AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Judgment in *Mulokozi Anatory v. Tanzania*
Application No. 057/2016, 5 September 2023

Joint Dissenting Opinion of
Judge Blaise Tchikaya and Judge Dumisa Ntsebeza

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Introduction

1. At its sitting held at Arusha on 23 June 2023, the Court heard the case of *Mulokozi Anatory v. United Republic of Tanzania.*[1] Once again, the death penalty was at the heart of the matter. Two judges, Judge Blaise Tchikaya and Judge Dumisa Ntsebeza, expressed their disapproval of the Court's majority position. The purpose of the dissent is to challenge both the legal basis of the death penalty and its social effectiveness. The death penalty is not, and never has been, a solution to deviant human behaviour. So it is that the initiative for this joint dissenting opinion was taken, contrary to the majority position of the Honourable Judges of the Court.

2. The unfortunate men, Mulokozi Anatory and others, who are Tanzanian nationals, were detained in the well-known Butimba prison (Mwanza region). Mr.

[1]ACtHPR, *Mulokozi Anatory v. United Republic of Tanzania*, Application No. 057/2016, 23 June 2023. This case was among those already on the Court's list of causes. On 21 November 2019, Tanzania deposited with the African Union an instrument withdrawing the Declaration authorizing individuals and NGOs to bring cases before the Court. The withdrawal of the Declaration had no bearing on pending cases, including the present case.

Mulokozi, having been tried and sentenced to death by hanging, for murder, was awaiting execution of the sentence pronounced against him when he took the initiative of seizing this Court. He alleged that his right to a fair trial before domestic courts was violated. Furthermore, he challenged before this Court what he considered to be violations of the right to equality before the law and equal protection of the law, guaranteed by Article 3 (1) and (2) of the African Charter. It is noteworthy that the Applicant pointed out that his dignity, as guaranteed by Article 5 of the same Charter, was at stake.[2]

3. This case is similar to one already decided by the Court, namely, the *Evodius* case of 26 February 2021. *Mulokozi Anatory and Evodius Rutechura*[3] - the already decided - are two landmark cases. They are similar in terms of the disputed facts of gang murder, the proceedings, the Respondent State and the criminal sanction: death sentence by hanging.

4. Yet, in an order for provisional measures dated 18 November 2016, the Court took a stand, requesting the Respondent State to stay enforcement of the death penalty, adding that: "The Applicant is sentenced to capital punishment and the request appears to reveal a situation of extreme gravity, as well as a risk of irreparable harm to him". This is already an acknowledgement of the "extreme seriousness" of the case[4].

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[2]Article 5 of the African Charter on Human and Peoples' Rights 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". Thus, in the aftermath of the end of World War 2 war and the victory of free peoples over regimes that attempted to enslave and degrade the human person, certain States once again proclaimed that every human being, without distinction of race, religion or belief, is vested with inalienable and sacred rights. This principle is rooted in Article 6 of the Universal Declaration of Human Rights (10 December 1948). In a noteworthy development, France in particular has made human dignity an integral part of its legal framework. We note: "Respect for the dignity of the human person is one of the components of public order" (CE, Ass., October 27, 1995, Commune de Morsang-sur-Orge). v. in particular, Cival (Charles), Égalité, c'est Justice! ou Question de vie ou de mort pour la dignité humaine, Ed. Hachette, 2016, 50 p.; Sobze (S.), *La dignité humaine dans l'ordre juridique africain*, Ed. Universitaires européennes, 2018, 618 p.

[3] ACtHPR, *Evodius Rutechura v. Tanzania, 26* February 2021. The Applicant is a Tanzanian national sentenced to death by hanging for murder. He contested the proceedings and, ultimately, the sentence passed on him. In the operative part of the judgment, the Court rightly found that the Respondent State did not violate Article 7 of the Charter with regard to the manner in which the evidence was assessed; nor did it violate the right to free legal assistance to which the applicant was entitled. While we endorse its decision, it would have been desirable for the Court to take a position on the issue of the death penalty, which was the underlying theme of the judgment. This would have been a welcome extension of its praetorian power, in this matter of crucial importance.

[4]ACtHPR, *Mulokozi Anatory v. Tanzania*, Order of 18 November 2016.

5. The Court settled questions of jurisdiction and the admissibility of this application fairly quickly. This was done on grounds that enhanced the Court's capacity to "take in hand" the entire litigation by exercising a kind of full jurisdiction. The decision states that the applicant alleges:

> "a violation of provisions of the Charter, in particular Articles 3(1)(2) on the right to equality before the law and equal protection of the law, 5 on the right to dignity and 7 on the right to a fair trial. The Court observes that these rights are protected by the Charter and the International Covenant on Civil and Political Rights, to which the Respondent State is a party".

6. It is not for nothing that the Covenant is mentioned in the grounds of the judgment. The fact that it is mentioned presupposes that the principles of the International Covenant on Civil and Political Rights, to which the Respondent State is a party, are invoked. Many of its provisions are relevant and applicable to the present case. It should be recalled that the 1966 Covenant currently includes Protocols, notably those of 16 December 1966 and 15 December 1989 prohibiting the death penalty.

7. It is the position of the authors of this opinion that the death penalty is (I) neither a solution nor an option to crises of social relations. Nor was it a solution in the *Mulokozi* case. (II) Moreover, as in previous cases of a similar nature[5], the Court adopted a position that has now been banished from the law of nations.

I. The Mulokozi case: the death penalty is no solution

8. Mahatma Gandhi's well-known reflection: "An eye for an eye makes the whole world blind" adequately captures the contradictions of the death penalty, including the various forms it can take to be accepted. The fact that certain crimes carry the mandatory death penalty has already been criticized, as is the practice in the Respondent State.[6] Thus, this case was familiar litigation terrain for the Court.

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[5]Numerous decisions, v. Individual Op. attached to the 2019 *Ally Rajabu et al.* decision, penned byJudges Bensaoula Chafika and B. Tchikaya; and in particular ACtHPR, *Marthine Christian Msuguri*; *Ghati Mwita*; *Igola Iguna*; 1December 2022.

[6] *Ally Rajabu and Others v. Tanzania* (merits and reparations), § 98 and *Gozbert Hererico v. Tanzania* (merits and reparations) §§ 149-150.

A. *Mulokozi v. Tanzania illustrates the legal and sociological futility of the death penalty*

9. One might ask whether enforcement of capital punishment has any bearing on the despicable criminal acts for which they are enforced.
The aim of such inquiry is to determine whether criminal sentences constitute a solution to crime and, by extension, to assess their deterrent value. A case in point is the *Anatory Mulokozi* case. Mr. Mukolozi, together with two other accomplices, Batula William and "Mwarabu from Mwanza", were accused of the gruesome murder of Shukuru Teleshphory on 17 January 2010 in the Kagera region. The victim was attacked, hit on the back of the head with an iron bar and on the stomach with a stick. His body was then mutilated, cutting out his tongue, ears and genitals [7].

10. In Mesopotamia, the heydays of which extended into the early centuries of our era[8], recourse to the death penalty was already widespread under the doctrine of *lex talionis* embodied in "An eye for an eye, a tooth for a tooth", whereby deviants were made to suffer damage identical to that which they caused. This law of retaliation is encouraged by many scriptures. Without quoting Koranic texts, the Christian Bible is not silent on the subject:

> "If anyone sheds the blood of man, by man shall his blood be shed; for God made man in his own image".

11. Abolitionist movements have noted, as expressed in current United Nations law, that since the dawn of human civilization, the death penalty has never been proven to be effective[9]. Reliable information on the subject is lacking. This is further fuelled by

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[7]ACtHPR, judgment in *Mulokozi Anatory v. Tanzania*, § 3.
[8]Grandpierre (V.), Histoire de la Mésopotamie, Paris, Gallimard, coll. "Folio Histoire no 175", 2010, 544 p.; Thomas (A.) (dir.), *L'histoire commence en Mésopotamie*, Gand et Lens, Snoeck et Louvre-Lens, 2018, 448 p.
[9] Amnesty International, Annual Report on the Death Penalty, 2023, according to this Report, sharp increases in the number of executions were recorded in the world in 2022. Last year, at least 883 people were executed in 20 countries around the world. That is, 53% more than in 2021. The sharp increase in executions was mainly due to the significant increase

recorded in the Middle East and North Africa region, with 93% of known global executions (excluding

a manifest misconception that the abundance of public executions will eradicate crime. This lure, for which there is no shred of evidence, holds sway in various regimes and governments. The Apartheid regime in South Africa was a case in point.

12. Innocent people pay a heavy price. We know the unfair and discriminatory nature of trials often without lawyers at the various stages of the judicial process. The ability of the death penalty to improve social relations is also questionable. It is well known that no executions have been carried out in the Respondent State since 1994. Nevertheless, people are regularly sentenced to death. There is no point in maintaining such a penalty.

13. In any case, the stand taken by the international community against the death penalty is now, at the very least, irreversible.

B) Irreversibility of the international movement against the death penalty

14. The fragility and vulnerability of the human species calls for a deepening of protection and preservation frameworks. An irreversible movement has emerged against the death penalty. It is already illegal under current international law.[10]

15. It should be recalled that in its 1996 *Advisory Opinion on the Legality of Nuclear Weapons*[11], the International Court of Justice described a large number of rules under humanitarian law applicable in armed conflict as "intransgressible principles of international customary law", the purpose of which, as we know, is to prohibit torture. This could also apply to inhuman and degrading treatment.[12]

16. It is tempting to use as a pretext the failure to ratify or sign international treaties against the death penalty. The International Court of Justice is rather reserved about

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China). Clearly, the death penalty has not reduced crime worldwide. On the contrary crime has become more diversified.

[10]v. An instructive book by Mbata Mangu (B.), Abolition *de la peine de mort et constitutionnalisme en Afrique* (Études africaines), Ed. L'Harmatan, 2011, 202 p.
[11] ICJ, Legality of the Threat or Use of Nuclear Weapons (UN and WHO), Advisory Opinion, 8 July 1996: P. H. F. Bekker, AJIL 1997, p. 126; v. Coussirat-Coustère, AFDI 1996, p. 337; G. Kohen, JEDI, 1997, p. 336 See also CDH, Kindler v. Canada, 30/07/1993, RUDH 1994.
[12]Dissenting opinion, B. Tchikaya, *Evodius Rutechura v. Tanzania*, 26 February 2021, Application No. 004/2016, § 41.

the liberties that States, under this pretext, take with regard to fundamental rights. In *North Sea Continental Shelf*,[13] the Court indicated that the Netherlands' and Denmark's argument could be upheld only if the conduct of the Federal Republic of Germany was "very definite, very consistent", but that even in this hypothesis, the German position must be further examined by specifically asking why it did not ratify the Convention (§ 28), that is, carry out the unilateral acts (ratification, accession, etc.) which are required by the convention regime for it to be applicable. The ICJ further held that "the carrying out of certain prescribed formalities (ratification, accession)" had not been achieved, and that "it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way". This analysis applies, *a fortiori*, in specific cases, to all convention provisions that protect human or fundamental rights. In effect, it is not only the ratification of a convention that is binding, even if this is the meaning of *Res inter alios acta* (treaty law). Many other circumstances may bind third parties, even if they are not parties to the convention.

17. A convention that outlaws the death penalty can be binding on a State even if it has not ratified the said convention. Ratification is only one of the ways in which conventions can be applied. A convention can be applied for objective reasons relating to the content of its text. It is a principle applicable *erga omnes* that as long as States are fundamental subjects of the international community, they must observe the principles that protect human nature and its rights[14].

18. The Human Rights Council expresses this irreversibility in a different way. It recognizes that the majority of member states are moving towards abolition of the death penalty. States are developing the International Covenant on Civil and Political Rights," said the Council[15]. The Court's decision is reminiscent of its other decisions

[13] ICJ, North Sea Continental Shelf, Denmark and Netherlands v. FRG, February 20, 1969: F. Eustache (F.), RGDIP, 1970, p. 590; Lang (J.), LGDJ, 1970, 169 p.; Marck (J.), RBDI, 1970, p. 44; Monconduit (F.), AFDI, 1969, p. 213.

[14] The opinion of the International Court of Justice on the Genocide Convention is along these lines (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948: ICJ, Advisory Opinion, 28 May 1951, Rec. 1951, p. 496). A reservation made by a State may not be contrary to the fundamental objectives of the convention in question, nor undermine the major principles of international law.

[15]UNHRC, P*ratt and Morgan v. Jamaica*, 6 April 1989.

on the death penalty, notably in *Evodius Rutechura*[16] in which the Court's failure to fully apply international human rights law was deplored.

19. It is worth examining the Court's position further. As it stands, the Court appears to adopt an alternativist position, insofar as it alternates its decisions according to national systems.

II. The "alternativist" position on the death penalty is already outlawed

20. At the heart of its decision, in paragraph 75 of the judgment, lies the structure of the Court's reasoning, which is the fundamental purpose of this dissent. As mentioned, the same reasoning has informed previous judgments[17]. Once again, we refer to the international rejection of the death penalty and the particularity of the judgment in that it uses a method of execution also banned by international human rights law.

A. International rejection of the death penalty insufficiently expressed by the Judgment

21. The Court's approach to the legal regime applicable to the death penalty alternates between consideration of the national position and the nature of the penalty (mandatory or not). This alternativist approach, which operates at the discretion of States, runs counter to common sense[18]. It holds that the death penalty is legally valid simply because the State has incorporated it into its legal system.

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[16] ACtHPR, *Evodius Rutechura v. Tanzania*, 26 February 2021: The Applicant is a Tanzanian national sentenced to death by hanging for murder. He contested the proceedings and, ultimately, the sentence passed on him. In the operative part of the judgment, the Court rightly found that the Respondent State did not violate Article 7 of the Charter with regard to the manner in which the evidence was assessed; nor did it violate the right to free legal assistance to which the applicant was entitled. While we endorse its decision, it would have been desirable for the Court to take a position on the issue of the death penalty, which was the underlying theme of the judgment. This would have been a welcome extension of its praetorian power in this matter of crucial importance.

[17] ACtHPR, *Ghati Mwita v. Tanzania*, 1 December 2022 (merits and reparations), §§ 64 to 66; *Amini Juma v. Tanzania*, 30 September 2022, § 122 and see *Ally Rajabu and others v. United Republic of Tanzania*, ACtHPR, judgment of 28 November 2019, § 96.

[18] This would give the impression that the State would no longer apply the death penalty until such a time when the sovereign accepted it outside international law; or that the non-mandatory death penalty, as opposed to the mandatory death penalty, is valid. This would be heresy. The fact, though, is that nothing about the death penalty is acceptable.

Clearly, this is reductive as the Court's jurisprudence will then be alternative, not constant. It will be inconsistent, and will not, as it stands, follow a clear line that proscribes and rejects the death penalty.

22. It must be reiterated that the State cannot subjugate the nation to its mortifying penal conception of the right to human life. It should accept the global trend towards abolition[19]. In fact, the Court stated that:

> "The applicant was convicted of murder and sentenced to death by hanging. In its jurisprudence, the Court acknowledges global trends towards the abolition of the death penalty, embodied, in part, by the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights ".[20]

23. This raises the question of whether the Court has drawn any legal consequences from this global campaign against the death penalty. So far, the consequences drawn are next to zero. In this *Mulokozi* decision, the Court refuses - as it did in the past - to draw conclusions under the pretext that national regimes are amenable to the death penalty. It states in paragraph 75 - cited above - that:

> 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.[21] With regard to the Second Optional Protocol to the ICCPR, the Court notes that as of 28 June 2023, 90 of the 173 State parties to the Covenant have ratified it.

[19]It should be remembered that the State is free to apply abolitionist protocols, even without formal ratification. Both customary international law and the 1969 Vienna Convention on the Law of Treaties leave States entirely free to adopt the procedure of their choice to express their adherence to a treaty practice. v. in particular ICJ, Oct. 10. 2002, Frontière Cameroun-Nigeria, Rec. 2002, § 264.

[20]The Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights. It should be noted that on 15 December 2022, the United Nations General Assembly adopted the 9th resolution calling for a moratorium on the death penalty.

[21]For a comprehensive statement on developments in relation to the death penalty, see, United Nations General Assembly Moratorium on the use of the death penalty – Report of the Secretary General 8 August 2022.

24. The Court took the same position in its 2019, in the case of Rajabu *et al.* jurisprudence.[22] In the said case, the Court held that:

> "… while Article 4 of the Charter provides for the inviolability of life, it contemplates deprivation thereof 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".

25. This idea of "admissibility of the death penalty", which is supposedly grounded in the national system (through a domestic law) or is mandatorily imposed in certain so-called serious offences (mandatory death penalty), is at variance with the evolution of the law of nations. At a time of global interconnectedness in matters of human rights, it is unacceptable for an island of states to impose their will on the rest of the pro-life states. It is unacceptable that some people should be deprived of such a fundamental right.

26. It is in the name of this right that certain States are applying a new policy that is more conducive to the protection of life. The European Court of Human Rights is taking this path. It refuses to extradite an individual under the jurisdiction of a member state, if that person runs the risk of being sentenced to death in the country concerned. In any case, the conditions surrounding death by execution are contrary to human rights. These include death row syndrome, anxiety, waiting times, among others. There is no such thing as a good "death penalty", nor is there one that is humane as illustrated in the famous 1989 case of *Soering v. United Kingdom*.[23] Since then, the jurisprudence has evolved to become automatic.

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[22] ACtHPR, *Rajabu and others v. Tanzania*, 2019, § 98.

[23] In its *Soering v. United Kingdom* judgment of 7 July 1989, the European Court of Human Rights ruled for the first time that a State was liable for removing a person at risk of ill-treatment from his or her host country. A violation of Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment) would be occasioned in case of extradition to the United States owing to a real risk of treatment exceeding the threshold of gravity set by Article 3); Herran (Thomas), L'emprise de la Cour européenne des droits de l'homme sur l'entraide répressive internationale, *Revue de science criminelle et de droit pénal comparé*, 2013/4, pp. 735-758; v. Coussirat-Coustère (V.), Jurisprudence of the European Court of Human Rights 1989, 1990 and 1991; AFDI, 1991. pp. 581-616.

27. The principle of banning the death penalty has been internationalized.[24] Judges apply it as a principle to be recognized by all States, irrespective of the case under consideration. In his concurring opinion in *Soering v. United Kingdom*, Judge De Meyer stated that:

> "The main issue in this case is not "the prospect of the person concerned being exposed" to "death row syndrome", but the very simple fact that extradition would put his life in danger".

28. It would be either short-sighted or inward-looking to consider that the internationalization or universalization of major rights flows exclusively from ratification of conventions by national authorities. The international regime for the navigation of rivers and seas has never been subject to the agreement of national sovereigns. It is widely recognised in the law of treaties that some of these international regimes can be objective without any national recognition. Recognition of the primacy of life seems to be a duty of humanity.

29. The Court should no longer leave the use of the death penalty at the discretion of national authorities, as it still does in *Mulokozi case*:

> "Bearing in mind Article 4 of the Charter and the more general development of international law on the death penalty (...) given that the circumstances in which the death penalty may be appropriate cannot be accurately qualified, the definition of the crimes justifying the application

[24]From the point of view of applicable law, Article 3 of the Universal Declaration of Human Rights (December 10, 1948) states that: "Everyone has the right to life, liberty and the security of person"; Covenant No. 2 on Civil and Political Rights confirms this in Article 6: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. Article 1 of its *Second Optional Protocol*, which aims at the abolition of the death penalty, provides: "No one within the jurisdiction of a State Party to the present Protocol shall be executed. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction. *The Thirteenth Protocol to the European Convention on Human Rights in its Article 1 concludes that:* "The death penalty shall be abolished. No one shall be condemned to such penalty or executed". Protocol No. 13 abolishes the death penalty in all circumstances. The decision in *Mulokozi et al. v. Tanzania* is therefore out of step with current international practice.

> of the death penalty must be left to the discretion of the national courts, on a case-by-case basis"[25].

30. In § 77 and 78, the Court expands on this approach, which the present dissent does not support. In particular, it considers that the Applicant was:

> "… tried, convicted and sentenced in accordance with international human rights standards for an offence that was criminalised under the domestic laws. He was also provided with all the guarantees to ensure a fair trial. As such, there is no reason to question the grounds for the decisions of the domestic courts."

31. Unfortunately, the Court decided to find that the Respondent State did not violate the right to dignity guaranteed by Article 5 of the Charter.[26] It stated that:

> "The prohibition of the violation of dignity through cruel, inhuman or degrading treatment is therefore absolute. [...] the said prohibition is interpreted to provide the broadest possible protection against physical or psychological abuse. Finally, personal suffering and injury to dignity can take various forms (...)".[27]

32. As emphasized above, no violation was established, regarding the right to respect of dignity, on account of the death penalty

33. In the previous cases[28], it was recalled that international law outlaws the death penalty and rejects it in all its forms.[29] Already abolitionist, the international community adopted at the same time, in December 2022, Resolution A/RES/77/222 for a universal moratorium on the use of the death penalty. This adoption on 15 December 2022 by the UN General Assembly did not have the desired impact at the domestic level.

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[25] ACtHPR, *Mulokozi v. Tanzania*, *Op. cit.*, § 76.
[26] *Op. cit.*, § 71.
[27] ACtHPR, *Lucien Ikili Rashidi v. Tanzania*, 28 March 2019, § 88.
[28] v. Dissenting opinion under ACtHPR, *Thomas Mgira v. Tanzania*; *Umalo Mussa v. Tanzania*, 13 June 2023;
29Bachelet (O.), Le droit de choisir sa mort: les ambiguïtés de la cour de Strasbourg, *Revue internationale de droit pénal*, 2011, n° 1-2, pp. 109-127.

34. In any case, it is legally inadmissible and anachronistic to impede the global will to put an end to the death penalty with national idiosyncrasies. Mr Ban Ki-Moon learned this the hard way. On the day he took office as Secretary General of the United Nations, he declared (on the subject of the hanging of Iraqi dictator Saddam Hussein) that capital punishment was a matter for each sovereign state, thus ineptly putting on hold the doctrinal position of the UN on the matter. He had great difficulty in regaining the lustre lost as a result of his statement.

35. Presenting his conclusions and recommendations, the UN Special Rapporteur stated:

> "Even if the emergence of a customary norm that considers the death penalty as per se running afoul of the prohibition of torture and cruel, inhuman or degrading treatment is still under way, most conditions under which capital punishment is actually applied renders the punishment tantamount to torture. Under many other, less severe conditions, it still amounts to cruel, inhuman or degrading treatment."[30]

36. Finally, one might question the relevance of the Court's developments in § 61 to 66 of the decision. In its reasoning, the Court holds that:

> "… the allegation has no basis as the Applicant has failed to demonstrate how his right to equality before the law and equal protection of the law was violated".

37. If we consider that the Applicant's judicial aim is to challenge the sentence as contrary to international human rights law, it seems insufficient to examine his claims under the authority of domestic law. The Court dismisses the Applicant's allegation that the Respondent State has violated Article 3(1) and (2) of the Charter on the violating the Applicants right to equality and equal protection of the law.

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[30]UN, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, General Assembly resolution 66/150, A/67/150, August 9, 2012.

38. Only the death penalty by hanging imposed on Mr. Mulokozi is discussed, and not the death penalty *per se* , although its legal validity is contested under international law. It was international law that had to prevail, rather than domestic law. This is in line with the principle of compliance of national repressive law with international law.

39. Lastly, the Court seems to give the death penalty validity in § 76, insofar as it stated that:

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

40. The Court's conclusion in upholding the death penalty is deplorable, to say the least.

41. The sentence handed down in the present case clearly involves a number of violations. These violations extend even to the method of execution supported by the Court, which is death by hanging.

B. Rejection of death by hanging

42. In addition, the *Mulokozi* case has a criminal peculiarity, not the least of which is that Mr. Mulokozi Anatory was tried and sentenced to death by hanging for murder. The Court observed that the Applicant did:

> "not allege violation of the right to life, he was found guilty of murder and sentenced to death by hanging"[31].

43. This issue once again deserves to be clarified by the Court. The UN High Commissioner for Human Rights rightly considered that the prohibition of cruel,

[31] ACtHPR, *Mulotozi and others v. Tanzania*, § 75.

inhuman and degrading treatment was a fundamental provision of international human rights law. Executions by hanging had serious flaws that made their implementation tantamount to cruel, inhuman and degrading punishment.[32]

44. The issue can be considered from two perspectives, the first of which seeks to remove an ambiguity. The Court seems to lend weight to the Applicant's allegation without any major reason with regard to the right to life. It is clearly recognized that a violation of this nature is raised *ex officio* by the human rights judge. The second perspective is not far removed from the first; the Court should have raised hanging as a serious violation of human rights on its own initiative.[33]

45. The Court has a solid basis in Article 27 of the Protocol, which states that:

> "If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of the fair compensation or reparation".

46. These provisions introduce a power of full jurisdiction. The judge is entitled to use any legal means to qualify and obtain redress for any violation of personal rights. When a violation has been established, there is no need for the judge to make an *expressis verbis* allegation of the violation, once it has been referred to him or her. As long as the judge is in a position to do so, he takes "appropriate measures" (Article 27).

47. It is therefore surprising that the Court was unable to repudiate hanging as one of the most serious violations of Article 5 of the Charter, in its precise and protective provisions on the human person:

> "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

[32]UN, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, General Assembly resolution 66/150, A/67/150, August 9, 2012.

[33] Such an approach, in addition to being induced by Article 27 of the Protocol, is well known to the Court. See *Mussa Zanzibar v. Tanzania*, 26 February, 2021: "The Applicant has not invoked the violation of any specific provision of the Charter. Nevertheless, the Court has noted that the Applicant alleges, in fact, a violation of his right to a fair trial, guaranteed by Article 7 of the Charter".

particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

48. In terms of human rights, the regime applicable to hanging is precise: it is considered abject in fact, and inhuman and degrading in law. This is the thrust of a 2010, European Court of Human Rights (ECHR) decision where two Iraqi authorities who murdered British soldiers were sentenced to death by hanging. The Court ruled that hanging constituted inhuman treatment. The ECHR condemned the United Kingdom. The Court ruled that the two plaintiffs had been subjected to inhuman and degrading treatment[34].

49. In the *Kigula* case, in 2009, a case brought before the Ugandan Supreme Court, Judge Egonda Ntende, in a dissenting opinion, found the expert testimony on this subject horrifying, and concluded that various practices associated with hanging in Uganda, notably clubbing or tearing off the heads of those who did not die instantly, constituted unquestionably cruel, inhuman and degrading treatment.[35]

Conclusion

50. The *Mulokozi* decision stands at the crossroads of two violations that should have been more prominent in the Court's operative part: the violation of life and the cruel, inhuman and degrading treatment that constitutes death by hanging. In this decision, the Court, in our opinion, insufficiently judged the first violation while ignoring the second. It is for this reason that we pen this dissenting opinion, being regrettably unable to agree with the majority position expressed by the Honourable Judges.

51. As one abolitionist put it, "it is impossible to recognize the power of death in the justice of men, because they know that this justice is fallible".[36] While considering the majority position of our Honourable Colleagues in this *Mulokozi Anatory* case, as in

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[34] On 31 December 2008, Great Britain had already ignored a request from the ECHR not to hand over to the Iraqi authorities Faisal Hussain Al-Saadoon and Khalef Hussain Mufdhi, former Sunni dignitaries of the Baath Party, who had been arrested in Iraq by the British army. See ECHR, *Al-Saadoon and Mufdhi v. United Kingdom*, Judgment of 2 March 2010.
[35]Supreme Court of Uganda, Decision in the case of Attorney General v. Susan Kigula and 417 others, Constitutional Appeal No. 3, 2006, 2009.
[36]Badinter (R.), L'abolition de la peine de mort, *Assemblée nationale française*, 17 September 1981.

previous cases, the same questions deserve to be asked: (i) How is it possible to understand that this Court maintains its jurisprudence to such an extent? and (ii) How is it possible that the Court does not establish jurisprudence that best expresses, in the words of the continent, the international rejection of the death penalty?

Judge Blaise Tchikaya

Judge Dumisa Ntsebeza

Done at Arusha this Fifth Day of September, in the year, Two Thousand and Twenty Three in English and French, the French text being authoritative.