

Judgement

Evodius Rutechura v. United Republic of Tanzania

26 February 2021, Application No. 004/2016

Dissenting opinion

of

Judge Blaise Tchikaya

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1. International human rights law, through its most advanced jurisprudence, *has already derived from the prohibition of torture, cruel, inhuman or degrading treatment or punishment* the international prohibition of the death sentence¹. The question of the legal basis for this prohibition no longer arises.

2. Like my honourable colleagues, I approved the operative part of the *Evodius Rutechura v. Republic of Tanzania*² decision of 26 February 2021³. However, it

¹ The Strasbourg Court's reading of Articles 2 and 3 of the European Convention on Human Rights (4 November 1950) (the judgments on *Ocalan v. Turkey*, 12 May 2005 and *Al-Saadoon and Mufdhi v. the United Kingdom*, 2 March 2010) allows the Court to characterise a death sentence imposed following an unfair trial as inhuman treatment. It describes the death sentence as an "unacceptable punishment" prohibited by Article 2 and considers, in the light of State practice, that the enforcement of the death penalty in all circumstances now constitutes inhuman and degrading treatment contrary to Article 3. Recall that the US Supreme Court decision in *Roper v. Simmons*, 13 October 2004. This case invoked the Eighth Amendment to the Constitution prohibiting cruel and unusual punishment. It held that the execution of persons under the age of 18 at the time of the trial constituted cruel and unusual punishment, contrary to the 8th and 14th amendments.

² On 21 November 2019, this State notified the Chairperson of the AU Commission of its withdrawal of its Declaration accepting the Court's Jurisdiction to receive applications filed directly by individuals and non-governmental organisations. The Court, taking into account the applicable law and its jurisprudence (*Ingabire Victoire Unuhoza v. Rwanda*, 3 June 2016, 1 AfCLR 584, § 67; *Andrew Ambrose Cheusi v. Tanzania*, 26 June 2020, §§ 37-39), decided that the withdrawal had no bearing on cases pending before the Court as well as on cases filed before the withdrawal took effect, one year after the deposit of the instrument of withdrawal, i.e., on 22 November 2020. The Court thus retained admissibility and jurisdiction over the case.

³ AfCHPR., *Evodius Rutechura v. Tanzanie*, udgement, 26 février 2021.

would have been desirable for the said operative part to have been supplemented by one of the aspects relating to the evolution of the sentence in question: the death penalty. The death penalty was not the main focus of this judgment, nor was it its legal issue. However, this penalty is undoubtedly the cause of Mr Evodius Rutachura's procedural challenges before the Court. Evodius limits his complaints before the Court of Appeal to the dismissal of his request for additional time to file a request for review, the lack of legal aid during his trial and appeal, and the insufficiency of evidence⁴.

3. In the same proceedings, the Applicant requested for provisional measures on his death sentence. In order to avoid irreparable harm despite the *de facto* moratorium adopted by the Respondent State and the fact that no execution had taken place for a long time, the Court granted these provisional measures in a decision rendered in 2016⁵. The operative part of the said decision was limited in scope. It was not intended to make a pronouncement on the death penalty regime⁶

4. The practice of executing people for 'serious' offences, although in decline, still exists on the continent. Although this is not the place for an analysis, the so-called "legal" death penalty pronounced by judges, is an extension of the power of the rule of law. A death sentence in this case results from the construction of the State itself. The etymology of the word *potency* derives from the latin word *potentia*, meaning 'power' in the public and political sense. This is precisely the Roman position⁷, which held that the death penalty would protect society, because it would be an exemplary punishment and would serve as deterrence to criminals. This position, although widely-held, has not been sociologically proven. It has been considered an absolute denial of human rights, a premeditated and cold-blooded State murder or an act of barbarism. Since 1973, more than 160 death row inmates

⁴ *Idem.*, § 6.

⁵ AfCHPR, Order, *Evodius Rutechura v. Tanzania*, 18 March 2018

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⁷ Gaudemet (J.), *Les institutions de l'Antiquité*, Paris, Montchrestien, coll. « Domat Droit public », 5^e éd., 1998, p. 511 ;

have been exonerated or released in the United States after being proven innocent⁸. Other prisoners have been executed even though there were serious doubts about their guilt⁹.

5. The question - the relevance of which remains to be demonstrated - is whether human law affirms or negates the outlawing of the death sentence. The Evodius case has given the Court the opportunity to reflect further on the subject. Once again, the continental court noted the opportunity given it to recall, as an incentive, to clarify an increasingly universal doctrine on the abolition of the death sentence. The case of Evodius Rutechura comes after the Second Additional Protocol to the International Covenant on Civil and Political Rights, which abolishes the death sentence for States that are party to it. On 17 November 2020, the General Assembly called on "States that have not yet done so to consider acceding to or ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death sentence"¹⁰.

6. In the operative part of the Evodius Rutechura decision, which we endorsed, the Court shows strict compliance with the applicable law (1.). However, the Court could, on this occasion, have clarified and prompted the States of the region to pay more attention to the human rights developments that are taking place before them on the issue of the death penalty (2.).

1. *Evodius Rutechura*, a *lex lata* decision

⁸ Badinter (R.), *Contre la peine de mort*, Ed. Poche, 320 p. ; *L'abolition*, Ed. Poche, 2002, p. 288

⁹<https://www.amnesty.org/fr/what-we-do/death-penalty/>

¹⁰AGONU, Resolution. No. °73/175, *Moratorium on the Use of the death penalty*, 17 December 2018 (Report of the 3rd Commission (A/73/589/Add.2), § 10. 123 UN Member States voted in favour of the resolution, including Djibouti, Jordan, Lebanon and South Korea, who support the proposal for the first time. The Democratic Republic of Congo, Guinea, Nauru and the Philippines, Yemen and Zimbabwe also supported the Resolution. The UN Commission on Human Rights held that "States that no longer apply the death penalty but maintain it in their legislation to abolish it" (Point 6) of the Resolution of the Commission on Human Rights 2004/67 adopted by a recorded vote of 29 to 19, with 5 abstentions. Chap. XVII E/2004/23-E/CN.4/2004/127], 21 April 2004

7. As recalled, the Applicant and two acolytes, undertook to rob the home of Erodia Jason in Mwanza on 13 May 2003. Erodia Jason's daughter, Arodia, was shot while trying to escape from the house. On 15 May 2003, the Applicant was arrested. He was convicted on 19 November 2008 and sentenced to death by hanging by the High Court sitting in Mwanza¹¹.

1.1 - The Evodius case, issues and solutions

8. The Applicant is a Tanzanian national sentenced to death by hanging for murder. He challenged the proceedings and ultimately the sentence imposed on him. In the operative part of the judgment, the Court rightly concludes that the Respondent State did not violate Article 7 of the Charter as regards the manner in which the evidence was assessed, nor did it violate the right to free legal assistance to which the Applicant was entitled. While adhering to its decision, it would have been desirable for the Court to take a position on the issue of the death sentence which was the essence of the judgment. This would have been a welcome extension of the Court's praetorian power in this matter of such concern.

9. The Respondent State's arguments could not prosper. The Court, committed to its principles, unanimously held that it has jurisdiction to assess the relevant proceedings before domestic courts to the extent of the international instruments ratified by the State. It relied on case law that is now established¹². It also rightly pointed out that the withdrawal of the Declaration deposited pursuant to Article 34(6) of the Protocol has no retroactive effect and has no bearing on the Evodius case insofar as it was pending at the time the Respondent State deposited its

¹¹AfCHPR., *Evodius Rutechura v. Tanzanie*, Judgement, § 3.

¹² AfCHPR, *Ernest Francis Mtingwi v. Malawi* (Jurisdiction) (15 March 2013), 1 AfCLR 197, § 14; *Kenedy Ivan v. Tanzania*, Application No. 25/2016, 28 March 2019, § 26; *Armand Guéhi v. Tanzania* (Merits and reparations) (7 December 2018), 2 AfCLR 493, §33; *Nguza Viking (Babu Seya) and Johnson Nguza (Papi Kocha) v. Tanzania* (Merits) (23 March 2018) 2 AfCLR 297, § 35.

instrument of withdrawal. The latter does not take effect until twelve (12) months after this deposit (22 November 2020)¹³.

10. The Court declared the case admissible, as it appeared that the Applicant had appealed his conviction and sentence to the Tanzanian Court of Appeal, the highest court, on 18 June 2010, which court upheld the judgment of the High Court of Justice. The Respondent State was thus given the opportunity to cure the alleged violations. The Applicant had therefore previously exhausted all available local remedies. This position of the Court was defensible and of established jurisprudence¹⁴. It should be recalled that the admissibility of the Application is subject to the principle of prior exhaustion of local remedies. This principle prescribes that persons challenging a State in a human rights dispute before an international body are, in principle, under an obligation to make prior use of the remedies available under their country's legal system.

11. The Court was therefore faced with the question of whether the referral was made within a reasonable time. As in many previous cases, "the determination as to whether the duration of the procedure in respect of local remedies has been normal or abnormal should be carried out on a case-by-case basis depending on the circumstances of each case¹⁵". In *Evodius* case, the Court found that the Applicant was detained and sentenced to death, imprisoned and restricted in his movements with limited access to information. On two occasions, he attempted to apply for a review, the last attempt being on 8 June 2015, i.e., seven (7) months

¹³ AfCHPR, *Ingabire Victoire Unuhoza v. Rwanda* (Merits) (2016) 1 AfCLR 584, § 67 ; *Cheusi v. Tanzania* (Merits), §§ 35 à 39.

¹⁴ ECHR, *Akdivar et al. v. Turkey*, 16 September 1996; JDJ, 1996,239, obs. E. Decaux; RTDH. 1998, p. 27, note P. Legros and P. Coenraets. It is clearly understood that States are not accountable to an international body before they have had the opportunity to rectify the situation in their domestic legal order, *Interhandel Case*, Switzerland v. United States, Preliminary Objections, ICJ 21 March 1959, ICJ Reports 1959, p. 27; Wiebringhaus (H.), *La règle de l'épuisement préalable des voies de recours internes dans la jurisprudence de la Commission européenne des Droits de l'Homme*, AFDI, 1959. pp. 685-704.

¹⁵ AfCPHR., *Zongo and Others v. Burkina Faso* (Merits), *op. cit.*, § 92; See also *Thomas v. Tanzania* (Merits) *op. cit.*, § 73.

and five (5) days before the case was brought before the Court. It further held that the circumstances mentioned delayed the filing of the Application before it. The Application was therefore deemed to have been filed within a reasonable time.

12. The operative part of the judgment was unanimous. On the whole, the Court did not uphold the Applicant's claims, except for the aspect relating to the Respondent State's failure to provide free legal assistance to the Applicant under Article 7(1)(c) of the Charter.

1.2- The relationship of the *Evodius decision* with previous case law

13. It should be recalled that the Court has handed down numerous decisions on the issue of the death penalty. Although this particular Evodius case did not make it a point of law, it was fundamentally at the root of the proceedings before the African Court. In the *Armand Guehi* case (2018)¹⁶, its first and most important case on the matter, the Court, in accordance with the reasons contained in its judgment, ruled against the requested release. It said, without further provision on the death sentence, that it dismissed 'the Applicant's prayer for the Court to quash his conviction and sentence, and order his release'¹⁷. The Court thus went no further than to rule on the Applicant's claims.

14. The Arusha Court has been seized with various cases involving the death penalty¹⁸. From 2015 to 2020, the Court has heard almost 20 cases involving the

¹⁶ AfCHPR., *Armand Guehi v. Tanzania*, 3 June 2016 (Jurisdiction and admissibility) and 7 December 2018 (Merits).

¹⁷ *Idem.*, 205, point X of the operative part.

¹⁸ These include *John Lazaro v Tanzania*, Order 18 March 2016; *Habiyalimana Augustino and Mburo Abdukarim v Tanzania*, Order, 3 June 2016; *Deogratius Nicholas Jeshi v Tanzania*, Order, 3 June 2016; *Cosma Faustin v Tanzania*, 3 June 2016; *Joseph Mukwano v Tanzania*, 3 June 2016 and; *Oscar Josiah v Tanzania*, Provisional Measures, 3 June 2016; *Dominick Damian v Tanzania*, 3 June 2016; *Chrizant John v Tanzania*, 18 November 2016; *Crospery Gabriel and Ernest Mutakyawa v Tanzania*, Provisional Measures, 18 November 2016; *Nzigiyimana Zabron v. Tanzania*, interim measures (2016); *Marthine Christain Msuguri v. Tanzania*, Provisional measures, 18 November 2016; *Gozbert Henerico v. Tanzania*, interim measures, 28 November 2016, *Mulokozi*

death sentence. They come to the Court on the basis of Article 7 (1) of the African Charter which protects the right to a fair trial. The typical argument in the 2019 *Oscar Joshua* case¹⁹, for example, is as follows:

"The Court of Appeal's judgment was rendered on the basis of evidence derived from statements of the Prosecution Witness which were marred by inconsistencies and "manifest errors patent in the face of the records (...) the Court of Appeal misdirected itself by dismissing his grounds of appeal without giving them due consideration by relying on incriminating evidence obtained from an "untruthful witness. The Court of Appeal's wrongful dismissal of his Appeal violates his rights under sections 3(1) and (2) and 7(1)(c) of the Charter"²⁰.

15. This argument cannot be assessed *a priori*, but it can be noted, as here in *Evodius*, that it is almost always used in death sentence cases.

16. The *Ally Rajabu* case has attracted a great deal of attention from the Court²¹. In this case, Ally Rajabu and four other Tanzanian nationals were sentenced to death for murder. They alleged, as already mentioned, that they had been convicted without a full hearing of their case and that the fact that they were

convicted in violation of Section 235(1) of the Criminal Procedure Act and therefore should be given the benefit of the doubt²².

Anatory v. Tanzania, Provisional measures, 28 November 2016; *Amini Juma v. Tanzania*, 18 November 2016.

¹⁹CAfDHP., *Oscar Josiah*, Merits, 28 November 2019

²⁰ *Idem.*, § 7 and 8.

²¹ AfCHPR., *Ally Rajabu, Angaja Kazeni, Geoffrey Stanley, Emmanuel Michael and Julius Michael v. Tanzania*, Order. 18 March 2016; admissibility and jurisprudence, 4 July 2019

²² *Idem.*, § 6.

17. The operative part of the judgment made no reference to the death sentence regime at issue, which was contested by the Applicants. Rather, the Court stated that:

"the Respondent State has not violated the Applicants' right to be tried within a reasonable time, under Article 7(1) (d) of the Charter, (nor)(...) the right to life guaranteed under Article 4 of the Charter, in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer"²³.

18. Thus, the Court in *Evodius Rutechera* simply recalls its established jurisprudence on the issue of the death sentence, resolutely steering clear of the current debates applicable to the law in force, an approach that will be followed in the *Dexter* case.

1.3. The *Evodius* case and the particularities of the *Dexter* case

19. The case of *Dexter Eddie Johnson v. the Republic of Ghana*²⁴ followed the same line of reasoning, albeit with some peculiarities, but the Court of Appeal maintained its jurisprudential stance.

20. On 27 May 2004, this Applicant, who has dual Ghanaian and British nationality, killed an American national in the Greater Accra region of Ghana. When brought to court, he denied the offence. On 18 June 2008, the Accra High Court, in a fast-track procedure, found him guilty of the murder and sentenced him to death. In addition to the issue of due process, the right to life and the prohibition of inhuman or degrading treatment or punishment, the problem in Dexter's case is that the only sentence for this offence under Ghanaian law is capital punishment, which has been called the mandatory death sentence²⁵. Dexter is currently awaiting execution.

²³ *Ibidem.*, § 171 – vii and viii.

²⁴ AfCHPR, *Dexter Eddie Johnson*, Order. 28 September 2017 and Judgement on the merits, 28 November 2019.

²⁵ UN Human Rights Committee, Communication *Dexter Eddie Johnson v. Ghana*, 18 July 2012.

21. In this precedent, the Court reiterates its jurisprudence, *lex lata*. Pursuant to Rule 56.7 of its Rules of Court, it ruled that the case was not admissible because it had been heard by another body, the Human Rights Committee, and was therefore a "*non bis in idem*". In this case, the Court did not rule on the merits. From paragraphs 33 to 57 of the Dexter judgment, the Court perceives the issue of the mandatory death sentence, but in this 2018 decision it complies with the procedural restriction of *non bis in idem*.

22. The Court was right not to add incentives to its operative part in *Dexter*, at least for two reasons. The first reason was that the case was declared inadmissible; the second reason was that once it had held that the United Nations Human Rights Committee had disposed of the substance of the dispute, it would have seemed prudent to focus more on the merits than to add incentives to its decision to dismiss the case. The Court's position in *Dexter* on this point, clearly seems consistent.

23. The question of the form of these incentives already arises, as does the question of their basis.

2. *Evodius Rutechura, the death sentence and incentives*

24. The Court's attention was rightly drawn to the enactment of the death sentence incentives. It was noted that the Court could deal with this only if it is a principal issue of law in the case or if it was not a request in the Application.

25. At the margin, a question therefore arose for the Court as to a specific extension of the operative part of the judgment on the attitude of the Respondent State to the law applicable to the death sentence. Was this possible, given the content of the terms of the dispute? In short, could the Court include in its operative part a statement, which it would consider appropriate, for the purpose of advancing human rights, even though it was not among the Applicant's requests? Would the Court not be ruling *ultra petita*? This question deserves to be addressed.

2.1 - Should the specter of *ultra petita* therefore limit the Court's creative function?

26. The issue at hand is arguably one of the most important and sensitive in human rights: the death sentence. When the Court is seized of this issue, directly or indirectly, its jurisdictional function should be carried out in the normal way, while taking strict account of the essential counterpart of this right: the right to life²⁶.

27. It is accepted that a court can only rule on the findings submitted to it because its judicial function is the application of the law. It must provide the resulting interpretation. The *Evodius* judgment in its operative part, by the principle of *lex lata*, is limited to the Applicant's claims. The question to be asked is whether the spectre of *ultra petita* should limit the Court's jurisdictional function from the outset. This point is so important that it requires clarification. Three arguments suggest that the Court can go further.

28. The first argument is that the Court has, when it is in the interests of human rights, a broad power of interpretation. It cannot limit it in order to safeguard its jurisdictional function. It may consider that this was induced by the claims or by the facts in dispute²⁷. In sum, it is known in international law that the judge can establish himself the meaning of his judgment on the points referred to in the submissions,

²⁶ This argument may seem relative in the context of peremptory rights, certain human rights, including the prohibition of the death penalty.

²⁷ The right to life has been rightly invoked to protect the citizen against "legal murder", i.e., the death penalty. It is conventionally known that "No one shall be arbitrarily deprived of his life", Articles 5 and 7 of the American Convention on Human Rights, which guarantee the right to life, physical integrity and personal liberty. See IACHR, *Velasquez Rodriguez* case, Preliminary objection, 26 June 1987; Merits, 29 July 1988. Cohen-Jonathan (G.), RGDIP, 1990, pp. 145-465 ; Cerna (Ch.), AFDI, 1996, pp. 715-732 ; Frumer (Ph.), RBDIP, 1995/2, p. 515 ; Hennebel (L.) and Tigroudja (J.), *Revue trimestrielle des droits de l'Homme*, 2005, No. 66, pp. 277-329 ; Tigroudja (H.), AFDI, 2006, pp. 617-640 ; Burgorgue-Larsen (L.) and Úbeda de Torres (A.), *Les grandes décisions de la CIDH*, Ed. Bruylant, 2008, p.996

because the procedure for interpreting the law is always specific to a Court²⁸. This would mean that the Court could not be considered to have ruled *ultra petita*.

29. In its *Papamichalopoulos judgment*²⁹, the ECHR recalled that its power to sanction is not confined within narrow limits. On the contrary, the adjective "equitable" and the phrase "where appropriate" would indicate the latitude it has in its exercise³⁰. It is clear that the Court has a significant margin of discretion in the exercise of its powers. This corresponds, moreover, to the very idea of implicit, non-contestable jurisdictions established in general international law³¹.

30. The second argument is that the Court itself, and rightly so, has been in the habit of attaching binding measures to its orders that are not included in the requests of the Parties. While this is the very meaning of the Court's injunctions, it provides a basis for justifying any incentive measures. They could have allowed the inclusion of incentives on the death sentence in line with current international human rights law³².

28 See in particular, I.C.J., Order, Case of the free zones of Haute-Savoie and Pays de Gex, France v. Switzerland, 19 August 1929: "having regard to the fact that the Court cannot as a general rule be compelled to choose between constructions determined beforehand none of which may correspond to the opinion at which it may arrive". p. 15.

29 See also (CPIJ, Interpretation of Judgments Nos. 7 and 8 (Chorzów Factory), 16 December 1927, pp. 15-16: "In so doing, the Court does not consider itself as bound simply to reply "yes" or "no" to the propositions formulated in the submissions of the German Application. It adopts this attitude because, for the purpose of the interpretation of a judgment, it cannot be bound by formulæ chosen by the Parties concerned, but must be able to take an unhampered decision".

30 ECHR, *Papamichalopoulos v. Greece*, 31 October 1995

31 ECHR., *Comingersoli SA v. Portugal*, 6 April 2000, § 29.

32 The concept of implied jurisdiction is well established in international law. It is the result of a confirmed and internationally recognised analysis. The CJEU has recognised it in the Community system (29 November 1956, *Fédéchar*, Case 8/55, ECR 291; 31 March 1971, *Commission v. Council* (AETR), ECR 1971, p. 1263; 26 April 1977, *Opinion 1/76*, ECR 754). However, it was the ICJ that applied at the international level the reasoning that led to the finding of implicit jurisdiction (ICJ, *ILO Jurisdiction*, Opinion, 23 July 1926, Series B, No. 13, p. 18). The Court has consistently applied the theory of implied competence. See in particular: ICJ, *South West Africa*, 11 July 1950, p. 128; Opinion, *Certain United Nations Expenditures*, 20 July 1962, p. 151; Opinion, *Legal Consequences of the Continued Presence of South Africa in Namibia*, [1971] ECR 16; Judgment, *Cameroon v. United Kingdom of Great Britain and Northern Ireland*, Northern Cameroon, 2 December 1963, [1963] ECR 15.

31. Such measures are found in various judgments. They are neither contained in the actual terms of the Protocol establishing the Court nor in the reasons for the judgments in which they are included. Two examples: a) In the *Ajavon* case, the Court orders:

"Respondent State to publish the operative part of the present Judgment within a period of one (1) month from the date of notification of the present Judgment, on the websites of the Government, the Ministry of Foreign Affairs, the Ministry of Justice and the Constitutional Court, and for six (6) months."³³.

32. b) In the *Mugesera* case, the Court ordered:

"the Respondent State to pay the amounts indicated in paragraphs xi, xii and xviii above, free of tax, within six (6) months from the date of notification of this judgment, failing which it shall also pay default interest calculated on the basis of the applicable rate set by the Central Bank of the Republic of Rwanda, throughout the period of late payment and until the sums due have been paid in full"³⁴.

33. These measures certainly provide the conditions for the effectiveness of the operative part in question. They also remain guarantees of effectiveness in the protection of human rights. In this respect, the Court can only resort to them, notwithstanding the Protocol's silence to this effect. This silence is relative, because Article 27 of the Protocol on the measures to be taken by the Court when it considers that there has been a violation refers to "all appropriate measures". This

³³ AfCHPR., *Ajavon v. Benin*, 4 December 2020, § 369, XXVII

³⁴ AfCHPR., *Léon Mugesera v. Rwanda*, 27 November 2020, § 177, XIX

article leaves it open to the Court to take all measures "to remedy the situation"³⁵, including incentives to adapt domestic laws.

34. The third argument relates to the number of applications relating to the death sentence or referring to it. The Court should assist and consider those countries that still retain the death sentence. The protection of the right to life depends on it. In five (5) years, at least twenty (20) cases have been repeatedly brought before the Court. This last circumstance alone justifies the Court's taking incentives in its judgments to bring domestic legislation into line with international law.

35. This relates even to the way in which the function and material jurisdiction of the Court's should be understood as established by Articles 3, 7 and 27 of the Protocol. The Court has consistently held that for it to have jurisdiction,

“As long as the rights allegedly violated are protected by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter. (...)”³⁶.

36. In addition to opening up the jurisdiction to hear the case, the Court has full jurisdiction to inquire into all aspects of the dispute in order to examine all aspects that make the protection of the rights concerned effective.

2.2. Judicial proscription of the death sentence

37. Judicial proscription of the death sentence is possible. It is compatible with international human rights law. Notwithstanding the framework set by cases such as *Evodius*, the Court can become involved through its case law. With the support

³⁵ Article 27 of the Protocol establishing the Court provides: “If the Court finds that there has been violation of a human or peoples’ right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation”.

³⁶ The Court has recalled this in various cases, including: *Alex Thomas v/ United Republic of Tanzania* (Merits), 20 Nov 2015, Application No. 005/2013, 1 RJCA, p. 491

of numerous international laws that aim to prohibit the death sentence³⁷, the Court can contribute in this respect to more dynamic judicial protection.

38. It has been pointed out that human rights jurisprudence has deduced from the prohibition of torture, cruel, inhuman or degrading treatment or punishment the international prohibition of the death sentence³⁸. The question of the legal basis for this prohibition no longer arises. The relatively widespread idea that human rights judges have normative limits in this respect no longer stands up to criticism. Many fundamental rights are at stake: the prohibition of torture, inhuman and degrading treatment, the right to life, etc.

39. The prohibition of torture is a peremptory norm of international law, yet the death sentence is, if not similar, at least close to torture. Death row falls, quite sensibly, under this same prohibition. This constitutes *erga omnes* obligations, opposable to all, outside any law.

40. In its 1996 Advisory Opinion on the Legality of Nuclear Weapons³⁹, the International Court of Justice described many rules of humanitarian law applicable in armed conflict as "intransgressible principles of international customary law",

³⁷ Recall that the United Nations General Assembly, through various resolutions, has called for the establishment of a universal moratorium on the use of the death penalty. These resolutions were adopted in 2007, 2008, 2010, 2012, 2014, 2016 and 2018 with increasing majorities. In 2018, this Resolution received 121 votes in favour, 35 votes against and 32 abstentions, i.e., 8 more votes in favour and 2 fewer votes against than in 2016. This is a notable progress and a growing support from African countries, members of the African Union. The Human Rights Council, through the Resolution adopted in June 2014, for the first time in a United Nations text, noted the grave human rights violations arising from the use of the death penalty. Additional Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms (May 2002), provides for the abolition of capital punishment in all circumstances, including in time of war or imminent threat of war. The aim is "to take the ultimate step towards abolishing the death penalty in all circumstances". The Charter of Fundamental Rights, in its Article 2, prohibits the death penalty as well as the expulsion or extradition of a person to a country where he or she would face the death penalty.

³⁸ ECHR, *Ocalan v. Turkey*, 12 May 2005 and *Al-Saadoon and Mufdhi v. United Kingdom*, of 2 March 2010. The death penalty is an "unacceptable punishment" prohibited by Article 2 and considers, in the light of State practice, that the enforcement of the death penalty in all circumstances now constitutes inhuman and degrading treatment contrary to Article 3.

³⁹ *Legality of the threat or use of nuclear weapons (UN and WHO)*, Advisory Opinion, 8 July 1996: P. H. F. Bekker, *AJIL* 1997, p. 126; see Coussirat-Coustère, *AFDI* 1996, p. 337; G. Kohen, *JEDI* 1997, p. 336. See also CHR, *Kindler v. Canada*, 30/07/1993, *RUDH* 1994.

which are known to include a prohibition on torture. This is possible for inhuman and degrading treatment. The *Al-Adsani* decision⁴⁰ had indeed clarified the answer to the question of whether a State could claim sovereign immunity from the prescriptions of international law. The answer is now clear: it is no. Even if, in the case under consideration (*Al-Adsani*), the conditions for such an application were not met for the ECHR.

41. The same question then arose at the ECHR in rather eloquent terms. Is Russia obliged to forgo the Applicant's removal in order to protect his life? On 16 August 2015, the Court unanimously held that such an obligation arose from Articles 2 and 3 of the Convention. Extradition to China would expose the Applicant to a real risk of being sentenced to death for murder. The Court upheld its provisional measures to prohibit the Applicant's removal until its judgment became final (§ 101). In this case⁴¹, the ECHR gave full effect to provisions not ratified by Russia.

42. Another question insidiously raised is that of the formal enforceability of the principle of the international abolition of the death sentence against those States that have not ratified the texts enshrining the abolition of the death sentence.

2.3 - The primacy of the international death sentence regime notwithstanding the non-ratification of texts by certain States

43. The known fact that many States do not execute their death row inmates speaks volumes about the ineffectiveness of this criminal sanction on its sociological flaws. In a monistic approach⁴², some States argue that they have not ratified or signed the international instruments condemning the death sentence.

⁴⁰ ECHR, *Al-Adsani v. United Kingdom*, 21 November 2001

⁴¹ ECHR., *A.L. (X.W.) v. Russia*, 16 August 2015

⁴² Alain Pellet rightly said that "Intellectually, monism is not without attraction, if only because it should - in theory at least - avoid conflicts between legal rules, each one, to whatever 'system' it belongs, finding its foundation in a higher rule up to a higher axiomatic norm which would make it possible to resolve *in fine* all problems of incompatibility between two or more rules", *Repenser les rapports entre ordres juridiques ?*

44. It should be noted that in this sense the analysis of the International Court of Justice in *North Sea Continental Shelf*, which was correct, should be highlighted. The Court held that the argument of the Netherlands and Denmark could be accepted provided that Germany's conduct was "absolute and consistent" but that, even in this case, the German position would have to be further examined by specifically examining the reasons for which it did not ratify the Convention (§ 28), i.e., to carry out the unilateral acts (ratification, accession, etc.) which are required for the treaty regime to be applicable. The ICJ went on to say that "the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way"⁴³. This analysis applies a fortiori, in specific cases, to all treaty provisions that preserve fundamental rights of the highest order.

45. These provisions can be applied to a State that has not ratified the provisions outlawing the death sentence. Ratification of a convention is only one of the ways in which it can be enforced. This application can be obtained because of objective reasons relating to the content of the text. The Court says this quite clearly for humanitarian rights in its advisory opinion on *the Legality of the Threat or Use of Nuclear Weapons*:

a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949

Oui, mais pas trop ! in B. Bonnet (ed.), *Traité des rapports entre ordres juridiques*, BLGDJ / Lextenso, Paris, 2017, pp. 1781-1789

⁴³ ICJ, *North Sea Continental Shelf, Denmark and the Netherlands v. Germany*, ICJ, 20 February 1969: B. Conforti, RDI, 1969, p. 509; F. Eustache, RGDIP, 1970, p. 590; L. Goldie, RGDIP RFA), ICJ, 20 February 1969: B. Conforti, RDI, 1969, p.509; F. Eustache, RGDIP, 1970, p. 590; L. Goldie, AJIL, 1970, p.536; E. Grisel, AJIL, 1970, p.562; J. Lang, LGDJ, 1970, 169 p.; J. Marck, RBDI, 1970, p.44; F. Monconduit, AFDI, 1969, p. 213; A. Renaud, LGDJ, 1975, p. 263 p. See the reflections of Barberis (Julio A.), *Réflexions sur la coutume internationale*, AFDI, 1990, pp. 9- 46.

in the *Covfu Channel* case (1. C. J Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

46. The jurisprudence of the Human Rights Council has made it possible to move forward resolutely on the subject of the death sentence and to keep pace with developments in international treaty law. The Council has, in fact, focused on analysing the enforcement of the death sentence in relation to Article 7 of the Covenant on Civil and Political Rights more than Article 6 and the right to life and Protocol 2, when it held that detaining the condemned person causes intense psychological stress and a deterioration in the state of health, particularly mental health, of the condemned person, the violation of Article 7 is established⁴⁴.

47. The Human Rights Council recognises that the majority of Member States are moving towards the abolition of the death sentence. It even points out that States are evolving the International Covenant on Civil and Political Rights. In the decision against Canada, it states that any abolitionist State extraditing an alien to a country where a person risks the death sentence violates Article 6 of the Covenant.

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48. I have shared the Court's unanimous decision in the *Evoduis Retuchera* case with my honourable colleagues. The decision on the merits is in accordance with the state of the law. The issue of the death sentence at the origin of the facts in dispute required that the operative part be reinforced. Sociologically speaking, there is only one weak argument left to support the death sentence as a criminal sanction: the fear it would instill in potential criminals. The emptiness of this argument, if it

⁴⁴ HRC, *Pratt and Morgan v. Jamaica*, 6 April 1989, RUDH, 1989.

was ever an argument, is demonstrated by the fact that most crimes are crimes of passion or spontaneous acts. Finally, it should be remembered that intellectuals used to say, at the end of the Second World War, that universal peace will only be possible when legal death is definitively outlawed.

