

**IN THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS
REQUEST FOR ADVISORY OPINION NO. 001 OF 2024**

**IN THE MATTER OF A REQUEST BY THE PAN AFRICAN LAWYERS UNION
(PALU) FOR AN ADVISORY OPINION ON THE INCOMPATIBILITY OF THE
DEATH PENALTY WITH THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S
RIGHTS**

**(Made under Article 4 of the Protocol to the African Charter on Human and
Peoples' Rights on the Establishment of the African Court on Human and
Peoples' Rights and Rule 82(1) of the Rules of the African Court on Human and
Peoples' Rights)**



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3. Summary of facts

1. The death penalty—the deliberate killing of a human being by the State—stands apart from all other penal acts. Incarceration involves punishing a person by denying him freedom and privileges, separating him from society, and, ultimately in most cases, reforming him so that he can reunite with family, re-enter society, and contribute to others. The death penalty, by contrast, entails extinguishing an individual's life. The inhumanity of the death penalty extends from the moment the sentence is delivered to the moment it is carried out. The delivery of the death sentence confronts a person with the horror that, if and when the State has its way, it will take him and kill him. And the execution of a death sentence entails infliction of torture, cruelty and deprivation of dignity. There is no humane way to kill a human.

2. The death penalty is thus brutal, final and irreversible—on a plane above and beyond all other forms of punishments. It is an anachronism that does not comport with the rights enshrined in Article 4 and Article 5 of the African Charter on Human and Peoples' Rights (the "African Charter" or the "Charter"). The death penalty is an affront to Article 4's core principle: "Human beings are inviolable." And because the death penalty is plagued by due process deficiencies and is imposed in a discriminatory and arbitrary manner, it violates Article 4's mandate that "[e]very human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." Moreover, the death penalty cannot be imposed or carried out without causing cruel, inhuman and degrading treatment and punishment, in violation of Article 5 of the Charter.
3. The African Commission on Human and Peoples' Rights (the "African Commission" or the "Commission") has long recognized the incompatibility of the death penalty with these rights and international human rights law, and has repeatedly called for abolition of the death penalty over the past 25 years.¹
4. Most members of the African Union recognize this as well, as demonstrated by the continuous trend away from imposing and carrying out the death penalty and towards abolition. Across the African continent, most countries have now prohibited—through constitutional amendment, judicial decision, or legislation—the death penalty for most crimes.² Today, over 80 percent of African countries

¹ See *infra* ¶¶ 27-32.

² See Annex C (Table of current status of capital punishment in African Union Member States). By way of a few recent examples, in 2023, the Ghanaian parliament amended the criminal code ("Criminal Offense Act") to eliminate capital punishment as a cognizable penalty, except for acts of high treason. See *Ghana Abolishes the Death Penalty*, EQUAL JUSTICE INITIATIVE (July 27, 2023), <https://eji.org/news/ghana-abolishes-the-death-penalty>. Zambia abolished the death penalty by way of amendments to its penal code and defence act in 2022 and 2023. See Penal Code Amendment of 2022, GOVERNMENT OF ZAMBIA, Act No. 23 (Dec. 23, 2022), <https://www.parliament.gov.zm/sites/default/files/documents/acts/Act%20No.%2023%20Penal%20Code%20%28Amendment%29%2C%202022.pdf>; Defence (Amendment) of 2023, GOVERNMENT OF ZAMBIA, Act No. 12 (Dec. 26, 2023), <https://zambialii.org/akn/zm/act/2023/12>. And in April 2020, the National Assembly of Chad adopted the abolition of the death penalty for all crimes. Marion Chahuneau and Melissa Verpile, *Chad's National Assembly abolishes the death penalty for all crimes*, PARLIAMENTARIANS FOR GLOBAL ACTION, (Apr. 28, 2020), <https://www.pgaction.org/news/chad-abolishes-death-penalty-all-crimes.html>. A number of African Union Member States are also considering legislation aimed at abolishing the death penalty by

have either abolished the death penalty *de jure* or no longer carry out executions of those sentenced to death. Based on data from Amnesty International and the Cornell Center on the Death Penalty Worldwide, of the 55 African Union Member States (“AU Member States”), 24 have abolished the death penalty *de jure* under their domestic laws;³ 23 are abolitionist *de facto*, having chosen not to carry out any executions for at least 10 years (and in many cases granting mass commutations of sentences);⁴ one—Nigeria—is only two years away from being considered abolitionist *de facto*, having carried out its last execution in 2016;⁵ and two have abolished the death penalty for common law crimes.⁶ Only four AU Member States—Egypt, Somalia, South Sudan and Botswana—have carried out executions since 2021;⁷ only two—Egypt and Somalia—carried out executions in

law, including Zimbabwe, Liberia, Malawi, and Kenya. See Ben Farmer and Peta Thornycroft, *Will Africa Be The Next Continent to Abolish the Death Penalty?*, TELEGRAPH (Apr. 16, 2024), <https://www.telegraph.co.uk/global-health/terror-and-security/death-penalty-abolishment-africa-capital-punishment/>. The Democratic Republic of the Congo, however, lifted its moratorium on the death penalty—which had been in place for over two decades—in March of this year, although it does not appear to have carried out any executions since that time and, accordingly, the Democratic Republic of the Congo remains classified as abolitionist *de facto*. See Yassin Kombi and Sonia Rolley, *Congo lifts moratorium on death penalty, justice ministry circular shows*, REUTERS (Mar. 15, 2024), <https://www.reuters.com/world/africa/congo-lifts-moratorium-death-penalty-justice-ministry-circular-shows-2024-03-15/>.

³ See Annex C. See also *Death Sentences and Executions in 2023*, AMNESTY INT’L, at 41 (last visited Aug. 1, 2024). Amnesty International lists 23 AU Member States as having abolished the death penalty by law, but does not appear to include Zambia which, as noted above (see *supra* n.2), abolished the death penalty in 2022 and 2023.

⁴ See Annex C. See also Cornell Center on the Death Penalty Worldwide Home Page, CORNELL LAW SCHOOL, <https://deathpenaltyworldwide.org/> (last visited Aug. 1, 2024). The Cornell Center on the Death Penalty Worldwide considers 22 AU Member States as abolitionist *de facto*, which can be determined by navigating through either the map provided on the homepage of the Center’s website or by searching for the status of individual countries in the Center’s database. The total number of 23 abolitionist *de facto* AU Member States is arrived at by treating Morocco and Western Sahara separately.

⁵ See Federal Republic of Nigeria (Nigeria), CORNELL CENTER ON THE DEATH PENALTY WORLDWIDE, <https://deathpenaltyworldwide.org/database/#/results/country?id=53> (last visited Aug. 1, 2024) (noting Nigeria’s last executions were in 2016).

⁶ See Annex C.

⁷ See *Death Sentences and Executions in 2021*, AMNESTY INT’L, 40, 51–52, <https://www.amnesty.org/en/documents/act50/5418/2022/en/> (last visited Aug. 1, 2024) (identifying Egypt, Somalia, South Sudan, and Botswana as the only AU Member States to carry out executions in 2021); *Death Sentences and Executions in 2022*, AMNESTY INT’L, 28, 33–34, <https://www.amnesty.org/en/documents/act50/6548/2023/en/> (last visited Aug. 1, 2024) (identifying Egypt, Somalia, and South Sudan as the only AU Member States to carry out executions in 2022).

2023;⁸ and, based on currently available information, only Somalia has carried out executions in 2024.⁹

5. Outside of Africa, the vast majority of countries have also rejected the death penalty. 166 countries have abolished the death penalty by law, in practice, or for most crimes.¹⁰ Of these, 113 have abolished the death penalty by law,¹¹ 45 are considered abolitionist *de facto*,¹² and 8 have abolished the death penalty for common law crimes.¹³ Only a small number of countries continue to impose the death penalty; and among those, even fewer continue to carry out executions.¹⁴ In 2022, for example, apart from China (which does not report statistics but is regarded as the world's most prolific executioner), three countries carried out over

⁸ See *Death Sentences and Executions in 2023*, AMNESTY INT'L, at 29, 35–36 (last visited Aug. 1, 2024).

⁹ See *Somalia: Somali Military Court Executes Three Men for Murder of Two Brothers*, SHABELLE MEDIA NETWORK (MOGADISHU) (June 6, 2024), <https://allafrica.com/stories/202406070063.html#:~:text=Somalia%3A%20Somali%20Military%20Court%20Execut>.

¹⁰ The total of 166 is arrived at by adding the total number of countries that have abolished the death penalty by law, the total number of countries that are considered abolitionist *de facto*, and the total number of countries that have abolished the death penalty for common law crimes, as set forth in the following sentence.

¹¹ See *Death Sentences and Executions in 2023*, AMNESTY INT'L, 41 <https://www.amnesty.org/en/documents/act50/7952/2024/en/> (last visited Aug. 1, 2024). Amnesty International lists 112 States as having abolished the death penalty by law, but does not appear to include Zambia which, as noted above (see *supra* n.2), abolished the death penalty in 2022 and 2023.

¹² See *Database: 2.1. Abolitionist de facto*, CORNELL CENTER ON THE DEATH PENALTY WORLDWIDE, <https://deathpenaltyworldwide.org/database> (last visited Aug. 2, 2024). The Cornell Center on the Death Penalty Worldwide considers 44 States globally as abolitionist *de facto*, which can be determined by navigating through either the map provided on the homepage of the Center's website or by filtering the Center's database for abolitionist *de facto* states. The Cornell Center on the Death Penalty Worldwide addresses Morocco and Western Sahara together, however, and the total number of 45 abolitionist *de facto* States is arrived at by treating Morocco and Western Sahara separately.

¹³ See *Death Sentences and Executions in 2023*, AMNESTY INT'L, at 41–42, <https://www.amnesty.org/en/documents/act50/7952/2024/en/> (last visited July 14, 2024). Amnesty International lists 9 States as having abolished the death penalty for common law crimes, but appears to have misclassified Zambia in this category which, as noted above (see *supra* n.2), abolished the death penalty in 2022 and 2023, leaving only 8 States that have abolished the death penalty for common law crimes only.

¹⁴ See Matthew Robinson & Lauren Moody, *Capital Punishment, International Law, and Human Rights*, 14 INT'L J. CRIM. JUST. SCIS., 298, 301 (2019). See also John D. Bessler, *The Death Penalty, From Draconian Legal Codes to the Enlightenment*, in *THE DEATH PENALTY'S DENIAL OF FUNDAMENTAL HUMAN RIGHTS: INTERNATIONAL LAW, STATE PRACTICE, AND THE EMERGING ABOLITIONIST NORM*, 1 (Cambridge Univ. Press 2022) (discussing changing attitudes towards the death penalty and declines in the number of executions over time).

90% of all known executions: Iran, Saudi Arabia and Egypt.¹⁵ In light of these facts and trends, as scholars have observed, “[a]bolition is . . . the norm in the world.”¹⁶

6. The African Court on Human and People’s Rights (the “African Court” or “Court”) has recognized the global trend towards abolition. In its 2022 decision in *Ghati Mwita v. United Republic of Tanzania*, for example, the Court “acknowledge[d] global trends towards the abolition of the death penalty,” particularly in Africa.¹⁷ Specifically in relation to Africa, the Court took “cognisance of the continent-wide developments in relation to the death penalty.”¹⁸ The Court observed: “[I]n 1990, only one country, Cape Verde, had abolished the death penalty. Today, out of the fifty-five (55) African Union member States, twenty-five (25) have abolished the death penalty in law, fifteen (15) have placed a long-term moratorium on executions while fifteen (15) retain capital punishment. Most recently in 2020, Chad abolished the death penalty, followed by Sierra Leone in 2021 and the Central African Republic and Equatorial Guinea [for ordinary crimes] in 2022.”¹⁹ As noted, the facts concerning executions reinforce this trend, with only four AU Member States carrying out executions since 2021; only two AU Member States carrying out executions last year; and only one carrying out executions so far this year.
7. In 2019, Judge Tchikaya issued a separate opinion in *Ally Rajabu and Others v. United Republic of Tanzania*, in which he observed that African and international law doctrines have shifted in support of complete abolition and, considering the increasing number of African nations with complete or *de facto* abolition, as well

¹⁵ See *Death Penalty 2022: Recorded Executions Skyrocket to Highest Figure in Five Years*, AMNESTY INT’L (May 16, 2023), <https://www.amnesty.org/en/latest/news/2023/05/death-penalty-2022-executions-skyrocket/> (stating that, excluding China, over 90% of all reported executions were carried out by Iran, Saudi Arabia, and Egypt). While it is not possible to obtain a firm number of executions occurring in China because China considers such information a state secret, China was estimated to have executed more than 1,000 people in 2022, more than any other country. *Executions Around the World (2023)*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/policy-issues/international/executions-around-the-world/> (last visited Aug. 1, 2024).

¹⁶ Robinson & Moody, *supra* n.14 at 300.

¹⁷ See *Ghati Mwita v. United Republic of Tanzania*, No. 012/2019, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 64 (Dec. 1, 2022).

¹⁸ *Id.* ¶ 65.

¹⁹ *Id.* ¶ 65.

as various international sources, he called for this Court to find that Article 4 of the African Charter prohibits the death penalty in all forms.²⁰

8. In addition to the growing trend towards abolition, as discussed in greater detail in the remainder of this submission, the imposition and implementation of the death penalty inevitably results in a violation of the Charter's fundamental protections; and in practice in Africa (as in other regions), the imposition and implementation of the death penalty is beset by a host of problems, demonstrating that a death sentence cannot be imposed and carried out without violating the rights enshrined in Article 4 and Article 5 of the African Charter.²¹ All of these factors, both individually and in the aggregate, support a determination that the death penalty is wholly incompatible with the African Charter and fundamental human rights principles.

4. Legal Matters

9. PALU respectfully submits that the imposition and implementation of the death penalty violates Article 4 and Article 5 of the African Charter and, accordingly, that AU Member States have an obligation to abolish all laws and regulations that permit the death penalty.
10. PALU therefore respectfully submits to this Honourable Court the following issues for determination in the form of an advisory opinion:
 - a. Whether laws and/or regulations of African states permitting the imposition and implementation of the death penalty violate:

²⁰ See generally *Ally Rajabu and Others v. United Republic of Tanzania*, No. 007/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Nov. 28, 2019) (separate opinion by Judge Blaise Tchikaya).

²¹ We are cognizant of the fact that the Court does not resolve factual disputes during advisory proceedings. *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa*, No. 001/2018, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 36 (Dec. 4, 2020). Any and all factual examples discussed herein are intended only to highlight for the Court the practical dimensions of the imposition of the death penalty in Africa, and to illustrate how it cannot be imposed in a manner that does not violate either and/or both Articles 4 and 5 of the African Charter.

- i. Article 4 of the African Charter, including its mandate that “human beings are inviolable” and its prohibition against the arbitrary deprivation of life; and
 - ii. Article 5 of the African Charter, including its protection of “the dignity inherent in a human being and [] the recognition of his legal status” and its prohibition of “[a]ll forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.”
 - b. Whether, if such laws and/or regulations violate the African Charter, AU Member States are obligated to repeal any such laws and/or regulations.
11. As discussed in the remainder of this submission, this Court should answer each of these questions in the affirmative for the following reasons.
12. *First*, Article 4 establishes a fundamental recognition of the sanctity of human beings: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.” The Charter’s proclamation and guarantee that “human beings are inviolable” cannot be reconciled with an AU Member State’s deliberate killing of a human being.
13. Applying Article 4 to prohibit the death penalty by its plain terms is further supported by the trend, among AU Member States and other nations around the world, of moving away from the death penalty as a legitimate form of criminal punishment, the statements and holdings of the African Commission, international human rights bodies, and the relevant provisions of international treaties and protocols (including those ratified by AU Member States), all of which support abolishing the death penalty completely.²²

²² See *infra* Section 4(A).

14. Second, even if Article 4 were interpreted to protect only against the arbitrary deprivation of human life, the imposition and implementation of the death penalty in practice would violate that protection. The degree of protection from arbitrariness must be commensurate with the degree of the sanction at issue. Because extinguishing a human life is the ultimate sanction, far beyond any other permissible form of criminal punishment, a criminal justice system should not be permitted to impose that sanction unless it can deliver a commensurate level of fairness, rigor, and freedom from arbitrariness.²³ But the criminal justice systems in Africa (and throughout the world) do not and cannot meet that standard; instead, they are marked by intrinsic and omnipresent deficiencies.
15. As demonstrated below, for example, all four AU Member States that carried out recorded executions from 2021 through the present—Egypt, Somalia, South Sudan, and Botswana²⁴—have demonstrable due process flaws in their criminal justice systems.²⁵ The same is true of other AU Member States that continue to impose the death penalty while refraining from carrying out executions. One of the

²³ See, e.g., *Hilaire, Constantine and Benjamin and Others v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 148 (June 21, 2002) ("Taking into account the exceptionally serious and irreparable nature of the death penalty, the observance of due process, with its bundle of rights and guarantees, becomes all the more important when human life is at stake."); *Medellin, Ramirez Cardenas and Leal Garcia v. United States*, Admissibility and Merits (Publication), Inter-Am. Comm'n H.R., No. 90/09, Case 12.644, ¶¶ 122–123 (Aug. 7, 2009) ("The Commission ... considers that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty comply strictly with the requirements of the applicable inter-American human rights instruments."); *Chad Roger Goodman v. The Bahamas*, Merits (Publication), Inter-Am. Comm'n H.R., No. 78/07, Case 12.265, ¶ 34 (Oct. 15, 2007) ("[The 'heightened scrutiny test'] requires in particular strict adherence to the rules and principles of due process and fair trials in the context of capital cases. The Commission has previously emphasized that, due in part to its irrevocable and irreversible nature, the death penalty ... warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.").

²⁴ Egypt carried out 83 executions in 2021, 24 executions in 2022, and 8 executions in 2023; Somalia carried out at least 21 executions in 2021, at least 6 executions in 2022, and at least 38 executions in 2023; South Sudan carried out at least 9 executions in 2021, at least 5 executions in 2022, and 0 executions in 2023; and Botswana carried out 3 executions in 2021 and 0 executions in 2022 and 2023. See *Death Sentences and Executions in 2023*, AMNESTY INT'L, at 29, 35–36 <https://www.amnesty.org/en/documents/act50/7952/2024/en/#:~:text=Amnesty%20International's%20monitoring%20of%20the,2022%20to%2016%20in%202023> (last visited June 6, 2024); *Death Sentences and Executions in 2022*, AMNESTY INT'L, at 28, 33–34, <https://www.amnesty.org/en/documents/act50/6548/2023/en/> (last visited June 6, 2024); *Death Sentences and Executions in 2021*, AMNESTY INT'L, at 40, 51–52, <https://www.amnesty.org/en/documents/act50/5418/2022/en/> (last visited June 6, 2024). See also *supra* n.9 (noting Somalia is the only African country that appears to have carried out executions so far this year).

²⁵ See *infra* Section 4(B)(i).

most widespread and troubling due process issues, for instance, is the failure to provide adequate legal representation to those persons facing capital punishment.

16. Moreover, the death penalty is imposed in an unfair and discriminatory manner due to factors such as gender, age, mental disabilities, poverty, language barriers, and political affiliation. In light of the effect of these flaws and deficiencies, the death penalty cannot be imposed without violating the protection from arbitrariness that Article 4 mandates.²⁶
17. *Third*, the death penalty violates the protections guaranteed by Article 5 of the Charter. Article 5 provides: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." The imposition and implementation of the death sentence necessarily entails consequences and conduct that violate Article 5 because they constitute (i) cruel, inhuman or degrading punishment and treatment ("CIDPT") and/or (ii) torture.
18. The violation of Article 5 begins at the moment an individual is subject to a prosecution in which the death sentence is sought; and it certainly occurs once a person is sentenced to death and is thereafter held on death row awaiting his or her execution. In these circumstances, a human being is subject to the psychological torment of knowing that there will come a day when the State puts him or her to death. This Court, along with other courts and scholars around the world, has acknowledged that this psychological torment, known as the "Death Row Phenomenon", rises to the level of CIDPT or torture.²⁷
19. Specifically, this Court has acknowledged that international jurisprudence has established that "a delay of more than three (3) years between the confirmation of a prisoner's death sentence on appeal and execution constitutes cruel, inhuman or degrading treatment or punishment" and has accordingly found a violation of

²⁶ See *infra* Section 4(B)(ii).

²⁷ See *infra* Section 4(C)(i)(1).

Article 5 when a defendant is held on death row for eight years following the confirmation of a death sentence on appeal.²⁸ Because persons subject to death sentences in African countries are typically held on death row for at least three years, and often much longer, a violation of Article 5 could be found on that basis. But the violation of Article 5 should not be limited to the circumstances when a person is held on death row for three years or more following the affirmation of the sentence on appeal. The Death Row Phenomenon—the psychological torment that a human being experiences when confronted with the prospect of being deliberately killed by the State—takes hold from the moment the individual is confronted with the prospect of a death sentence and certainly at the moment the death sentence is delivered. Accordingly, this Court should recognize a violation of Article 5 on this basis as an inevitable feature of the death penalty, without regard to how long a person is held on death row. Furthermore, the deplorable conditions faced by women on death row and, in some instances, their children, as well as the severe psychological and emotional impacts suffered by the family members of those sentenced to death, also give rise to violations of Article 5.²⁹

20. A State's act of carrying out a death sentence—actually killing a human being—also constitutes a violation of Article 5. Any honest assessment would acknowledge that there is no way to kill a human being without, in Article 5's words, violating “the dignity inherent in a human being” and without subjecting her or him to “torture, cruel, inhuman or degrading punishment and treatment.”³⁰ And each of the methods of execution used by AU Member States that retain the death penalty have been found to constitute CIDPT or torture.³¹
21. In sum, the death penalty cannot be imposed or carried out without violating Article 4 or 5 of the African Charter. While each of the grounds outlined above and discussed below provide an independent basis for finding that the death penalty is

²⁸ *Nzigiimana Zabron v. United Republic of Tanzania*, No. 051/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 157–158 (June 4, 2024).

²⁹ See *infra* Sections 4(C)(i)(2-3).

³⁰ Article 5, African Charter on Human and Peoples' Rights. See *infra* Section 4(C)(ii).

³¹ See *infra* Section 4(C)(iii).

contrary to the African Charter, the cumulative effect of all of these grounds in the aggregate also leads inexorably to the conclusion that the death penalty violates the African Charter and fundamental human rights principles.

22. Accordingly, as the death penalty violates the Charter, each AU Member State must abolish any laws and/or regulations which would permit the continued imposition and implementation of the death penalty.

A. The death penalty inherently violates Article 4.

23. The death penalty is at its core a violation of Article 4. Article 4 provides that, "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." "Inviolable" means "Not to be violated; not liable or allowed to suffer violence; to be kept sacredly free from profanation, infraction, or assault."³² The Charter's proclamation and guarantee that "human beings are inviolable" cannot be reconciled with an AU Member State's deliberate killing of a human being.³³
24. This application of Article 4 to proscribe any extermination of a human being via the death penalty is reinforced by the movement by AU Member States and other nations around the world away from the death penalty as a legitimate form of criminal punishment, as well as the statements and holdings of the African Commission, international human rights bodies, and the relevant provisions of international treaties and protocols (including those ratified by AU Member States), all of which support abolishing the death penalty completely.
25. The second and third sentence of Article 4 refer to respect for the life and integrity of a person and the prohibition of any arbitrary deprivation of this right. With respect to this portion of Article 4, this Court has commented in *dicta* in *Ally Rajabu and Others v. The United Republic of Tanzania*, *Ghati Mwita v. United Republic of*

³²*Inviolable*, OXFORD ENGLISH DICTIONARY (June 2024), <https://doi.org/10.1093/OED/5825033183>.

³³ See *Al-Saadoon & Mufdhi v. The United Kingdom*, No. 61498/08, Judgement, Eur. Ct. H.R., ¶ 115 (Apr. 10, 2010) ("Judicial execution involves the deliberate and premeditated destruction of a human being by the State authorities."); Article 4, African Charter on Human and Peoples' Rights.

Tanzania, and other cases that these sentences in Article 4 do not prohibit the death penalty in all circumstances but instead prohibit only the *arbitrary* deprivation of life.³⁴ In *Rajabu*, for example, this Court stated that the appearance of “arbitrary” in the third sentence of Article 4, “contemplates [the] deprivation [of life] as long as such is not done arbitrarily. By implication, the death sentence is permissible as an exception to the right to life under Article 4 as long as it is not imposed arbitrarily.”³⁵ But the issue of whether Article 4—including its command that “Human beings are inviolable”—establishes an absolute bar on the death penalty was not before the Court in those cases: this issue was not presented by the Applicants, it was not addressed by the parties, nor was it necessary to nor a deciding factor in the Court’s decision. Rather, those cases addressed only whether Tanzania’s mandatory imposition of the death penalty in all murder cases was contrary to Article 4, on the basis that it is arbitrary, and the Court answered that question in the affirmative.³⁶ Accordingly, the Court’s remarks regarding the interpretation of Article 4—which are inconsistent with prevailing jurisprudence and developments in international law—should not be considered a binding or authoritative decision and should be disregarded. In fact, to our knowledge, this Court has never been faced with the direct question of whether the death penalty is inherently incompatible with Article 4.

³⁴ *Ally Rajabu and Others v. United Republic of Tanzania*, No. 007/2015, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 98 (Nov. 28, 2019). See *Ghati Mwita v. United Republic of Tanzania*, No. 012/2019, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 66 (Dec. 1, 2022) (“However, since the circumstances for which the death penalty may be appropriate, cannot be categorised with exactitude, the determination of incidents of crimes warranting the imposition of the death penalty must be left to domestic courts to decide on a case-by-case basis.”). See also, e.g., *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 202–203 (Sept. 3, 2024).

³⁵ See *Ally Rajabu and Others v. United Republic of Tanzania*, No. 007/2015, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 98 (Nov. 28, 2019).

³⁶ *Ally Rajabu and Others v. United Republic of Tanzania*, No. 007/2015, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 14(vii-viii) (Nov. 28, 2019) (setting forth the applicant’s request that the Court hold that the mandatory death penalty violates Article 4); *id.* ¶¶ 111–114 (holding the mandatory death penalty violates Article 4); *Ghati Mwita v. United Republic of Tanzania*, No. 012/2019, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 80 (Dec. 1, 2022) (same); *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 195, 207–208 (Sept. 3, 2024).

26. PALU respectfully submits that the Court should address this question now and should produce coherent jurisprudence as to the interpretation and application of the African Charter on this issue. In doing so, the Court should confirm that Article 4—including its essential mandate that “Human beings are inviolable”—does not permit an AU Member State to deliberately kill a human being.
27. Additional support for the conclusion that a State's killing of a human being violates Article 4 can be found in the pronouncements of the African Commission, the separate opinions of distinguished members of this Court, and in the movement away from the death penalty in Africa and around the globe.
28. The Commission has repeatedly condemned the death penalty and called for its abolition in increasingly emphatic terms over the past 25 years. In 1999, the Commission adopted Resolution 42, which called on AU Member States to “limit the imposition of the death penalty only to the most serious crimes,” “consider establishing a moratorium on executions,” and “reflect on the possibility of abolishing the death penalty.”³⁷
29. In 2008, the Commission adopted Resolution 136, which called on Member States to establish a moratorium on executions “with a view to abolishing the death penalty” and to ratify the Second Optional Protocol (“OP2”) to the International Covenant on Civil and Political Rights (“ICCPR”),³⁸ which in turn provides that “[n]o one within the jurisdiction of a State Party to the present Protocol shall be executed” and that “[e]ach State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.”³⁹ In 2014, the Commission organized the Continental Conference on the Abolition of the Death Penalty in Africa (the “Continental Conference”), which adopted the Declaration of the Continental

³⁷ *Resolution Urging the State to Envisage a Moratorium on Death Penalty*, ACHPR/Res.42(XXVI)99, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Nov. 15, 1999).

³⁸ *Resolution Calling on State Parties to Observe the Moratorium on the Death Penalty*, ACHPR/Res.136(XXXIV)08, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Nov. 24, 2008).

³⁹ G.A. Res. 44/128, *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, U.N. TREATY COLLECTION, art. 1(1) (Dec. 15, 1989), https://treaties.un.org/doc/source/docs/A_RES_44_128-E.pdf.

Conference on the Abolition of the Death Penalty in Africa ("The Cotonou Declaration"). The Cotonou Declaration "call[ed] on legislators in Africa to review their national laws and enact legislation abolishing the death penalty" and urged AU Member States to ratify the OP2 to the ICCPR.⁴⁰

30. In 2015, the Commission adopted General Comment No. 3 on the African Charter regarding Article 4's right to life. In relevant part, General Comment No. 3 provides that:

"[T]he Commission has on several occasions passed resolutions calling on States to abolish the death penalty, or to establish a moratorium in line with the continental and global trend. The vast majority of African States have now abolished the death penalty in law or in practice. **International law requires those States that have not yet abolished the death penalty to take steps towards its abolition in order to secure the rights to life and to dignity**, in addition to other rights such as the right to be free from torture, and cruel, inhuman or degrading treatment."⁴¹

31. The Commission has reiterated and emphasized these principles and positions in its jurisprudence. In the 2015 Communication *Interights & Ditshwanelo v. The Republic of Botswana*, the African Commission strongly suggested that the death penalty can no longer be sustained as compatible with the African Charter:

"[G]iven the 'evolution of international human rights law and jurisprudence, and State practice', and cognisant of the progressive work undertaken by the Commission's own Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings in Africa, **the Commission considers it increasingly difficult to envisage a case in which the death penalty can be found to have been applied in a way that is not in some way arbitrary**. As a result it is difficult to conceive that, if called upon in future to do so, that the

⁴⁰ Declaration of the Continental Conference on the Abolition of the Death Penalty [hereinafter "The Cotonou Declaration"], African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (July 4, 2014), <https://achpr.au.int/index.php/en/news/statements/2014-07-08/declaration-continental-conference-abolition-death-penalty>.

⁴¹ General Comment No. 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4), African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], § D.22 (Dec. 12, 2015), <https://www.refworld.org/legal/general/achpr/2015/en/70896> (emphasis added).

Commission will find that the death penalty, however it is executed, is any longer compatible with the African Charter.”⁴²

32. In the same vein, Commissioner Zainabou Sylvie Kayitesi in her report to the 49th session of the African Commission, stated as follows: “[C]apital punishment is cruel and therefore morally unjustifiable, unnecessary, irreversible, illogical; and represents a most grave violation of fundamental human rights in particular the right to life under Article 4 of the African Charter.”⁴³
33. In addition, distinguished judges on this Court have called for the Court to find that the death penalty in all circumstances is contrary to Article 4. Judge Tchikaya, in his separate opinion in *Ally Rajabu and others v Tanzania*, observed that reading Article 4 to require the complete elimination of the death penalty by States would reflect the African trend to introduce “moratoria on the execution of the death penalty.”⁴⁴ Further, Judge Tchikaya urged this Court not to shy from using its interpretative powers to conclude that Article 4’s reference to the right to life is absolute, and should be interpreted to prohibit the death penalty.⁴⁵ He further explained that this approach has been adopted by other courts and States both when interpreting Article 4 and when dealing with similar provisions contained in other instruments.⁴⁶ Judge Tchikaya concluded that, consistent with the international (and African) trend to abolish capital punishment, Article 4 should be interpreted as prohibiting the death penalty.⁴⁷
34. In his dissenting opinion in *Zabron v. United Republic of Tanzania*, Judge Tchikaya reiterated that Article 4 “makes human life inviolable in all its forms and procedures” and that “[t]he Court should clearly invalidate the death penalty in order to protect

⁴² *Interights and Ditshwanelo v. The Republic of Botswana*, Communication 319/06, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 66 (Nov. 18, 2015) (emphasis added).

⁴³ *Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa - 49OS*, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.] (Apr. 28, 2011), <https://achpr.au.int/index.php/sw/node/1553>.

⁴⁴ See *Ally Rajabu and Others v. United Republic of Tanzania*, No. 007/2015, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶¶ 18–19 (Nov. 18, 2019) (separate opinion by Judge Blaise Tchikaya).

⁴⁵ See *id.* ¶ 21.

⁴⁶ See *id.* ¶¶ 22–25.

⁴⁷ See *id.* ¶ 28.

the right to life” as required by the application of international law and “international texts abolishing the death penalty.”⁴⁸ Judge Tchikaya pointed to progress in Europe, where, due to the “instrumentality of international human rights law”, Europe “has become a death penalty-free zone”.⁴⁹ The universal principles of human rights law should require that the death penalty be prohibited in Africa as well. Further, in his declaration in *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, Judge Tchikaya reiterated that “[a]ny death sentence is a death sentence, whether it is mandatory or not. It is this iniquitous and useless sanction that must be disapproved of and repudiated from the social order. The Court could help States that are slow to achieve this.”⁵⁰ He continued on to say that the “Court should have concluded long ago that there is no longer any room for according the death penalty any validity in any form.”⁵¹

35. Similarly, Judge Ntsebeza issued a declaration in *Zabron and Augustino*, stating that “[t]he death penalty has a potential for error, yet its consequences are irreversible. Further, it has no demonstrable deterrent effect, and its discriminatory application undermines the fundamental principles of human dignity, justice, and equality.”⁵² While Judge Ntsebeza’s observations were made in support of a declaration that the death penalty “in and of itself, violates Article 5 of the Charter,” the same observations also support a finding that the death penalty in and of itself violates Article 4 of the Charter.⁵³

⁴⁸ *Nzigiyimana Zabron v. United Republic of Tanzania*, No. 051/2016, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 35, 38, 39 (June 4, 2024) (dissenting opinion by Judge Blaise Tchikaya).

⁴⁹ *Id.* ¶ 38.

⁵⁰ *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 8 (Sept. 3, 2024) (declaration by Judge Blaise Tchikaya).

⁵¹ *Id.* ¶ 11.

⁵² *Nzigiyimana Zabron v. United Republic of Tanzania*, No. 051/2016, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 2 (June 4, 2024) (declaration by Judge Dumisa Buhle Ntsebeza); *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 2 (Sept. 3, 2024) (declaration by Judge Dumisa Buhle Ntsebeza).

⁵³ *Nzigiyimana Zabron v. United Republic of Tanzania*, No. 051/2016, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 1 (June 4, 2024) (declaration by Judge Dumisa Buhle Ntsebeza); *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 1 (Sept. 3, 2024) (declaration by Judge Dumisa Buhle Ntsebeza).

36. International scholars and experts also interpret Article 4's protection of an individual's right to life to be absolute.⁵⁴ According to these scholars and experts, the absolute right to life translates into an absolute prohibition of the death penalty.⁵⁵
37. Still further, the conclusion that the death penalty is contrary to the protection of life as a basic principle of human rights, as embodied in Article 4, is bolstered by the continuing trend—both globally and in Africa—towards abolition of the death penalty. As noted above, the great majority of countries around the world, and in Africa, have abolished the death penalty as a matter of law or in practice.⁵⁶ Furthermore, multiple international instruments support the prohibition of the death penalty, and these instruments have been formally ratified and adopted widely within Africa and around the world. For example, of the AU Member States that have formally abolished the death penalty, 15 have ratified the OP2 to the ICCPR.⁵⁷
38. Even those AU Member States that have not ratified the OP2, or other international treaties discussed herein, may be subject to the fundamental principles embodied in these instruments, as this Court has stated that “all Member[] States of the AU have undertaken to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments” and that “[b]y making this commitment, Member States have

⁵⁴ See, e.g., *A Guide to the African Charter on Human and Peoples’ Rights*, Amnesty Int’l, <https://www.amnesty.org/en/wp-content/uploads/2021/08/ior630052006en.pdf> (last visited Apr. 24, 2024) (“[N]obody should ever be sentenced to death or executed – even prisoners who have been found guilty after fair trials of committing appalling crimes.”).

⁵⁵ See, e.g., Andrew Novak, *Hanging and the Mandatory Death Penalty in Africa: the Significance of Rajabu v. Tanzania*, 5 AFR. HUM. RTS. Y.B., 401, 409 (2021).

⁵⁶ See *supra* ¶¶ 4–5.

⁵⁷ *Ratification Status for the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, U.N. TREATY COLLECTION, 414 (July 11, 1991), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-12&chapter=4&clang=en (listing those countries that have ratified the OP2).

assumed the obligation to uphold human rights in respect of all persons within their jurisdiction.”⁵⁸ Worldwide, 91 countries have ratified the OP2.⁵⁹

39. In addition, European and Latin American regional human rights bodies have also adopted a number of protocols aimed at prohibiting the death penalty. To begin, European treaty protocols providing for the abolition of the death penalty have nearly unanimous support among members of the Council of Europe. For instance, in Europe, Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in 1982, provides that “[t]he death penalty shall be abolished. No-one [sic] shall be condemned to such penalty or executed.”⁶⁰ This statement was reaffirmed in 2002 by Protocol No. 13 to the same Convention.⁶¹ Protocol No. 6 has been ratified by all 46 members of the Council of Europe, and Protocol No. 13 has been ratified by 45 (and signed by the remaining one).⁶² And in Latin America, 13 countries have ratified the Protocol to the American Convention on Human Rights to Abolish the Death Penalty, adopted in 1990, which provides in Article 1 that “[t]he States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.”⁶³

⁵⁸ *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa*, No. 001/2018, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 35 (Dec. 4, 2020).

⁵⁹ *Ratification Status for the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, U.N. TREATY COLLECTION (July 11, 1991), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-12&chapter=4&clang=en.

⁶⁰ Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, C.E.T.S. No. 114, art. 1 (1983).

⁶¹ See Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in all Circumstances, C.E.T.S. No. 187, art. 1 (2002).

⁶² Signatories for Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, DANISH INST. FOR HUM. RTS., <https://sdg.humanrights.dk/instrument/signatories?i=44908> (last visited June 11, 2024); *Chart of signatures and ratifications of Treaty 187*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=187> (last visited May 7, 2024).

⁶³ These countries are Argentina, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay and Venezuela. *Signatories and Ratifications, A-53: Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, DEPARTMENT OF INTERNATIONAL LAW, <http://www.oas.org/juridico/english/sigs/a-53.html> (last visited May 7, 2024).

40. At a global level, the trend towards abolition continues to strengthen with each passing year. Even if there is not yet a categorical prohibition on the death penalty under international law, the international community has increasingly made statements in opposition to the continued use of the death penalty, suggesting a strengthening customary norm. For example, over the last fifteen years, the UN General Assembly has adopted a series of resolutions in 2007, 2008, 2010, 2012, 2014, 2016, 2018, 2020, and 2022, urging States to respect international standards that protect the rights of individuals facing the death penalty, and to progressively restrict the use of, and reduce the number of offences which are punishable by, the death penalty.⁶⁴ In 2022, a historic 126 countries voted in favor of adopting a resolution establishing a moratorium on the use of the death penalty, while only 37 countries voted against the resolution.⁶⁵ The number of countries that have voted in favor of a global moratorium on the death penalty has steadily increased since 2007. While these resolutions do not have the binding authority of a treaty, they reflect and support the strong global trend toward abstaining from, and abolishing, the death penalty on fundamental human rights grounds.
41. For all of the reasons set forth herein, PALU respectfully submits that the Court should hold that the death penalty inherently violates Article 4 of the African Charter.

⁶⁴ G.A. Res. 62/149, *Moratorium on the use of the death penalty*, A/RES/62/149 (Dec. 18, 2007); G.A. Res. 63/168, *Moratorium on the use of the death penalty*, A/RES/63/168 (Dec. 18, 2008); G.A. Res. 65/206, *Moratorium on the use of the death penalty*, A/RES/65/206 (Dec. 21, 2010); G.A. Res. 67/176, *Moratorium on the use of the death penalty*, A/RES/67/176 (Dec. 20, 2012); G.A. Res. 69/186, *Moratorium on the use of the death penalty*, A/RES/69/186 (Dec. 18, 2014); G.A. Res. 71/187, *Moratorium on the use of the death penalty*, A/RES/71/187 (Dec. 19, 2016); G.A. Res. 73/175, *Moratorium on the use of the death penalty*, A/RES/73/175 (Dec. 17, 2018); G.A. Res. 75/183, *Moratorium on the use of the death penalty*, A/RES/75/183 (Dec. 16, 2020); G.A. Res. 77/222, *Moratorium on the use of the death penalty*, A/RES/77/222 (Dec. 15, 2022).

⁶⁵ *Voting Record of the Third Committee*, U.N. General Assembly (Nov. 11, 2022), https://www.un.org/en/ga/third/77/docs/voting_sheets/L.44.Rev.1.pdf. Note that 24 countries abstained from the vote. *Id.*

B. *The imposition and implementation of the death penalty in practice amounts to an arbitrary deprivation of life in violation of Article 4.*

42. In the alternative, the Court can and should hold that, even if Article 4 is interpreted as prohibiting only the arbitrary taking of a human life, the imposition and implementation of the death penalty in practice is in fact arbitrary and therefore is contrary to Article 4 on this basis.
43. As the African Commission has explained, “[a]rbitrariness should be interpreted with reference to considerations such as appropriateness, justice, predictability, reasonableness, necessity and proportionality.”⁶⁶ The African Commission has further observed that it is “increasingly difficult to envisage a case in which the death penalty can be found to have been applied in a way that is not in some way arbitrary [and as] a result it is difficult to conceive that, if called upon in future to do so, that the Commission will find that the death penalty, however it is executed, is any longer compatible with the African Charter.”⁶⁷
44. In addition, as the African Commission has also observed, the imposition of the death penalty in breach of the due process standards of Article 7 of the African Charter or in violation of the Charter’s substantive safeguards such as Article 2’s prohibition of discrimination, is *per se* arbitrary.⁶⁸
45. This Court similarly views “arbitrariness” through the lens of “due process,” finding in a number of cases that the mandatory death penalty, which does not allow for consideration of mitigating factors and circumstances, does not comport with due process and is therefore arbitrary.⁶⁹ In *Ally Rajabu and Others v. the United*

⁶⁶ See *General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4)*, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 12 (Dec. 12, 2015), <https://www.refworld.org/legal/general/achpr/2015/en/70896>.

⁶⁷ *Interights & Ditshwanelo v. The Republic of Botswana*, Communication 319/06, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶ 66 (Nov. 18, 2015).

⁶⁸ *General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4)*, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], ¶¶ 11–12, 24 (Dec. 12, 2015), <https://www.refworld.org/legal/general/achpr/2015/en/70896>.

⁶⁹ See, e.g., *Nzigiimana Zabron v. United Republic of Tanzania*, No. 051/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 143–145, 152 (June 4, 2024); *Ally Rajabu and Others v. United Republic of Tanzania*, No. 007/2015, Judgment, African Court on Human and Peoples’ Rights

Republic of Tanzania, for example, this Court found that “whether deprivation of life is arbitrary within the meaning of Article 4 of the Charter should be assessed against three criteria: first, it must be provided by law; second, it must be imposed by a competent court; and, third, it must abide by due process.”⁷⁰ And in *Marthine Christian Msuguri v. United Republic of Tanzania*, this Court observed that violations of “due process” include lengthy delays before trial and ineffective representation.⁷¹ Because the death penalty constitutes an extreme sanction, on a plane above all others, these protections from arbitrariness and guarantees of due process must be correspondingly rigorous and robust. Yet as discussed herein, the serious due process defects and systemic flaws in the imposition of the death penalty in practice in Africa render its continued imposition a violation of Article 4.

46. Beyond these due process issues, the death penalty violates Article 4 for the additional reason that it is imposed in a discriminatory manner, further demonstrating its inherent arbitrariness. International human rights organizations with expertise in the death penalty, such as Amnesty International, have chronicled this issue with respect to the imposition of the death penalty in practice, noting that the death penalty is “often used disproportionately against the poor, minorities and members of racial, ethnic and religious groups. It is imposed and carried out arbitrarily...[and] used as a tool of repression – a swift and brutal way of silencing political opposition.”⁷²

[Afr. Ct. H.P.R.], ¶¶ 107–111 (Nov. 28, 2019); *Ghati Mwita v. United Republic of Tanzania*, No. 012/2019, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 78 (Dec. 1, 2022); *Forum of Conscience v. Sierra Leone*, No. 223/98, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 19 (Nov. 6, 2000); *Gozbert Henerico v. United Republic of Tanzania*, No. 056/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 149–50 (Jan. 10, 2022); *Amini Juma v. United Republic of Tanzania*, No. 024/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 130 (Sept. 30, 2021).

⁷⁰ *Ally Rajabu and Others v. United Republic of Tanzania*, No. 007/2015, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 104 (Nov. 28, 2019).

⁷¹ *Marthine Christian Msuguri v. United Republic of Tanzania*, No. 052/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 86–87, 107–110 (lengthy delays), ¶¶ 88–101 (ineffective representation) (Dec. 1, 2022).

⁷² *Campaigning Toolkit, Death Penalty the Ultimate Punishment* (June 2021), AMNESTY INT’L, 2, <https://www.amnesty.org/en/wp-content/uploads/2021/06/act500152008eng.pdf>; see also *What We Do*:

47. Courts in Africa have recognized this issue as well. The South African Constitutional Court, for example, has previously determined that in practice the death penalty is often imposed arbitrarily and unequally as a result of issues of race, poverty, chance, ineffective counsel, language barriers, and judicial bias.⁷³ There are numerous examples illustrating that, in Africa (as elsewhere), the death penalty is imposed in a discriminatory manner on women, children, members of different ethnic groups, those living in economic precarity, and members of disfavored political groups.
48. International law requires that states adhere to the most rigorous standards of due process when seeking to impose the death penalty in light of the gravity and severity of a penalty that extinguishes a human life.⁷⁴ As discussed further below, the evidence concerning the current state of affairs in African states that impose the death penalty demonstrates that they do not achieve the level of freedom from arbitrariness that should be required before the death penalty can be imposed.

Death Penalty, AMNESTY INT'L, [hereinafter "Death Penalty, AMNESTY INT'L"] <https://www.amnesty.org/en/what-we-do/death-penalty/> (last visited Aug. 7, 2024) (arguing that "[t]he weight of the death penalty is disproportionately carried by those with less advantaged socio-economic backgrounds or belonging to a racial, ethnic or religious minority. This includes having limited access to legal representation, for example, or being at greater disadvantage in their experience of the criminal justice system.").

⁷³ See generally *The State v. T. Makwanyane and M. Mchunu*, (16) HRLJ 154 (CC) (S. Afr.) (June 6, 1995).

⁷⁴ See, e.g., *Hilaire, Constantine and Benjamin and Others v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94, ¶ 148 (June 21, 2002) ("Taking into account the exceptionally serious and irreparable nature of the death penalty, the observance of due process, with its bundle of rights and guarantees, becomes all the more important when human life is at stake."); *Medellin, Ramirez Cardenas and Leal Garcia v. United States*, Admissibility and Merits (Publication), Inter-Am. Comm'n H.R., Report No. 90/09, Case 12.644, ¶¶ 122–123 (Aug. 7, 2009) ("The Commission ... considers that it has an enhanced obligation to ensure that any deprivation of life which may occur through the application of the death penalty comply strictly with the requirements of the applicable inter-American human rights instruments. ... This 'heightened scrutiny test' is consistent with the restrictive approach taken by other international human rights authorities to the imposition of the death penalty and has been articulated and applied by the Commission in previous capital cases before it. The Commission will therefore review the petitioner's allegations in the present case with a heightened level of scrutiny, to ensure in particular that the right to life, the right to due process, and the right to a fair trial...has been properly respected by the State."); *Chad Roger Goodman v. The Bahamas*, Merits (Publication), Inter-Am. Comm'n H.R., No. 78/07, Case 12.265, ¶ 34 (Oct. 15, 2007) ("[The 'heightened scrutiny test'] requires in particular strict adherence to the rules and principles of due process and fair trials in the context of capital cases. The Commission has previously emphasized that, due in part to its irrevocable and irreversible nature, the death penalty ... warrants a particularly stringent need for reliability in determining whether a person is responsible for a crime that carries a penalty of death.").

Rather, the reality is that the imposition of the death penalty in practice is plagued with arbitrariness and, accordingly, violates Article 4.⁷⁵

i. The Lack of Due Process in the Imposition of the Death Penalty in Practice

49. The fallibility of any justice system, *i.e.*, the possibility that a person will be wrongfully convicted or subjected to a punishment that is disproportionately severe when taking into consideration all circumstances, is a serious concern in any criminal case. But in a case in which a defendant faces the loss of his very life, flaws that undermine the quality of justice and due process a defendant receives are intolerable as a matter of basic human rights principles. In Africa, despite international law's strict due process requirements for death penalty cases, due process problems—and particularly a lack of adequate representation—permeate the imposition of the death penalty, as demonstrated by the following examples.

1. *Due Process Issues in AU Member States with Recent Recorded Executions*

50. As noted, four AU Member States—Egypt, Somalia, South Sudan and Botswana—have carried out executions since 2021.⁷⁶ Each of these have demonstrable defects in their systems that lead to a failure to provide the required level of due process and result in the arbitrary and improper imposition of the death penalty.

⁷⁵ As noted above, *see supra* n.21, the examples set forth herein are intended to highlight for the Court the practical dimensions of the imposition of the death penalty in Africa, and to illustrate how it cannot be imposed in a manner that is not in some way arbitrary.

⁷⁶ See *Death Sentences and Executions in 2021*, AMNESTY INT'L, at 40, 51–52, <https://www.amnesty.org/en/documents/act50/5418/2022/en/> (last visited Aug. 4, 2024) (identifying Egypt, Somalia, South Sudan, and Botswana as the only AU Member States to carry out executions in 2021); *Death Sentences and Executions in 2022*, AMNESTY INT'LINT'L, at 28, 33–34, <https://www.amnesty.org/en/documents/act50/6548/2023/en/> (last visited Aug. 4, 2024) (identifying Egypt, Somalia, and South Sudan as the only AU Member States to carry out executions in 2022).

51. **Egypt:** Egypt executed at least 230 people between January 2020 and March 2022⁷⁷ and reportedly carried out eight executions in 2023.⁷⁸ Egypt imposes death sentences in even greater numbers. According to independent monitors, in 2023, Egyptian courts issued death sentences for at least 348 individuals and the Court of Cassation upheld death sentences for at least 27 individuals.⁷⁹ Rights groups have found systemic due process violations in death penalty cases in Egypt. These include proceedings before military courts and Emergency State Security Courts where defendants underwent merely pro forma hearings in which authorities did not file formal charges or present evidence and detainees were not allowed to present a defense.⁸⁰ After setting forth these facts, Amnesty International determined that the country's courts imposed death sentences after proceedings that did not meet international fair trial standards.⁸¹
52. As an illustrative example, in June 2022, a terrorism-circuit of the Cairo Criminal Court sentenced 10 men to death for "terrorism" and murder after a grossly unfair trial, during which many had been forcibly disappeared and tortured, denied access to their lawyers, and held in cruel and inhumane conditions amounting to torture.⁸² This example is not an outlier; according to reports from local rights groups, hundreds of terrorism-related arrests did not comply with due process—

⁷⁷ *Egypt's Compliance with the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment: the death penalty*, THE ADVOCATES FOR HUMAN RIGHTS, REPRIEVE, AND WORLD COALITION AGAINST THE DEATH PENALTY, (Oct. 2, 2023), <https://www.theadvocatesforhumanrights.org/Res/AHR%20WCADP%20Reprieve%20Egypt%20CAT%20Final%20.pdf>.

⁷⁸ *Death Sentences and Executions in 2023*, AMNESTY INT'L, at 9, <https://www.amnesty.org/en/documents/act50/7952/2024/en/#:~:text=Amnesty%20International's%20monitoring%20of%20the,2022%20to%2016%20in%202023> (last visited Aug. 4, 2024).

⁷⁹ *Decrease in the Implementation of the Death Penalty or Increase in Restrictions on Access to Information?: Monitoring Report on the Status of the Death Penalty in Egypt during the Year 2023*, EGYPTIAN FRONT FOR HUMAN RIGHTS (Feb. 26, 2024), <https://egyptianfront.org/2024/02/decrease-in-the-implementation-of-the-death-penalty-or-increase-in-restrictions-on-access-to-information-monitoring-report-on-the-status-of-the-death-penalty-in-egypt-during-the-year-2023/>.

⁸⁰ Yee et al., *Egypt's Revolving Jailhouse Door: One Pretrial Detention After Another*, NEW YORK TIMES, (July 16, 2022), <https://www.nytimes.com/interactive/2022/07/16/world/middleeast/egypt-prisoners.html>. See also *infra* ¶ 101.

⁸¹ *Egypt Report 2023*, AMNESTY INT'L INT'L, <https://www.amnesty.org/en/location/middle-east-and-north-africa/north-africa/egypt/report-egypt/> (last visited Aug. 7, 2024).

⁸² *Submission to the UN Human Rights Committee. 137th session, 27 February – 24 March 2023*, AMNESTY INT'L, at 7, <https://www.amnesty.org/en/wp-content/uploads/2023/01/MDE1263762023ENGLISH.pdf> (last visited Aug. 7, 2024).

detainees were not charged with crimes, not referred to prosecutors, and/or denied access to counsel and to their families.⁸³

53. Further, human rights groups have identified evidence of regular due process violations in the Egyptian civilian court system with respect to death penalty cases, including but not limited to the use of torture to extract confessions, inadequate access to counsel, a lack of transparency, insufficient investigations into allegations of torture, and the use of mass trials to sentence individuals to death.⁸⁴ Moreover, in 2017 Egypt limited the ability of the Court of Cassation—Egypt’s highest court—to reverse convictions and remand a case for a second trial, thereby stripping death penalty defendants of an important check on flawed convictions, which Amnesty International has described as a “nail in the coffin of fair trial standards.”⁸⁵
54. **Somalia:** Somalia, which has regularly carried out executions in the last several years, is likewise marked by fundamental due process failures and arbitrary impositions of death sentences. According to Amnesty International, there were over 38 executions in Somalia in 2023,⁸⁶ and reports indicate Somalia has already

⁸³ Yee et al., *Egypt’s Revolving Jailhouse Door: One Pretrial Detention After Another*, NEW YORK TIMES, (July 16, 2022), <https://www.nytimes.com/interactive/2022/07/16/world/middleeast/egypt-prisoners.html>. See also Amr Ahmed Ibrahim, *The Façade of Dialogue and Political Openness: Egypt’s Increasing Repression and Arbitrary Detention*, TAHRIR INSTITUTE FOR MIDDLE EAST POLICY (June 21, 2023), <https://timep.org/2023/06/21/the-facade-of-dialogue-and-political-openness-egypts-increasing-repression-and-arbitrary-detention/> (citing to *Arrest and Detention on Political Background Report 2018–2023*, SHAFIAFA TRANSPARENCY CENTER FOR RESEARCH, ARCHIVING, AND DATA MANAGEMENT, <https://drive.google.com/file/d/1nJSwb9BLQ4ZSEQmeUUGfNuwgK5ATkxb8/view>).

⁸⁴ *Egypt’s Compliance with the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment: the death penalty*, THE ADVOCATES FOR HUMAN RIGHTS, REPRIEVE, AND WORLD COALITION AGAINST THE DEATH PENALTY, at 2 (Oct. 2, 2023), <https://www.theadvocatesforhumanrights.org/Res/AHR%20WCADP%20Reprieve%20Egypt%20CAT%20Final%20.pdf>; Jeed Basyouni, *The Death Penalty in Egypt – Ten Years After the Uprising*, REPRIEVE, at 10, 13–14 (May 24, 2021), <https://reprieve.org/uk/2021/05/24/the-death-penalty-in-egypt-ten-year-after-the-uprising/>.

⁸⁵ Jeed Basyouni, *The Death Penalty in Egypt – Ten Years After the Uprising*, REPRIEVE, at 14 (May 24, 2021), <https://reprieve.org/uk/2021/05/24/the-death-penalty-in-egypt-ten-year-after-the-uprising/> (internal citations omitted).

⁸⁶ *Death Sentences and Executions in 2023*, AMNESTY INT’L, at 9, <https://www.amnesty.org/en/documents/act50/7952/2024/en/#:~:text=Amnesty%20International's%20monitoring%20of%20the,2022%20to%2016%20in%202023> (last visited Aug. 4, 2024); see also *Death Sentences and Executions in 2022*, AMNESTY INT’L, at 34 (Somalia carried out at least 6 executions in 2022), <https://www.amnesty.org/en/documents/act50/6548/2023/en/> (last visited Aug. 4, 2024); *Death Sentences*

carried out at least three executions in 2024.⁸⁷ With respect to executions in Somalia, Human Rights Watch has reported that authorities in Somalia often carried out executions, including executions of civilians, following military court proceedings that violated international fair trial standards.⁸⁸ The basis for prosecutions in such military courts in Somalia is often unclear and the death penalty is imposed arbitrarily.⁸⁹

55. In addition, the Committee Against Torture has reported that such military courts “try civilian cases, including cases concerning juveniles...[but] do not guarantee due process according to law, including providing defendants with legal representation and the right to appeal, and their proceedings lack transparency.”⁹⁰ As a result of Somalia’s use of military courts to try and sentence civilians to death, it is difficult to ascertain whether Somalia’s civilian courts have also issued death sentences in recent years. But the record is clear that Somalia continues to make use of military courts to sentence civilians to death and carry out executions, including as recently as June 2024, notwithstanding the prevalence of serious documented due process issues in such military courts.⁹¹

and Executions in 2021, AMNESTY INT’L, at 60 (Somalia carried out at least 21 executions in 2021), <https://www.amnesty.org/en/documents/act50/5418/2022/en/> (last visited June 6, 2024).

⁸⁷ See *Somalia: Somali Military Court Executes Three Men for Murder of Two Brothers*, SHABELLE MEDIA NETWORK (MOGADISHU) (June 6, 2024), <https://allafrica.com/stories/202406070063.html#:~:text=Somalia%3A%20Somali%20Military%20Court%20Execut.>

⁸⁸ *Somalia. Events of 2023*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2024/country-chapters/somalia#:~:text=Authorities%20throughout%20the%20country%20carried,forces%2C%20often%20after%20unfair%20trials> (last visited Aug. 4, 2024).

⁸⁹ Vanda Felbab-Brown, *The Limits of Punishment: Transitional Justice and Violent Extremism*, at 11 (May 2018), <https://i.unu.edu/media/cpr.unu.edu/attachment/2770/4-LoP-Somalia-Case-Study.pdf>.

⁹⁰ *Concluding Observations on the initial report of Somalia*, CAT/C/SOM/CO/1, U.N. Committee Against Torture, ¶ 13 (Dec. 2, 2022). See also Corinne Noonan, *Calling for Somaliland to Release Abshir Saleban Hussein, a Child, from Death Row*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (July 31, 2024), <https://deathpenaltyworldwide.org/calling-for-somaliland-to-release-abshir-saleban-hussein-a-child-from-death-row/> (discussing a recent case from February of 2024 where a court in Somaliland sentenced a child to death).

⁹¹ See *Somalia: Somali Military Court Executes Three Men for Murder of Two Brothers*, SHABELLE MEDIA NETWORK (MOGADISHU) (June 6, 2024), <https://allafrica.com/stories/202406070063.html#:~:text=Somalia%3A%20Somali%20Military%20Court%20Execut.>

56. **South Sudan:** South Sudan, which carried out executions in 2022 and 2021, presents similar due process issues with respect to the death penalty.⁹² It operates under a transitional government and its justice system falls far short of international standards.⁹³ Law enforcement and judicial authorities have, for instance, subjected accused persons to prolonged detention without adequate opportunity to prepare a defense⁹⁴ and have reportedly sentenced individuals to death for crimes committed as children.⁹⁵ Most disturbing, many defendants were sentenced to death without access to any legal representation at all.⁹⁶
57. **Botswana:** Botswana, which executed three individuals in 2021,⁹⁷ also suffers from similar serious due process concerns, including the lack of adequate legal representation for criminal defendants in capital cases. While those facing the death penalty are formally entitled to legal representation, such state-appointed counsel generally lack the skills and training to adequately defend their death row clients.⁹⁸ Due to severe financial constraints, fees paid to state-appointed

⁹² *Death Sentences and Executions in 2022*, AMNESTY INT'L, at 34 (South Sudan carried out at least 5 executions in 2022), <https://www.amnesty.org/en/documents/act50/6548/2023/en/> (last visited Aug. 4, 2024); *Death Sentences and Executions in 2021*, AMNESTY INT'L, at 60 (South Sudan carried out at least 9 executions in 2021), <https://www.amnesty.org/en/documents/act50/5418/2022/en/> (last visited Aug. 4, 2024).

⁹³ Press Release, *Disturbing wave of extrajudicial executions on the rise in South Sudan's Warrap State – UN experts note*, U.N. Press Release (July 29, 2021), <https://www.ohchr.org/en/press-releases/2021/07/disturbing-wave-extrajudicial-executions-rise-south-sudans-warrap-state-un>.

⁹⁴ See, e.g., "Prison Is Not For Me." *Arbitrary Detention in South Sudan*, AMNESTY INT'L, at 4–5 (June 21, 2022), <https://www.hrw.org/report/2012/06/21/prison-not-me/arbitrary-detention-south-sudan>.

⁹⁵ See, e.g., South Sudan Stakeholder Report for the 40th Session of the Working Group on the United Nations Universal Periodic Review, THE ADVOCATES FOR HUMAN RIGHTS & WORLD COALITION AGAINST THE DEATH PENALTY, ¶ 16 (July 15, 2021), <https://www.theadvocatesforhumanrights.org/Res/South%20Sudan%20Death%20Penalty%20Report%20Final%202.pdf>.

⁹⁶ See, e.g., *id.* at 17; Rachel Ibreck et al., *Negotiating Justice: Courts as local civil authority during the conflict in South Sudan*, at 8–9 (2017), <https://research.gold.ac.uk/id/eprint/21114/1/17-0048-Sudan-Report-v9.Web.pdf>. See also, "Prison Is Not For Me." *Arbitrary Detention in South Sudan*, HUMAN RIGHTS WATCH, at 5, 11 (June 21, 2022), <https://www.hrw.org/report/2012/06/21/prison-not-me/arbitrary-detention-south-sudan> (stating approximately 95% of prisoners in South Sudan go through the criminal justice system without counsel and "are sentenced to death even though they have not been able to call and prepare witnesses in their defense" and describing the absence of effective legal aid in South Sudan).

⁹⁷ *Death Sentences and Executions in 2021*, AMNESTY INT'L, at 60, <https://www.amnesty.org/en/documents/act50/5418/2022/en/> (last visited Aug. 4, 2024) (Botswana carried out 3 executions in 2021).

⁹⁸ Elizabeth Macharia-Mokobi, *The Death Penalty In Botswana: Time For a Re-Think?*, SOUTH AFRICA MIGRATION CENTRE, at 70–71 (2017), <https://www.southernafricallitigationcentre.org/wp->

attorneys are minimal compared to average fees paid to private lawyers, and death penalty cases have been poorly handled by junior lawyers who lacked any experience whatsoever in death penalty proceedings.⁹⁹ Moreover, there are reported death penalty cases in which the burden of proof has been shifted to the defendant.¹⁰⁰ This improper shifting of the burden of proof, combined with the failure of the state to provide adequate legal representation, leads to miscarriages of justice and the imposition of the death penalty in violation of due process protections and contrary to prohibitions of arbitrariness.

2. *Failure to Provide Adequate Legal Representation to Death Penalty Defendants*

58. Both with respect to the foregoing examples, and with respect to the imposition of the death penalty in Africa more generally, a troubling common due process problem is the lack of proper representation of persons facing capital punishment.¹⁰¹ Although only four AU Member States carried out executions in recent years, several other AU Member States continue to impose the death penalty despite failing to provide adequate legal representation to defendants.¹⁰² In Nigeria, for example, capital defendants rarely receive adequate legal representation due in part to a lack of legal aid resources, including a shortage of attorneys who specialize in criminal defense and a lack of legal aid offices in

[content/uploads/2017/08/GOAL-16-Book-Mokobi.pdf](https://www.fidh.org/en/region/Africa/botswana/The-Death-Penalty-in-Botswana); *The death penalty in Botswana: Hasty and secretive hangings: International fact finding mission*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (FIDH) AND DITSHWANELO – The Botswana Centre for Human Rights, at 21 (June 2007), <https://www.fidh.org/en/region/Africa/botswana/The-Death-Penalty-in-Botswana>.

⁹⁹ Onkemetse B. Tshosa, *The death penalty in Botswana in the light of international law: The case for abolition*, BIICL, at 6–7 (2004), https://www.biicl.org/files/2216_tshosa_death_penalty_botswana.pdf.

¹⁰⁰ Andrew Novak, *Guilty of Murder with Extenuating Circumstances: Transparency and the Mandatory Death Penalty in Botswana*, BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL, at 187–88 (2009).

¹⁰¹ See S. L. Babcock, *An Unfair Fight for Justice: Legal Representation of Persons Facing the Death Penalty*, in *COMPARATIVE CAPITAL PUNISHMENT* (Ed. Carol S. Steiker and Jordan M. Steiker), at 97–105 (2019) (discussing practical barriers to adequate and effective legal representation in death penalty cases both in Africa and globally).

¹⁰² See, e.g., *Death Sentences and Executions in 2023*, AMNESTY INT'L, at 29, 35–36, <https://www.amnesty.org/en/documents/act50/7952/2024/en/#:~:text=Amnesty%20International's%20monitoring%20of%20the,2022%20to%2016%20in%202023> (last visited Aug. 4, 2024) (noting the imposition of death sentences during the course of 2023 in a number of AU Member States that have not carried out a recorded execution since 2021, including Nigeria (246 death sentences) and Kenya (131 death sentences)).

remote areas.¹⁰³ This is especially true for poor and indigent defendants who consistently struggle to obtain representation, especially at the appellate level, and who constitute the majority of those subject to trial.¹⁰⁴ Further, officers routinely attempt to extract confessions from prisoners during pre-trial detention—which can last years in many cases—when they do not yet have access to a lawyer.¹⁰⁵ These basic failures to provide legal representation in criminal proceedings, including capital punishment cases, result in a denial of due process; and they also lead to disparate, and therefore arbitrary, outcomes between those who are and are not afforded representation.

59. Further, some States provide free legal assistance only when a proceeding reaches trial, with the result that indigent individuals are often subject to interrogations and investigations without the aid of counsel, raising serious due process concerns, including forced confessions.¹⁰⁶ In these circumstances, a defendant's right to fair trial may already be lost by the time the proceedings reach the courtroom.¹⁰⁷
60. Even in countries where criminal defendants (including defendants in capital cases) have a constitutional or statutory right to representation, many do not actually receive competent representation or any representation at all. Courts (or

¹⁰³ Paulina Lucio Maymon, *Nigeria's Debate on Death Penalty: Sign Execution Warrants or Impose a Moratorium?*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (June 26, 2019), <https://deathpenaltyworldwide.org/nigerias-debate-on-capital-punishment-sign-execution-warrants-or-impose-a-moratorium/>.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ For example, over a third of death row prisoners in Kenya were denied legal assistance during their police interrogation. Carolyn Hoyle and Lucrezia Rizzelli, *Living With a Death Sentence in Kenya: Prisoners' Experiences of Crime, Punishment and Death Row*, at 49–50 (2022), <https://deathpenaltyproject.org/wp-content/uploads/2022/12/Living-with-a-Death-Sentence-in-Kenya-Prisoners-Experiences-of-Crime-Punishment-and-Death-Row.pdf>. And in some states, such as Uganda, foreign nationals may be excluded from guarantees of state-appointed counsel when they are charged with an offence against the security of the State (which is punishable by death). Report of the Office of the United Nations High Commissioner for Human Rights, *Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, A/HRC/36/26, ¶ 28 (Aug. 22, 2017), <https://documents.un.org/doc/undoc/gen/q17/244/09/pdf/q1724409.pdf>.

¹⁰⁷ See Press Release, *Death Penalty Disproportionately Affects the Poor, UN Rights Experts Warn*, U.N. Press Release (Oct. 10, 2017) [hereinafter "U.N. Joint Statement"], <https://www.ohchr.org/en/press-releases/2017/10/death-penalty-disproportionately-affects-poor-un-rights-experts-warn> (emphasis added).

government authorities) frequently fail to appoint counsel for indigent defendants in criminal cases, including capital cases. Without the ability to pay for private lawyers or invoke the aid of non-profit organizations, many individuals have been sentenced to death without representation. In South Sudan, for example, though the Code of Criminal Procedure nominally provides for appointed counsel for indigent defendants, there is virtually no legal aid available or any legal structure for providing for such aid.¹⁰⁸ The resulting lack of counsel means that practically all executed inmates did not receive representation in the proceedings that led to their conviction and death sentence.¹⁰⁹

61. Even in countries that appear to have a structure for providing legal aid, the lack of state funding routinely results in defendants being sentenced without representation or without adequate access to their public defenders, in violation of their due process rights.¹¹⁰ A 2022 study in Kenya, for example, reported that almost a quarter of prisoners sentenced to death had received no legal representation at trial and almost half reported not receiving legal assistance during their appeal.¹¹¹
62. Even where representation is provided, the appointment of counsel is often a mere formality that does not lead to effective representation. In Botswana, for example, courts have reported and emphasized in public opinions the reality of poor

¹⁰⁸ Republic of South Sudan, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (Apr. 25, 2013), <https://deathpenaltyworldwide.org/database/#/results/country?id=69>.

¹⁰⁹ *Id.*

¹¹⁰ See S. L. Babcock, *An Unfair Fight for Justice: Legal Representation of Persons Facing the Death Penalty*, in COMPARATIVE CAPITAL PUNISHMENT (Ed. Carol S. Steiker and Jordan M. Steiker), 100–02 (2019) (discussing the lack of state resources available for public defenders and the practical difficulties in ensuring a prisoner's access to counsel in a number of African countries).

¹¹¹ Carolyn Hoyle and Lucrezia Rizzelli, at 50; see also Report of the Office of the United Nations High Commissioner for Human Rights, *supra* n.106 at ¶ 17. Further, in Kenya there are no government-sponsored public defenders, and local NGO's are unable to meet the demand for legal counsel. As a result, most defendants either represent themselves or rely on paralegal services in prison. See, e.g., Damaris Kemunto, *Legal And Regulatory Gaps Inherent to the Implementation Of the Legal Aid Act*, INTERNATIONAL COMMISSION OF JURISTS (March 6, 2024), <https://ici-kenya.org/news/legal-and-regulatory-gaps-inherent-to-the-implementation-of-the-legal-aid-act/>; Keith Zubrow, *How COVID-19 transformed the Kenyan court system*, CBS NEWS (Aug. 15, 2021), <https://www.cbsnews.com/news/covid-19-kenya-court-system-60-minutes-2021-08-15/>.

representation in capital cases.¹¹² In one homicide case, the defendants' initial court-appointed lawyers *never* consulted with them, and failed to inform the defendants about their options under Botswana law to provide testimony during trial.¹¹³ In addition, capital cases are often handled by inexperienced lawyers, due at least in part to the fact that in many capital cases, attorneys' fees are often either barely paid at all, or paid very late, such that there is little incentive for more experienced practitioners to take on such cases.¹¹⁴

63. Finally, even where representation is provided, there is often a wide disparity in the availability of counsel between rural and urban communities. In many countries, lawyers cannot access their clients because of how far away they are from a city. For example, in Mali, where the last known execution took place many years ago but dozens of individuals remain on death row, a study found that the majority of the 275 lawyers in the country practiced in the capital city, significantly limiting access to any attorney for defendants outside of the capital.¹¹⁵

* * *

64. The foregoing demonstrates that the lack of due process in capital cases amounts to a serious, and pervasive, concern, which results in a denial of due process and the arbitrary imposition of the death penalty. In particular, the failure to ensure that capital defendants are adequately represented means that two identical

¹¹² See *Gorosang v. State*, Criminal Appeal No. 95 of 2012, Judgement, Ct. of Appeal of Botswana, BWCA 40, ¶ 3 (Feb. 1, 2013) (noting that the trial was "marred . . . by inadequate investigation, inadequate prosecution, and inadequate defence, which has a material effect on the outcome."). See also Alice Mogwe, *The Death Penalty in Botswana: Barriers to Equal Justice*, in MOVING AWAY FROM THE DEATH PENALTY: ARGUMENTS, TRENDS AND PERSPECTIVES, 170, 174 (Ivan Simonovic ed., Sept. 21, 2015), <https://www.ohchr.org/en/documents/tools-and-resources/moving-away-death-penalty-arguments-trends-and-perspectives> (discussing *DITSHWANELO v. Attorney General of Botswana*, MISCRA Case No. 2 of 1999).

¹¹³ See Alice Mogwe, *The Death Penalty in Botswana: Barriers to Equal Justice*, in MOVING AWAY FROM THE DEATH PENALTY: ARGUMENTS, TRENDS AND PERSPECTIVES, 170, 174 (Ivan Simonovic ed., Sept. 21, 2015), <https://www.ohchr.org/en/documents/tools-and-resources/moving-away-death-penalty-arguments-trends-and-perspectives> (discussing *DITSHWANELO v. Attorney General of Botswana*, MISCRA Case No. 2 of 1999).

¹¹⁴ *Republic of Botswana*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (Apr. 21, 2020), <https://deathpenaltyworldwide.org/database/#/results/country?id=10>.

¹¹⁵ *Actualités du projet Mali: La situation du Mali*, AVOCATS SANS FRONTIERES FRANCE (last accessed July 24, 2010) (copy available upon request).

defendants who committed identical crimes may receive vastly different sentences—i.e., one may be sentenced to death and executed and one may not—based solely on whether or not they have sufficient resources to retain their own counsel. Such injustices result in a denial of due process and an arbitrary deprivation of life in violation of Article 4.

ii. The Discriminatory Imposition of the Death Penalty in Practice

65. Another fundamental problem with the death penalty is that it is imposed in a discriminatory, or arbitrary, manner as between different types of persons. As international human rights organizations have observed, the death penalty is “used disproportionately against the poor, minorities and members of racial, ethnic and religious groups. It is imposed and carried out arbitrarily...[and] used as a tool of repression – a swift and brutal way of silencing political opposition.”¹¹⁶ In particular, as discussed below, the death penalty is imposed in Africa in a discriminatory manner on women, children, members of different ethnic groups, those living in economic precarity, those who speak a different language than the majority, and members of disfavored political groups. This discriminatory and arbitrary imposition of the death penalty establishes a further basis on which the death penalty violates Article 4.

1. *Gender Discrimination*

66. Gender discrimination frequently contributes to a disparate application of the death penalty on women and girls. Women accused of capital crimes often face systemic discrimination, including lack of education, economic resources, or legal representation, making it “difficult for women to gain access to justice on an equal

¹¹⁶See *Death Penalty*, AMNESTY INT’L, at 8: “The weight of the death penalty is disproportionally carried by those with less advantaged socio-economic backgrounds or belonging to a racial, ethnic or religious minority. This includes having limited access to legal representation, for example, or being at greater disadvantage in their experience of the criminal justice system.”

basis with men.”¹¹⁷ Further, when women are charged with crimes, courts often fail to recognize mitigating factors such as domestic violence or mental illness.¹¹⁸

67. Gender discrimination also denies women access to education, which makes them especially vulnerable to abuse by law enforcement and the criminal justice system.¹¹⁹ As a result of their unequal access to education, women may be unfamiliar with the language of the legal system, rendering them unable to engage in their defense.¹²⁰ Women generally also often lack economic resources as compared to men, and when charged with the death penalty may be even less able to afford legal counsel.¹²¹ For example, of the four women on death row in Malawi as of 2018, all were indigent, three had never attended school, and two were illiterate.¹²² The inability to understand the process and engage meaningfully with, or even be able to retain, legal counsel often results in a failure to mount an adequate defense and ensure a fair trial.¹²³
68. In addition, law enforcement and prosecutors often fail to recognize mitigating factors that especially affect women, including domestic violence or mental illness.¹²⁴ For example, as of 2018, all of the women on death row in Malawi “had experienced multiple forms of gender-based oppression and some form of mental

¹¹⁷ See, e.g., *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, at 3–4, 6–8, 15 (Sept. 2023) [hereinafter “*Judged for More Than Her Crime*”], <https://deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>.

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 29.

¹²⁰ *Id.* at 3; see *Fati: An Innocent Woman Sentenced to Death for Terrorism After Being Falsely Accused by a Rejected Suitor*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (Nov. 17, 2021), <https://deathpenaltyworldwide.org/publication/fati-an-innocent-woman-sentenced-to-death-for-terrorism-after-being-falsely-accused-by-a-rejected-suitor/?version=html> (where Fati, a Cameroonian woman who did not speak French, was not provided a translator despite being accused of terrorism and held).

¹²¹ See *Judged for More Than Her Crime* at 8, 18 (highlighting that women frequently lack money or property of their own, and that the vast majority of women on death row are from poor and marginalized communities, hindering their ability to retain adequate legal counsel).

¹²² See *id.* at 29.

¹²³ See *id.*

¹²⁴ See *id.* at 12, 15–17.

illness or trauma.”¹²⁵ Additionally, one woman in Malawi was charged with murder in 2003 after striking her abusive husband in self-defense.¹²⁶

69. This problem persists in sentencing women, where courts often disregard the impact of gender-based violence, abuse, and trauma as mitigating factors.¹²⁷ Women on death row were frequently victims of gender-based violence, a phenomenon regularly disregarded or discredited when considering the circumstances that led to their crimes.¹²⁸ As just one example, in a recent case in Tanzania, the trial court failed to take into account a female defendant’s mitigating evidence of self-defense in sentencing her to death for the killing of her “infamous abusive husband,” including her uncontested testimony that he had brutally attacked and beat her with a hammer while drunk before she took the hammer from him and killed him.¹²⁹
70. The aforementioned systemic discrimination faced by women accused of capital crimes, including lack of education, economic resources, and legal representation, as well as the failure of law enforcement, prosecutors, and courts to properly account for mitigating factors such as domestic violence and mental illness in death penalty cases concerning women, result in gender-based arbitrariness in the imposition of the death penalty in practice.

2. Children

71. There is a clear and universal prohibition on sentencing children to death, as set forth in the African Charter on the Rights and Welfare of Children, international

¹²⁵ See *id.* at 29.

¹²⁶ See *id.* at 30.

¹²⁷ See, e.g., Sally Parker, *Center on the Death Penalty Worldwide Wins Freedom for Two Women in Tanzania*, CORNELL L. SCH. (March 13, 2024), <https://www.lawschool.cornell.edu/news/center-on-the-death-penalty-worldwide-wins-freedom-for-two-women-in-tanzania/> (where Tanzanian woman’s husband had inflicted repeated and brutal violence on his wife and children, and it had not been taken into account in her sentencing for killing her husband in self-defense).

¹²⁸ See, e.g., *id.*; see also *Judged for More Than Her Crime* at 15–16, 29–30.

¹²⁹ *Chausiku Nchama Magoiga v. Republic*, Criminal Appeal No. 297 of 2020, Judgement, Ct. of Appeal of Tanzania, at 5 (Nov. 9, 2023). See also *id.* at 9–11 (further describing the husband’s attack on the defendant and overturning her conviction due to the trial court’s error in not considering the circumstances surrounding the commission of the offence).

human rights instruments, and the laws of every AU Member State. Nevertheless, children in Africa continue to be sentenced to death. The imposition of the death penalty on juveniles persists for multiple reasons, including that States disregard the laws prohibiting it, the age of minority is different in State law than the age in international legal instruments, and a frequent lack of documentation of age.

72. Between 1990 and 2019, Amnesty International documented instances of children executed in five African countries: the Democratic Republic of Congo, Nigeria, Somalia, South Sudan, and Sudan.¹³⁰ In 2015, the U.N. Secretary General reported that Nigeria had sentenced juvenile offenders to death in recent years.¹³¹ In certain AU Member States, the continued imposition of the death penalty on children may result from the fact that a particular state's definition of "children" does not accord with the definition of the term in international legal instruments. The Convention on the Rights of the Child ("CRC"), which has been signed and ratified by every AU Member State,¹³² defines "children" to mean individuals below the age of 18,¹³³ but some AU Member States have chosen an age lower than 18 as the point at which an individual is no longer considered a child and can be treated as an adult for the purposes of criminal adjudication or sentencing.¹³⁴
73. Further, children are at risk of being sentenced as adults in capital cases when they lack documentation of their birthdate. When a child is not able to confirm their age, they are at risk of being tried as an adult and sentenced to death when their case may not otherwise be eligible for the death penalty. This issue is particularly

¹³⁰ *Executions of Juveniles Since 1990 as of November 2019*, AMNESTY INT'L (Nov. 2019), <https://www.amnesty.org/en/documents/act50/0233/2019/en/>; *Somalia: Five Children Executed, Two Others at Risk*, AMNESTY INT'L (Apr. 28, 2017), <https://www.amnesty.org/en/documents/afr52/6112/2017/en/>.

¹³¹ See *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty*, Economic and Social Council Res. 2015/49, ¶ 79 (Apr. 13, 2015).

¹³² See *Ratification Status for CRC - Convention on the Rights of the Child*, UNITED NATIONS TREATY BODY DATABASE, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clanq=en.

¹³³ Convention on the Rights of the Child, U.N.T.S., No. 27531, art. 1 (Nov. 20, 1989) (entered into force Sept. 2, 1990).

¹³⁴ See *Minimum Ages of Criminal Responsibility in Africa*, CHILD RIGHTS INTERNATIONAL NETWORK (CRIN) (Oct. 17, 2014), <https://archive.crin.org/en/home/ages/Africa.html>.

prevalent where there are low rates of birth registration.¹³⁵ In Africa, many AU Member States that continue to apply the death penalty lack functioning birth registries.¹³⁶

74. One additional factor leading to the incorrect identification, and sentencing to death, of juvenile offenders is the extended time suspects spend in detention before trial.¹³⁷ In several Sub-Saharan African countries, those accused of crimes can remain in detention for years without seeing a lawyer.¹³⁸ By the time they appear in court, they are often past the age of majority, and their lawyers typically do not deem it necessary at that point to verify their age at the time the crime was committed.¹³⁹
75. In sum, despite the fact that the imposition of the death penalty on children is universally condemned and prohibited as a basic human rights principle, as long as the death penalty is an option for punishment in Africa, there is a persistent risk and likelihood that children will be at risk of being sentenced to death and executed.

3. Mental Disabilities

76. Those suffering from intellectual or psycho-social disabilities are at an increased risk of wrongful execution and an unjust criminal process overall as compared to persons without such conditions. It is widely recognized that to impose the death penalty on persons with mental or intellectual disabilities is contrary to human rights principles. Indeed, the African Commission has expressly stated that "...the execution of...persons with psycho-social or intellectual disabilities, will always

¹³⁵ See S. L. Babcock, *Deciding who lives and who dies: eligibility for capital punishment under national and international law*, in *COMPARATIVE CAPITAL PUNISHMENT* (Ed. Carol S. Steiker and Jordan M. Steiker), at 56–58 (2019).

¹³⁶ In many of the retentionist countries less than 50% of the population under the age of five possesses a birth certificate. Namely, we refer to Somalia (3%) and South Sudan (35%). See Birth Registration, UNICEF GLOBAL DATABASE, <https://data.unicef.org/topic/child-protection/birth-registration/#data> (last update: June 2023).

¹³⁷ See S. L. Babcock, *Deciding who lives and who dies: eligibility for capital punishment under national and international law*, in *COMPARATIVE CAPITAL PUNISHMENT* (Ed. Carol S. Steiker and Jordan M. Steiker), at 58, n.27. (2019).

¹³⁸ *Id.*

¹³⁹ *Id.*

amount to a violation of the right to life.”¹⁴⁰ Furthermore, several UN bodies have urged States to exclude persons with mental or intellectual disabilities from the death penalty entirely: the UN Commission on Human Rights in Resolution 2005/59 called on States not to impose a death sentence or execute “a person suffering from any mental or intellectual disabilities”¹⁴¹; the UN Special Rapporteur on Torture in 2014 stated that “[i]nternational law considers the imposition and enforcement of the death penalty on persons with mental disabilities a violation of the prohibition of torture and other cruel, inhuman and degrading treatment or punishment”¹⁴²; the UN Commission on Human Rights has adopted resolutions urging all states not to execute any person “suffering from any form of mental disorder”¹⁴³; and, most recently, the UN General Assembly’s resolution in support of a moratorium on the death penalty urges states “[t]o progressively restrict the use of the death penalty and not to impose capital punishment . . . on persons with mental or intellectual disabilities[.]”¹⁴⁴ In addition, this Court has previously recognized that the failure to consider evidence of a defendant’s mental health status can give rise to a violation of the defendant’s right to a fair trial under Article 7(1) of the Charter and, in the context of the mandatory death penalty, that such failure constitutes a violation of the right to life as guaranteed by Article 4 of the Charter.¹⁴⁵

¹⁴⁰ General Comment No. 3 On The African Charter On Human And Peoples’ Rights: The Right To Life (Article 4), African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], § D.25 (Dec. 12, 2015), <https://www.refworld.org/legal/general/achpr/2015/en/70896>.

¹⁴¹ See, e.g., Commission on Human Rights Resolutions 2005/59: *Question of the Death Penalty*, UN Commission on Human Rights (Apr. 20, 2005).

¹⁴² Press Release, *Death row: UN experts urge US authorities to stop execution of Scott Panetti, a mentally ill prisoner*, U.N. Press Release (Dec. 02, 2014), <https://www.ohchr.org/en/press-releases/2014/12/death-row-un-experts-urge-us-authorities-stop-execution-scott-panetti>.

¹⁴³ *The Question of the Death Penalty*, E/CN.4/RES/2003/67, U.N. HUM. RTS. OFFICE HIGH COMM’R, ¶ 4(g) (Apr. 25, 2003).

¹⁴⁴ U.N. General Assembly Res. 77/222, *Moratorium on the use of the death penalty*, A/RES/77/222, ¶ 7(e) (Jan. 6, 2023).

¹⁴⁵ See *Gozbert Henerico v. United Republic of Tanzania*, No. 056/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 160 (Jan. 10, 2022) (finding a violation of Article 7(1) due to the domestic court’s failure to consider a medical evaluation report of the Applicant’s mental health status). See also *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 214–15 (Sept. 3, 2024) (finding a violation of Article 4 “owing to the domestic courts not [being] afforded discretion to consider the mental health of the Applicants in imposing the death sentence.”).

77. Protecting against the imposition of the death penalty on mentally and intellectually disabled persons is a particular concern in Africa, in light of the lack of resources necessary to identify offenders with such disabilities and appropriately take into account their condition as a mitigating factor in sentencing.
78. Even in countries where those with mental illnesses or intellectual disabilities are exempt from the death penalty by law, and even when the threshold applied to determine who suffers from such a mental illness or disability is adequate and does not exclude certain categories of mentally disabled people, defendants that fall into this category may still be sentenced to death because of the lack of trained experts who are qualified to perform the required investigations.¹⁴⁶ A study in Malawi, for example, found that few mental health workers have been trained to carry out comprehensive assessments of capital murder defendants to determine whether they suffered intellectual disabilities or mental impairments that may serve as mitigating factors for sentencing.¹⁴⁷ In fact, although more than two hundred persons were sentenced to death in Malawi between 1994 and 2005, not one was assessed for intellectual disabilities prior to trial.¹⁴⁸
79. In other circumstances, courts simply ignore evidence of a defendant's mental disability as a potential mitigating factor. For example, as this Court noted in *Gozbert Henerico v United Republic of Tanzania*,¹⁴⁹ the High Court of Tanzania at Bukoba failed to consider a medical report on Mr. Henerico's mental health status

¹⁴⁶ See S. L. Babcock, *Deciding who lives and who dies: eligibility for capital punishment under national and international law*, in *COMPARATIVE CAPITAL PUNISHMENT* (Ed. Carol S. Steiker and Jordan M. Steiker), at 58–66 (2019); *Justice Denied: A Global Study of Wrongful Death Convictions*, at 6, 37 (Jan. 2018).

¹⁴⁷ See *Justice Denied: A Global Study of Wrongful Death Convictions*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, at 37 (Jan. 2018).

¹⁴⁸ S. L. Babcock, *Deciding who lives and who dies: eligibility for capital punishment under national and international law*, in *COMPARATIVE CAPITAL PUNISHMENT* (Ed. Carol S. Steiker and Jordan M. Steiker), at 65 (2019). While the last known execution in Malawi took place in 1992, the record of death sentences being imposed without adequate assessment of mental and intellectual disabilities demonstrates the pervasiveness of this problem.

¹⁴⁹ *Gozbert Henerico v. United Republic of Tanzania*, No. 056/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (Jan. 10, 2022).

and sentenced him to death, which failure in and of itself constituted a violation of the right to a fair trial.¹⁵⁰

80. As demonstrated by the foregoing, criminal justice systems in Africa cannot guarantee that a defendant's mental health status is assessed—or even considered—before sentencing him or her to death, resulting in a serious risk that persons suffering from mental illness or intellectual disabilities are wrongfully executed in an arbitrary manner.

4. Poverty

81. The death penalty is also often imposed disproportionately on those living in poverty. UN experts have stated that, in general:

"[i]f you are poor, the chances of being sentenced to death are immensely higher than if you are rich. There could be no greater indictment of the death penalty than the fact that in practice it is really a penalty reserved for people from lower socio-economic groups. This turns it into a class-based form of discrimination in most countries, thus making it the equivalent of an arbitrary killing."¹⁵¹

Several circumstances render those living in poverty more likely to face the death penalty and ultimately be sentenced to death, including: (1) structural obstacles, such as the costs of legal proceedings or the absence of necessary institutions in rural or impoverished areas, that prevent such individuals from exercising their rights to a fair trial; (2) stereotypes correlating poverty and criminality; (3) lack of access to education, social or financial support required to navigate complex criminal proceedings; (4) lack of effective legal representation, which in turn results in an increased likelihood of unfair proceedings; and (5) deprivation of appellate rights. Each is summarized below.

¹⁵⁰ *Id.* ¶ 160; see also African Charter, Article 7(1).

¹⁵¹ U.N. Joint Statement; see also Report of the Office of the United Nations High Commissioner for Human Rights, *High-level panel discussion on the question of the death penalty*, A/HRC/42/25, ¶ 5 (June 21, 2019), https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/42/25.

82. First, structural obstacles to accessing the justice system disproportionately affect those living in poverty, leading to negative outcomes in criminal proceedings and a disproportionate impact of the death penalty on this group.¹⁵² The accused's inability to bear the costs of criminal proceedings is one such obstacle. From the initial investigation until execution, wealth and income impact every stage of the criminal process, including the death penalty process, as defendants face fees and other costs at all stages of the proceedings. For instance, during the investigation process, poor individuals may be disadvantaged in cases where payments (or bribes) may influence the thoroughness of the investigation.¹⁵³ In Nigeria, for example, suspects may be required to pay for the police's fuel when traveling to see and interview witnesses, including witnesses who may be able to verify the alibi of suspects facing the death penalty for their alleged crimes.¹⁵⁴ There are documented cases where the police did not conduct these interviews because suspects facing the death penalty could not pay, including cases where suspects were later sentenced to death.¹⁵⁵
83. In addition, rural, poor, and marginalized areas often lack institutions necessary for the administration of justice, such as police officers, lawyers, judges, and courthouses.¹⁵⁶ In such instances, those "living in poverty have to travel long distances at great cost to engage with the justice system."¹⁵⁷ In Malawi, for instance, a lack of resources means that "[b]ackground investigations are rarely conducted due to the fact that defendants may live in remote villages that are not accessible given the scarce resources. [...] Travel expenses are also too high to

¹⁵² See Report of the Special Rapporteur on extreme poverty and human rights, *Extreme poverty and human rights*, A/67/278, U.N. General Assembly, ¶¶ 35–59 (Aug. 9, 2012) [hereinafter "U.N. Poverty Report"].

¹⁵³ See *Nigeria. Waiting for the Hangman*, AMNESTY INT'L, at 3 (Oct. 2008) [hereinafter "AI Nigeria Report"], <https://www.amnesty.org/en/documents/afr44/020/2008/en/>. Nigeria is a retentionist state. *Death Sentences and Executions in 2022*, AMNESTY INT'L, at 41 (May 16, 2023), <https://www.amnesty.org/en/documents/act50/6548/2023/en/>.

¹⁵⁴ See AI Nigeria Report, at 3.

¹⁵⁵ *Id.*, at 3, 13–14.

¹⁵⁶ U.N. Poverty Report, ¶ 37.

¹⁵⁷ *Id.*

bring in witnesses for murder trials.”¹⁵⁸ As a consequence, in most cases, the only witness for the defense is the defendant themselves.¹⁵⁹

84. *Second*, individuals living in poverty are often targeted as likely suspects for crimes: “[d]isproportionately high numbers of [individuals living in poverty] are arrested, detained and imprisoned as a result of law enforcement officials’ frequent use of poverty, homelessness or disadvantage as an indicator of criminality.”¹⁶⁰ In this regard, a report of the Presidential Commission on Reform of the Administration of Justice of Nigeria concluded that “limited legal protection [and] unequal access to justice perpetuate a situation in which the poor and other vulnerable groups are highly susceptible to arrest and subsequent imprisonment.”¹⁶¹ The effects of this “criminalization of poverty” phenomenon were also observed in the context of the death penalty. According to the same report, inmates on death row in Nigeria are “almost exclusively poor and without legal representation.”¹⁶²
85. *Third*, indigent defendants also often lack access to education and are deprived of the necessary social, financial, and legal support to navigate complex death penalty proceedings. In the absence of such education and support, they are often unable to understand or fully participate in the proceedings and effectively advocate for themselves.¹⁶³ For instance, a study in Kenya involving 671 prisoners across 12 prisons who had been sentenced to death revealed significant educational and economic disadvantages: their average wage before arrest was below the Kenyan living wage and more than 10% had never received formal

¹⁵⁸ Report for the 56th Ordinary Session of the African Commission on Human and Peoples’ Rights for the Commission’s Examination of Malawi’s Initial and Combined Periodic Country Report on the Implementation of the African Charter on Human and Peoples’ Rights in Malawi, THE ADVOCATES FOR HUMAN RIGHTS, at 10 (Sept. 2014) [hereinafter “THE ADVOCATES FOR HUMAN RIGHTS Report on Malawi”].

¹⁵⁹ See THE ADVOCATES FOR HUMAN RIGHTS Report on Malawi, at 10.

¹⁶⁰ U.N. Poverty Report, ¶ 48 (emphasis added).

¹⁶¹ AI Nigeria Report, at 37.

¹⁶² *Id.*

¹⁶³ *Death Penalty and Poverty Factsheet*, WORLD COALITION AGAINST THE DEATH PENALTY, at 4, https://worldcoalition.org/wp-content/uploads/2020/09/EN_WD2017_FactSheet-1.pdf (last visited Aug. 8, 2024).

education.¹⁶⁴ Additionally, more than two-thirds had only completed primary education, with nearly half not advancing beyond class 4.¹⁶⁵ Less than 2% had attended university.¹⁶⁶ Given these factors, it is unsurprising that the Kenya National Commission on Human Rights cited poverty and poor education among the primary factors contributing to the lack of fair trials for many death row inmates.¹⁶⁷

86. *Fourth*, once an individual has been identified as a suspect, poverty continues to impact their case because a reasonably effective legal defense often requires significant resources. Impoverished individuals thus disproportionately face unfair treatment throughout the trial process, including in death penalty trials, due to their lack of resources. This is especially true in those countries where the right to counsel is not guaranteed to all capital defendants, either under the law or in practice. For instance, Nigeria's Legal Aid Act provides (i) that courts "may" provide legal aid in serious criminal cases but (ii) legal aid does not extend to armed robbery, a mandatory death penalty offense.¹⁶⁸ And as discussed in further detail above in ¶¶ 58-61, *supra*, legal aid programs in many States that continue to impose the death penalty are overburdened and underfunded, making it extremely challenging for indigent prisoners subject to a potential death penalty to find lawyers to represent them effectively or at all.¹⁶⁹

¹⁶⁴ *Living With a Death Sentence in Kenya: Prisoners' Experiences of Crime, Punishment and Death Row*, The Death Penalty Project, at 26, 29 (2022), <https://deathpenaltyproject.org/wp-content/uploads/2022/12/Living-with-a-Death-Sentence-in-Kenya-Prisoners-Experiences-of-Crime-Punishment-and-Death-Row.pdf>.

¹⁶⁵ *Id.* at 26.

¹⁶⁶ *Id.*

¹⁶⁷ Report of the Office of the United Nations High Commissioner for Human Rights, *supra* n.106 at ¶ 17.

¹⁶⁸ *Justice Denied: A Global Study of Wrongful Death Convictions*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, at 44 (Jan. 2018), <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Justice-Denied-A-Global-Study-of-Wrongful-Death-Row-Convictions.pdf>.

¹⁶⁹ Report of the Office of the United Nations High Commissioner for Human Rights, *Question of the death penalty*, A/HRC/51/7, U.N. HUM. RTS. OFFICE HIGH COMM'R, ¶¶ 37-40 (July 26, 2022), <https://worldcoalition.org/document/a-hrc-51-7-advance-edited-version-question-of-the-death-penalty/> (citing the Joint Declaration by Secretary General and EU High Representative on the World and European Day Against the Death Penalty, <https://www.coe.int/en/web/portal/-/world-day-against-the-death-penalty-10-october-2020-joint-declaration-by-eu-high-representative-and-council-of-europe-secretary-general>); see also General Comment No. 36 on Article 6: Right to Life, CCPR/C/GC/36, U.N. HUM. RTS. COMM., ¶ 41

87. Further, many prisoners detained in countries that impose the death penalty, including many indigent prisoners, have to wait years for their trials to be concluded or even scheduled due to, among other things, an overwhelmed judicial system that lacks resources and the low number of state-appointed lawyers.¹⁷⁰ These delays not only result in potentially innocent individuals being forced to spend years in prison pre-trial, but may also lead to degradation in the evidence or loss of witnesses. These issues “have a disproportionate impact on the poor, for whom a long process is not only a denial of justice but also unaffordable and may aggravate their situation.”¹⁷¹ In addition, cases of impoverished individuals “are underprioritized owing to biased preferential treatment of the wealthy or lack of sensitivity or understanding of the impact of the delay” on them.¹⁷²
88. Most inmates in Nigeria, for example, wait at least two, and sometimes more than seven, years for their trials to be concluded.¹⁷³ Approximately four out of ten men on death row in Nigeria waited for more than five years to be tried, while many waited six, seven or eight years.¹⁷⁴ One man in Nigeria spent 16 years in prison before he was sentenced to death.¹⁷⁵
89. *Fifth*, the particular difficulties faced by poor or indigent defendants in death penalty cases do not end at the trial court. Although the right to appeal is guaranteed by both the African Charter and the ICCPR,¹⁷⁶ poor or indigent defendants may be effectively prevented from exercising their appellate rights due to their lack of

(Sept. 3, 2019), <https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life#:~:text=The%20right%20to%20life%20is,the%20life%20of%20the%20n>

¹⁷⁰ See U.N. Poverty Report, ¶ 68.

¹⁷¹ U.N. Poverty Report, ¶ 69.

¹⁷² *Id.*

¹⁷³ AI Nigeria Report, at 15.

¹⁷⁴ AI Nigeria Report, at 15.

¹⁷⁵ *Id.* Such long delays are also common in the appellate process in Nigeria, as the average period spent on death row is between 10 to 15 years. *Id.* at 25.

¹⁷⁶ African Charter on Human and People's Rights, Article 7(1)(a) (providing for an individuals' right to have their case heard, including the “right to an appeal to competent national organs against acts of violating [their] fundamental rights”); International Covenant on Civil and Political Rights, U.N.T.S. 171, vol. 999, art. 14(5) (Dec. 19, 1966) (providing that “[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”).

resources.¹⁷⁷ The Amnesty International Nigeria Report found, for example, that “[f]our out of 10 prisoners on death row never filed an appeal, either because their right to appeal was denied or because they did not have the money for court fees and a lawyer.”¹⁷⁸ In Malawi, although all defendants charged with murder are able to obtain free legal assistance at the trial court level, “legal representation is not routinely provided for prisoners who wish to appeal their death sentences.”¹⁷⁹ A study conducted in 2014 estimated that only half of the 200 prisoners sentenced to death in Malawi between 1994 and 2007 could exercise their right to appeal their death sentences.¹⁸⁰ Lack of funds to pursue the lengthy appeals process means indigent death row inmates are disproportionately unable to exercise their right to appeal and therefore disproportionately remain on death row.¹⁸¹

90. Each of these factors means those living in poverty are often denied access to the full range of resources necessary for the fair administration of justice. In their absence, individuals living in poverty face a higher likelihood of false convictions.¹⁸² When the death penalty is a potential sentence that can be imposed in such circumstances, the result is a violation of the protections of due process and the prohibition of the arbitrary deprivation of life that is guaranteed in Article 4 of the Charter.

5. Language

91. Language barriers also play a role in the disparate application of the death penalty. In particular, foreign nationals and ethnic minorities who speak different languages than the majority group in a given country may not even be able to understand the language in which their criminal proceeding is conducted, limiting their ability to

¹⁷⁷ See S. L. Babcock, *An Unfair Fight for Justice: Legal Representation of Persons Facing the Death Penalty*, in *COMPARATIVE CAPITAL PUNISHMENT* (Ed. Carol S. Steiker and Jordan M. Steiker), at 99 (2019) (noting that throughout sub-Saharan Africa, prisoners sentenced to death must file appeals *pro se* or forfeit their right to appeal).

¹⁷⁸ AI Nigeria Report, at 21.

¹⁷⁹ THE ADVOCATES FOR HUMAN RIGHTS Report on Malawi, at 11.

¹⁸⁰ *Id.*

¹⁸¹ See AI Nigeria Report, at 21 (finding that fear of an exceedingly delayed or prolonged appeals process also keeps some Nigerian death row prisoners from applying for appeal).

¹⁸² See AI Nigeria Report, at 15 *et seq.*

mount an effective defense. Beyond the impact on the accused's ability to understand the proceedings and mount their defense, foreign nationals and ethnic minorities will also often be unfamiliar with the legal process and procedures, have limited awareness of their rights, face financial constraints, and lack a supportive social network.¹⁸³ These concerns are especially important in Africa, because it is "home to approximately one-third of the world's languages."¹⁸⁴ In addition, Africa's legacy of colonialism has caused the borders of countries to be drawn in a manner that does not reflect the cultural and social characteristics of their people, often partitioning ethnic groups across several countries and resulting in ethnic and language minority groups being subject to criminal procedures in ethnic majority systems that take place in a language that is not their own.¹⁸⁵

92. In response to this issue, this Court has previously held that where the accused cannot understand or speak the language being used in a criminal proceeding, he or she has the right under Article 7(1)(c) of the African Charter to be assisted by an interpreter speaking a language he or she understands.¹⁸⁶ Judge Bensaoula further emphasized the critical nature of the accused's right to understand the proceedings in her separate opinion in *Zabron*, stating that "[t]here is no doubt that the right to a fair trial includes 'the right to participate in the hearing', which requires

¹⁸³ U.N. Joint Statement, *supra* n.107. Additionally, these populations are at heightened risk of facing the death penalty for certain categories of offenses, such as drug offenses and violation of counter-terrorism laws. See Report of the Office of the United Nations High Commissioner for Human Rights, *Question of the death penalty*, A/HRC/51/7, U.N. Hum. Rts. Office High Comm'r, ¶¶ 30–31 (July 26, 2022), <https://worldcoalition.org/document/a-hrc-51-7-advance-edited-version-question-of-the-death-penalty/>.

¹⁸⁴ *Introduction to African Languages*, THE AFRICAN LANGUAGE PROGRAM AT HARVARD, HARVARD L. SCH., <https://alp.fas.harvard.edu/introduction-african-languages#:~:text=With%20anywhere%20between%201000%20and,more%20than%20one%20million%20speakers> (last visited Aug. 8, 2024).

¹⁸⁵ See Tasew Gashaw, *Colonial Borders in Africa: Improper Design and its Impact on African Borderland Communities*, WILSON CENTER (Nov. 17, 2017), <https://www.wilsoncenter.org/blog-post/colonial-borders-in-africa-improper-design-and-its-impact-on-african-borderland-communities>.

¹⁸⁶ See *Guehi v. United Republic of Tanzania*, No. 001/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 66–79 (Dec. 7, 2018); *Nzigiymana Zabron v. United Republic of Tanzania*, No. 051/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 102–105 (June 4, 2024); *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 84 (Sept. 3, 2024) ("It is, therefore, evident from a joint reading of [Article 7(1)(c) of the Charter and Article 14(3)(a) of the ICCPR] that every accused person has the right to an interpreter if they are unable to understand the language in which the proceedings are being conducted.").

that the accused be able to understand the proceedings and to discuss with his lawyer of any issues he deems useful to raise for the purpose of his defense. The assistance of an interpreter is therefore so essential that it cannot be relegated to the relationship between the accused and his lawyer, but must be extended to the relationship between the accused and the trial judges.”¹⁸⁷ Similarly, in his declaration in *Augustino*, Judge Rafaa Ben Achour stated that “the lack of interpretation services” in that case were of such gravity that they “could have changed its course”, and therefore the Court should have considered the release of the individuals in the case or ordered the reopening of the trial.¹⁸⁸ But, as discussed further herein, the reality is that the accused’s right to an interpreter is often effectively ignored.

93. The linguistic barriers faced by ethnic minorities are illustrated by a country such as Botswana, which is home to more than 30 ethnic groups.¹⁸⁹ While eight of these ethnic groups have the national language of Setswana as their first language,¹⁹⁰ the official language used in most court proceedings is English.¹⁹¹ This imposes a high burden on defendants in criminal cases, who must rely on translations and interpreters, and the defendants’ inability to understand the language may negatively impact the outcome of their case.
94. As one example, in 1999, two indigenous men of the Basarwa/San minority ethnic group were found guilty of murder and sentenced to death. Not only were the defendants poor and illiterate, but they also spoke neither Setswana nor English. The Basarwa defendants spoke only Secherechere, a dialect of Sesarwa.¹⁹²

¹⁸⁷ See *Nzigiyimana Zabron v. United Republic of Tanzania*, No. 051/2016, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 20 (June 4, 2024) (separate opinion by Judge Chafika Bensaoula).

¹⁸⁸ *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 7–8 (Sept. 3, 2024) (declaration of Judge Rafaa Ben Achour).

¹⁸⁹ Mogwe, *supra* n.112 at 177.

¹⁹⁰ *Id.*

¹⁹¹ Fewdays Miyanda, *Problems Faced by Court Interpreters in Botswana*, at 44 (2019), https://journals.co.za/doi/pdf/10.10520/AJA18167659_29#:~:text=Despite%20the%20fact%20that%20the,to%20conduct%20their%20legal%20affairs.

¹⁹² Mogwe, *supra* n.112 at 177.

95. On appeal, the defendants argued that they had not understood the confession documents they had supposedly verified, and communicated to the judge in a letter written on their behalf that they could not even understand the court documents, which had been translated back and forth from Sesarwa to Setswana to English.¹⁹³ Despite this, no new public lawyer was appointed, nor was an official translator provided.¹⁹⁴
96. A similar case was reported in Cameroon in 2021.¹⁹⁵ The case, in which 4 men were sentenced to death by a military court, was marred by linguistic barriers.¹⁹⁶ The trial was conducted in French and translated into English despite the fact that most defendants only fully understood pidgin English.¹⁹⁷
97. Further, in *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, decided in September of this year, this Court found that Tanzania “violated Article 7(1)(c) of the Charter, as read together with Article 14(3)(a) of the ICCPR, with regard to the alleged failure to provide the Applicants with interpretation services during their arrest interrogation, detention and trial.”¹⁹⁸ In this case, two individuals were subject to interrogation and a trial conducted in Kiswahili, a language which they did not fully understand.¹⁹⁹ This Court accordingly found that the individuals were therefore “unable to participate meaningfully in those proceedings.”²⁰⁰
98. To impose the death penalty on an individual who cannot understand and participate in the proceedings because of language (or ethnic) barriers plainly

¹⁹³ *Id.*

¹⁹⁴ *Id.* The free assistance of an interpreter is required under article 14(3)(f) of the ICCPR. International Covenant on Civil and Political Rights, U.N.T.S. 171, vol. 999, art. 14(3)(f) (Dec. 19, 1966).

¹⁹⁵ Cameroon is an abolitionist state in practice. *Republic of Cameroon (Cameroon)*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (March 26, 2012), <https://deathpenaltyworldwide.org/database/#/results/country?id=13>.

¹⁹⁶ *Death Sentences and Executions in 2021*, AMNESTY INT’L, at 54, <https://www.amnesty.org/en/documents/act50/5418/2022/en/> (last visited Aug. 2, 2024).

¹⁹⁷ *Id.*

¹⁹⁸ *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 88 (Sept. 3, 2024).

¹⁹⁹ *Id.* ¶ 86.

²⁰⁰ *Id.* ¶ 87.

constitutes a violation of the Charter's protection of due process and its prohibition of the arbitrary deprivation of life.

6. Political Groups

99. The death penalty is also used to target disfavored political groups and activists, a clear arbitrary application of the death penalty based on differences in political views amongst individuals.
100. Political activist groups that represent a minority or those that criticize or oppose the dominant political group are likely targets of state repression when they come into contact with the criminal justice system. Such repression may include, for instance, torture, inadequate provision of legal representation, lack of access to evidence, and limited transparency in criminal proceedings, each of which contribute to biased and unfair outcomes, including with respect to death sentences.²⁰¹ More specifically, because certain states have justified the retention of the death penalty on terrorism grounds²⁰² and because terrorism laws can be, and often are, vague and indefinite, and also often limit defendants' fair trial rights²⁰³, the death penalty may be applied arbitrarily under the guise of "anti-terrorism" based on the political beliefs of the defendant.²⁰⁴
101. This concern is demonstrated in Egypt.²⁰⁵ In Egypt, civilians have been tried for terrorism-related offenses before military courts since 1992, including when they

²⁰¹ See, e.g., Ruth Michaelson, & Adham Youssef, *Egypt Sentences 75 Muslim Brotherhood Supporters to Death*, THE GUARDIAN (Sept. 8, 2018), <https://www.theguardian.com/world/2018/sep/08/egypt-sentences-75-to-death-in-rabaa-massacre-mass-trial>; *Nigeria: The Ogoni Trials and Detentions*, AMNESTY INT'L (Sept. 14, 1995), <https://www.amnesty.org/en/documents/afr44/020/1995/en/>.

²⁰² States that maintain the death penalty for terrorism-related offenses include: Algeria, Cameroon, Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Gambia, Liberia, Libya, Mali, Mauritania, Morocco, Niger, Nigeria, Somalia, South Sudan, Sudan, Tanzania, Tunisia, Uganda, and Zimbabwe. See *Death Penalty*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, <https://deathpenaltyworldwide.org/> (last visited Aug. 2, 2024).

²⁰³ See Martin Scheinin (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism), Rep. on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, U.N. Doc. A/63/223, ¶ 13 (Aug. 6, 2008).

²⁰⁴ See *The Death Penalty, Terrorism and International Law*, PENAL REFORM INT'L (2014), <https://www.penalreform.org/resource/death-penalty-terrorism-international-law/>.

²⁰⁵ The Egyptian Commission for Rights and Freedoms has estimated that, since 2011, more than 57 people have been sentenced to death for crimes associated with terrorism. See *Trials Data*, EGYPT DEATH PENALTY INDEX, <https://egyptdeathpenaltyindex.com/index/trials/> (last visited May 20, 2024).

face charges that could incur the death penalty.²⁰⁶ Such military courts disregard fundamental fair trial guarantees, such as the right to a public trial before an independent and impartial court.²⁰⁷ Furthermore, beginning in 2017, jurisdiction over certain political and terrorism-related crimes, including those which may incur the death penalty, was granted to Emergency State Security Courts, and the use of such courts was escalated in 2021.²⁰⁸ And in 2019, Egypt's parliament approved constitutional amendments that expanded the role of military courts in prosecuting civilians.²⁰⁹ Unlike regular courts, decisions of Emergency State Security Courts are "not subject to appeal"²¹⁰ and reports indicate that they also do not respect basic fair trial guarantees, including the use of confessions obtained under duress or torture.²¹¹ These courts have also been reported as being used to prosecute political dissidents.²¹² Although the state of emergency ended in October 2021, cases initiated before President al-Sisi ended the state of emergency are still subject to the Emergency State Security Courts' jurisdiction, including cases against the Muslim Brotherhood and supporters of the former Egyptian president Mohamed Morsi.²¹³

102. Using the death penalty to target disfavored political groups is arbitrary in itself, because the death sentence is used as a political weapon and not as a measure

²⁰⁶ See *Justice subverted: trials of civilians before military courts*, AMNESTY INT'L, at 1–2 (Aug. 2, 2007), <https://www.amnesty.org/en/documents/mde12/022/2007/en/>.

²⁰⁷ See *id.* at 2–5 (noting that the fair trial guarantees that are violated include the right to a public trial before an independent and impartial court, the right to prompt access to a lawyer, the right to prepare an adequate defense, and the right to appeal).

²⁰⁸ See *Egypt: President Declares State of Emergency for Health and Security Conditions*, LIBR. OF CONG. (May 6, 2021), <https://www.loc.gov/item/global-legal-monitor/2021-05-06/egypt-president-declares-state-of-emergency-for-health-and-security-conditions/>.

²⁰⁹ See *A Crisis By Design: The Systematic Violation of Human Rights Abuses in Egypt*, CAIRO INST. FOR HUM. RTS. STUD., ¶ 33 (Jan. 2023), <https://egyptianfront.org/wp-content/uploads/2023/01/Egypt-UPR-Crisis-by-Design-1.pdf>.

²¹⁰ *World Report 2022: Events in 2021*, HUMAN RIGHTS WATCH, at 215 (2022), https://www.hrw.org/sites/default/files/media_2022/01/World%20Report%202022%20web%20pdf_0.pdf.

²¹¹ See "We Do Unreasonable Things Here." *Torture and National Security in al-Sisi's Egypt*, HUMAN RIGHTS WATCH (Sept. 5, 2017), <https://www.hrw.org/report/2017/09/06/we-do-unreasonable-things-here/torture-and-national-security-al-sisis-egypt>. See also Amir Ahmed, *Egypt Using Death Sentences to 'Settle Scores,' Lawyer Says*, CNN (Jan. 3, 2018), <https://www.cnn.com/2018/01/03/middleeast/egypt-military-courts-executions/index.html>.

²¹² See EGYPTIAN FRONT FOR HUMAN RIGHTS, *supra* n.79; Ibrahim, *supra* n.83.

²¹³ See *Egypt: Stop Trials by Emergency Courts*, AMNESTY INT'L (Oct. 31, 2021), <https://www.amnesty.org/en/latest/news/2021/10/egypt-stop-trials-by-emergency-courts/>.

of criminal justice. This impermissible result is exacerbated by the fact that such proceedings are often carried out without anything approaching adequate due process.

* * *

103. In sum, for a multitude of reasons, the death penalty would be impermissible under Article 4 even if the scope and meaning of this Article were limited to the prohibition of arbitrary deprivations of life.

C. *The imposition and implementation of the death penalty violates Article 5's prohibition of torture and cruel, inhuman or degrading punishment and treatment.*

104. Article 5 provides: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited." Article 5 thus specifically prohibits, among other things, cruel, inhuman or degrading punishment and treatment ("CIDPT") and torture.
105. This Court has emphasized that "Article 5 has no limitation provisions and thus the prohibition of indignity manifested in cruel, inhuman and degrading treatment is absolute" and that "the prohibition in Article 5 provides the widest possible protection against both physical and mental abuse."²¹⁴ In light of the wide scope of protection offered by Article 5, this Court also has explained that it should "remain open-minded in assessing novel allegations of violations of the Charter."²¹⁵ This perspective and approach comports with the absolute and non-derogable

²¹⁴ *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa*, No. 001/2018, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 77 (Dec. 4, 2020). See also *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 152 (Sept. 3, 2024) ("...the prohibition of cruel, inhuman and degrading treatment under Article 5 of the Charter is absolute.").

²¹⁵ *Id.* ¶ 78.

prohibition on torture and CIDPT under international law.²¹⁶ As discussed below, the death penalty violates Article 5's unequivocal ban on torture and CIDPT. From the moment an individual is confronted with the threat of the State taking his or her life, to the period during which an individual is held on death row with his or her impending execution ever-present, to the moment the State actually carries out the killing of a human, there is no way to extinguish a human life that does not entail CIDPT or torture. For all these reasons, we respectfully submit that this Court should find that the death penalty, the most brutal and inhumane of punishments, cannot be reconciled with Article 5.

106. The "Death Row Phenomenon" that this Court, along with other human rights bodies and authorities around the world, has recognized as a violation of Article 5 begins the moment an individual is confronted with the threat of the State taking his life and extends throughout the period during which an individual is held on death row with his impending execution ever-present.
107. The imposition of the death penalty also imposes inhumane suffering on female death row prisoners and, in some cases, their children, as well as on the family members of those sentenced to death, as they face the constant nightmare of the State seeking to end the life of their loved one and, when the death penalty is ultimately implemented, they endure the horror of experiencing the State's killing of their loved one. For these reasons, the imposition and implementation of the death penalty effectively imposes CIDPT and torture on women, children, and the family members of the person who is subjected to the death penalty.
108. In addition, when the death penalty is actually imposed, the State's act of killing a person itself should be considered CIDPT or torture, and therefore also a *per se* violation of Article 5. And, finally, the methods of execution currently in use or

²¹⁶ Both the International Covenant on Civil and Political Rights (the "ICCPR") and the Universal Declaration of Human Rights (the "UDHR") provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment. See International Covenant on Civil and Political Rights, U.N.T.S. 171, vol. 999, art. 7 (Dec. 19, 1966); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 5 (Dec. 10, 1948).

available to implement a death sentence each constitute CIDPT and torture. There simply is no way to kill a human being that does not entail CIDPT and torture.

109. For these reasons, we respectfully submit that this Court should hold that laws and/or regulations permitting the imposition and implementation of the death penalty violate Article 5 of the African Charter, and that all AU Member States are obligated to abolish any such laws and/or regulations.

i. The "Death Row Phenomenon" and Other Unavoidable Consequences of Implementing the Death Penalty Constitute Cruel, Inhuman and Degrading Treatment or Punishment or Torture

110. The fact that the death penalty inevitably produces the psychological horror and suffering known as the Death Row Phenomenon establishes a clear violation of Article 5. Additional grounds for violations of Article 5 are created by the special problems associated with sentencing women and children to death and holding them on death row, and by the suffering imposed on the families of those sentenced to death.

1. *The Death Row Phenomenon*

111. The "Death Row Phenomenon" is an unavoidable consequence of capital sentences resulting from the severe mental trauma of the death penalty that occurs at every point along the process: at the outset, when the State confronts an individual with the prospect of his or her execution by prosecuting him or her in a case in which the State seeks a death sentence; at trial, when the death sentence is delivered; subsequently, when the death sentence is confirmed on appeal; and throughout the entire period when a person is held on death row knowing that he or she is subject to being deliberately killed by the State. This Court, as well as other African and international courts, has concluded that the Death Row Phenomenon constitutes CIDPT and violates Article 5 of the African Charter and corresponding provisions of other human rights instruments. In addition, human rights experts have observed that the effects of the Death Row Phenomenon are so severe as to constitute torture.

112. The Death Row Phenomenon is widely recognized. As described by the UN Special Rapporteur on torture and cruel, inhuman or degrading treatment (the “UN Special Rapporteur on Torture”), the phenomenon encompasses a range of extreme suffering, including the “lengthy and anxiety ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held,” which produce severe mental trauma and physical suffering.²¹⁷
113. This Court, in *Marthine Christian Msuguri v. United Republic of Tanzania* and the recently decided *Nzigiyimana Zabron v. United Republic of Tanzania* and *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, has found that “death row has the inherent potential to cause an adverse impact on an individual’s psychological state due to the fact that the person involved may be executed at any time.”²¹⁸ In these cases, this Court found a violation of Article 5 based on the Death Row Phenomenon, finding that it caused such extreme anxiety and psychological anguish as to amount to CIDPT.²¹⁹
114. In its cases to date, this Court has focused on circumstances involving an extended period on death row. Specifically, this Court concluded in *Zabron* “that a delay of more than three (3) years between the confirmation of a prisoner’s death sentence on appeal and execution constitutes cruel, inhuman or degrading treatment or punishment” and therefore found that *Zabron*’s eight-year period on death row “whereby [*Zabron*] had to endure the conditions on death row and the anguish and tension of living with the ever-present fear of being executed” after being

²¹⁷ *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/67/279, U.N. General Assembly, ¶ 42 (Aug. 9, 2012).

²¹⁸ *Marthine Christian Msuguri v. United Republic of Tanzania*, No. 052/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 112 (Dec. 1, 2022); *Nzigiyimana Zabron v. United Republic of Tanzania*, No. 051/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 156 (June 4, 2024); *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 166 (Sept. 3, 2024).

²¹⁹ *Marthine Christian Msuguri v. United Republic of Tanzania*, No. 052/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 114, 116 (Dec. 1, 2022); *Nzigiyimana Zabron v. United Republic of Tanzania*, No. 051/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 158 (June 4, 2024); *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 168 (Sept. 3, 2024).

sentenced to death constituted CIDPT and violated Article 5 of the Charter. And, in *Augustino*, this Court reiterated that a delay of more than three years between the confirmation of a prisoner's death penalty on appeal and execution constitutes CIDPT in holding that Augustino's more than eight years on death row constituted CIDPT in violation of Article 5 of the Charter.²²⁰

115. While *Zabron* and *Augustino* involved an extended period on death row, the "anguish and tension" caused by the "fear of being executed" begins from the moment the State threatens an individual with a sentence of death, continues throughout the process, and also encompasses the period when an individual is held on death row, including while pursuing appeals and challenges to his or her conviction and sentence.
116. Other human rights courts have recognized these truths. In *Al-Saadoon & Mufdhi v. The United Kingdom*, the European Court of Human Rights held that this suffering, which the court also held constitutes inhuman treatment, begins even before trial and sentencing, and extends to the moment when an individual is placed in the custody of a State that threatens to seek a death sentence against him.²²¹
117. The issue in *Al-Saadoon & Mufdhi* was whether Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment," would be violated if the United Kingdom transferred individuals into the custody of Iraq, where they may face a criminal prosecution seeking the death penalty.²²² Thus, the case did not involve being held on death row for an extended period or even being sentenced to death, but only the prospect of being subject to a prosecution in which the State could seek the death penalty.

²²⁰ *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 166–69 (Sept. 3, 2024).

²²¹ See generally *Al-Saadoon & Mufdhi v. The United Kingdom*, No. 61498/08, Judgment, Eur. Ct. H.R. (Apr. 10, 2010).

²²² See *Al-Saadoon & Mufdhi v. The United Kingdom*, No. 61498/08, Judgment, Eur. Ct. H.R., at 45 (Apr. 10, 2010).

The European Court of Human Rights concluded that this in itself would be a violation of Article 3's prohibition of torture and inhuman or degrading treatment or punishment.²²³

118. Specifically, the European Court of Human Rights found that the “foreknowledge of death at the hands of the State must inevitably give rise to intense psychological suffering.”²²⁴ The court then noted, with respect to the prohibition of CIDPT and torture, that “inhuman” treatment includes “premeditated” actions “applied for hours at a stretch” that cause “intense physical or mental suffering” and that “degrading” treatment includes treatment that “arouse[s] in the victims feelings of fear, anguish and inferiority capable of humiliating or debasing them.”²²⁵ Thus, the court reiterated that “expulsion by a Contracting State may give rise to” a violation of this prohibition “where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to” such treatment.²²⁶
119. Accordingly, the European Court of Human Rights held that the “intense psychological suffering” of being “subjected to a well-founded fear of execution” began the moment the Iraqi criminal courts accepted jurisdiction over the applicants’ cases to stand trial for crimes for which the death penalty was available as a possible sentence, that such suffering intensified when the United Kingdom transferred the applicants into the custody of Iraqi authorities, and that such “well-founded fear of being executed...must have given rise to a significant degree of mental suffering” which “constituted inhuman treatment within the meaning of Article 3.”²²⁷ Therefore, by transferring the prisoners into the custody of Iraqi authorities, the court held, the United Kingdom breached its obligations under Article 3 of the Convention for the Protection of Human Rights and Fundamental

²²³ *Al-Saadoon & Mufdhi v. The United Kingdom*, No. 61498/08, Judgement, Eur. Ct. H.R., ¶ 144 (Apr. 10, 2010).

²²⁴ *Id.* ¶ 115.

²²⁵ *Id.* ¶ 121.

²²⁶ *Id.* ¶ 123.

²²⁷ See *id.* ¶¶ 133–37.

Freedoms, due to the “substantial grounds for believing that the applicants would face a real risk of being sentenced to death and executed.”²²⁸

120. In its decision years earlier in *Soering v. United Kingdom*, the European Court of Human Rights concluded that, to the extent the length of time that a person is held under a death sentence is significant, the calculation should include the period after the death sentence is imposed and while appeals are being pursued. In other words, the period when appeals are pending should not be excluded. The court explained that even though the length of time awaiting death between sentencing and the conclusion of any appellate process is “in a sense largely of the prisoner’s own making”, “the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever present shadow of death.”²²⁹ There, the court found that extraditing the petitioner *Soering* to the United States—where he would be at risk of being put on death row and suffering from the Death Row Phenomenon as a result of the foregoing—would violate the European Convention on Human Rights’ prohibition of torture and CIDPT.²³⁰ Thus, to the extent this Court chooses to consider the length of time that a person is subject to a death sentence, that period should at least include the period when an appeal is being pursued, as the European Court observed in *Soering*. But in fact, a violation of Article 5 should not depend on the length of time that an individual spends under the threat of a death sentence. Rather, as the European Court of Human Rights concluded in *Al-Saadoon & Mufdhi*, a violation of the prohibition against torture and inhuman or degrading treatment or punishment begins from the moment an individual is confronted with the horror of the State seeking to impose a death sentence on him or her.

²²⁸ See *id.* ¶¶ 143–44.

²²⁹ *Soering v. United Kingdom*, No. 14038/88, Judgement, Eur. Ct. H.R., ¶ 106 (July 7, 1989).

²³⁰ *Id.* ¶ 111.

121. Domestic courts in Africa, in addition to this Court, have likewise noted the reality of the Death Row Phenomenon and its classification as CIDPT.²³¹ The Supreme Court of Zimbabwe ruled in *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General* that “[f]rom the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanising environment of near hopelessness” and that a prisoner “begins to suffer” the Death Row Phenomenon upon the “imposition of the death sentence.”²³² This finding that those sentenced to death begin to suffer the Death Row Phenomenon as of the moment of their sentencing, not just when the appeals process has been exhausted, comports with common sense. The UN Special Rapporteur on Torture’s definition of the Death Row Phenomenon as an “anxiety ridden wait for uncertain outcomes, isolation and drastically reduced human contact” applies from the moment of sentencing, at which point the lengthy wait on death row begins, with the possibility of death looming as one such uncertain outcome.

²³¹ See *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General*, Judgement, Supreme Court of Zimbabwe, (4) SA 239 (ZS), (June 24, 1993) (finding that being held for between four to six years under sentence of death, aggravated by the abhorrent conditions on death row, constituted inhuman or degrading punishment, even where the original sentence had been lawfully imposed). The Supreme Court of Zimbabwe noted that “[t]here is widespread judicial and academic acceptance of what is termed the ‘death row phenomenon’. Much has been said and written by jurists, penologists and psychiatrists about the mental suffering endured by prisoners who have been sentenced to death. Confinement under sentence of death has been described as exquisite psychological torture, wherein many inmates suffer obvious deterioration and severe personality distortions.” *Id.* at 3.

²³² *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General*, Supreme Court of Zimbabwe, (4) SA 239 (ZS), at 3 (June 24, 1993). The Zimbabwe Supreme Court additionally included a closing that emphasized the importance of upholding the prohibition against torture and CIDPT with respect to the death penalty, stating:

“Because retribution has no place in the scheme of civilised jurisprudence, one cannot turn a deaf ear to the plea made for the enforcement of constitutional rights. Humaneness and dignity of the individual are the hallmarks of civilised laws. Justice must be done dispassionately and in accordance with constitutional mandates. The question is not whether the Court condones the evils committed by the four condemned prisoners, for certainly it does not. It is whether the acute mental suffering and brooding horror of being hanged which has haunted them in their condemned cells over the long lapse of time since the passing of sentence of death is consistent with the guarantee against inhuman or degrading punishment or treatment. For, like art 21 of the Constitution of India, s 15(1) stands as sentinel over human misery, degradation and oppression. Its voice is that of justice and fairness. It can never be silenced on the ground that the time to heed to its dictates ended with the passing of the death penalty. It echoes through all stages - the trial, the sentence, the incarceration on death row and, finally, the execution.”

Id. at 28.

122. Other domestic courts in Africa have similarly acknowledged the reality of the Death Row Phenomenon and the inherent suffering it causes. Multiple members of the Constitutional Court of South Africa noted in *S v. Makwanyane and Another* the impact of the Death Row Phenomenon upon those who are forced to experience it.²³³ The Supreme Court of Uganda in *Attorney General v. Susan Kigula and 417 others* also noted the severity of the Death Row Phenomenon, and suggested that undue delays could amount to a double punishment. The court held that “while a person exercises his rights under the law to exhaust all avenues under the law before he is executed, he at the same time [may] not [be] unduly kept in prison serving a sentence that he was not sentenced to.”²³⁴ The court concluded by “urg[ing] that the Legislature should reopen debate on the desirability of the death penalty in [Uganda’s] Constitution, particularly in light of findings that for many years no death sentences have been executed yet the individuals concerned continue to be incarcerated on death row without knowing whether they were pardoned, had their sentences remitted, or are to be executed.”²³⁵
123. The effects of the Death Row Phenomenon are experienced not only by those sentenced to death in AU Member States that have carried out executions in recent years, but also by death row prisoners in abolitionist *de facto* or retentionist AU Member States that continue to impose the death penalty on large numbers of individuals, even without carrying out executions. As acknowledged by this Court in *Msuguri, Zabron, and Augustino*, part of what makes the Death Row Phenomenon so cruel, rising to the level of CIDPT, is the death row prisoner’s

²³³ See *The State v. T. Makwanyane and M. Mchunu*, (16) HRLJ 154 (CC) (S. Afr.), ¶¶ 55–56 (June 6, 1995) (Justice Chaskalson noting the difficulty of designing a system that avoids both arbitrariness and the Death Row Phenomenon, and that extended periods on death row have been characterised as cruel and degrading); ¶ 196 (Justice Kentridge noting that the Death Row Phenomenon, and the “mental agony of the criminal, in its alternation of fear, hope and despair must be present even when the time between sentence and execution is measured in months or weeks rather than years.”); ¶ 234 (Justice Langa noting that the Death Row Phenomenon aggravates the cruel, inhuman and degrading nature of the death penalty); ¶¶ 249–50 (Justice Madala discussing the impact of the death row phenomenon).

²³⁴ *Attorney General v. Susan Kigula and 417 Others*, Constitutional Appeal No. 3 of 2006, Judgement, Supreme Court of Uganda, at 50 (Jan. 21, 2009).

²³⁵ *Id.* at 63.

lack of knowledge as to when they may be executed.²³⁶ This cruel uncertainty persists regardless of whether or not the State which has sentenced a person to death has carried out executions in recent years, and is a serious issue in those States which continue to place large numbers of individuals on death row even without carrying out executions.

124. Nigeria, for example, held more than 2,000 people on death row as of the end of 2018, but has not carried out executions since 2016.²³⁷ Executions in Nigeria are only carried out once state governors sign death warrants, the timing of which can be highly unpredictable.²³⁸ Some prisoners in Nigeria have been held on death row, under the shadow of the Death Row Phenomenon, for more than 30 years, with the average period spent on death row being between 10 and 15 years, leading to diagnoses with “various ailments, common among which is mental disorder.”²³⁹ Similarly, in Tanzania, although the last known execution took place in 1994 (and therefore Tanzania is considered abolitionist *de facto*), there were at least 500 people on death row as of the end of 2018.²⁴⁰ Other abolitionist *de facto* countries also continue to issue death sentences, forcing death row prisoners to suffer for extended periods of time under threat of death.²⁴¹ Further exacerbating

²³⁶ *Marthine Christian Msuguri v. United Republic of Tanzania*, No. 052/2016, Judgement, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 112 (Dec. 1, 2022); *Nzigiyimana Zabron v. United Republic of Tanzania*, No. 051/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 156 (June 4, 2024); *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 166 (Sept. 3, 2024).

²³⁷ *Federal Republic of Nigeria (Nigeria)*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (May 23, 2019), <https://deathpenaltyworldwide.org/database/#/results/country?id=53>.

²³⁸ See Ayodeji Adeyemi, *Waiting Endlessly on Nigeria's Death Row*, AL JAZEERA (Dec. 4, 2013), <https://www.aljazeera.com/features/2013/12/4/waiting-endlessly-on-nigerias-death-row>.

²³⁹ *Id.*

²⁴⁰ *United Republic of Tanzania (Tanzania)*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (May 23, 2019), <https://deathpenaltyworldwide.org/database/#/results/country?id=77>.

²⁴¹ See, e.g., *People's Democratic Republic of Algeria (Algeria)*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (Dec. 1, 2011), <https://deathpenaltyworldwide.org/database/#/results/country?id=2> (estimating 1,000 individuals to be on death row, although the last execution was carried out in 1993); *Republic of Cameroon (Cameroon)*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (Aug. 6, 2018), <https://deathpenaltyworldwide.org/database/#/results/country?id=13> (estimating at least 220 individuals are on death row as of August 2018, although the last execution was carried out in 1997); *Republic of Ghana (Ghana)*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (May 29, 2019), <https://deathpenaltyworldwide.org/database/#/results/country?id=27> (estimating at least 172 individuals are on death row as of the end of 2018, although the last execution was carried out in 1993); *Republic of Kenya (Kenya)*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (June 5, 2019),

the trauma resulting from prolonged periods of detention on death row is the fact that prisoners on death row are often held in sections of the prison within view of the site of their execution. For example, at Zomba Central Prison in Malawi—another abolitionist *de facto* AU Member State—the courtyard traditionally reserved for use of death row inmates has the gallows at one end.²⁴²

125. Additionally, beyond CIDPT, the Death Row Phenomenon rises to the level of torture. As acknowledged by the Zimbabwe Supreme Court in *Catholic Commissioner*, “[c]onfinement under sentence of death has been described as exquisite psychological torture....”²⁴³ Further, as discussed in paragraph 140, *infra*, capital punishment necessitates the use of practices that have long been considered torture, including because capital charges and death sentences amount to no more than state-sponsored credible threats of death and because a prisoner being executed experiences the same psychological harms as a prisoner subjected to a mock execution. At a global level, experts from the UN have also determined that the Death Row Phenomenon constitutes torture.²⁴⁴ Former United Nations Special Rapporteur on Torture, Manfred Nowak, noted the connection between the death penalty and torture and CIDPT.²⁴⁵ Nowak’s successor, Juan Méndes, also explained that sentencing an individual to death causes them severe mental anguish due to the prison conditions and uncertainty as to when they will be executed.²⁴⁶ He therefore argued that “[s]tates need to re-examine their procedures under international law because the ability of [s]tates to

<https://deathpenaltyworldwide.org/database/#/results/country?id=38> (estimating 650 individuals are on death row, although the last execution was carried out in either 1986 or 1987).

²⁴² *Death-Sentenced Prisoners: Description of Prison Conditions*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, <https://deathpenaltyworldwide.org/database/#/Results/?search> (last updated Sept. 6, 2018).

²⁴³ *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General*, Supreme Court of Zimbabwe, (4) SA 239 (ZS), at 3 (June 1993).

²⁴⁴ The Inter-American Commission on Human Rights has also found that a prisoner who was held on death row for twenty years in deplorable conditions suffered such extreme mental health consequences that his time on death row “in addition to being inhuman, cruel, unusual, and infamous, constitute[d] a form of torture.” *Víctor Saldaño v. United States*, Report on the Merits (Publication), Inter-Am. Comm’n H.R., Report No. 24/17, Case 12.254, ¶ 251 (March 18, 2017).

²⁴⁵ See Nicolas Chua & FIACAT, *Death Penalty is Torture, Says Expert*, WORLD COALITION AGAINST THE DEATH PENALTY (Nov. 29, 2018), <https://worldcoalition.org/2018/11/29/death-penalty-is-torture-says-expert/>.

²⁴⁶ See Press Release, *Death penalty increasingly viewed as torture, UN Special Rapporteur finds*, U.N. Press Release (Oct. 23, 2012), <https://www.ohchr.org/en/press-releases/2012/10/death-penalty-increasingly-viewed-torture-un-special-rapporteur-finds>.

impose and carry out the death penalty is diminishing as these practices are increasingly viewed to constitute torture.”²⁴⁷ And in 2022, the U.N. Special Rapporteur on Torture and the U.N. Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions issued a statement that “it is almost impossible for [s]tates to impose capital punishment while meeting their obligations to respect the human rights of those convicted”—i.e., without torturing their prisoners or subjecting them to CIDPT—and therefore “[a]bolition of the death penalty is the only viable path.”²⁴⁸

126. In sum, as this Court acknowledged in *Msuguri*, *Zabron*, and *Augustino*, the time spent waiting with the shadow of death looming over one’s head will inevitably cause psychological suffering and torment to an extent that clearly constitutes CIDPT, and should additionally constitute torture, in violation of Article 5. As this level of suffering is unavoidable in a system that still utilizes the death penalty, capital punishment cannot be imposed without consequently sentencing the person to suffer such CIDPT or torture.

2. *Women and Children on Death Row*

127. Special consideration should be given to the deplorable conditions faced by female death row prisoners and, in some cases, their children. These conditions plainly constitute torture or CIDPT.
128. The protection of women in prison is recognized in the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the “Bangkok Rules”)²⁴⁹ and the United Nations Standard Minimum

²⁴⁷ *Id.*

²⁴⁸ Press Release, *UN experts warn of associated torture and cruel punishment*, U.N. Press Release (Oct. 10, 2022), <https://www.ohchr.org/en/press-releases/2022/10/un-experts-warn-associated-torture-and-cruel-punishment>.

²⁴⁹ *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*, adopted at the U.N. General Assembly on 21 December 2010, <https://cdn.penalreform.org/wp-content/uploads/2016/07/BangkokRules-Updated-2016-with-renumbering-SMR.pdf>.

Rules for the Treatment of Prisoners (the "Mandela Rules"),²⁵⁰ which provide specific instructions for the protection of women, including rules on separating female detainees from male detainees and direct supervision from only female staff. Despite the Bangkok Rules and the Mandela Rules, women on death row in prisons in Africa often face brutal conditions in contravention of these rules.²⁵¹ Particular difficulties are faced by women with children on death row, who are either isolated from their children while awaiting the end of their lives or else forced to raise their children on death row itself, which in both cases will have an obvious and lasting impact on both the mother's and the child's mental health.²⁵²

3. *Impact on Family Members*

129. Article 5's prohibition of CIDPT is also implicated by the severe psychological and emotional impacts suffered by the family members of those sentenced to death, which separately amount to CIDPT of such family members.
130. Various UN bodies have contemplated the impact of the imposition of a death sentence or execution of a parent on their children since 2013.²⁵³ The impact on

²⁵⁰ *United Nations Standard Minimum Rules on the Treatment of Prisons (2015 Revision) (the Nelson Mandela Rules)*, adopted by the U.N. General Assembly on 17 December 2015, <https://cdn.penalreform.org/wp-content/uploads/1957/06/ENG.pdf>.

²⁵¹ See, e.g., *Prison Conditions for Women Facing the Death Penalty, A Factsheet*, PENAL REFORM INT'L and CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, 3 (2018), <https://deathpenaltyworldwide.org/wp-content/uploads/2020/02/Prison-conditions-for-women-facing-death-penalty.pdf> (noting that in Tanzania women may be subject to predatory behavior from male guards, such as requiring sexual favors in exchange for basic necessities like food); *Judged for More Than Her Crime*, at 21–22 (discussing Malawi, where some female death row prisoners who need to urinate or defecate during the night must use a bucket in their cells, and Zambia, where water is restricted and toilets do not flush, causing severe hygiene problems, and where women must wash menstrual clothes with inadequate or no detergent, as the prison does not supply soap).

²⁵² See, e.g., *Prison Conditions for Women Facing the Death Penalty, A Factsheet*, PENAL REFORM INT'L and CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE, at 4 (2018), <https://deathpenaltyworldwide.org/wp-content/uploads/2020/02/Prison-conditions-for-women-facing-death-penalty.pdf> (noting that women on death row in Malawi rarely receive visits from family and that in Uganda there have been cases of children living with their mothers on death row); *Judged for More Than Her Crime* at 21 (discussing an instance in Sudan where a female death row prisoners was shackled to heavy chains in prison while eight months pregnant and caring for a young child).

²⁵³ See, e.g., Resolution 22/11, Panel on the human rights of children of parents sentenced to the death penalty or executed, A/HRC/RES/22/11, U.N. H.R.C (Apr. 10, 2023), <https://www.refworld.org/legal/resolution/unhrc/2013/en/100464>.

children with parents sentenced to death in Sub-Saharan Africa was specifically discussed in 2019 during the 65th session of the African Commission.²⁵⁴

131. One study conducted in South Africa, published in 1994 (prior to the death penalty's abolition in South Africa), found that family members were often impacted by a lack of understanding regarding the legal proceedings, the technical or official language used in the proceedings, and the lack of any explanation by counsel.²⁵⁵ The majority of the families studied did not know their family member was involved in any kind of illegal activity, did not believe that the death penalty was warranted, and were in shock and disbelief regarding the sentencing.²⁵⁶ Family members described that witnessing the trial in which their loved one was facing the death penalty was a source of "unbearable pain."²⁵⁷ The psychological impact also had physical health effects on individuals who witnessed their family members endure the legal process, including high blood pressure, fainting or worsening of existing illnesses.²⁵⁸
132. The impact of a death sentence continues long after the trial, leaving family members in despondency and despair.²⁵⁹ The family faces uncertainty as to when—or if—their family member will die and so live in "limbo" in which they must contemplate the death of their family member without any certainty of closure.²⁶⁰ This kind of grief, called anticipatory grief, is unlike normal grief in that it does not diminish over time.²⁶¹

²⁵⁴ Connie Numbi and Bronwyn Dudley, *Children and the death penalty in Sub-Saharan Africa: NGO Forum and the 65th ACHPR Session*, WORLD COALITION AGAINST THE DEATH PENALTY (Dec. 9, 2019), <https://worldcoalition.org/2019/12/09/children-and-the-death-penalty-in-sub-saharan-africa-ngo-forum-and-the-65th-achpr-session/> (describing a side-event hosted by FIACAT and WORLD COALITION AGAINST THE DEATH PENALTY where this issue was discussed).

²⁵⁵ C.M. De La Rey, et al., *Socio-psychological effects of the death penalty on families of prisoners on death row*, ACTA CRIMINOLOGICA, Vol. 7 No. 2, at 20, 22 (1994), https://journals.co.za/doi/pdf/10.10520/AJA10128093_357.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 22–23.

²⁶⁰ *Id.* at 23–24.

²⁶¹ *Id.* at 24.

133. Family members of those sentenced to death also often face exclusion from their community, lose contact with other family members, and struggle with feelings of “guilt-by-association” and “self-blame.”²⁶² Children whose family members are sentenced to death or executed also experience trauma from the “stigma, judgment, and exclusion from natural supports such as social communities” and from being “shamed, harassed, or excluded by others.”²⁶³ As one study put it, family members “must know that the death of their loved one is actively desired by others,” compounding the pain.²⁶⁴ Healing is more difficult for family members because they may not be seen by the rest of society as having a right to grieve.²⁶⁵ Finally, in many cases, the family member sentenced to death is either the main or an important source of income, leading to financial difficulties for their families as a result.²⁶⁶ UN Special Representative of the Secretary-General on Violence against Children, Marta Santos Pais, noted that children may feel a pressure to become the family “breadwinner.”²⁶⁷ As a result, the child becomes vulnerable to exploitation.²⁶⁸ All of these combined effects and traumas amount to CIDPT of the family members of those sentenced to die, in violation of Article 5.

²⁶² *Nobody to Talk To: Barriers to Mental Health Treatment for Family Members of Individuals Sentenced to Death or Executed*, TEXAS AFTER VIOLENCE PROJECT REPORT, at 2 (Oct. 2019), https://texasafterviolence.org/wp-content/uploads/2021/02/TAVP_Report.pdf; C.M. De La Rey *supra* n.255 at 23.

²⁶³ *Children Who Are Impacted by a Family Member's Death Sentence or Execution: Information for Mental health Professionals*, THE NATIONAL CHILD TRAUMATIC STRESS NETWORK (NCTSN) (Dec. 2021), <https://www.nctsn.org/sites/default/files/resources/fact-sheet/children-who-are-impacted-by-a-family-members-death-sentence-or-execution-for-mh-professionals.pdf>.

²⁶⁴ *Report Addresses Death-Row Family Members' Barriers to Mental Health Care*, DEATH PENALTY INFORMATION CENTER (Jan. 2, 2020), <https://deathpenaltyinfo.org/news/report-addresses-death-row-family-members-barriers-to-mental-health-care> (quoting a 1983 study by Michael Radelet).

²⁶⁵ TEXAS AFTER VIOLENCE PROJECT REPORT, *supra* n.262 at 5.

²⁶⁶ C.M. De La Rey, *supra* n.255 at 23.

²⁶⁷ *The Death Penalty in the OSCE Area, Background Paper*, OSCE's OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS (ODIHR), at 7 (2017), <https://www.osce.org/files/f/documents/5/5/343116.pdf>.

²⁶⁸ Oliver Robertson and Rachel Brett, *Lightening the Load of the Parental Death Penalty on Children*, Quaker United Nations Office, at 29 (June 2013), https://www.quono.org/sites/default/files/resources/Lightening%20the%20Load.Web_EN_.pdf.

ii. The Death Penalty Constitutes a Per Se Violation of Article 5

134. In light of the irreconcilable conflict between the imposition of the death penalty and the prohibition on torture and CIDPT, the death penalty should be found to be a *per se* violation of Article 5.²⁶⁹
135. Judge Ntsebeza of this Court has articulated why the death penalty is a *per se* violation of Article 5 of the Charter:

“The death penalty is not only a clear violation of Article 5 of the African Charter on Human and peoples’ Rights (the “Charter”) in relation to the method of execution by hanging as implemented by the Respondent State but also, in and of itself, violates Article 5 of the Charter, because it is inherently cruel, degrading, and inhuman treatment or punishment. The death penalty has a potential for error, yet its consequences are irreversible. Further, it has no demonstrable deterrent effect, and its discriminatory application undermines the fundamental principles of human dignity, justice, and equality.”²⁷⁰

136. The Constitutional Court of the Republic of South Africa (the “South African Court”) likewise found in *S v. Makwanyane* that “[capital punishment] is . . . an inhuman punishment for it ‘. . . involves, by its very nature, a denial of the executed person’s humanity’, and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.”²⁷¹ The South African Court examined the goals of the state when implementing the death penalty—deterrence, prevention and retribution—and weighed them against both the alternative punishments available to the state and the factors making capital

²⁶⁹ Cf. Juan E. Mendez, *The Death Penalty and the Absolute Prohibition on Torture and Cruel, Inhuman and Degrading Treatment or Punishment*, <https://www.corteidh.or.cr/tablas/r27394.pdf> (last visited Aug. 8, 2024).

²⁷⁰ See *Nzigiyimana Zabron v. United Republic of Tanzania*, No. 051/2016, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶¶ 1–2 (June 4, 2024) (declaration by Judge Dumisa Buhle Ntsebeza); *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples’ Rights [Afr. Ct. H.P.R.], ¶ 1–2 (Sept. 3, 2024) (declaration by Judge Dumisa Buhle Ntsebeza).

²⁷¹ *The State v. T. Makwanyane and M. Mchunu*, (16) HRLJ 154 (CC) (S. Afr.), ¶ 26 (June 6, 1995) (quoting *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring)).

punishment cruel, inhuman and degrading.²⁷² In doing so, the South African Court compared capital punishment with alternative methods of punishment, finding that, while imprisonment is a severe punishment, “there is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether.”²⁷³ Accordingly, the South African Court found that “the death penalty is indeed a cruel, inhuman and degrading punishment.”²⁷⁴

137. Leading human rights scholars with expertise in the death penalty have similarly observed that it is illogical to deem the killing of an individual pursuant to a death sentence permissible, while non-lethal but debilitating corporeal punishments are deemed illegal under customary international law.²⁷⁵
138. Further, the UN Special Rapporteur on Torture signalled that the limited exceptions to the general rights to life under international law, which have been used to justify States’ retention of the death penalty, are becoming increasingly narrow and that a norm of customary law prohibiting the death penalty *per se* as a form of CIDPT or torture may have already developed.²⁷⁶ The UN Special Rapporteur on Torture reported that there was an “evolving standard within international bodies and a robust State practice to frame the debate about the legality of the death penalty within the context of the fundamental concepts of human dignity and the prohibitions of torture and cruel, inhuman or degrading treatment or punishment.”
139. The UN Special Rapporteur on Torture further acknowledged that this standard—one that puts primacy on human dignity within discussions of punishment—was “developing into a norm of customary law, if it has not already done so.”²⁷⁷ Moreover, even if the development of a customary norm considering the death

²⁷² *The State v. T. Makwanyane and M. Mchunu*, ¶ 135.

²⁷³ *Id.* ¶ 143.

²⁷⁴ *Id.* ¶ 95.

²⁷⁵ See, e.g., John D. Bessler, *Human Dignity and the Law’s Evolution, in THE DEATH PENALTY’S DENIAL OF FUNDAMENTAL HUMAN RIGHTS: INTERNATIONAL LAW, STATE PRACTICE, AND THE EMERGING ABOLITIONIST NORM*, at 227–28 (Cambridge University Press, 2022).

²⁷⁶ See *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, U.N. General Assembly, A/67/279, ¶ 72 (Aug. 9, 2012).

²⁷⁷ *Id.* ¶¶ 73–76.

penalty a *per se* violation of the prohibition on torture and CIDPT has yet to be formally acknowledged, the UN Special Rapporteur on Torture noted that “most conditions under which capital punishment is actually applied renders the punishment tantamount to torture or at least cruel, inhuman or degrading treatment.”²⁷⁸

140. Still further, capital punishment involves practices that have long been considered to be torture. For example, the United Nations and United States courts consider credible death threats to be a form of psychological torture due to the trauma, pain, and suffering they inflict.²⁷⁹ And scholars have noted that, “capital charges and death sentences are, at bottom, nothing more than state-sponsored threats of death,”²⁸⁰ as, after all, a court sentencing someone to the death penalty is credibly telling them that they will soon be killed. It follows that, if death threats are considered a form of torture, then capital punishment should be as well. Similarly, many countries and scholars classify mock executions as a form of psychological torture.²⁸¹ A prisoner being executed experiences the same horror and psychological harms as a prisoner going through a mock execution; the only difference is that the latter prisoner survives. Thus, if a mock execution constitutes an act of torture, then an actual execution must also qualify.²⁸²

²⁷⁸ *Id.*

²⁷⁹ See Ergün Cakal, *Perception, Practice, and Proximity: Qualifying Threats as Psychological Torture in International Law*, 31 TORTURE J., at 19, 22 (2021); John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 N.E. U. L. REV., at 1, 7, 12 (2019).

²⁸⁰ John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 N.E. U. L. REV., at 1, 10 (2019).

²⁸¹ *Id.* at 81 (discussing how the United States considers mock executions to be a form of psychological torture); Cakal, *supra* n.279, at 23 (discussing how the European Commission of Human Rights considers mock executions to be a form of psychological torture); Linda Piwowarczyk, *Seeking Asylum: A Mental Health Perspective*, 16 GEO. IMMIG. L.J., at 155, 162 (2001) (discussing how sham executions inflict “great[] psychological damage”); Almerindo E. Ojeda, *What Is Psychological Torture?*, in THE TRAUMA OF PSYCHOLOGICAL TORTURE: CONCEPTUAL AND NEUROPSYCHOLOGICAL OBSERVATIONS, at 1–3 (Almerindo e. Ojeda ed., 2008) (arguing that mock executions are a form of psychological torture).

²⁸² John D. Bessler, *Taking Psychological Torture Seriously: The Torturous Nature of Credible Death Threats and the Collateral Consequences for Capital Punishment*, 11 N.E. U. L. REV., at 1, 79–80 (2019) (citations omitted).

141. For all of these reasons, we respectfully submit that this Court should conclude that imposing and carrying out a sentence of death is a *per se* violation of Article 5's robust prohibition of torture and CIDPT.

iii. All Methods of Execution Constitute Violations of Article 5

142. All methods of killing a human being in order to implement the death penalty entail CIDPT and torture, and accordingly this establishes an additional ground on which the death penalty violates Article 5.

143. This Court has observed that “many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto.”²⁸³ Specifically, in *Ally Rajabu and others v. United Republic of Tanzania*, the Court found that hanging violates Article 5's prohibition of torture and CIDPT, observing that “hanging a person is. . . inherently degrading” and “inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment.”²⁸⁴ Recently, in *Nzigiymana Zabron v. United Republic of Tanzania and Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, this Court re-emphasized that hanging violates Article 5.²⁸⁵

144. International caselaw and other authorities have characterized all methods of execution currently in use (or potentially available) in Africa—hanging, stoning,

²⁸³ See *Ally Rajabu and Others v. United Republic of Tanzania*, No. 007/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 118 (Nov. 28, 2019).

²⁸⁴ *Ally Rajabu and Others v. United Republic of Tanzania*, No. 007/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 119–120 (Nov. 28, 2019).

²⁸⁵ *Nzigiymana Zabron v. United Republic of Tanzania*, No. 051/2016, Judgment Summary, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 151, 199 (June 4, 2024) (reiterating that hanging is an “inherently degrading” method of execution and ordering Respondent States to take all necessary measures to remove “hanging” from its laws as the method of execution of the death sentence); see also *Nzigiymana Zabron v. United Republic of Tanzania*, No. 051/2016, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 1 (June 4, 2024) (declaration by Judge Dumisa Buhle Ntsebeza) (stating “the death penalty is not only a clear violation of Article 5 of the African Charter on Human and peoples' Rights...in relation to the method of execution by hanging...but also, in and of itself, violates Article 5 of the Charter, because it is inherently cruel, degrading, and inhuman treatment or punishment.”). See also *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 159 (Sept. 3, 2024) (“...the Court holds that, as method of enforcing the death sentence, hanging inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment.”).

shooting/firing squad, and lethal injection—as constituting torture or CIDPT.²⁸⁶ The UN Special Rapporteur on Torture concluded in a 2012 interim report, which considered each of these methods of execution, that “there is no categorical evidence that any method of execution in use today complies with the prohibition of torture and cruel, inhuman or degrading treatment in every case. . . . [A]ll methods of execution currently used can inflict inordinate pain and suffering. States cannot guarantee that there is a pain-free method of execution.”²⁸⁷ The European Court of Human Rights has similarly stated that “[w]hatever the method of execution, the extinction of life involves some physical pain.”²⁸⁸ Each of the methods of execution currently in use or potentially available in AU Member States that continue to impose the death penalty, as detailed in Table 1, below, violate Article 5 of the African Charter.

Table 1: Methods of Execution by Country²⁸⁹

Country	Method of Execution
Algeria	Shooting (last known execution in 1993)
Botswana	Hanging (last known execution in 2021)
Burkina Faso	Firing squad²⁹⁰ (last known execution in 1988)²⁹¹
Cameroon	Shooting, hanging (last known execution in 1997)
Comoros	Shooting (last known execution in 1997)

²⁸⁶ See *infra* ¶¶ 145–150.

²⁸⁷ *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/67/279, U.N. General Assembly, ¶ 41 (Aug. 9, 2012).

²⁸⁸ *Al-Saadoon & Mufdhi v. The United Kingdom*, No. 61498/08, Judgement, Eur. Ct. H.R., ¶ 115 (Apr. 10, 2010).

²⁸⁹ Unless otherwise noted, the information in the following table is drawn from country reports authored by the World Coalition Against the Death Penalty, each of which are available at: <https://worldcoalition.org/resources/the-death-penalty-worldwide/>.

²⁹⁰ See *Burkina Faso Coup Attempt Foiled*, LOS ANGELES TIMES (Sept. 19, 1989), <https://www.latimes.com/archives/la-xpm-1989-09-19-mn-360-story.html>.

²⁹¹ Burkina Faso is officially abolitionist for non-war crimes. See *Burkina Faso has joined the global trend toward abolition of the death penalty in Africa*, INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (FIDH), (June 6, 2018) <https://worldcoalition.org/2018/06/06/burkina-faso-has-joined-the-global-trend-toward-abolition-of-the-death-penalty-in-africa/>.

Country	Method of Execution
Democratic Republic of the Congo	Hanging (for civilians), firing squad (for military)²⁹² (last known execution in 2003)
Egypt	Hanging (for civilians), shooting (for military)²⁹³
Equatorial Guinea	Shooting, hanging (last known execution in 2014)
Eritrea	Hanging, shooting (last known execution in 1989)
Eswatini	Hanging (last known execution in 1983)
Ethiopia	Shooting (last known execution in 2007)
Gambia	Hanging, shooting (last known execution in 2012)
Ghana	Shooting, hanging (last known execution 1993)
Kenya	Hanging (last known execution in 1987)
Lesotho	Hanging (last known execution in 1995)
Liberia	Hanging (last known execution in 2000)
Libya	Shooting (last known execution in 2010)
Malawi	Hanging (last known execution in 1992)
Mali	Shooting (last known execution in 1980)
Mauritania	Shooting, stoning (last known execution in 1987)
Morocco	Shooting (last known execution in 1993)
Niger	Shooting (last known execution in 1976)
Nigeria	Hanging, lethal injection, shooting, stoning (last known execution in 2016)
Somalia	Shooting
South Sudan	Hanging
Sudan	Hanging, stoning

²⁹² See Olivier Lungwe Fataki, *Towards the abolition of the death penalty in DRC: advances to be confirmed*, WORLD COALITION AGAINST THE DEATH PENALTY (Dec. 13, 2016), <https://worldcoalition.org/2016/12/13/towards-the-abolition-of-the-death-penalty-in-drc-advances-to-be-confirmed/>.

²⁹³ See *Towards the abolition of the death penalty and its alternative sanctions in the Middle East and North Africa: Algeria, Egypt, Jordan, Lebanon, Morocco, Tunisia and Yemen*, PENAL REFORM INT'L, at 12 (March 2012), <https://cdn.penalreform.org/wp-content/uploads/2013/05/MENA-research-report-on-death-penalty-and-alternative-sanctions-ENGLISH-March-20121.pdf>.

Country	Method of Execution
Tanzania	Hanging (last known execution in 1994)
Tunisia	Hanging, shooting (last known execution 1991)
Uganda	Shooting, hanging (last known execution 2005)
Zambia	Hanging (last known execution in 1997)
Zimbabwe	Hanging (last known execution in 2005)

1. Hanging

145. As discussed above, this Court has already held—on multiple occasions—that hanging violates Article 5's prohibition of torture and CIDPT.²⁹⁴

2. Stoning

146. Stoning also clearly amounts to torture or CIDPT under international law. The UN Human Rights Committee has stated that “certain methods of execution are in all cases prohibited as they constitute torture or cruel, inhuman or degrading punishment. . . . [T]hese include execution in gas chambers, **stoning**, burning and burying alive, public executions and other painful and humiliating methods of execution” (emphasis added).²⁹⁵ General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights (the “ICCPR”), which addresses the right to life, provides that “States parties that have not abolished the death penalty must respect article 7 of the [ICCPR], which prohibits certain methods of execution. Failure to respect article 7 would inevitably render the execution arbitrary in nature and thus also in violation of article 6. The UN Human Rights Committee has already opined that **stoning...[is] contrary to article 7**”

²⁹⁴ See *Ally Rajabu and Others v. United Republic of Tanzania*, No. 007/2015, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 119–120 (Nov. 28, 2019); *Nzigiymana Zabron v. United Republic of Tanzania*, No. 051/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶¶ 151, 199 (June 4, 2024); *Habyalimana Augustino and Muburu Abdulkarim v. United Republic of Tanzania*, No. 015/2016, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 159 (Sept. 3, 2024).

²⁹⁵ *Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, A/HRC/42/28, U.N. H.R.C., ¶ 16 (Aug. 28, 2019).

(emphasis added).²⁹⁶ It has therefore called on States amend their criminal codes to remove all references to stoning as a method of execution.²⁹⁷ Fifty-four African countries have signed or ratified the ICCPR and therefore are bound by its provisions.²⁹⁸ International courts have also agreed with this clear-cut characterization of stoning as a method of execution that entails CIDPT or torture. In the case *Jabari v. Turkey*, the European Court of Human Rights determined that the expulsion of the applicant to Iran breached the prohibition on CIDPT and torture, due to the risk of the applicant being stoned to death.²⁹⁹ Stoning, therefore, constitutes CIDPT and/or torture and should be prohibited under Article 5 of the African Charter.

3. Shooting/Firing Squad

147. Several countries in Africa have used shooting/firing squads as a method of killing a person sentenced to death, and at least one has done so as recently as last year.³⁰⁰ Execution by shooting or firing squad is subject to error and potential spectacle,³⁰¹ both of which render it torture or CIDPT. In *Roberto Girón and Pedro Castillo Mendoza v. Guatemala*, for example, the Inter-American Commission on Human Rights (“IACHR”) concluded that “execution through firearms can lead to prolonged agony and suffering”, as evidenced by the facts that one of the executed

²⁹⁶ General Comment No. 36 on Article 6: Right to Life, CCPR/C/GC/36, U.N. HUM. RTS. COMM., ¶ 40 (Sept. 3, 2019), <https://www.ohchr.org/en/calls-for-input/general-comment-no-36-article-6-right-life> (emphasis added).

²⁹⁷ See *Concluding observations on the fifth periodic report of the Sudan*, CCPR/C/SDN/CO/5, U.N. H.R.C., ¶ 30 (Nov. 19, 2018); *Concluding observations on the second periodic report of Mauritania*, CCPR/C/MRT/CO/2, U.N. H.R.C., ¶ 25 (Aug. 23, 2019).

²⁹⁸ See Ratification Status of the *International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION, (entered into force March 23, 1976), <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>.

²⁹⁹ *Jabari v. Turkey*, No. 40035/98, Judgement, Eur. Ct. H.R., ¶¶ 33-4211 (Oct. 2000).

³⁰⁰ See, e.g., Naima Said Salah, *Somalia's Football Pitch That Doubles as an Execution Ground*, BBC (March 29, 2024), <https://www.bbc.com/news/world-africa-68675452> (stating at least 25 people were executed by firing squad in Somalia in 2023 and that journalists are invited to witness the killings and local residents, including children, are not prohibited from watching); *Ghana Abolishes the Death Penalty*, EQUAL JUSTICE INITIATIVE (July 27, 2023), <https://eji.org/news/ghana-abolishes-the-death-penalty/> (noting that Ghana previously used hanging or firing squads as methods of execution).

³⁰¹ This argument can be extended to any method of execution performed publicly. As stated above, the UN Human Rights Committee has stated that public executions constitute CIDPT. See *Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, A/HRC/42/28, U.N. H.R.C., ¶ 16 (Aug. 28, 2019), <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/42/28&Lang=E>.

“did not die during the discharge of bullets and had to receive a ‘coup de grâce” and “the executions were televised to expose the alleged victims to public scorn.”³⁰² The IACHR further concluded that “these elements taken together suggest that the method of execution generated intense physical and mental suffering for the alleged victims” and that “the method used for the execution of the death penalty constituted cruel, inhumane and degrading treatment.”³⁰³

4. Lethal Injection

148. Nigeria is the only country in Africa that permits execution by lethal injection, and has not yet used lethal injection in executions.³⁰⁴ To the extent this method of execution may become available in other AU Member States, it too should be found to constitute torture and/or CIDPT.
149. The UN Human Rights Council has stated that the use of untested lethal drugs constitutes torture or CIDPT.³⁰⁵ Likewise, the IACHR recognized in *Russell Bucklew v. United States* that lethal injection could constitute torture or CIDPT because “if subjected to execution by the existing protocol for lethal injection, during the execution Mr. Bucklew ‘will be aware he is choking on his own blood and in pain before the pentobarbital renders him unconscious and unaware of pain.”³⁰⁶ Lethal injection would also put Bucklew at “particular risk of choking on his own blood [and] being aware of it, [] for a period of up to four minutes.”³⁰⁷ The

³⁰² *Roberto Girón and Pedro Castillo Mendoza v. Guatemala*, Inter-Am. Comm’n H.R., Report No. 76/17, Case 11.686, OEA/Ser.L/V/II.163, doc. 90 ¶¶ 113, 117 (2017). The IACHR interprets and applies the American Convention on Human Rights, which includes a prohibition of torture or cruel, inhuman, or degrading punishment or treatment similar to Article 5 of the African Charter. See *Organization of American States*, American Convention on Human Rights, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 5, § 2 (Nov. 22, 1969).

³⁰³ *Roberto Girón and Pedro Castillo Mendoza v. Guatemala*, Inter-Am. Comm’n H.R., Report No. 76/17, Case 11.686, OEA/Ser.L/V/II.163, doc. 90, ¶¶ 117–118 (2017).

³⁰⁴ See Paulina Lucio Maymon, *Nigeria’s Debate on Death Penalty: Sign Execution Warrants or Impose a Moratorium?*, CORNELL CTR. ON THE DEATH PENALTY WORLDWIDE (June 21, 2019), <https://deathpenaltyworldwide.org/nigerias-debate-on-capital-punishment-sign-execution-warrants-or-impose-a-moratorium>.

³⁰⁵ *Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, A/HRC/42/28, U.N. H.R.C., ¶ 16 (Aug. 28, 2019), <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/42/28&Lang=E>.

³⁰⁶ *Russell Bucklew v. United States*, Inter-American Commission on Human Rights, Report No. 71/18, Case 12.958, OEA/Ser.L/V/II.168, doc. 81, ¶¶ 77–78 (2018).

³⁰⁷ *Id.* ¶ 78.

IACHR found that “the severity of the suffering that would be imposed under such circumstances could amount to torture” and that “in the event that the State becomes aware that there is a significant risk that the specific method of execution could cause a breach of its international obligations, including peremptory norms of international law, it is required to abstain from proceeding with the execution under those circumstances.”³⁰⁸

150. In sum, each of the methods of execution currently in use by AU Member States, or potentially available to them, violate Article 5’s prohibition of CIDPT or torture. However, even if there were some ‘humane’ hypothetical method of execution that could in theory be implemented without violating Article 5, the use of the death penalty in practice would still violate Article 5 due to its other unavoidable impacts, including particularly the Death Row Phenomenon, as detailed above.

D. *The aggregate and cumulative effect of all of the many problems with the death penalty supports a determination that the death penalty is incompatible with the African Charter and other fundamental human rights principles.*

151. The discussion above sets forth numerous individual grounds upon which the death penalty violates Article 4 and Article 5 of the Charter. But the imposition and implementation of the death penalty does not involve just one or two of these fundamental assaults on the principles and protections of Articles 4 and 5; it involves *all* of them. These many problems with the death penalty therefore should be considered in the aggregate. When the aggregate and cumulative effects are considered, the death penalty cannot be imposed or carried out without violating Article 4 or Article 5 of the African Charter or the fundamental principles embodied in other human rights instruments.³⁰⁹

³⁰⁸ *Id.* ¶¶ 77–78.

³⁰⁹ As this Court has previously stated, even with respect to human rights instruments that have not been ratified by each AU Member State, “all Members States of the AU have undertaken to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments” and “[b]y making this commitment, Member States have assumed the obligation to uphold human rights in respect of all persons within their jurisdiction.” *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African*

152. The fact that an AU Member State's deliberate killing of a human being cannot be reconciled with either Article 4's command that "[h]uman beings are inviolable" or Article 5's protection of the "dignity inherent in a human being" and prohibition of "torture, cruel, inhuman or degrading punishment and treatment" are each independently sufficient for this Court to hold that the death penalty violates the Charter.³¹⁰ And even if those fundamental conflicts between the death penalty and the principles set forth in the African Charter and other human rights instruments did not exist, the serious practical issues with the imposition and implementation of the death penalty, including (1) the pervasive due process issues in death penalty cases, (2) the discriminatory and arbitrary imposition of the death penalty on certain groups of individuals, (3) the unavoidable suffering of the Death Row Phenomenon, (4) the special problems associated with sentencing women and children to death and holding them on death row, and the suffering imposed on the families of those sentenced to death, and (5) the fact that every available method of execution constitutes CIDPT or torture, are each also independently sufficient for this Court to find that the death penalty violates the Charter and fundamental human rights principles.³¹¹
153. But even if each of the foregoing were not independently sufficient for this Court to hold that the death penalty violates the African Charter, the cumulative effect of these issues provides an additional ground for this Court to find that the death penalty cannot be imposed or carried out without violating an individual's human rights.

Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa, No. 001/2018, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 35 (Dec. 4, 2020).

³¹⁰ See *supra* Section 4(A) (the death penalty inherently violates Article 4); Section 4(C)(ii) (the death penalty constitutes a *per se* violation of Article 5).

³¹¹ See *supra* Section 4(B)(i) (the lack of due process in the imposition of the death penalty in practice); Section 4(B)(ii) (the discriminatory imposition of the death penalty in practice); Section 4(C)(i) (the Death Row Phenomenon); Section 4(C)(iii) (all methods of execution constitute violations of Article 5).

E. *AU Member States are obligated to abolish all laws and/or regulations permitting the imposition and implementation of the death penalty.*

154. As discussed above, the imposition and implementation of the death penalty violates both Articles 4 and 5 of the Charter and the continued use of the death penalty should, therefore, no longer be permitted. Accordingly, we respectfully request that this Court hold that all African States are obligated to repeal any and all laws and/or regulations permitting the death penalty in any form.
155. Article 1 of the African Charter requires AU Member States to “recognize the rights, duties and freedoms enshrined in [the African] Charter and...undertake to adopt legislative or other measures to give effect to them.”³¹² When this Court has previously found that certain laws and/or regulations of AU Member States violate the Charter, it has interpreted Article 1 to require that *all* States must “either amend or repeal [such laws] to bring them in conformity with [the Charter].”³¹³
156. Therefore, if this Court finds that laws and/or regulations permitting the imposition and implementation of the death penalty violate Articles 4 and 5 of the Charter—as it should for the reasons set forth above—this Court should also hold that all AU Member States are obligated to abolish any such laws and/or regulations.

5. *Are there proceedings pending before the African Commission on Human and Peoples Rights?*

157. PALU submits this Request for an Advisory Opinion under Article 4 of the Court Protocol and Rule 82 of the Rules of Court.
158. Article 4 of the Court Protocol empowers the African Court to issue Advisory Opinions:

³¹² Article 1, the African Charter on Human And Peoples' Rights.

³¹³ *Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa*, No. 001/2018, Judgment, African Court on Human and Peoples' Rights [Afr. Cl. H.P.R.], ¶¶ 153–54 (Dec. 4, 2020) (emphasis added) (holding that all AU Member States are obligated to amend or repeal all of their vagrancy laws, after finding that such laws violate the Charter).

“on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission.”

159. PALU therefore respectfully submits that this request for an Advisory Opinion is a legal matter relating to whether the imposition of the death penalty violates certain provisions of the African Charter and other African human rights' instruments.
160. PALU further submits that the present request for an Advisory Opinion does not relate to any application pending before the African Commission as per Rule 82(3) of the Rules of the African Court.
161. Rule 82(1) of the Rules of Court provides that a request for an Advisory Opinion may be filed by an African Organization recognized by the AU. This Honorable Court has defined “organization” to include a non-governmental organization and has defined “African organization” to refer to an organization that is registered in an African State, has structures at the sub-regional, regional or continental levels, or undertakes its activities beyond the territory where it is registered. PALU therefore respectfully submits that it meets all the above criteria to be classified as an African organization.
162. This Honourable Court has further established that recognition of nongovernmental organizations by the AU is through the granting of observer status or the signing of a Memorandum of Understanding between the AU and those organizations. PALU respectfully submits that by virtue of having signed a Memorandum of Understanding with the AU, a copy of which is attached here to as Annex B, and having illustrated above tangible examples of its engagement with the AUC and various AU organs and institutions, it is accordingly formally recognized by the AU, thus meeting the criteria set forth by this Honorable Court.
163. Therefore, PALU respectfully submits that it is an African organization recognized by the AU, pursuant to the Rules of the Court, and as defined by the Court in its

jurisprudence, as having demonstrated the requisite locus standi to file the present request for an Advisory Opinion.

6. Summary of the Request

164. A number of AU Member States retain laws that permit the imposition of the death penalty and continue to both impose the death penalty and carry out executions. Many other AU Member States have abolished the death penalty by law—either enshrining that abolition in their constitutions or legislation—or have eradicated or effectively placed a moratorium on its use. This trend of eliminating the death penalty within Africa corresponds with a similar trend around the world and reflects the growing international consensus that the imposition and use of the death penalty is contrary to fundamental human rights.
165. We respectfully submit that the death penalty *per se* violates the express and absolute protections set forth in Article 4 of the African Charter, including its mandate that “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”
166. Further, we submit that the imposition and implementation of the death penalty in practice violates Article 4 of the Charter, including because: (i) the due process problems inherent in the imposition of the death penalty render its application arbitrary; and (ii) the death penalty is imposed in a disparate, or arbitrary, manner as between different types of persons.
167. Finally, we submit that the death penalty also violates Article 5 of the African Charter, including because: (i) the inevitable consequences of implementing the death penalty, such as the “Death Row Phenomenon” and related psychological impacts, special problems associated with sentencing women and children to death and holding them on death row, and the suffering imposed on the families of those sentenced to death constitute cruel, inhuman or degrading punishment or treatment (“CIDPT”) or torture; (ii) the taking of life itself by the State *per se*

constitutes CIDPT or torture; and (iii) the methods of execution currently in use (or potentially available) each constitute CIDPT or torture.

168. Each of the foregoing is independently sufficient for this Court to hold that the death penalty violates the Charter. In addition, the aggregate effect of each, taken together, further supports a determination that the death penalty violates the fundamental human rights principles embodied in the Charter and other international human rights instruments.
169. Accordingly, this Court should hold that the existence of the death penalty and the manner of its imposition and implementation are contrary to Article 4 and Article 5 of the African Charter and underlying principles of international human rights law, and that all AU Member States have a positive obligation to abolish any and all laws and/or regulations permitting the death penalty.

Preferred language of correspondence:

Arabic

English ☒

French

Portuguese

Kiswahili

Other(s) (Specify)

Signed and dated at Arusha, in the United Republic of Tanzania this 10th day of
October 2024



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For: AUTHOR/REPRESENTATIVE

Index of Annexures

- A. List of Authorities Relied Upon in the Request for an Advisory Opinion
- B. Memorandum of Understanding between the Pan African Lawyers Union and the African Union
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