Judgments
Marthine Christian Msuguri v. Tanzania
Ghati Mwita v. Tanzania
Igola Iguna v. Tanzania
(1 December 2022)

Separate opinion

from
Judge Blaise Tchikaya, Vice President

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Introduction

1. The sixty-seventh session of the African Court was the session of "the death penalty".

2. Despite the increasingly abolitionist, continental and universal position, the African Court, by three judgments, confirmed its position in its earlier decision in *Ally Rajabu and others v. Tanzania* of 8 December 2019. I was unable to share the position taken by the majority of the honourable judges through these three judgments on the issue of the death penalty.

3. Since the beginning of the third millennium, 146 states have been classified as either abolitionist or *de facto* abolitionist[1] including the Respondent State in the three cases, namely*: Marthine Christian Msuguri, Igola Iguna* and *Ghati Mwita*, all dated 1 December 2022.[2]

4. *Marthine Christian Msuguri* was the first case examined by the Court. After committing murder, the Applicant in the aforementioned case was incarcerated at the central prison of Butimba (Mwanza) having been found guilty of the offence and sentenced to death. The second case involved Mr. *Igola Iguna*, who was incarcerated at Uyui Prison (in the Tabora Region). He was sentenced to death for murder. Finally, the third case involved *Ghati Mwita*, a woman convicted of murder, sentenced to death and incarcerated at the same Butimba Central Prison.

5. All in all, these three applicants challenged before this Court, *mutatis mutandis,* the violation of their rights in the proceedings before domestic courts, which resulted in the death penalty.

6. This opinion reformulates and supports the idea that the death penalty is vacuous in socio-human terms on the one hand, and on the other hand, highlights the wait-and-see attitude of the Court. This wait-and-see attitude is due to the fact that it denounces the irregular nature of the mandatory penalty imposed by the Respondent State without questioning the underlying principle. Having stated the grounds of the judgments, the Court does not seem to dwell on the death penalty legal regime.

7. As in its 2019 decision in *Rajabu et al.*[3] , the Court in these three judgments invalidates Tanzania's mandatory death penalty provisions but allows the death penalty to persist in the Respondent State's system. It should have taken the opportunity to strengthen international law on this issue. This assessment of the

[1] The death penalty is enshrined in domestic law, but it is not applied.
[2] ACtHPR, *Marthine Christian Msuguri v. Tanzania; Igola Iguna* v. Tanzania, Ghati *Mwita v. Tanzania,* 1 December 2022. A fourth case, *Thomas Mgira v. Tanzania (Application No. 003/2019)*, relating to the death penalty, was on the Court's list for this 67 session, but was deferred for further consideration.
[3] v. The Individual Opinions in the 2019 *Ally Rajabu et al.* decision, Justices Bensaoula Chafika and B. Tchikaya.

law on the death penalty, which makes a distinction between crime and offence, should no longer be supported because of the evolution of international human rights law. The Court, a human rights court, should keep pace with the evolution of international law.

8. As long as it is the task of international jurisdictions to develop the clarity of human rights, it seems useful to recall that *the right to life and the sanctity of human life* are not associated with the death penalty, of which they are the strict antidotes. For this reason, it seems unfortunate that the three decisions of the Court have maintained the old legal regime that apply a variant of the death penalty (I.). Next, it will be clarified that the current situation in which Article 4 of the Charter operates and the evolution of human rights, imposes an interpretation that rejects any form of death penalty (II.).

I. "Keeping the death penalty alive" through three judgments/decisions

9. Three judgments have just been delivered by the Court. Common to all three is the fact that they recall the 2019 *Rajabu and Others v. Tanzania* decision and by doing so, they keep the death penalty alive.

A. Confirmation of the 2019 precedent

10. The operative part of its 2019 decision in *Ally Rajabu and others* states:

> § 8: Finds that the Respondent State violated the right to life guaranteed under Article 4 of the Charter in relation to the provision in its penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer;
>
> § 9: Finds that the Respondent State has violated the right to dignity protected under Article 5 of the Charter in relation to the provision for the execution of the death penalty imposed in a mandatory manner.

11. By these grounds, the Court deplores various infringements of fundamental rights, but, as it does in the judgments that follow, it does not reject the empire of the death penalty. This approach is once again the focus of attention in the three cases.

12. In the *Marthine Christian Msuguri* judgment of 2022 the Court states in its operative part that:

> "v. Finds that the Respondent State has violated the right to life protected under Article 4 of the Charter in relation to the provision in its Penal Code for the mandatory imposition of the death penalty as it removes the discretion of the judicial officer;
> ...
> vii. Finds that the Respondent State has violated the Applicant's right not to be subjected to inhuman and degrading treatment protected under Article 5 of the Charter in relation to the lengthy pre-trial detention, detention in the death row, and confinement"[4] .

13. There is one particular element in this provision. The Court rejects and condemns the fact that the applicant was subjected to long pre-trial detention, detention on death row and confinement. This is somewhat contradictory, as the death penalty is indirectly validated. The death penalty has often been synonymous with death row and confinement.

14. *Last but not least,* the Court, once again, made a point of recalling its constant jurisprudence. In the instant case, the legality of the mandatory death penalty under international law is challenged.[5] The United Nations Human Rights Committee had declared that the mandatory death penalty: "constitutes an arbitrary deprivation of life, in violation of article 6 of the *International Covenant on Civil and Political Rights".*[6] It is clear that:

> "the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence".[7]

15. These words are repeated in the *Igola Iguna* decision. Paragraph 55 states that:

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[4] ACtHPR, *Marthine Christian Msuguri v. Tanzania, op. cit. at § 143.*
[5] ACtHPR, *Rajabu et al*.
[6]Human Rights Committee, *Pagdayawon Rolando v. Philippines*, Communication No. 1110/2002, UN Doc. CCPR/C/82/ D/1110/2002, 8 December 2004, § 5.2. 99; UN Doc. E/CN.4/1999/39, 6 January 1999, § 63. 100; UN Doc. E/CN.4/2005/7, 22 December 2004, § 80. See also *Woodson v. North Carolina*, 428 U.S. 280 (1976).
[7]Human Rights Committee, PACE document 12223 on the situation in Belarus, 27 April 2010.

> "Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State. Furthermore, the Applicant should be given a hearing on the sentencing through a procedure that does not allow the mandatory imposition of the death sentence and which upholds the full discretion of the judicial officer"[8] .

16. The Court typifies the Applicant *Iguna* in demonstrating the need to comply with international law. Thus, Mr. *Igola Iguna* was the subject of an erroneous procedure and should not have been sentenced to death.

B. The specificity of the Ghati Mwita judgment

17. The *Ghati Mwita* case does not depart from this. The operative part states:

> "xiii. Finds that the Respondent State has violated the right to life of the Applicant, protected by Article 4 of the Charter by reason of the mandatory nature of the death penalty;
>
> "ix. Finds that the respondent state has violated the right to dignity under Article 5 of the Charter by prescribing hanging as the method of execution of the death penalty"[9] .

18. As a result, the state "violated the right to life" and acted contrary to international law and its evolution.

19. Two violations of fundamental rights are involved: the violation of life and the violation of human dignity.

20. The *Ghati Mwita* decision introduces the idea that hanging is unacceptable, unlike other methods of enforcing the death penalty, without saying which.[10] Moreover, no execution technique humanizes the death penalty or makes it lawful. The same goes for hanging. Europe was not mistaken in adopting a set

[8] ACtHPR, *Igola Iguna v. Tanzania, op. cit. at § 55.*
[9] ACtHPR, *Ghati Mwita v. Tanzania, op. cit.* at § 184.
[10] Points ix of the operative part.

of Rules that is mandatory for all European States, which prohibit trade of instruments used in the enforcement of the death penalty.[11]

21. The Court confirmed its displeasure in *Amini Juma v. Tanzania* in 2021[12] , a case that was of particular interest to the Court. In that case, on 15 December 2003, the Applicant was charged with murder and sentenced to life imprisonment. The Applicant appealed the conviction and sentence, and the Respondent State also appealed, seeking an upward review of the sentence. The Applicant's appeal was dismissed and his sentence of life imprisonment was replaced by a sentence of death by hanging, thus granting the Respondent State's appeal.

22. In the 2021 *Amini Juma* case, like the three 2022 cases, and regarding the Appeal Court substituting life imprisonment for capital punishment by hanging, the Court found that the Respondent State violated Article 5 of the Charter insofar as it allowed the death penalty to be carried out "through a brutal manner, that is, by hanging" (§ 132).[13]

23. This decision also emphasises that hanging a person is […] inherently degrading. Furthermore, […] the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature […], the method of implementation of that sentence, that is, hanging, inevitably encroaches upon the dignity of a person in respect of the prohibition of torture and cruel, inhuman and degrading treatment.[14] .

24. This reasoning was also found in *Rajabu et al*:

> The Court observes 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. In line with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, the prescription should therefore be that, in cases where the death penalty is permissible, methods of

[11]EU, Regulation No. 2019/125 *concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment*, April 5, 2019.
[12]ACHPR, *Amini Juma v. Tanzania,* September 30, 2021
[13]v. AU Commission on Human and Peoples' Rights, *Case of Interights and Ditshwanelo v. Republic of Botswana*, 18 November 2015: "where the death penalty is applied by a state party for the most serious crimes, it must be carried out in such a way as to cause the least possible physical and mental suffering".
[14] ACtHPR, *Amini Juma v. Tanzania*, 30 September 2021, § 136.

execution must exclude suffering or involve the least suffering possible.

25. The central question of respect for the right to life and the strict observance thereof, enshrined in international human rights law, is once again raised.

II. The right to life and the end of the death penalty are already enshrined in international law

26. The question of the death penalty regime in Africa and its inevitable demise is considered. The fact that the current regime is contrary to Article 4 of the African Charter on the right to life gives rise to this reflection. This last aspect, mentioned earlier, deserves to be updated.

A. Human rights and the death penalty

27. We can detail the bumpy path of the Arusha Court on this issue. The death penalty has evolved, before becoming contrary to international rules and fundamental freedoms, for example, Article 2 § 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that "No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law". While the death penalty regime is still contrasted in the Inter-American system,[15] the jurisprudence of the ECHR has followed the trend towards the abolition of the death penalty in Council of Europe member states, thereby following the footsteps of the European Court of Human Rights.[16] Protocol No. 13 is clear in its reference. It speaks of abolition of the death penalty "in all circumstances".[17]

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[15] The death penalty is maintained in one-third of OAS member states. Of the 14 states that apply it, 12 are now in the English-speaking Caribbean. However, none of them has carried out executions for more than a decade. The United States is the only OAS country that carries out executions.

[16] ECHR, *Al-Saadoon and Mufdhi v. United Kingdom*, 2010, § 116: Following the opening for signature of Protocol No. 6 to the Convention, the Parliamentary Assembly of the Council of Europe established a practice whereby states wishing to join the Council of Europe had to commit themselves to an immediate moratorium on executions, to abolish the death penalty in their domestic legislation, and to sign and ratify Protocol No. 6.

[17] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, on the abolition of the death penalty in all circumstances. All member states of the Council of Europe have now signed this protocol, and ratified it, except Russia. Article 1 on the abolition of the death

28. It seems reasonable to discuss the death penalty in relation to other human rights. This was the approach of the Inter-American Court when it examined the death penalty regime with the right to life, in *the Case of Martínez Coronado v. Guatemala of* 10 May 2019[18] . The Inter-American Court showed its leaning towards an "abolitionist tendency" in its interpretation of this form of punishment, which implies that the use of the death penalty is exceptional.[19] Clearly, this represents progress on the part of the said court.

29. The Court, therefore, remained committed to its position expressed in the judgment, *Ally Rajabu and others (28* November 2019). It did not take a new position. While impugning the laws of Tanzania on the mandatory death penalty, it allows the death penalty to continue; it only rejects and challenges the so-called mandatory death penalty in the three decisions under discussion.

30. In this, the Court says:

> "Given the framing of Article 4 of the Charter, and the broader developments in international law in relation to the death penalty, the Court holds that this type of punishment should exceptionally be reserved only for the most heinous of offences committed in seriously aggravating circumstances"[20] .

31. Thus, deplorably, the death penalty is maintained.

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penalty states that "The death penalty is abolished. No one shall be condemned to such a penalty or executed".

[18] IACHR, *Martínez Coronado v. Guatemala*, Merits, Reparations and Costs, May 10, 2019, Series C, nº 376, § 62. v. *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, June 8, 1990, OASTS nº 73. v. also *Restrictions to the Death Penalty* (1983), Advisory Opinion, OC-3/83, IACHR (Ser A) nº 3; L. Hennebel, *The American Convention on Human Rights: Mechanisms of Protection and Scope of Rights and Freedoms*, Bruylant, 2007, Pref.

[19] The wording of Article 4: on the right to life states that "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life". And, paragraph 6 adds that "Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority. The Convention gives elements of maintenance and attachment to life".

[20] ACtHPR, *Ghati Mwita*, § 66.

32. It is of interest to note that in *Marthine Christian Msuguri*, the Court is persuaded that although the applicant's arguments are admissible, they cannot prosper because of domestic legislation. The Court refrains from going further.

33. The Court noted that:

> In this respect, this Court recalls its position in Gozbert Henerico v. United Republic of Tanzania[21] where it found that the failure of the High Court to consider the medical evaluation report of the Applicant's mental health status, constituted a grave procedural irregularity that resulted in a violation of the Applicant's right to a fair trial, as guaranteed under Article 7(1) of the Charter[22]

In sum, the Court finds the insanity argument valid, but it cannot defeat the argument of the current death penalty legislation. One might think of the image of the *Wolf and the Lamb*, so dear to the fabulists.

B. Article 4 of the African Charter and total abolition of the death penalty

34. Relying on Article 4, which protects the right to life by declaring it sacred and inviolable[23], the Court, in *Ghati Mwita[24],* acknowledged the two trends, global and African, towards abolition of the death penalty. It acknowledged that

> "[…] a global trend towards the abolition of the death penalty, including the adoption of the Second Option Protocol to the International Covenant on Civil and Political Rights (ICCPR)[25]" § 64.

However, the Court supports its position by arguing that:

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[21] ACtHPR, Gozbert Henerico v. Tanzania (merits and reparations), § 160.
[22] ACtHPR, *Msuguri v. Tanzania*, § 72.
[23] Trindade Antonio Augusto Cançado, The Inter-American Human Rights Protection System: Current Status and Prospects for Evolution at the Dawn of the 21st Century, *AFDI*, 2000, p. 548.
[24] *Ghati Mwita* judgment, §§ 64 and 65.
[25] *Amini Juma v. United Republic of Tanzania*, ACtHPR, Application No. 024/2016, Judgment of 30 September 2021 (merits and reparations), § 122 and *Ally Rajabu* and others v. United Republic of Tanzania, ACtHPR, Application No. 007/2015, Judgment of 28 November 2019 (merits and reparations), § 96. It should be noted that the Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

> "At the same time, […] the death penalty remains on the statute books of some states and that no treaty, on the abolition of the death penalty has gained universal ratification[26].Presently, the Second Optional Protocol to the ICCPR, the Court notes, has ninety (90) State Parties out of the one hundred-seventy three (173) State Parties to the ICCPR", § 64.

35. The Court takes up the same idea in *Igola Iguna* where stands as an *obiter dictum* protecting the right to life:

> "Having held that the Respondent State did not violate the rights of the Applicant, the Court nevertheless reiterates its finding in its previous cases that the mandatory death penalty is a violation of the right to life among other rights in the Charter and should thus be expunged from the laws of the Respondent State. Furthermore, the Applicant should be given a hearing on the sentencing through a procedure that does not allow the mandatory imposition of the death sentence and which upholds the full discretion of the judicial office". [27]

36. The African continent is joining the international movement whose goal is the total abolition of the death penalty. 20 out of the 55 member states of the African Union (AU), no longer execute those sentenced to death, and nearly forty countries are abolitionist in law or in practice. It is possible to say that the majority of these states refuse this ultimate sanction[28]. It is well known that "the Respondent State violated Article 1 of the Charter by failing to amend its Penal Code which permits the mandatory death sentence as well as execution by hanging"[29] . It was, therefore, up to the Court to place this violation in its legal context: in addition to the right to life, the application of the death penalty was at stake.

37. This issue falls under the ambit of individual states, which determine their criminal policy and the hierarchy of penalties enshrined in their criminal law. As has already been written, the concept of reservation takes on its full meaning in international law. It applies to those "matters which are essentially within the domestic jurisdiction of a

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[26] For more comprehensive information on developments relating to the death penalty, see, United Nations General Assembly, Secretary-General's report on a moratorium on the use of the death penalty 8 August 2022.
[27] Judgment, *Igola Iguna v. Tanzania*, § 55.
[28]As of this date, Congo-Brazzaville and Madagascar having abolished capital punishment in 2015 and Guinea in 2016 are the last African abolitionist states.
[29] *Idem,* § 14.

State", within the meaning of Article 2(7) of the Charter[30] , and which are subject to their international commitments. The Court, using its praetorian power, should give impetus to this movement in order to uphold the right to life.

38. The European system, which, through Article 3 of its last Protocol prohibiting the death penalty, excludes reservations, sets the tone. It states that "No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol". The Protocol takes care to emphasise that "The death penalty shall be abolished. No one shall be condemned to such penalty or executed."[31] It is further states that this constitutes a "final step in order to abolish the death penalty in all circumstances"[32] .

39. In support of this opinion, it is useful to recall that the superiority of international law is a principle applicable to all categories of internal procedural and material rules. This commitment is sovereignly negotiated and fixed by the State with its peers. It is therefore up to the States to adapt their legal system. It is not certain that, for the law of treaties, States lose their sovereignty by their international commitment.[33]

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Conclusion

40. If the Court fails to keep up with the advances in international law, it is bound to be "caught up" by the international law patrol. Human rights doctrine and jurisprudence will note this. While listening to the majority position of my honourable colleagues, a question deserves to be asked: How can we understand that the Court maintains its

[30]Schabas (W.), *The abolition of the death penalty in International Law*, Grotius, Cambridge, 1993, 384 p.

[31]Article 1, Protocol No. 13, *Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances*, Vilnius, 3 May 2002

[32] *Idem*, preamble to the Protocol

[33] Whatever its relationship with international law, a State only commits itself to rights and duties which, when accepted by other States, become the law in force. This law takes precedence, otherwise it is unlawful. This also applies to its supranational relations in the field of human rights. A well-known formula of the Permanent Court underlines this. v. P.C.I.J., A.C., *Pecuniary claims of Danzig railway employees who have entered Polish service against the Polish railway administration* (Jurisdiction of the Danzig courts), March 3, 1928, *Rec.* Serie B, no. 15, pp. 18. In this same case, the Hague Court laid down the principle of the non-invocability of constitutional provisions against international law: "a State cannot, vis-à-vis another State, rely on the constitutional provisions of the latter but only on international law and international commitments validly entered into, on the other hand, and conversely, a State cannot invoke vis-à-vis another State its own Constitution in order to evade the obligations imposed upon it by international law", *Treatment of Polish Nationals in Danzig*, 4 February 1932, Series A/B, No. 44, pp. 24.

jurisprudence behind the evolution of the applicable international law. There would be two regimes: one favourable to the full protection of the right to life[34] and the other less favourable.[35] A harmonization is necessary.

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[34] Breillat (D.), L'abolition mondiale de la peine de mort, A propos du 2e Protocole facultatif se rapportant au Pacte international relatif aux droits civils et politiques visant à abolir la peine de mort, *RSC*, 1991, p. 261.
[35] The 2019 *Rajabu et al.* decision, and other 2022 decisions from this perspective, reflect a limited reading of Article 4 of the Charter.