this nagging question. As a result, the African Commission on Human and Peoples' Rights, the continent's human rights monitoring and implementing body, has since felt entitled to consider the matter. A few years ago it set up a Working Group on the Death Penalty and mandated it to undertake a study of the problem and make recommendations to it.

This document is the modest fruit of the labours of that Working Group. The document broadly looks at the historical, human rights law, and practical aspects of the death penalty. It takes a comprehensive approach to the question of the death penalty, bearing in mind the need to provide the African Commission with sufficient information that will enable it to take an informed position on the matter.

The Study is divided into parts. The introductory part gives a global overview of the death penalty with a special focus on Africa. The part that immediately follows dwells on two matters, the human rights law context that informs a major part of the arguments on the death penalty, and the question of the death penalty in Africa from a historical perspective. That history shows that the death penalty existed in pre-colonial African communities. It was normally available for serious crimes such as witchcraft and unlawful homicide. Methods of execution included decapitation, spearing to death, administration of poison, and burial alive. However, a person guilty of a capital offence was not necessarily executed. He/she could be sent on temporary exile or required simply to make restitution or pay compensation (blood money) to the family of the victim. The basis for exacting capital punishment was literal retribution or permanent incapacitation. Two main considerations informed the payment of blood money, namely, the practical necessity to assuage the anger of the victim's family for the loss suffered, and the need to promote peace and reconciliation. The death penalty for a variety of offences was a prominent feature of legislation in colonial Africa and continues to be so in post-colonial Africa in respect of an expanded list of capital offences in retentionist states.

Provisions in international, regional and national instruments that are relevant to the question of the death penalty are highlighted in the next part of the Study. These provisions provide a framework from which the discussion on the practical arguments, challenges and recommendations draw information in the debate on the death penalty in Africa. Unlike other continents, Europe is today a death penalty-free area. The prospects of other continents also becoming death penalty-free zones any time soon appear elusive. In fact, some states in the Americas, strongly subscribe to the argument that "[I]n a democratic society, the criminal justice system, including the punishments prescribed for the most serious crimes, should reflect the will of the people, freely expressed and appropriately implemented".

The fourth part of the Study dwells at some length on the practical arguments for and against the death penalty and also discusses the issue of moratoria on executions. The basic argument for the death penalty is that it deters crime, prevents recidivism, and is an appropriate punishment for serious crime. But the opposing argument is that the penalty does not deter criminals more than would do, say, life imprisonment, that it violates human rights, that it entails the risk of executing a wrongly convicted person, and that punishment that allows criminals to reflect and reform themselves is more appropriate than execution. In the matter of the death penalty, some states are said to be abolitionist *de facto* (i.e. states that have a moratorium on executions). A moratorium on executions ought normally to be a step towards the ultimate decision proscribing the death penalty. Unfortunately, this is not necessarily the case in Africa.

Challenges and Strategies come at the end of the Study. The Study acknowledges that there are challenges in the way of efforts to bring about total abolition of the death penalty in Africa. Some of the key challenges identified are: public support for the death penalty, a support driven by ignorance and exacerbated by illiteracy; absence of effective policing in many countries; the influence of tradition and religion; and the perception by some African governments that abolition is yet another Euro-centric imposition.

Strategies highlighted in the Study consist inter alia: the African Commission working closely with United Nations bodies, in particular the Office of the High Commissioner for Human Rights, as well as with National Human Rights Institutions and Civil Society Organizations in their respective capacities to mobilize towards the abolition of the death penalty; continue engagement with States Parties on the necessity of the abolition of the death penalty, engagement through its Resolutions, Promotional Activities, Special Mechanisms, Examination of State Reports and Communication Procedures; recommend to the African Union and to State Parties the adoption of a Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa; and strongly urge State Parties that still retain the death penalty, that they should, pending the adoption and the entry into force of the proposed Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa *take the following measures*: impose a moratorium on sentencing to death; impose a moratorium *on executions* and commute *all* death sentences already passed into fixed-term or life sentences, depending on the gravity of the circumstances of the offence; and refrain from resuming executions once a moratorium *is* in place.

In its overall conclusion the Study posits that among countries that still have the death penalty in their statute books and continue to apply it effectively, serious questions do arise which include the following: whether a system based on the rule of law can

continue to run the risk of depriving persons of the right to life; whether it is acceptable to apply the death penalty where there are appropriate alternative punishment; whether it is really humane to keep a person on the death row for years, with him/her not knowing if the next day will be his/her last. It is evident from this study that there are individuals , private organizations, lawyers, academics, politicians and members of religious groups who seek the abolition of the death penalty.

The Working Group recognizes that the Study may have some limitations and may call for further study in some areas. However, the Working Group is convinced that in spite of any shortcomings there might be, any additional study is unlikely to change the basic findings of the Study in relation to the necessity for the abolition of the death penalty. What emerges from the survey of the pros and cons of the death penalty is that the abolitionist case is more compelling than the retentionist case.

P R E F A C E

The African Commission on Human and Peoples' rights is an organisation established by the African Charter on Human and Peoples' Rights adopted by the Eighteenth Assembly of Heads of State and Government in June 1981. Among the mandates of the African Commission as stipulated in Article 45(1) are those to promote human and peoples' rights and in particular to, firstly, collect documents, undertake studies and researches on African problems in the field of human and people's rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions in charge of human and peoples' rights and, should the case arise, give its views or make recommendations to Governments; secondly, to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation; and thirdly cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.

In recent years, the African Commission has sponsored or assisted with studies, researches and conferences on a variety of African legal issues related to the promotion and protection of human and peoples' rights in Africa. The study and report of the African Commission's Working Group on Indigenous Populations/Communities completed in 2005 is one case in point. Among such studies has been the question of the death penalty in Africa which more recently has taken a prominent stage. This study deals with such a topic and is the direct consequence of the African Commission's comprehensive research project on the topic.

The idea on the issue of the death penalty commenced in 1999 when the African Commission adopted a Resolution at its 26th Ordinary Session held in Kigali, Rwanda not only urging States Parties to the African Charter to envisage a moratorium on the death penalty but also to reflect on the possibility of abolishing it. What followed that Resolution were a number of activities such as the development of a draft Paper on the question of the death penalty in Africa, appointment of a Working Group mandated to further elaborate the draft document and propose ways and means of tackling the question, research meetings of the Working Group, consultation by way of regional conferences and the re-drafting of the document, the final aspect of which is the embodiment of this present study whose aims and objectives are clearly set out in the document. Essentially though, the study, as is the case with the projects of the African Commission, is comprehensive in nature and ambit, as it seeks to investigate the most relevant areas of the question of the death penalty in Africa and to suggest an integrated approach towards the abolition of the death penalty in Africa. That much, I can happily state have been achieved by the publication of the present study.

It is an impossible task to name and thank everybody and every institution that contributed in some way or another to this study. I would, however, like to single out the following:

- the African Commission on Human and Peoples' Rights for initiating, approving and supporting the study project financially and otherwise;
- the States Parties commitment and observance of a moratorium in some countries; and for their participation and pertinent contributions in the two regional conferences which influenced the strategies and recommendations reflected in the Study;
- the Members of the Working Group, myself who has been honoured to chair the group assisted by Commissioner Mumba Malila as Deputy Chairperson of the Working Group, and the Expert Members, Ms. Alice Mogwe, Mme. Alya Chammari, Mr. Mactar Diallo and especially Professors Charlson Anyangwe and Professor Philip Iya, for their hard work, guidance, advice and commitment without which this study and resulting report would not have been possible;
- the African Commission's Partners in particular FIDH, FIACAT and The World Coalition Against the Death Penalty who have rendered extensive assistance by way of guidance and advice in the research leading to the publication of this study;
- the African Commission also appreciates the important contribution of FIDH in translating and harmonizing the Document in French;
- civil society, academics, citizens and other national and international experts who, individually and/or collectively not only attended all our conferences but also participated fully in providing the much required guidance and advice without which we would not have progress this far with this important project; and
- the African Commission's Secretariat, recognizing in a special way Dr Robert Eno (ex-Senior Legal Officer) and Mrs. Aminata Jawara-Manga (Legal Officer), who have throughout the project tirelessly provided the necessary excellent secretarial services to the Working Group.

Finally, our profound gratitude also goes to the publishers of this study for their foresight and insight in publishing this book.

At this juncture and on behalf of the Working Group, I would also like to take this opportunity to thank the entire African Commission on Human and Peoples' Rights for their confidence in appointing the Working Group to this honourable but onerous task and in wishing the African Commission in achieving its important mandate of protecting, and promoting human and peoples' rights in Africa and far beyond. There is no doubt that this Study would add new and special value to the raging debates on the question of the death penalty in Africa.

On behalf of the African Commission, I have great pleasure in introducing this book to all the citizens of Africa. It is written in clear and accessible language. It has a comprehensive bibliography which, together with the details found in the text, provide useful background information not only for the understanding of the death penalty from its historical, human rights law and practical complexities, but, more importantly, for the in-depth knowledge and understanding of the debate on the death penalty. I, therefore, appeal to all the peoples of Africa specifically and of the world generally to read this Study so as to take the informed decision that the death penalty contravenes many established international and national instruments on the right to life as the highest among all other human rights. It should, therefore, be abolished.

Kayitesi Zainabo Sylvie

Hon. Commissioner
Chairperson,
Working Group on the Death Penalty in Africa and Vice-Chairperson of the African
Commission on Human and Peoples' Rights

PART I. INTRODUCTION

1.1 Contextual Overview

For thousands of years the death penalty was the keystone of all penal systems and the exemplary punishment *par excellence*. This form of punishment was justified on the ground that society needed to be purged of incorrigible, dangerous and undesirable persons. For ages, therefore, the idea of capital punishment was universally accepted without any question.

Today, we however observe a worldwide trend towards the abolition of the death penalty: 97 states have so far abolished the death sentence for all crimes, 73 have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty and 109 have voted in favor of the third United Nations Resolution adopted on December 21 2010, calling on states to establish a moratorium on executions with a view to abolishing the death penalty¹.

On the African continent, 16 countries have abolished the death penalty, 23 are abolitionists in practice and 17 have voted in favor of the above mentioned United Nations Resolution. This abolitionist trend in Africa seems to be confirmed with 2 States awaiting for the adoption of bills proposing the abolition of the death penalty.²

Despite this clear trend towards abolition and a more limited use of capital punishment, the number of death sentences and the application of the death penalty in some African countries remain consistent. Between 2000 and 2005, it is estimated that more than 2,000 death sentences have been pronounced in Africa. During the same period, at least 157 people were executed and more than 5,000 prisoners were on the death row in 11 countries³. In 2010, at least 670 sentences of capital punishment were imposed in 28 African countries, and six countries, namely Botswana (1), Egypt (4), Equatorial

¹ Res. A/RES/65/206, United Nations General Assembly, Moratorium on the use of the death penalty, 21th, December 2010.

² In Mali, a bill proposed by the Council of Ministers since 2007 is to be examined by the National Assembly shortly. In Tunisia, the Council of Ministers of the interim government approved, on February, 1st, 2011, the accession of Tunisia to a series of international conventions and protocols including the abolition of the death penalty. No executions have been carried out for 31 years in Mali, 20 years in Tunisia.

³ Chenwi L., *Towards the Abolition of the Death Penalty in Africa*, PULP, Pretoria, 2007, pp. 53-56. The countries referred to are: Burundi, Cameroon, Chad, Democratic Republic of Congo, Ethiopia, Nigeria, Swaziland, Tanzania, Uganda, Zambia.

Guinea (4), Libya (18), Somalia (at least 8) and Sudan (at least 6) have executed prisoners⁴.

The methods of executions

The world over previously, the method of executing condemned persons varied very much in time and space. In former times, for example, convicted citizens were executed by decapitation by axe, sword, sabre or guillotine; convicted slaves or plebeians were executed by hanging on the cross or by stoning; and persons convicted of specified exceptional crimes were executed by impalement, spearing, burning at the stake (especially for religious heretics and witchcraft practitioners), burial alive (the 'pit'), drowning, boiling, administration of poison, slow strangulation, crushing by elephant or a weight, or exposure to be eaten up by wild beasts. Even up to the early nineteenth century, methods of execution in some countries included the following: breaking on the wheel, garroting, beheading by the axe or guillotine, hanging by the long drop, pressing to death, and 'hanging, drawing and quartering'. Nowadays, the common methods of execution in use are death by the noose, by shooting, by electrocution, or by lethal injection⁵.

In Africa specifically, the methods of execution commonly in use are firing squad, hanging,⁶ and in some Muslim states, stoning to death. There have been occasions in Africa where executions have been carried out in public on the theory that it is a fitting terror to the masses, and that it is a comforting sight to the relatives and friends of the victim.

As the organ mandated to promote and protect human rights in Africa, seeing the number of persons sentenced to death and those executed, the African Commission on Human and Peoples' Rights adopted a Resolution at its 26th Ordinary Session held in Kigali, Rwanda, in 1999, urging States Parties to the African Charter to envisage a moratorium on the death penalty⁷. This Resolution also calls upon all States Parties that still maintain the death penalty to among other things,

- i. Limit the imposition of the death penalty only to the most serious crimes ;

⁴ Amnesty International, *Death Sentences and Executions*, 2010, <http://www.amnesty.org/en/news-and-updates/report/death-penalty-2010-executing-countries-left-isolated-after-decade-progress>

⁵ Monestier M, *Peines de mort. Histoires et techniques des exécutions capitales des origines à nos jours*, Le Cherche Midi, 1994; Andrew W, *Old Time Punishments*, Dorset Press, New York, 1991.

⁶ FIDH, 'The Death Penalty in Botswana: Hasty and Secretive Hangings', June 2007: <http://www.fidh.org/IMG/pdf/Botswana>.

⁷ http://www.achpr.org/english/doc_target/documentation.html?../resolutions/resolution47_en.html

and

- ii. Reflect on the possibility of abolishing the death penalty.

After the adoption of the above Resolution, the African Commission felt entitled to consider this matter further by initiating constructive debate on it with a view to take an informed position on the question, rather than a mere mimetic stand. It was because of the felt need to do so that the African Commission at its 35th Ordinary Session held in Banjul, The Gambia, in May 2004, commissioned the Secretariat of the African Commission to develop a draft document on the 'Question of the Death Penalty in Africa'. This draft paper was discussed at a public session of the African Commission during its 36th Ordinary Session held in Dakar, Senegal in November 2004, and the views of human rights actors and other stakeholders, such as States Parties, National Human Rights Commissions, NGOs and other individuals and institutions, on this burning human rights issue, were sought to further enrich the document.

At its 37th Ordinary Session held in Banjul, The Gambia, in May 2005, the document was discussed at the private session of the African Commission and after a lengthy debate on the matter the Commission decided to set up a Working Group on the Death Penalty composed of three Commissioners: Commissioner Vera Chirwa (convener), Commissioners Yasser El Hassan and Tom Bahame Nyanduga (Members). The Working Group was mandated to further elaborate the draft document and propose ways and means of tackling the question of the death penalty in Africa.

At its 38th Ordinary Session held in Banjul, The Gambia, in November 2005, the African Commission adopted a Resolution⁸ based on the suggestion of the Working Group to broaden the composition of the Group to include two Commissioners and five experts drawn from within Africa, taking into consideration the geographic, legal and religious make up of the continent and to broaden the mandate of the Working Group in the following manner-:

- i. Elaborate further a Concept Paper on the Death Penalty in Africa;
- ii. Develop a Strategic Plan(s), including a practical and legal framework on the abolition of the Death Penalty;
- iii. Collect information and continue to monitor the situation of the application of the Death Penalty in African States;

⁸ ACHPR /Res.79(XXXVIII)05: Resolution on the Composition and the Operationalisation of the Working Group on the Death Penalty.

- iv. Develop a funding proposal with a view to raising funds to meet the costs of the work of the Working Group;
- v. Submit a progress report at each Ordinary Session of the African Commission;

During its 42nd Ordinary Session held in Congo, Brazzaville, in November 2007, the African Commission appointed Commissioner Kayitesi Zainabo Sylvie as Chairperson and Commissioner Tom Bahame Nyanduga as Member and six independent experts to form the Working Group on the Death Penalty, with a view to implement its mandate and work on the draft document on the Question of the Death Penalty. Amongst the independent expert members appointed by the African Commission, only five expert members joined the working group: Professor Philip Iya, Professor Carlson Anyangwe, Ms. Alice Mogwe, Mme. Alya Chammari and Mr. Mactar Diallo. At its 45th Ordinary Session held in Banjul, The Gambia, in May 2009, Commissioner Mumba Malila was appointed as a Member of the Working Group to replace Commissioner Tom Bahame Nyanduga after his term came to an end.

At its 44th ordinary session, held in Abuja, Nigeria in November 2008, the African Commission adopted another Resolution, on a moratorium on the death penalty⁹.

The International Federation for Human Rights (FIDH), the World Coalition against Death Penalty (WCADP) and Amnesty International (AI) and the International Federation of Action by Christians for the Abolition of Torture (FIACAT) joined the Working Group as observers to support its work since its meeting held in the margins of the 43rd Ordinary Session of the African Commission, held in Ezulwini, Swaziland, in May 2008.

To further enrich the initial draft document on the 'Question of the Death Penalty in Africa', members of the working group conducted research on the issue. The Working Group organized two Regional Conferences on the Death Penalty and had planned to organize a Continental Conference thereafter. The objectives of the Regional Conferences seek to:

- i. Engage States Parties, National Human Rights Institutions, NGOs and other actors, as well as the African population of all social strata to debate the issues concerning the death penalty;
- ii. Get information about all the consequences of the death penalty;
- iii. Acknowledge the fact that the death penalty is a very serious human

⁹ ACHPR/Res.136(XXXXIII)08 : Resolution on a moratorium on the death penalty.

rights issue;

- iv. Sensitise stakeholders on the consequences of applying the death penalty;
- v. Take a position concerning the abolition of the death penalty which is consistent with the world trend and adopt political and legal strategies to give effect to the abolition; and to
- vi. Adopt a framework on the question of the death penalty in Africa and explore with a view to adopting a Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa.

The first Regional Conference on the Death Penalty was held in Kigali, Rwanda, from 23 to 25 September 2009, for Central, East and Southern Africa and the second Regional Conference was held in Cotonou, Benin, from 12 to 15 April 2010, for West and North Africa. The two conferences brought together representations of State Parties, AU Organs, UN Agencies, NHRI's, International Organizations, Academic Institutions and NGOs.

The Regional Conferences gave birth to the Kigali and Cotonou Framework documents, which detail concrete recommendations for the abolition of the death penalty including; strategies to abolish the death penalty and the necessity of a Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa, to fill gaps in the African Charter on the inviolability and sanctity of human life. However the Conferences noted that religion and culture in some countries limit the progress on abolishing the death penalty.

1.2 The Question of the Death Penalty and Human Rights

In the context of the death penalty as a human rights issue, states all over the world have long histories of applying capital punishment. Historically, the penalty was misused, being meted out for minor crimes and easily resorted to against political and religious dissenters. However, such misuse declined in the twentieth century. It came to be recognised that there was need to infuse criminal law systems with human rights values.

The right to life is the primary right that conditions all others. It ranks highest among all other human rights. This is implicit in the Universal Declaration of Human Rights, which entrenches the right to life in unqualified terms i.e. everyone has the right to life (Art 3). Without life, all human rights become superfluous. State-sanctioned killing as a

penalty for crime, like unnecessary killing in war, is the biggest threat to human rights. Such killing by the State raises moral and religious issues. Human life has supreme value and regimes that make prolific use of the death penalty violate the most important human right – the right to life. Killing by the State also raises issues that impinge on law enforcement and the administration of criminal justice.

It is easy to see from the foregoing why all over the world the debate over the death penalty is always fraught with emotions and controversies. Some countries insist on its abolition; others cling on to its retention; and yet others are moving towards either abolishing or re-introducing it. The community of nations has come to adopt several methods for dealing with this complex issue. Criminal prosecution of those responsible for gross human rights violations, including the fundamental right to life, is now an important part of global, regional and national agenda.

However, the method of punishing those responsible for the violations remains a very serious bone of contention. For example, there are those states which regard capital punishment as a violation of the right to life together with all its related rights, guaranteed by international, regional or national human rights law. On the other hand there are those who contend that the death penalty, properly executed and preceded by appropriate and effective legal safeguards, is not prohibited by international human rights law but is actually acknowledged even by the International Covenant on Civil and Political Rights, 1966. What this means is that to some observers of human rights in the world, the carrying out of the death penalty represents a most grave violation of fundamental human rights perpetrated by the state itself. To others this is simply a punishment option of a particular legal regime¹⁰.

The statistics nevertheless indicate that half a century after the adoption of the Universal Declaration of Human Rights, the trend towards worldwide abolition of the death penalty is unmistakable¹¹. More than half of the world have abolished the penalty in law or in practice and the number continues to increase¹². In the very restricted area where human rights law acquiesces in the application of the death penalty, world-wide and regional instruments have been adopted to regulate its use.

1.3 The Aims and Objectives of the Study

The broad aim of this document is to provide a background to the understanding of the death penalty from the historical, human rights law, and practical perspectives. The document serves the ultimate and specific objective of providing the African

¹⁰ Kirgy M, 'Indicators for the implementation of human rights' in: Symonides J (ed.), *Human Rights: International Protection, Monitoring, Enforcement*, Ashgate, UNESCO Publication, 2003, pp.325-239.

¹¹ <http://www.worldcoalition.org/modules/accueil>;
http://www.fiacat.org/fr/IMG/pdf/CP_Coalition_mondiale; and <http://www.deathpenaltyworldwide.org>,

¹² Prokosch E, 'The death penalty versus human rights' in: *Death Penalty Beyond Abolition*, Council of Europe Publication, 2004, p. 23.

Commission on Human and Peoples' Rights with a comprehensive perspective on the question of the death penalty in Africa to enable it to take an informed position on the matter.

From a general human rights perspective the issue of the death penalty is a matter of legitimate concern to the African Commission on Human and Peoples' Rights as it had been to the other regional and international human rights implementing bodies. Moreover, in Africa with its diversity in religion, culture, colonial experience, and legal systems the death penalty is still very much alive in many countries as follows:

- Thirty-eight (38) African countries retain the death penalty in their statute books although in twenty three (23) of these countries there is a moratorium on executions and some death sentences are at times commuted to various terms of imprisonment¹³.
- Two (2) African countries, Egypt and Sudan, are reported to have the highest number of executions in Africa and are among the first ten countries in the world with the highest executions.
- It is estimated that more than 2,000 death sentences were pronounced in Africa between 2000 and 2005. During the same period, at least 157 people were executed and more than 5,000 prisoners were on the death row in 11 countries. In 2010, at least 670 sentences of capital punishment were imposed in 28 African countries, and six countries, namely Botswana (1), Egypt (4), Equatorial Guinea (4), Libya (18), Somalia (at least 8) and Sudan (at least 6) have executed prisoners¹⁴.
- Some African States that apparently had a policy or an established practice of not carrying out executions suddenly resumed executions.
- There is a tension in some countries between opponents of the death penalty and who have called for a moratorium on executions as a first step towards

¹³ The States that have as of December 2010 abolished the death penalty are 16 in number: Angola (1992), Burundi (2009), Cape Verde (1981), Cote d'Ivoire (2000), Djibouti (1995), Gabon (2010), Guinea-Bissau (1993), Mauritius (1995), Mozambique (1990), Namibia (1990), Rwanda (2007), Sao Tome and Principe (1990), Senegal (2004), Seychelles (1993), South Africa (1995) and Togo (2010.). The year in bracket indicates when the penalty was abolished. It is of no small interest to note that all the Lusophone countries, the former Portuguese colonies, have abolished the death penalty. This may be attributed to colonial influence, for Portugal abolished the death penalty in 1852 for political crimes, in 1867 for ordinary crimes and in 1976 for all offences. Apparently Portugal did not introduce the death penalty in its colonies and when these achieved independence they did not introduce that penalty in their legislation, except for Guinea-Bissau that did so for a brief period (1974-1993).

¹⁴ Amnesty International, *Death Sentences and Executions*, 2010, <http://www.amnesty.org/en/news-and-updates/report/death-penalty-2010-executing-countries-left-isolated-after-decade-progress>

abolition, and supporters of the death penalty who believe it should be retained for heinous offence¹⁵.

- Only about 8¹⁶ out of the current 54 African Union countries are parties to the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.

Many factors account for the retention of the death penalty in the statute books of most African countries. These include political considerations such as the suppression of 'subversive activities' and the 'war on terrorism'. They also include conservative ideas about morals and culture, arguments about specific or peculiar local settings such as political and social instability, public opinion ideas that the death penalty is an effective weapon in the fight against serious crime, and the perception that international law is in some ways a threat to national sovereignty and state authority. The majority of African States therefore not only retain the death penalty but also resist abolishing it, although some of these States have a moratorium in place. This flies in the face of the acknowledged fact that international human rights standards in general strongly affirm the necessity of the abolition of the death penalty. But human rights law, like international law generally, continues to be seen by some states as a law formulated from a Euro-centric perspective and value system and therefore a Western imposition.

1.4 Scope of the Study

This Study starts with an introduction which gives a broad overview of the death penalty in Africa. The second part deals with two main matters, the history of the death penalty in Africa from the pre-colonial to the contemporary period, followed by the human rights law context (universal, regional and national) that informs a major part of the arguments on the death penalty. The third part highlights provisions in international, regional and national instruments that are relevant to the question of the death penalty. Part four dwells at some length on the arguments for and against the death penalty. Part five discusses the issue of moratoria on executions. The sixth part summarily highlights and sidelights challenges in the way of the abolitionist crusade in Africa. Part seven makes a number of recommendations to the African Commission on Human and Peoples' Rights and the Study ends with an overall conclusion.

¹⁵ For example, in Nigeria, in October 2004, the National Study Group on the Death Penalty called on the Government to impose a moratorium on executions and commute to life imprisonment the sentences of all death row prisoners. But a National Political Reform Conference recommended in February 2005 the retention of capital punishment for "heinous offences such as armed robbery and cultism."

¹⁶ Cape Verde, Djibouti, Liberia, Mozambique, Namibia, Rwanda, Seychelles, and South Africa.

PART II. DEATH PENALTY IN AFRICA: PAST AND PRESENT

The importance of any historical discussion underscores and confirms the assertion that the present is shaped by factors of the past. For that reason, this part of the Study focuses on considering both the past and present factors which have shaped the discussion on the death penalty in Africa. Not only will the pre-colonial and the colonial factors be considered, but also the situation in independent Africa.

2.1 Pre-Colonial Africa

African customary law was an unwritten or oral law, presenting problems of ascertaining its exact content. However, we know from the writings of scholars on African law that the death penalty existed in all pre-colonial African communities¹⁷. It was normally available for serious crimes: patricide, fratricide, other unlawful homicide, and witchcraft¹⁸. In the chiefly societies of present-day Burundi and Rwanda it was surprisingly even available for cases of pregnancy before marriage, conduct that would not qualify as criminal in contemporary eyes. In all highly centralised African societies (e.g. the Buganda in Uganda, the Yoruba in Nigeria, the Ashanti in Ghana, the Zulu in South Africa), adultery with any of the chief's wives attracted the death penalty¹⁹. In communities where cattle constituted the main form of wealth notorious cattle thieves were sometimes put to death. Cannibalism also attracted the death penalty.

In acephalous societies a decision on the death penalty was taken by the council of elders sitting as a tribunal. In chiefly societies, the decision lay entirely in the hands of the chief²⁰. Methods of execution in pre-colonial Africa varied. They included decapitation, spearing to death, administration of poison, and burial alive. One or two unusual ones may be mentioned. In some communities the capital offender was publicly executed – despatched in like manner and by the same means as that employed by the offender or hanged by the neck from some tree in a public path as a warning to other potential wrongdoers²¹. In other communities a person found to be a witch or wizard was led to a forest and tied to a tree, the body lacerated and red pepper rubbed into

¹⁷ Elias TO, *The Nature of African Customary Law*, Manchester University Press, Manchester. (1956).

¹⁸ *Ibid*, pp. 117, 127

¹⁹ *Ibid*. p. 136 and footnote 1.

²⁰ For an account of the political organisation of indigenous African societies, see Elias, *op. cit.* p.11; Fortes M & Evans-Pritchard EE (eds), *African Political Systems*, London, OUP, 1940.

²¹ Elias, *op. cit.*, p. 113.

the wounds, and the person abandoned to die a slow and painful death²². A common form of execution consisted in forcing the condemned person to drink an infusion of a poisonous plant²³. Among some Sahelian communities, the method of executing a capital offender consisted in burying him alive inside a sewn-up bull's hide²⁴.

However, it would appear to be the case that the death penalty was not enforced as is the case today. In other words a person guilty of a capital offence was not necessarily executed. There were, depending on the circumstances of the crime, alternative methods of dealing with him. In some communities he was required simply to make restitution or pay compensation (blood money) to the family of the victim²⁵. In other communities he was exiled from the village for a stated period of time and upon his return was required to perform sacrifice and make restitution as directed by the elders.

Thus, although death was more often than not the normal penalty for unlawful homicide, in an appropriate case the penalty was commuted into compensation, for example, where the circumstances of the murder were not really aggravating or did not vitally disturb the social equilibrium of the community²⁶. In fact, in some communities the murderer was not executed. Instead, blood-money was exacted where the murderer was apprehended. However, if the murderer escaped he was outlawed and the members of the deceased's clan were entitled to obtain their satisfaction by killing a member of the escaped murderer's clan²⁷.

Whenever it was carried out, the execution of a criminal for serious crimes must not be confused with cases of deprivation of life for reasons other than as a penalty for crime. Many communities had practices such as 'ritual murder', killing at birth of twins or a child born with teeth, summary execution of a person guilty of practicing witchcraft, and death ensuing from 'trials by ordeal' (an ancient technique used for ascertaining guilt based on belief in intervention by the deity to separate the guilty from the innocent). Ritual murder was the offering of human life for sacrifice to appease the gods, to avert some imagined god-ordained pending calamity or to obtain some favour from the gods. The summary execution of a 'witch' or 'wizard' by the social group was carried out so as to prevent him or her from ever getting a chance to disturb the delicate fabric of the community's social life. These practices, found also in all ancient human communities,

²² Baker J, 'Primitive Justice': <http://www.heretical.com/miscella/baker2> MACROBUTTON HtmlResAnchor <http://www.heretical.com/miscella/baker2>.

²³ *Ibid.*

²⁴ Dalgleish D, 'Pre-colonial Criminal Justice in West Africa: Eurocentric Thought Versus Africentric Evidence,' *African Journal of Criminology and Justice Studies*, vol.1 No.1, April 2005, p.55; See also <http://www.umes.edu>

²⁵ Elias, TO *op. cit.* pp. 135, 136, 140.

²⁶ *Ibid*, p. 124.

²⁷ *Ibid*, p. 140.

are hardly surprising. Man is susceptible to a certain psychological habituation due to marginal insecurity and spiritual dread of the unknown²⁸.

In pre-colonial Africa, the philosophy behind the death penalty for deliberate killing was restoration of a life for a life (literal retribution) or complete removal of the offender from the ranks of the tribe (permanent incapacitation). Both aims were intended to serve deterrent purposes as well. Less culpable form of homicide was not punishable by death. It attracted the award of compensation (blood-money) to the family of the deceased. The philosophy behind this benignity was the practical necessity to assuage the anger of the victim's family for the loss suffered and to promote peace and reconciliation. In fact, some communities saw no point in sacrificing a second life for one already lost because that meant causing the loss of another breadwinner and creating in the process more orphans and widows/widowers²⁹.

2.2 Colonial Africa

The death penalty, for a variety of offences, was a prominent feature of colonial legislation in Africa.

Britain³⁰ and France³¹ colonised most of Africa. A sizable part of the continent went to Portugal. Belgian made off with the enormous territory of the Congo, previously the private property of the Belgian King, Leopold; and the former German territory of Ruanda-Urundi. Spain had a little foothold in the Western Sahara and Equatorial Guinea. There was a brief period of German rule (1884-1914) in German East Africa (Tanganyika, Ruanda-Urundi), 'Kamerun' (British Cameroons, French Cameroun, and other parts excised and incorporated into French Equatorial Africa), South West Africa (Namibia) and Togo (British Togoland and French Togoland). Liberia (though under the sway of the United States of America) and Ethiopia (briefly occupied by Italy during World War II) escaped colonisation.

In 1900, Germany extended to its African colonies the 1871 Imperial German Criminal Code. The Code in Germany provided for the death penalty, (and in the colonies a similar Code which provided for capital offences punishable by hanging) included crimes of forcible resistance to a German official in the discharge of his duties, rape of a white

²⁸ *Ibid*, p.127.

²⁹ *Ibid*.

³⁰ Britain's African Empire comprised present-day: Egypt, Sudan, Somaliland, Kenya, Uganda, Tanzania,, South Africa, Gambia, Sierra Leone, Nigeria, ex-British Cameroons, Botswana, Zimbabwe, Zambia, Malawi, Ghana, Seychelles, Mauritius.

³¹ France's African empire included present-day French-speaking countries: Tunisia, Mauritania, Senegal, Mali, Guinea, Ivory Coast, Niger, Burkina Faso, Benin, Gabon, Congo-Brazzaville, Central African Republic, Chad, Djibouti, Madagascar, Comoros, and Cameroon.

woman, unlawful homicide, attempt to endanger railway trains, resistance to colonial rule, and rebellion against German authority.

Great Britain influenced the use of the death penalty in all of its African colonial territories. Great Britain influenced the use of the death penalty in all of its African colonial territories by introducing their legislation on and practice of the death penalty. These laws still exist in those countries today even though in Great Britain itself the death penalty was abolished in 1969. However, although British colonial legislation limited the death penalty to intentional killing and the rarely committed crime of treason, independent states expanded the list of offences punishable by death to include certain drug offences and 'economic sabotage' offences. In countries like Ghana, Nigeria, Sierra Leone, Sudan and Uganda the military rulers who periodically came to power by *coup d'état* expanded still further the scope of capital offences and ruthlessly enforced the death penalty after speedy trials by 'special military courts'³².

France also influenced the use of the death penalty in the French African colonies. The death penalty always existed in French law for many political and ordinary crimes. The death penalty was abolished in 1848 for political crimes and replaced in 1850 with '*déportation dans une enceinte fortifiée*'. It was however reinstated in 1939 for crimes against the external security of the state and in 1960 for crimes against the internal security of the state, both types being political offences. The method of carrying out the death penalty for political offences (e.g. treason) was by firing squad. By 1939 the number of capital offences had dwindled down to just a few. But when fifteen new capital offences³³ were added to the already existing number of capital offences the courts did not show any enthusiasm in passing death sentences so that between 1960 and 1971 only 16 executions (by decapitation) were carried out in the whole of France. A law of 9 October 1981 abolished the death penalty for both political and ordinary crimes and substituted for it '*la réclusion criminelle à perpétuité*', that is, life imprisonment³⁴.

In Francophone Africa the death penalty was part of the tool of colonial repression and violence³⁵. The death penalty and accompanying methods of execution (hanging, firing squad) were integral to France's colonising efforts in Francophone Africa. The basic legal framework on the death penalty introduced by France in its African territories before independence remains unchanged to this day in the French-speaking African states that still retain the death penalty.

³² Human Rights Watch 'Ghana – Revolutionary Justice. Abuse of the Legal System under the PNDC Government,' vol. iv, Issue No.1, January 31, 1992, News from Africa Watch: <http://www.hrw.org/reports//1992/01/31/Ghana-revolutionary-injustice>.

³³ Stefani L, Levasseur H & Bouloc B, *Droit Pénal Général*, 14th ed., Dalloz, Paris, 1992, pp.368 et seq

³⁴ *Ibid.*

³⁵ Dalgleish, *op. cit.*

Portugal did not include the death penalty in its colonial legislation because by 1870 Portugal had abolished the death penalty for both political offences and ordinary crimes. Guinea-Bissau gained independence from Portugal in 1974 and Cape Verde in 1975. Since the death penalty was not provided for in the colonial legislation of both countries the criminal legislation of Cape Verde at independence also did not provide for the death penalty. However, on achieving independence Guinea-Bissau provided for the death penalty in its criminal legislation. But strong opposition to the penalty eventually led to its abolition in 1993.

Equatorial Guinea retains the death penalty introduced into the country's legislation during colonial rule by Spain.

2.3 Independent Africa

In the matter of the death penalty, all African countries have adopted in their criminal law the model of their respective former colonial powers. However, since achieving independence each country has, as an incidence of its sovereignty, charted its own path in the matter of the death penalty rather than simply following the example of their erstwhile parent States in abolishing that penalty.

In fact, independent African states have tended to expand the list of capital offences to include certain economic crimes, threats to the regime in place, spying, aggravated theft, aggravated kidnapping and varieties of treasonable offences³⁶. In Uganda the 'spread of diseases' could earn a death sentence. In Burundi, which has since abolished the death penalty, witchcraft was a capital offence. In countries where the military have periodically seized political power or where a dictatorship has entrenched itself the death penalty is easily resorted to in the name of safeguarding state security but, in reality, in order to deal with political opponents and perceived threats to the regime. In Burundi there were for example, at the end of 2004, a total number of 500 persons sentenced to death and waiting execution.

This grim picture is somewhat mitigated, if one may say so, by a number of developments. First, many countries exclude the death penalty in the case of minors, pregnant women, the mentally ill and elderly persons. Second, the head of state always has power to commute any death sentence or even to grant a pardon to any person convicted of a capital offence and sentenced to death. Thirdly, while the number of countries that still retain the death penalty remains high, several countries (the

³⁶ Chenwi *op.cit.*

number of which can be expected to keep growing) have either abolished it or are in the process of doing so; an even greater number of countries have put a moratorium on executions.

2.4 Current situational Analysis of the Death Penalty in Africa

The general picture in Africa at the present moment is as follows: 16 countries have abolished the death penalty; 38 still maintain the death penalty, and amongst those there are 20 which observe a moratorium³⁷. Retentionist and abolitionist states per region are as follows:

Western Africa:

Countries that retain the death penalty are: Benin, Burkina Faso, Gambia, Ghana, Guinea-Conakry, Liberia, Mali, Mauritania, Niger, Nigeria, Saharawi Arab Democratic Republic, Sierra Leone, (12 in total);

Countries that have abolished the death penalty are: Cape Verde (1981), Cote d'Ivoire (2000), Guinea-Bissau (1993), Senegal (2004) and Togo (2009) (5 in total).

Central Africa:

Countries that retain the death penalty are: Cameroon, Chad, Democratic Republic of Congo, Equatorial Guinea, Central African Republic, and Congo-Brazzaville (6 in total);

Countries that have abolished the death penalty are: Gabon (2010) and Sao Tome & Principe (1990) (2 in total).

Eastern Africa:

Countries that retain the death penalty are: Eritrea, Ethiopia, Kenya, South Sudan, Sudan, Somalia, Tanzania and Uganda (8 in total);

Countries that have abolished the death penalty are: Burundi (2009), Djibouti (1995) and Rwanda (2007) (3 in total)

Southern African:

Countries that retain the death penalty are: Botswana, Lesotho, Madagascar, Malawi, Swaziland, Zambia and Zimbabwe (7 in total);

³⁷ See. Part 5.1, Positive Aspects of a Moratorium on Execution.

Countries that have abolished the death penalty are: Angola (1992), Mauritius (1995), Mozambique (1990), Namibia (1990), Seychelles (1993), and South Africa (1995) (6 in total).

Northern Africa:

Countries that retain the death penalty are: Algeria, Egypt, Libya, Morocco, and Tunisia (5 in total);

Countries that have abolished the death penalty: (none).

PART III. LEGAL FRAMEWORK

The main objective of this part is to identify the relevant international, regional and national instruments relating to the death penalty, providing thereby the outline for a quick point of reference and a framework from which the discussion on the arguments, challenges, strategies and recommendations will draw information in the debate on the death penalty in Africa. This part of the Study starts with a general overview of the evolution on the application of the death penalty at international level and is followed by the highlights of the relevant international, regional and national instruments.

3.1 Overview of International Developments and Experiences

Since the end of the First World War, several important mechanisms for the protection of human rights have been established. The role of the international community in this regard began to be significant only after the atrocities of the Second World War. The adoption of the United Nations Charter in 1945 justified hopes for the creation of effective implementation mechanisms at the universal level. The Charter was the starting point for the creation of the United Nations machinery and system of human rights protection. Many years, however, elapsed before clear legal instruments establishing modern structures and creating an exhaustive system comprising of state obligations, reporting mechanisms and other protection, monitoring and enforcement procedures took root³⁸.

The Universal Declaration of Human Rights, 1948, is the first comprehensive human rights instrument by the universal international organisation. Because of its moral status and the legal and political importance it has acquired over the years, the Declaration is ranked historically with the Magna Carta, the French *Déclaration des droits de l'homme et du citoyen*, and the American Declaration of Independence, as a milestone in mankind's struggle for freedom and human dignity.

³⁸ The Covenant of the League of Nations, the Treaty which in 1920 established the League and served as its constitution, contained no general provisions dealing with human rights. The Charter of the United Nations in Article 1 lists, among its purposes, the promotion and encouragement of respect for human rights and fundamental freedoms.

Today, there exist a growing number of international institutions with jurisdictions to protect individuals against human rights violations committed by a State against its own citizens or those of another State as well as by any other states. Therefore, individual human beings are deemed to have internationally guaranteed rights as individuals besides having those rights as nationals of a particular state. Legal instruments are now in place to ensure the protection, monitoring and enforcement of those rights. In particular, there are institutions established by law with clearly laid down necessary legal instruments related to the death penalty.

3.2 International Instruments and Treaty Monitoring Bodies

There are international instruments which provide some guarantees suggesting the necessity of abolishing the death penalty. These include the following:

Table 1: I International instruments and treaty monitoring bodies.

	Instruments	Provisions	Monitoring Bodies
	Protocol to ICCPR(1989)	Art. 1&2 (life)	Human Rights Committee
	Universal Declaration on Human Rights (1948)	Art.3 (life, liberty), Art.5(torture), Art.10(fair trial)	United Nations Human Rights Council
	IV Geneva Convention relative to the protection of civilian persons in time or war (1949)	Art.5(fair trial), Art.68(protected persons)	
	International Covenant on Civil and Political Rights (1966)	Art.6 (women, juveniles), Art.6 (1) (life), Art.7 (torture), Art.9 (liberty), Art.10 (Juvenile), Art. 14 (fair trial, juveniles).	United Nations Human Rights Committee
	Convention Against Torture(1984)	Art.1&2(torture) Art. 6 (life), Art.37(Juveniles), Art.40 (fair trial),	Committee Against Torture
	Convention on the Rights of the Child (1989)	Art.7&8(torture), Art.67(fair trial)	Committee on the Rights of the Child

	Rome Statute		International Criminal Court (ICC)

It is noteworthy that the provisions above are not absolute. Some legal instruments contain provisions that permit, but then limit, the application of the death penalty. The limitations are generally the following: the death penalty to be imposed only by law; the death penalty to be available only in cases of serious/specific crimes or circumstances; the death penalty not to apply to children, pregnant women and elderly persons; and the death penalty to be carried out in conformity with established guarantees and safeguards.

3.3 Regional Instruments and Treaty Monitoring Bodies

Table 2: Regional instruments and treaty monitoring bodies.

Region	Instrument	Provision	Treaty Monitoring Bodies
Europe	European Convention on the Human Rights (1953).	Common Art.1 of Protocol No.6 &13 abolished the death penalty in Europe.	European Court on Human Rights
	European Convention for the Prevention against Torture and Inhuman and Degrading Treatment or Punishment (1987)	Art.1(torture)	European Committee for the Prevention of Torture
	Charter of Fundamental Rights (2000)	Art.2 (life), Art.24(Juveniles)	

Inter-American	Death Penalty Protocol(1990)	Art. 1(Abolition of death penalty.	Inter-American Commission on Human Rights and the Inter-American Court on Human Rights
	American Charter on Human Rights (1969)	Art.4 (life), Art.4 (5) (juveniles, women), Art. 5(2) (torture), Art.7(liberty), Art.8(fair trial),	
	Convention for the Protection against Torture (1985)	Art.2-5(torture)	
Africa	African Charter on the Rights of the Child (1990)	Art.5(abolishes death penalty on children)	African Committee of Experts on the Rights and Welfare of the Child.
	African Charter on Human and Peoples' Rights (1981)	Art.4&5(life, liberty), Art.3&7(fair trial)	African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights.
	Protocol to African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)	Art. 4 (life) Art 4.2.j: "States Parties shall take appropriate and effective measures to ensure that, in those countries where the death penalty still exists, not to carry out death sentences on pregnant or nursing women;"	African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights
	Arab Charter on Human Rights (2004)	Art.5 (life), Art.12(pregnant women), Art.13(torture), Art.38(b)(special protection for families, mothers, children and aged)	Arab Commission on Human Rights

3.4 National Instruments

Table 3: The table below shows African states that still retain the death penalty; states that have abolished it in the constitution or by statute or following a court decision declaring that penalty unconstitutional; and those states that have ratified OPII – ICCPR and thereby evinced an intention to abolish the penalty.

State	Constitution	Legislation	Courts	Ratification of Optional Protocol No.2 to ICCPR	Retentionist
Algeria	✓				✓
Angola	✓				
Benin					✓
Botswana					✓
Burkina Faso					✓
Burundi		✓			
Cameroon					✓
Cape Verde				✓	
Central African Republic					✓
Chad					✓
Republic of Congo					✓
Comoros		✓			
Côte d'Ivoire		✓			
Democratic Republic of Congo					✓
Djibouti		✓		✓	
Egypt					✓
Equatorial Guinea					✓
Eritrea					✓
Ethiopia					✓
Gabon		✓			
Gambia					✓
Ghana					✓
Guinea					✓
Guinea Bissau		✓			
Kenya					✓
Lesotho					✓
Liberia				✓	✓
Libya					✓
Madagascar					✓
Malawi					✓
Mali					✓
Mauritania					✓
Mauritius	✓				
Morocco					✓
Mozambique	✓			✓	
Namibia	✓			✓	
Niger					✓

PART IV. ARGUMENTS FOR AND AGAINST THE DEATH PENALTY

The death penalty is a topic on which much has been written because of its complex and contentious nature. The arguments for and against remain essentially the same and have been much canvassed. The argument usually put forward for the death penalty is that it deters crime, prevents recidivism, and is an appropriate punishment for the most serious crimes. But those opposed to the death penalty argue that it does not deter criminals more than would do life imprisonment, that it violates human rights, that it entails running the risk of executing some who are wrongly convicted, and that punishment that allows criminals to reflect and reform themselves is more appropriate than execution.

It would therefore seem that there is nothing new to say on the subject. However, new interesting developments have emerged. Much of these developments go to strengthen the case against the death penalty. Among the new developments are judicial decisions in some countries to the effect that there is no known method of carrying out the death penalty that is not in some degree cruel or inhuman³⁹; and public admission by some judges and prisons commissioners⁴⁰ in a number of countries that passing the death sentence and executing condemned persons have a brutalising and traumatic effect on the sentencing judge, on the executioner and on the family of the condemned person.

Other developments include studies showing that the imposition of the death penalty even after a fair trial depends on such fortuitous circumstances as whether the trial judge happens to be for or against the death penalty⁴¹; and studies on executed persons, such as DNA evidence, showing that wrong persons have sometimes been executed.⁴² Still other developments include studies showing that the death penalty is often applied in an arbitrary and discriminatory fashion especially against vulnerable groups in society and also as a tool of political repression;⁴³ studies showing the agony and cruelty that sometimes attends executions as in cases of botched executions;⁴⁴ and the current emphasis on creative interpretation of international human rights instruments⁴⁵.

These developments have re-centred the debate on the death penalty and underscored the desirability of the total abolition of the death penalty.⁴⁶

4.1 Arguments Based on the Concept of Restraint

³⁹ See Special Rapporteur on Torture and other cruel, inhumane and degrading treatment, 14 January 2009, "*Promotion and Protection of all Human Rights, Civil, Political, Social and Cultural Rights, including the Right to Development*". A/HRC/7/3. And CEDH, Al Saadon and Muffi / RU, 4 October 2010, §115.

⁴⁰ http://www.newwordencyclopedia.org/entry/Capital_punishment. [Oral statement from Johnson O.R. Byabashaija, Commissioner General of Prisons Uganda Prisons Service, Round Table on 'The death penalty in sub-saharan Africa, from a moratorium to abolition'. 4th World Congress against the Death Penalty, Geneva, February 2010]

⁴¹ Chenwi, op. cit.

⁴² Centre for Capital Punishment Studies, *Capital Punishment Briefing Paper*, London, November 2009; Hood R., *The Death Penalty: a worldwide perspective*, 3rd ed., OUP, 2002.

⁴³ Ibid; Chenwi, op. cit.

⁴⁴ Ibid.

⁴⁵ Vienna Convention on the Law of Treaties 1969. Article 31(1). *The Government of the Republic of Namibia vs Cultura* 2000 (1993) 3 LRC pg. 175.

⁴⁶ Jaudel E, *Sur la peine de mort, le théoricien et le militant*, M. Houdiard éditeur, 2004.

Advocates of the death penalty consider that it is unquestionably the most restraining form of punishment. The condemned offender is executed, thus permanently disabling him and thereby putting to rest fears of possible recidivism by that particular offender. Judges of old used to say hang a thief when he is young and he will not steal when he is old. Abolition of the death penalty would place innocent people more at risk. Execution of a murderer, for example, brings closure to the murderer's crime, closure to the ordeal for the victim's family, and ensures that the murderer will create no more victims.

Abolitionists however contend that life imprisonment is also a restraining form of punishment and that in any case capital punishment is cruel, unnecessary, irreversible and illogical. They also point out that human rights derive from the inherent dignity and worth of the human person, that the Universal Declaration of Human Rights declares that all human beings are born free and equal in dignity and rights⁴⁷, and that both the International Bill of Rights and regional human rights instruments give concrete meaning to this fundamental axiom in various ways. They guarantee, among other rights, the right to life, though not in an absolute way⁴⁸. They outlaw torture⁴⁹ and proscribe other cruel, inhuman or degrading treatment or punishment⁵⁰.

Furthermore the death penalty is cruel and therefore morally unjustifiable. No matter how the death penalty is carried out, it is cruel. Its cruelty renders it morally unjustifiable. In times gone by legally sanctioned means of punishment included dismemberment, pressing to death, burning to death, drowning to death, decapitation, impalement, slow strangulation, administration of poison, hanging on the cross, pillory, stockade, thumbscrews, and the rack. But society has long turned its back on these methods of execution and no longer tolerates them because of their cruelty. Even whipping as a punishment is now generally considered cruel and inhuman.⁵¹ The death penalty is considered even the more cruel and inhuman because condemned prisoners are generally executed after years on death row, often under poor prison conditions such as being mechanically restrained and/or held in solitary confinement or under maximum security.

Most states in the world have abolished the death penalty and the abolitionist trend is growing. Several states that still retain the death penalty are careful not to generalise the application of the penalty but confine it to offences considered the most serious. In other words, the type of offences for which the death penalty may be imposed is very limited. Since it is a cruel form of punishment, the death penalty is generally excluded for certain categories of offenders: pregnant women, persons below 18 years of age, persons above 70 years of age, and persons suffering from mental illness⁵². Furthermore the growing

⁴⁷ Universal Declaration of Human Rights 1948, Article 1.

⁴⁸ International Covenant on Civil and Political Rights 1966, Article 6 and African Charter on Human and Peoples' Rights 1981, Article 4&5

⁴⁹ *ibid*, Article 5.

⁵⁰ Convention Against Torture 1984, Article 2.

⁵¹ In *Stephen Ncube & Others v. The State* (1987) CLB 1988 the Zimbabwe Supreme Court declared whipping to be unconstitutional and in *S. v. Tshuma, S. v. Ndhlovu* (1988) 2 SA 702 (ZS) proscribed the whipping of adult offenders as inhuman and degrading treatment. In *State v. Juvenile* (1989) 2 ZLR 61 the same court declared the whipping of minors inhuman and degrading. Many other jurisdictions have followed the Zimbabwe lead in rejecting corporal punishment as a justifiable form of punishment. For example, Namibia in *Ex Parte Attorney General of Namibia* (1992) LRC 515; Zambia in *John Banda v. The People* (1998) and *The People v. Ian Kainda* (2000).

⁵² International Convention on Civil and Political Rights, 1966, Article 6(5)

reluctance of states to carry out executions would suggest that states are prepared to concede the point that the death penalty is cruel and is morally unjustifiable.

4.2 Arguments Based on the Concept of Deterrence

Proponents of the death penalty submit that this form of punishment is necessary to deter grave crimes such as murder, treason, and certain crimes against military discipline, particularly in time of war. This argument is consistent with the general preventive theory of punishment. According to this theory, the reason for punishment is either particular or general deterrence, or both. Society has always used punishment to discourage would be criminals; the death penalty prevents future murders. While it is difficult to say how many murders capital punishment prevents, it would seem naive to suggest that it has no preventive value whatsoever. For, such is human nature that life is preferred over death. Some put forward that statistical demonstrations are not conclusive. In fact, perhaps they cannot be because capital sentences are rarely passed and it takes years before an execution is actually carried out, making the death penalty to lose some of its deterrent effect since the best deterrent are punishments which are sure and swift. Nevertheless, capital punishment is likely to deter more than other punishments, because people fear death more than anything else.

Since death is feared more than life, even the murderer fights for his life. If society is committed to the sanctity of life it should be inclined rather than be disinclined to capital punishment, for abolishing the death penalty would be tantamount to condemning many innocent people to death at the hands of murderers; retaining the death penalty would deter some murderers who otherwise might not have been deterred. Punishment less than the death penalty would thus undermine the value society places on protecting lives. In any event, if the execution of perpetrators of heinous crimes has in fact no deterrent effect then society has only removed from among its ranks those capital offenders; but if society fails to execute them, while doing so would in fact have deterred other capital offenders, society has in effect allowed the killing of innocent victims. Most people would rather risk the former⁵³

In contrast abolitionists argue that capital punishment has no deterrent, reformatory or other criminological value for the person convicted of a capital offence and waiting to be executed. Some studies and famous cases have shown that the personality of a condemned person at the time of his execution is usually very different from what it was at the time of commission of the capital offence⁵⁴. In any case the death penalty is not a deterrent because most people who commit capital offences either do not expect to be caught or do not carefully weigh the differences between a possible execution and life imprisonment before they act.

Capital punishment is unnecessary and therefore expendable. There is no conclusive evidence that the incidence of crime had become higher in countries that have abolished

⁵³ [http://www.newwordencyclopedia.org/entry/Capital punishment.](http://www.newwordencyclopedia.org/entry/Capital%20punishment)

⁵⁴ We can cite the famous case of Philippe Maurice, French citizen, condemned to death penalty in his country on 28 October 1980 who studied history while in detention and whose sentence has been commuted to life imprisonment on 25 May 1981 by François Mitterand, the then President of France. Mr. Philippe Maurice, who has been released on parole his now a well-known professor of history.

capital punishment; nor has there been social disaster in those countries on account of the abolition of the death penalty. A comparison between states that retain and those that have abolished the death penalty suggests little correlation, whether positive or negative, between capital punishment and the incidence of capitally punishable crimes. The cause of the high incidence of violent crime cannot be attributed to an absence of the death penalty. Indeed, many statistics demonstrate that the abolition of the death penalty in a given country has not resulted in the increase of the crime rate, as for example in France or in Canada. On the contrary, there are examples of countries maintaining death penalty in their legislation and applying this sentence which still have high crime rates as for example in the United States⁵⁵.

Homelessness, unemployment, poverty and the frustration consequent upon such condition are other causes of crime wave. Beccaria stated in 1764 that "The experience of all ages proves that the death penalty has never stopped the villains determined to harm"⁵⁶

The death penalty once carried out is irreversible and therefore not amenable to rectification where there has been a miscarriage of justice. A very telling argument against the death penalty is thus its finality. It forecloses the likelihood of the benefit of 'amnesty', pardon, or commutation of sentence. Because the execution of a person sentenced to death is irreversible there is no possibility of correcting any judicial mistake that might subsequently come to light. While an erroneous guilty verdict could possibly be corrected on the record the person executed in consequence of that verdict cannot, by definition, be brought back to life. Studies on finality and miscarriage of justice in criminal law have shown that appellate courts are alive to this fact and are thus more apt to reverse a conviction, even on a mere technicality, in cases involving a death sentence by the trial court⁵⁷. In Uganda, there is a vivid example of an offender who was released from death row in the nineties after discovering that his alleged victim was actually alive⁵⁸. The growing reluctance of judges to pronounce the death penalty is matched by the same growing reluctance on the part of a progressively increasing number of governments to sign execution warrants. Several studies have actually helped to highlight the serious risks of executing innocent people because of judicial errors. According to Amnesty International, between 1973 and 2005, 117 death row inmates have been released in the United States after evidence of their innocence⁵⁹.

4.3 Arguments Based on the Concept of Retribution

Retentionists also argue that capital punishment is consistent with the theory of ethical retribution. The theory of retributive justice, a refinement of the primitive urge to take

⁵⁵ For information of the crime rate per country, see cf. United Nations Office on Drugs and Crimes, and in particular the UNODC crime and criminal justice statistics, <http://www.unodc.org/unodc/en/dataand-analysis/crimedata.html>

⁵⁶ Cesare Beccaria, *On Crimes and Punishments*, 1764.

⁵⁷ Anyangwe C, 'Finality and miscarriage of justice in criminal law: post-conviction remedies in common and civil law jurisdictions,' *Zambia Law Journal*, vol 30, 1998, p.51

⁵⁸ Oral statement from Johnson O.R. Byabashaija, Commissioner General of Prisons Uganda Prisons Service, Round Table on 'The death penalty in sub-saharan Africa, from a moratorium to abolition'. 4th World Congress against the Death Penalty, Geneva, February 2010.

⁵⁹ Amnesty International, *Peine de mort, Faits et Chiffres*, Londres, avril 2005, www.efai.amnesty.org/peinedemort

revenge for injury, holds that there is a necessary moral nexus between wrongdoing and punishment; that offenders are punished in accordance with the moral law that requires or permits it; and that both moral blame and legal punishment are social reactions to aggression, including aggression against social standards or the moral code. Modern humans have sublimated their anger into moral disapproval and the legal system. When the state executes a murderer, it is applying retributive justice – literal retribution or ‘an eye for an eye’. The murderer gets what he justly deserves, justifiable commensurate revenge. He is eliminated from society which thereby gets more sanitized. Execution becomes for society a sort of cathartic experience, a process of releasing strong feelings that at last justice has been done, the murderer gets his comeuppance.

Furthermore, in the view of retentionist a long prison sentence or even a life sentence is not as dramatic, unequivocal and final as the death sentence is and so has a less intimidating effect. Even the availability of an alternative punishment such as ‘life without parole’ would not make that alternative punishment feasible because taxpayers’ money would have to be spent to keep the criminal in jail. The amount of money involved would not be negligible in this day and age where prison conditions are required to be consistent with the standard minimum rules and basic principles for the treatment of prisoners set out under international human rights law: healthy and balanced diet, clean clothing and sheets, recreational facilities, health care, prisoner's family visits at regular intervals⁶⁰. Thus, the murderer, far from being put to death so as to restore the balance of a life for a life and far from being made to compensate his victim's dependants, only goes to a comfortable prison for a long time to be maintained at the expense of everybody else.

Still another line of argument pursued by retentionists is that a person who deliberately kills another has no moral right like the law-abiding person to claim entitlement to the right to life. The moment the murderer intentionally takes away another person's life he puts his own life on the line and must be ready to forfeit it. Taking away his life in turn gives satisfaction and comfort to the family of the victim that real justice has been done. This assuages the feeling of friends and family members of the victim who otherwise might be tempted, as in ancient times, to exact revenge. The right to life is a fundamental human right. So too is freedom. No one quarrels with the fact that freedom may be taken away under certain circumstances as an appropriate response to criminal activity. There is no compelling reason why life may not also be forfeited under certain circumstances as an appropriate response to criminal activity deemed serious enough to warrant the death penalty.

The counter argument marshaled by abolitionist is that capital punishment does not serve any legitimate penal purpose as a sanction. Literal retribution is nowadays an impermissible purpose of punishment because that much retribution is unnecessary. This is the more so as many offences that are punishable capitally in some countries (e.g., sexual offences, drug-related offences, religious dissent, economic crimes, robbery, burglary, treason) are unsuitable for the death penalty. Indeed, the arguments by advocates of the death penalty have some attraction only in the context of killing by the offender. But in some countries many capitally punishable offences do not involve loss of human life (e.g. burglary, kidnapping, narcotic offences, rape, plotting to overthrow the government, espionage, apostasy; cowardice, desertion or mutiny by soldiers in the face of an enemy), in regard to which therefore the argument on retaining the death penalty is even much more weaker. The notion of an “eye for an eye” is a simplistic one and an

⁶⁰ United Nations Standard Minimum Rules for the treatment of Prisoners, 1997, Article 9-26.

expression of an emotional impulse for revenge whereas the standard of a more mature society demands a more measured response. For example, society does not allow torturing the torturer or raping the rapist.

Abolitionists further argue that the permanent incapacitation and literal retribution, by way of capital punishment, are now no longer considered legitimate objectives of punishment. Penologists are now agreed that the objective of criminal punishment should be: to punish the criminal for his wrong-doing so as to make him atone for his iniquity by a process of moral retribution, to protect the public against an evildoer and so turn him into a useful member of society, and to deter potential wrongdoers from crime by showing the offender up as a bad example.

Abolitionists therefore conclude that the death penalty is illogical. It requires the state to commit homicide, the very conduct for which the prisoner is sentenced to death. Capital punishment unwittingly encourages life-threatening crimes because people are apt to reason that if the state believes in killing people albeit as a form of retribution, then killing *per se* cannot be totally a wrong thing to do, especially when exacted as a form of retribution for some wrong.

4.4 Arguments based on Public Opinion

Retentionists further contend that in a democratic dispensation a listening and caring government cannot ignore strong and persistent public opinion on the desirability of retaining the death penalty on grounds of general deterrence or for more mundane reasons, including at least a psychological feeling of safety that the retention of the death penalty in the statute books gives. According to this line of thought while the death penalty may not deter all potential criminals likely to commit capital offences, nevertheless it does deter at least some such potential criminals. If the death penalty were to be abolished the incidence of capital crimes would become higher as the offenders would go about their criminal enterprise in the happy knowledge that they would at worst serve only a term of imprisonment, and on release might even afford to relapse.

The answer of abolitionists to this line of argument is that a key responsibility of a democratic and caring government is to lead and that includes a duty to educate people not to kill and to advise itself also not to kill. It can do this through legislation commanding absolute respect for human life, no matter how abject and miserable that life might be.

The abolitionists further argue that the death penalty is inconsistent with freedom from cruel, inhuman and degrading treatment or punishment⁶¹. By its nature capital punishment is possibly a form of grave mistreatment and is probably inconsistent with international human rights standards, although not specifically prohibited. These standards prohibit all forms of mistreatment and degradation of the human person. Executed criminals have not returned to give us the benefit of their experience at the moment of execution. But it requires no imagination to recognise that death by whatever method must be mentally agonising for the condemned person. It is agonising during the years on death row, between the activation of the mode of death and the actual moment when death occurs.

⁶¹ *Makwanyane vs another*. 1995 (6 BCLR 665), *Attorney General Vs. Susan Kigula and 416 others*, 2009, *Mutiso vs. Republic of Kenya*, 2010: http://kenyalaw.org/downloads_freecases/76411.pdf.

This must be so in the case of death by stoning, shooting, and hanging which are the methods of carrying out the death penalty in Africa.

The agony can be compounded by human error when carrying out the execution, whereby the condemned person does not die and the whole process of execution has to be resumed or the person finished off by a heavy blow on the head with a blunt object. There are documented accounts of botched hangings in Africa where the executioner then has to pull on the prisoner's legs or to deliver a blow on his head with a hammer, or to give a *coup de grâce* with another bullet at close range, to speed up his death. Quite apart from the possibility of human error, executions in some African countries are sometimes carried out in public, and in some cases, the bodies of those executed are exhibited in public in the doubtful belief that such gruesome spectacle would have a deterrent effect on potential criminals. This evidence would suggest that capital punishment *per se*, or at least the method in which it is carried out in some countries, is *ipso facto* torture, or cruel, inhuman and degrading punishment. In the United States, the constantly revived debate about the inhuman character of lethal injection demonstrates that it is impossible to kill in a clean way.

Abolitionists point to the very slow criminal justice processes in many African states where inmates on death row sometimes wait as long as 10 years to complete the appeal processes. In this period, some Prisons staff in charge of these inmates might develop a natural bond with them. It's traumatizing for these same staff to lead these inmates to the gallows⁶². Besides, the poor prison conditions and the poor treatment of death-row prisoners in many African countries, especially the exacerbation of their suffering and the psychological torture on relatives anxious over the fate of the condemned prisoner, is inconsistent with the Standard Minimum Rules for the Treatment of Prisoners (1977), and Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. In short, even if man's ingenuity were to develop more 'humane' methods of execution that would not validate the death row phenomenon or the deliberate taking away of human life by the state. If capital punishment does not serve any legitimate social purpose, then it must be expendable. Even if it was necessary, it would still be cruel, inhuman and degrading.

Finally, several statistical studies, conducted in particular in the United States, clearly demonstrate the importance of financial costs associated with the use of capital punishment. If these studies are usually specific to each state, they all come to the conclusion that "*the death penalty system is far more expensive than an alternative system in which the maximum sentence is life in prison*"⁶³. In 2008, the California Commission on the Fair Administration of Justice published a report indicating that the State of California was spending about \$137 million per year on the death penalty. According to this Commission's report, instead of death penalty, a maximum punishment of life without parole would cost \$11.5 million per year⁶⁴. This is those significant costs associated with the use of the death penalty that would have led several states, including

⁶² See Todd C. Peppers, Laura Trevvett Anderson, *Anatomy of an execution*, Northeastern University Press, 2009

⁶³ Testimony before the Commission to Study the Death Penalty in New Hampshire, Legislative Office Building Concord, New Hampshire, December 4, 2009. By Richard C. Dieter, Executive Director, Death Penalty Information Center.
<http://www.deathpenaltyinfo.org/documents/NHTestimony09.pdf>

⁶⁴ Ibid

the states of New York and New Jersey to abolish the death penalty. The issue of expenses related to the use of the death penalty is all the more important that it often appears that these costs far exceed those dedicated to the prevention of delinquency.

4.5 Arguments based on the Scope of the Death Penalty

Retentionists argue that if all killing is such a bad thing why do abolitionists limit their campaign to the abolition of death as a penalty? Why is the right to life not couched in such absolute terms as to render impermissible even killing in war, killing in self-defence, killing in defence of another, killing on grounds of mercy (euthanasia), and abortion on therapeutic grounds? The reality is that the right to life cannot be absolute, admitting of no qualifications whatsoever.

Abolitionists on the other hand argue that there is a strong body of opinion from human rights activist that killing should be abolished in all circumstances and that the abolition in the context of a penalty is just a first step towards attaining that goal. The current status of the death penalty internationally is the strong trend in favour of its abolition at least in peace time. That is why the United Nations Charter Article 2(4) states that '*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations*', and under Article 51 allows the use of force only in the context of self defence.

4.6 Arguments based on the killing of a Loved One.

Retentionists claim that abolitionists have never experienced the agony suffered by victims of a capital offender. They suggest that abolitionists would not be so willing to advocate for the abolition of the death penalty were they to lose a family member or a close friend to a murderer. Retentionists recognise that the death penalty has been abolished even in a country like Rwanda where genocide took place. But they doubt that the abolition can credibly be said to be reflective of popular will. They seem to think that the abolition is probably more a matter of government policy most likely informed by considerations (e.g. to appear 'good' internationally or to attract donor funds or out of mere imitation) that have nothing to do with criminal law policy and justice or theories of punishment.

The counter argument to this is that there are many people in countries such as Rwanda and South Africa who have gone through the severe pain of losing loved ones but have risen above the issue of revenge and have actively supported abolition of the death penalty in those countries. In other countries, notably in the United States, some families, whose relatives have been victims of homicide, strongly oppose the maintaining of death penalty and are very active in the advocacy for its abolition. Gathered within increasingly influential associations, those families, whose main targets include lawmakers, prosecutors, lawyers or the media, insist on the fact that imposing death penalty will not

make reappear their missing relatives and that it is on the contrary promoting the cycle of violence⁶⁵.

4.7 Arguments based on the fact that International Law does not Prohibit the Death Penalty

Retentionists are quick to point out that international law does not generally prohibit the death penalty. Even international human rights law does not. There is no international or regional instrument that absolutely outlaws the taking away of human life. Of course, the formulation of relevant worldwide human rights provisions on the subject and the statements and resolutions of the UN and human rights bodies do suggest that the abolition of the death penalty is desirable. But that is not the same thing as saying that international law proscribes the death penalty.

The reply by abolitionists is that the formulation of relevant worldwide provisions on the subject and the statements and resolutions of the UN and human rights bodies and instrument by some regional human rights systems do strongly suggest that the abolition of the death penalty is desirable. Examples are the Second Protocol to the ICCPR, Protocol No. 6&13 of the European Convention and Protocol to the American Convention on Human Rights on the Abolition of the Death Penalty. Europe is already a death-penalty-free region. Other regions of the world are in the process of following suit. Consistently with the abolitionist trend, the death penalty is excluded from the permissible punishments available to the International Criminal Court (ICC), the Special Court for Sierra Leone, and the ad hoc international criminal tribunals for ex-Yugoslavia and for Rwanda. This is so notwithstanding the fact that these courts have jurisdiction over extremely grave crimes, including genocide.

Table 4: Summary of the Arguments for and against the Death Penalty.

Arguments for the Death Penalty	Arguments against the Death Penalty
It is unquestionably the most restraining form of punishment.	<ul style="list-style-type: none"> • It is cruel and therefore morally unjustifiable. • Once carried out it is irreversible and therefore not amendable to rectification where there has been a miscarriage of justice. • It is illogical. It requires the State to commit homicide, the very contact for which the prisoner is

⁶⁵ See for instance the Mureder Victims' Families for Reconciliation (MVFR), an organisation organization of family members of victims of both homicide and executions founded in 1976 who oppose the death penalty in all cases. <http://www.mvfr.org/>

	<p>sentenced to death.</p> <ul style="list-style-type: none"> • It is an affront to human dignity and inconsistent with the right to life as the most important of all human rights.
<p>It is necessary to deter serious crime. Since death is feared more than life, even murderers fight for their life.</p>	<ul style="list-style-type: none"> • It is unnecessary and therefore expendable. There is no conclusive evidence that the incidence of crime had become higher in countries that have abolished capital punishment • It is not a deterrent because most people who commit capital offences do not expect to be caught.
<p>It is consistent with the theory of ethical retribution. A person who deliberately kills another has no moral right like the law-abiding person to claim entitlement to the right to life. The moment the murderer intentionally takes away another person's life he puts his own life on the line and must be ready to forfeit it. Taking away his life in turn gives satisfaction and comfort to the family of the victim that real justice has been done. This assuages the feeling of friends and family members of the victim who otherwise might be tempted, as in ancient times, to exact revenge.</p>	<p>The theory of an eye for an eye is a simplistic one and an expression of an emotional impulse for revenge whereas the standard of a more mature society demands a more measured response. For example a society does not allow torturing the torturer or raping the rapist.</p>
<p>If all killing is such a bad thing why do abolitionists limit their campaign to the abolition of death as a penalty? Why is the right to life not couched in such absolute terms as to render impermissible even killing in war, killing in self-defence, killing in defence of</p>	<p>There is a strong body of opinion from human rights activist that killing should be abolished in all circumstances and that the abolition in the context of a penalty is just a first step towards attaining that goal. The current status of the death penalty internationally is the</p>

<p>another, killing on grounds of mercy (euthanasia), and abortion on therapeutic grounds? The reality is that the right to life cannot be absolute, admitting of no qualifications whatsoever.</p>	<p>strong trend in favour of its abolition at least in peace time. That is why the United Nations Charter Article 2(4) states that: <i>'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'</i>. <i>Europe is a death-penalty-free region and other regions will follow suit.</i></p>
<p>Abolitionists have never experienced the agony suffered by victims of a capital offender. They will not be so willing to abolish the death penalty were they to lose a family member or a close friend to a murderer.</p>	<p>There are many people in countries such as Rwanda and South Africa who have gone through the severe pain of losing loved ones but have risen above the issue of revenge and have actively supported abolition of the death penalty in those countries.</p>
<p>International law does not generally prohibit the death penalty.</p>	<p>The formulation of relevant worldwide provisions on the subject and the statements and resolutions of the UN and human rights bodies and instrument by some regional human rights systems do strongly suggest that the abolition of the death penalty is desirable. Example Second Protocol to the ICCPR, Protocol No.6&13 of the European Convention and Protocol to the American Convention on Human Rights on the Abolition of the Death Penalty.</p>

PART V: Question of Moratorium on Executions

Concerning the attitude adopted by states the world over on the question of the death penalty, they (states) may be categorised as abolitionist *de jure*, abolitionist *de facto*, or retentionist. States that are abolitionist *de jure* are those that have legally abolished the death penalty as a legally permissible sanction for crime. Retentionist states are those that still retain the death penalty in their legislation as a valid sanction for certain crimes. A state is said to be abolitionist *de facto* if it has not legally proscribed the death penalty but on the other hand has declined to authorise the execution of those sentenced to death. In other words, these are states that have frozen or put on hold the carrying out of executions of condemned prisoners.

There is no prescribed period during which a State should not have carried out executions to qualify as observing a moratorium. However a reasonable period of non execution of the death penalty should have passed for a State to be regarded as observing a moratorium. The term used to describe those states which have frozen or put on hold the carrying out of executions is that they have placed *moratoria (moratorium in singular)* on executions. In Africa at the end of 2010, the countries in that category are as follows: **West Africa:** Benin, Burkina Faso, Gambia, Ghana, Mali, Mauritania, and Niger. **Central Africa:** Central African Republic, Democratic Republic of Congo and Congo Brazzaville. **Eastern Africa:** Eritrea, Ethiopia, Kenya, Tanzania, and Uganda. **Southern Africa:** Madagascar, Malawi, Swaziland, Zambia and Zimbabwe. **North Africa:** Algeria, Tunisia and Morocco.

5.1 Moratorium on Execution as a Positive Development

A state that has in place, expressly or impliedly, a moratorium on executions is one that still retains the death penalty, though probably with a weak resolve.

A moratorium appears to be something of a halfway house between abolition and retention. The adoption of a moratorium on executions ought normally to be a step towards the ultimate decision proscribing the death penalty. In other words, one would have assumed that after a number of years of moratorium it would be difficult for a state to resume executions and that a moratorium is a move that paves the way for abolition of the death penalty. This is probably the thinking behind various moratorium resolutions since the late 1990s adopted by the United Nations (the General Assembly and the High Commission for Human Rights) and regional human rights bodies.

Unfortunately, the experience in Africa has shown that this is not necessarily the case. More often than not, even after a moratorium period of as long as a quarter of a century, the state with an embargo on executions may resume executions without any compunction.

The imposition of a moratorium on executions may be official or unofficial; it may be in consequence of an international commitment to do so; or it may be as a mere matter of grace by the Head of State. Even when the moratorium is publicly announced, as in Zambia and Malawi, it is not presented as official government policy but as the personal position of the incumbent President not to sign any execution warrants during his presidency. This then leaves the door open for his successor to resume executions, if minded to do so. In a state which has a moratorium in place since the courts legally continue to pass death sentences but executions are not carried out, if the sentences are not systematically commuted this leads to an embarrassingly agonising situation whereby the number of inmates on death row keeps increasing without a corresponding increase or an improvement in holding facilities and conditions.

States with a moratorium on executions have all the more found it quite easy to resume executions because the moratorium is often not by legislative action but simply by act of forbearance by the incumbent Head of State. In fact the practice of states in regard to this matter is varied. In some such countries most death sentences are commuted and only in exceptionally rare cases are warrants of executions signed. This would tend to suggest that there is little commitment to use the death penalty as a means of crime control; it is also probably an indication that the death penalty is seen as undesirable. In other countries the Head of State routinely commutes all death sentences to various terms of imprisonment, a practice that lends credence to the view that the death penalty is undesirable. Still in other countries death sentences though legally passed are not carried out but at the same time they are not commuted, leaving the condemned prisoners in complete limbo regarding their ultimate fate. In Zambia, for example, although death sentences are passed, the President has refused to authorise any executions to be carried out. But on the other hand he does not systematically commute those sentences.

On 21 December 2010, 17 out of the 53 States in Africa were in favour of a Resolution adopted by the United Nations General Assembly at its 65th Session calling on States to adopt a moratorium on executions⁶⁶. Algeria, Benin, Burkina Faso, Madagascar and Mali already have a moratorium on executions and so their vote in favour of the resolution occasioned no surprise. On the other hand, two abolitionist states Djibouti and Senegal abstained, and two others, Mauritius, Seychelles, did not vote, while some states with a moratorium already in place (e.g. Central African Republic, Morocco, and Niger) intriguingly also chose to abstain instead of voting in favour of the resolution.

⁶⁶ **In favour** (17): Algeria, Angola, Burkina Faso, Burundi, Cape Verde, Congo, Gabon, Guinea-Bissau, Madagascar, Mali, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Somalia, South Africa, Togo **Against** (8): Botswana, Egypt, Ethiopia, Libya, Sudan, Swaziland, Uganda, Zimbabwe. **Abstention** (21): Cameroon, Central African Republic, Comoros, Democratic Republic of the Congo, Djibouti, Eritrea, Gambia*, Ghana, Guinea, Kenya, Lesotho, Liberia, Malawi, Mauritania, Morocco, Niger, Nigeria, Senegal, Sierra Leone, United Republic of Tanzania, Zambia. **Absent** (7): Benin, Chad, Côte d'Ivoire, Equatorial Guinea, Mauritius, Seychelles and Tunisia.

*After the vote, Gambia's representative said she wrongly voted on resolution. She had wished to abstain.

Support for the resolution hasn't changed much throughout the years with 20 votes in favour in 2008 and 17 in 2010. This is not true for the negative votes that decreased over time from 12 in 2007 to 8 in 2010⁶⁷. It is difficult to underline any clear trend in these changes because they have been affected by several external issues not necessarily linked with the position of the state regarding the resolution. For example in 2010 Cote d'Ivoire that has always supported the resolution was not allowed to vote because of its internal situation.

It is interesting though to see how the majority of the African States maintained a neutral position towards the resolution throughout the years with a constant majority either abstaining at the moment of the vote or not voting at all.

5.2 Abuse of the Practice of Moratorium

The "abolitionist" de facto category is a nebulous one. In countries that fall under this category, neither the death penalty nor executions have in law been abolished. The death sentence is still available in the statute books as a valid penalty and trial courts are entitled to pass it and do continue to do so. This is because the moratorium does not have an impact on the death penalty as a sentence, but its impact is on the carrying out of that sentence when passed by the court. Thus, executions may still be legally carried out. In a state that is abolitionist de facto, executions are simply being stayed for an indeterminate period. But this is an uncertain state of affairs because executions may always be, and often are, legally resumed at any time.

A retentionist state that merely imposes a moratorium on execution is always free to resume executions whenever it chooses to. For example, Cameroon resumed executions after 11 years of no executions; Burundi after 12 years; Libya after 23 years; Comoros after 22 years; Chad after 12 years; and Guinea-Conakry after 17 years. What is more, since the moratorium is imposed not on the passing of capital sentences, but on the carrying out of executions, the state with a moratorium in place may, like the retentionist

⁶⁷ United Nations Resolution A/Res/63/168 of 18 December 2008; Resolution on Moratorium on the Death Penalty: **In favour: (19)** Algeria, Angola, Benin, Burkina Faso, Burundi, Cape Verde, Congo, Côte d'Ivoire, Gabon, Guinea-Bissau, Madagascar, Mali, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome and Principe, Somalia, South Africa. **Against: (10)** Botswana, Comoros, Egypt, Ethiopia*, Libya, Nigeria, Sudan, Swaziland, Uganda, Zimbabwe. **Abstain: (19)** Cameroon, Central African Republic, Djibouti, Eritrea, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Malawi, Mauritania, Morocco, Niger, Senegal, Sierra Leone, Togo, United Republic of Tanzania, Zambia. **Absent: (5)** Chad, Democratic Republic of the Congo, Equatorial Guinea, Seychelles, Tunisia.

* *After the vote, Ethiopia's representative said he wrongly voted in favour of the resolution. He had wished to vote against*

United Nations Resolution (A/RES/63/168) of December 2007: *In favour (17):* Algeria, Angola, Benin, Burkina Faso, Burundi, Cape Verde, Congo, Cote d'Ivoire, Gabon, Madagascar, Mali, Mauritius, Mozambique, Namibia, Rwanda, Sao Tome and Principe, South Africa. *Against (12):* Botswana, Chad, Comoros, Egypt, Ethiopia, Libya, Mauritania, Nigeria, Somalia, Sudan, Uganda, and Zimbabwe. *Abstention (20):* Cameroun, Central African Republic, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Eritrea, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Malawi, Morocco, Niger, Sierra Leone, Swaziland, Togo, Tanzania, and Zambia. *Absent (4):* Guinea-Bissau, Senegal, Seychelles, and Tunisia.

state, legally extend the scope of the death penalty or the number of offences for which it is applicable, or make the death penalty to apply retrospectively for reasons of political expediency. A veil of secrecy surrounds the handling of death penalty cases. But among the reasons that often compels the resumption of executions are the following: a sudden apparent inexplicable recrudescence in criminality, a shocking event such as genocide or massacres, serious internal security concerns, treason such as an attempt to overthrow the government, the demands of public opinion, and the settling of political scores.

Studies on crime and punishment now lay greater emphasis not so much on crime typologies but on why crime is committed in the first place. The results of these studies have led criminologists to stress reformation and rehabilitation rather than deterrence and retribution.⁶⁸

The campaign to abolish the death penalty is achieving great success under the ordinary criminal law. Not much success has however been achieved regarding the abolition of the death penalty under military criminal law, especially as concerns grave offences committed in time of war. The basic argument for insisting on retaining the death penalty in this area is that the essential aim of punishment under the ordinary law is reformation whereas under military criminal law the primary objective is intimidation.

⁶⁸ Centre for Capital Punishment Studies, *op. cit.*

PART VI. CHALLENGES

The effort to bring about the total abolition of the death penalty in Africa is not without challenges. In the first place, there is support in the continent for the death penalty. Capital punishment is popular in Africa because the general public has little confidence in the government and state agencies, universally perceived as corrupt, inefficient and ineffective⁶⁹. At the level of the masses, the ignorance of the human rights approach to the death penalty, exacerbated by illiteracy, makes the acceptance of arguments in favour of the abolition of the death penalty even more difficult.

Anecdotal evidence from various African countries has it that the judiciary, the police and the prisons administration are generally seen as ineffectual, lax and encouraging impunity. Public consultation in some countries and opinion sampling in others show that the masses are generally in favour of the retention of the death penalty⁷⁰.

A further challenge is the influence of tradition and religion. In most African countries, customary law which is largely an unwritten law, and sometimes Islamic Law, coexists with written law inherited from Western colonisation. Both African customary law and Islamic law recognise the application of capital punishment for some serious crimes; and Christianity is not unequivocal on the subject.

Again, African regional human rights instruments are silent on the issue of the death penalty. Although the death penalty constitutes a human rights concern, if not a human rights violation, the African human rights system is the only such system without a protocol or any other African regional legal instrument on the death penalty. The silence of African regional legal human rights instruments on the issue of the death penalty is often used by African States to justify the retention of the death penalty in their domestic law.

Further still, there is general ignorance of the human rights approach to the death penalty. There are two opposing schools of thought: the abolitionists and the retentionists.

⁶⁹ Uganda can be a case in point because of the notion of mob justice, where because of lack of confidence in the justice system, those suspected of killing are also killed by mobs instead of bringing them to court.

⁷⁰ In South Africa in 2005, a research was conducted where 75% of respondents consulted; including members of the Ruling Party were in favour of bringing back the death penalty. In 2007 ahead of the forthcoming elections, some members of the Ruling Party, including its leaders wanted to introduce the debate about the death penalty, although there were pockets of resistance.

PART VII. STRATEGIES

In its continuing efforts to secure the abolition of the death penalty in Africa the African Commission on Human and Peoples' Rights will pursue strategies that include the following:

- i. Continued engagement with States Parties on the necessity of the abolition of the death penalty, engagement through its Resolutions, Promotional Activities, Special Mechanisms, Examination of State Reports and Communication Procedures;
- ii. Undertaking in African countries awareness raising activities aimed at eliciting continued support to abolish the death penalty. In doing so the African Commission will propose the adoption of 'an abolition of the death penalty day' and alternatives to the death penalty;
- iii. Taking a proactive approach by adopting sensitization and human rights education programmes at all levels, including the adoption of a media strategy to create public awareness on the need to abolish the death penalty, and urging States Parties to the African Charter to demonstrate stronger political will towards the abolition of the death penalty. Strategies to be developed in order to enhance public awareness shall include *inter alia* advocacy, pressure on decision makers, support for the establishment of regional and national human rights coalitions, as well as campaigns and petitions for the abolition of the death penalty;
- iv. Bringing on board the following constituencies as part of the public debate on the issue of the abolition of the death penalty: politicians including parliamentarians , Lawyers, Judges, Civil Society Organisations (CSOs), National Human Rights Institutions (NHRIs), Religious Leaders, traditional leaders, Non Governmental Organisations (NGOs), Trade Unions, Student Unions, Professional Associations, Regional Economic Communities, Academic Institutions, media and other stakeholders;
- v. Urging AU States Parties, which have not yet done so, to sign and ratify human rights instruments that prohibit the death penalty especially the Second Optional Protocol to the International Covenant on Civil and Political Rights on the abolition of the death penalty, and then to harmonize their national legislation accordingly;
- vi. Working closely with United Nations bodies, in particular; the Office of the High Commissioner for Human Rights, as well as with National Human Rights Institutions and Civil Society Organizations in their respective capacities to mobilize towards the abolition of the death penalty;

- vii. Recommending to the African Union and to State Parties the adoption of a Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa under any circumstances; the Protocol would fill the gap in the African Charter on Human and Peoples' Rights and expand on the provisions of the Second Optional Protocol to the International Covenant on Civil and Political Rights with stronger emphasis on restorative rather than on retributive justice;
- viii. Urging State Parties that still retain the death penalty, and pending the adoption and the entry into force of the proposed Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa,
 - a) to impose a moratorium on sentencing to death;
 - b) to impose a moratorium on the carrying out of death sentences and to commute death sentences already passed into fixed-term or life sentences, depending on the gravity of the circumstances of the offence; and
 - c) to refrain from resuming executions once they have a moratorium in place.

PART VIII. CONCLUSION

What emerges from the Study is that the “Question of the Death Penalty” is a very complex and contentious issue. The situational analysis in Africa shows that some countries have abolished the death penalty, while others have continued to apply it as a legal mode of punishment, and yet others have in place a moratorium on executions.

Among countries that still have the death penalty in their statute books and continue to apply it effectively, serious questions do arise which include the following: can a system based on the rule of law continue to run the risk of depriving persons the right to life? Would it be acceptable to apply the death penalty where there could be an alternative? Would it be really humane to keep a person on the death row for years, not knowing if the next day will be his/her last?

It is evident from this study that there are individuals including, private organizations, lawyers, academics, politicians and members of religious groups who seek the abolition of the death penalty. Indeed what emerges from the survey of the pro and cons of the death penalty is that the abolitionist case appears more compelling than the retentionist case. The Working Group recognizes that the Study may have some limitations and may call for more study in some areas. However the Working Group is convinced that in spite of any shortcomings there might be, any additional study is unlikely to change the basic findings of the Study in relation to the necessity for the abolition of the death penalty.

The Working Group believes that abolition of the death penalty may be achieved in one of three ways:

- by a clause in the national constitution guaranteeing the right to life in absolute terms (i.e. with no qualifications whatever);
- by legislation proscribing the death penalty as a permissible sanction; and
- by subscribing to regional and international human rights instruments requiring the abolition of the death penalty and then aligning municipal law to those instruments. Any of the last two methods is to be preferred because they make any hasty or a politically motivated re-introduction of the death penalty much more difficult. Abolition of the death penalty imposed by decree or by law enacted by a controlled legislature must be suspect because dictators can decree abolition over-night, and equally swiftly re-instate it.

It is for these reasons that the Working Group recommends that the African Commission considers and implements the recommendations for the abolition of the death penalty formulated in this Study.

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ABBREVIATIONS

AI- Amnesty International

AU- African Union

CFR 2000

FIACAT- International Federation of Action by Christians for the Abolition of Torture

FIDH- International Federation for Human Rights

ICCPR- International Covenant on Civil and Political Rights

NGO- Non-Governmental Organisation

NHRI- National Human Rights Institutions

UN- United Nations

OPII- Second Optional Protocol to the International Covenant on Civil and Political Rights

WCADP: World Coalition against the Death Penalty