AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Application No. 003/2016: John Lazaro v. United Republic of Tanzania
Application No. 033/2016: Makungu Misalaba v. United Republic of Tanzania
Application No. 049/2016: Chrizant John v. United Republic of Tanzania

Judgments of 7 November 2023

Dissenting Opinion of Judge Blaise Tchikaya

1. The Court heard three cases against Tanzania in which the Applicants challenged decisions of domestic courts sentencing them to death. The Court's September 2023 session stands out by the number of cases relating to capital punishment.[1] The Court heard the case of *John Lazaro*, who was sentenced to death on 6 August 2010, *Makungu Misalaba*, who was sentenced to death on 10 October 2013 and *Chrizant John*, who was sentenced to death on 26 June 2015.

2. The debates arising from the death penalty legal regime in a number of EU countries fuelled deliberations that did not seem ready to leave the courtroom, notwithstanding the certain twilight of the death penalty on the continent.

3. The present opinion, which I have penned to dissent from the majority holding, is self-evident in these three cases inasmuch as the text of the African Charter (Articles 4 and 5) provides a sufficient legal basis to outlaw the death penalty on the one hand, and to recall, on the other hand, that the Court should make greater use of its power of interpretation and evocation of Articles 4 and 5 of the said Charter. In the cases under discussion,

[1] ACtHPR, Judgments, Application No. 033/2016 *Makungu Misalaba v. United Republic of Tanzania*; Application No. 003/2016 *John Lazaro v. United Republic of Tanzania* and Application No. 049/2016 *Chrizant John v. United Republic of Tanzania*, 7 November 2023.

Lazaro, Misalaba, and *Chrizant John*, the Court was only partially persuaded of this, as it held on to its position in the 2019 case of *Rajabu et al*.

4. In the first part, therefore, it will be necessary to establish the link between these three new cases on (I) the death penalty and the contradictory aspects they contain, and then, (II) in the second part, to describe the decline in the Court's interpretative power on this subject.

I. *Three judgments on the death penalty with contradictory aspects*

5. If we look strictly at the death penalty legal regime, the three decisions under discussion are problematic. This taints the reasons given by the Court. In many respects, the reasoning appears contradictory to the ideals of human rights.

6. In the case of *Chrizant John*, the Tanzanian national challenged the decision of domestic courts sentencing him to death for murder. He had been arrested and tried for the murder of his mother-in-law. Following a land dispute, he had inflicted on the latter a fatal head wound with a machete. In Court, he challenged the denial of his right to fair justice under Article 7 of the African Charter.

7. The link between the *Chrizant John* decision and the other two cases, in particular that of Makungu *Misalaba*, handed down on the same day against Tanzania, mostly resides in the imposition of capital punishment. In the *Misalaba* case, the accused was tried for the double murder of his wife and son. Challenging the sentence imposed, he appealed to a higher domestic court to have the conviction quashed.

8. The contentious events leading to *Mr Lazaro*'s death sentence occurred on 31 August 2003. Together with four other people, Mr *Lazaro* and his accomplices broke into his neighbour's home and tied him up. They then gagged his wife. When his neighbour recognised him, the Applicant killed

him by thrusting a sword into his mouth and dragged him across the room to make sure he was dead. In this case, unlike the others under discussion, in addition to Article 4, the Applicant challenges Article 5 relating to dignity, alleging a violation thereof for having been sentenced to death by hanging.

9. Brought before it, these facts afforded the Court the opportunity to rule on the international human rights law applicable to the death penalty, including the opportunity to interpret the relevant African law on capital punishment. In the opinion of the two dissenting judges, the Court failed to do so.

10. In line with its holding in *the Rajabu case*, the Court seemed to support positions that, unless I am mistaken, might seem contradictory. *The Chrizant John* judgment is a case in point. It holds that:

> "Finds that the Respondent State did not violate the Applicant's right to be heard, under Article 7(1) of the Charter".[2]

11. In the same decision, however, the Court:

> "Finds that the Respondent State violated the Applicant's right to life under Article 4 of the Charter in relation to the mandatory imposition of the death penalty;
>
> Finds that the Respondent State violated the Applicant's right to dignity under Article 5 of the Charter, in relation to the method of execution of the death penalty, that is, by hanging."[3]

12. In this respect, the particulars of the recent *Chrizant John* decision are not self-evident.

[2] ACtHPR, *Chrizant John v. Tanzania judgment*, § 178 (v).
[3] Idem, § 178 (ix) and (x).

13. The right to have one's cause heard is not purely procedural[4]: It also presupposes the exclusion of *a priori* punishment, such as the mandatory death penalty in the Respondent State; it implies the judge's decision-making autonomy. Finally, it requires a judgment on a legally unobjectionable sentence. The case is therefore being heard under unacceptable legal conditions.

14. The European Court emphasises this when it holds that:

> "Compliance with the requirements of a fair trial must be examined in each case having regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident".[5]

15. The guarantees at stake concern the overall fairness of the proceedings. The Court held that:

> "The Court, therefore, considers that the Applicant fails to demonstrate and prove that the manner in which the domestic courts evaluated evidence revealed manifest errors requiring this Court's intervention".[6]

16. This is not an appropriate way to respond to criticism of the death penalty in the matter of the right to have one's cause heard.

17. The operative part of the *Makungu Misalaba* decision[7] also contains elements that are open to criticism from the point of view of denouncing the death penalty. By a majority of six votes to four, the Court:

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[4] v. Article 6 of the European Convention (Right to a fair trial): "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".
[5]See in particular, ECHR, *Ibrahim and Others v. the United Kingdom*, 13 November 2016.
[6] ACtHPR, *Chrizant John v. Tanzania judgment*, *cited above,* § 109 and § 75.
[7] ACtHPR, *Makungu Misalaba v. Tanzania*, § 218.

"v. Finds that the Respondent State did not violate the applicant's right to dignity under Article 5 of the Charter by allegedly not providing him medical treatment for his self-inflicted physical injury;

(…)

"vii . Finds that the Respondent State violated the applicant's right to life protected by Article 4 of the Charter by imposing a mandatory death penalty regardless of the subsequent act of clemency commuting the sentence to life imprisonment".

18. It defies rational understanding to assert that a person's dignity was not violated, while at the same time asserting that they were sentenced to a punishment, namely the death penalty, that human rights law rejects. These two points in the aforementioned decision are somewhat contradictory.

19. *The Lazaro John case,* which involved a death sentence and hanging as a method of execution, does not escape the same criticism because, in the opinion of the dissenting judges, it already gave the Court grounds to go further in its sovereign assessment of the sentence in question.

II. Three judgments on the death penalty in retreat from the human rights judge's power of interpretation

20. Article 4 of the African Charter[8] on Human and Peoples' Rights immediately weighs in on the law applicable by the Court in relation to the death penalty, which raises problems of interpretation. The Court must establish its role and determine its position. It cannot abstain.

21. In the judicious exercise of his or her discretion, the judge relies on his or her powers. The result is to clarify the meaning of the rule of law. This is the power of interpretation[9], *a priori* linked to praetorian power. As Mebu Nchimi

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Article 4 provides: "Human beings are inviolable. Every human being shall be entitled to respect for … the integrity of his person: No one shall be arbitrarily deprived of his right".

[9] ICJ, *Land and Maritime Boundary between Cameroon and Nigeria,* Cameroon v. Nigeria; Equatorial Guinea (intervener)*,* Judgment, 10 October 2002, p. 303: "Indeed, since the very content of these instruments is the subject of a dispute between the Parties, the Court, in order to definitively determine the delimitation of the boundary in question, must necessarily examine them

points out, the text of Article 4 leaves considerable room for interpretation. She posits quite rightly that:

> "The severe and peremptory prescriptions of Article 4 of the African Charter on Human and Peoples' Rights are far from absolute. The text suggests the possibility of a "justified" infringement of the human person by stating that "no one may be arbitrarily deprived of this right"[10].

22. It was incumbent on the Court, on this basis, which is well established in international judicial law, without prejudice to the will of sovereign States, to identify the meaning to be given to the provisions of this article of the African Charter. However, since *Rajabu and Others* (2019)[11], the Court has confined itself to a minimalist approach to this provision. This approach was the subject of an *Opinion* in which it was stressed that:

> "1) the mandatory death penalty is nothing but an avatar of the initial death penalty; it is an arbitrary deprivation of life and 2) It is not compatible with the requirements of international human rights law. The distinction between the two is decidedly inadequate."

23. Article 4 also contains a special feature worth highlighting. This provision neither explicitly authorises nor prohibits the death penalty. The current state of international law recommends a common prohibition regime applicable to all types of death penalty. The evidence of this trend can be seen in recent regional[12] and international developments, particularly at the United Nations.

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further. The dispute between Cameroon and Nigeria over certain points of the land boundary between Lake Chad and Bakassi is in reality nothing more than a dispute over the interpretation or application of a particular passage of the instruments delimiting that boundary. It is this dispute that the Court will now endeavour to resolve", § 85. It is clear that an international judge's interpretation is decisive.

[10]Mebu Nchimi (J. Claire), *La CADHP et le Protocole y relatif portant création de la Cour...,* Commenté article par article, Commentaire de l'Article 4, Ed. Bruylant, 2011, p. 141.

[11] This judgment, rendered on 28 November 2019, case concerns Mr *Ally Rajabu, Angaja Kazeni aka Oria, Geofrey Stanley aka Babu, Emmanuel Michael aka Atuu* and *Julius Petro*, Tanzanian nationals sentenced to death for murder. It states the Court's position on the death penalty. A partial position that should change.

Protocol to the *Convention for the Protection of Human Rights and Fundamental Freedoms, on the abolition* of the death penalty in all, 3 May 2002 circumstances.

24. The European human rights system excludes reservations under Article 3 of its latest Protocol and prohibits the death penalty. The Protocol makes the point of emphasising that “the death penalty is abolished. No one shall be condemned to such a penalty or executed”. Currently, of the fifty-five (55) Member States of the African Union, nearly forty are abolitionist in law or in practice...it can be said that the majority of states refuse this ultimate sanction[13].

25. Available data indicate that among the African countries that retain the death penalty in law, some are abolitionist in practice: Algeria, Cameroon, Central African Republic, Eritrea, Eswatini, Ghana, Kenya, Liberia, Malawi, Mali, Mauritania, Morocco and Western Sahara, Niger, Sierra Leone, Tanzania, Tunisia and Zambia. Some countries maintain the death penalty in law and in practice: Botswana, Chad, Comoros, Democratic Republic of Congo, Egypt, Equatorial Guinea, Ethiopia, Gambia, Lesotho, Libya, Nigeria, Sudan, South Sudan, Uganda and Zimbabwe. For many years now, in addition to Congo, Madagascar, Benin and Guinea, which have abolished the death penalty for all crimes, several countries have made considerable progress towards total abolition.

26. Other national trends should also be highlighted. The death penalty was abolished on 6 June 1995 by South Africa’s Constitutional Court. The death penalty “is unconstitutional and null and void. The State is prohibited from executing or sentencing to death anyone”, said the President of the Supreme Court, Justice Arthur Chaskalson. South Africa was under a moratorium: the death penalty by hanging still existed and was still pronounced by the courts, but executions had been suspended.

Since the United Nations General Assembly passed the first resolution calling for a moratorium on the use of the death penalty on 27 December 2007, 170 states have either abolished or introduced a moratorium on the death penalty. Congo-Brazzaville and Madagascar abolished capital punishment in 2015 while Guinea did so in 2016.

27. In 2016, Chad adopted a revised version of the Penal Code abolishing the death penalty, except for the crime of “terrorism”. In 2017, the Supreme Court of Kenya abolished the automatic imposition of the death penalty for murder. In 2018, Burkina Faso abolished the death penalty for crimes under the law[14]. Nigeria, which in its 1993 Periodic Report to the African Commission called for the abolition of capital punishment for drug trafficking (...) stated that the phenomenon of “death row” was incompatible with the African Charter.

28. It follows from the foregoing that the Court has at its disposal sufficient regional practice by African States to proceed, on the *one hand,* to an interpretation of Article 4 denying the legality of the death penalty and, on the *other* hand, to require the abolition of this penalty in national legislation insofar as it has become contrary to human rights and to its development[15]. Barring a major argument, the Court’s position cannot be less than that of the Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa (Cotonou Declaration) adopted in 2014 by the African Commission, which calls for:

> “[...] legislators in Africa to review their national laws and enact legislation abolishing the death penalty and to support the ratification of the Additional Protocol to the African Charter on Human and Peoples’ Rights on the Abolition of the Death Penalty in Africa”.

29. It is requested of States Parties to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) and to vote in favour of future UN General Assembly resolutions on a moratorium on the death penalty. At the very least, the African Court should draw inspiration from it.

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[14]Amnesty International, *Advocacy manual - Abolition of the death penalty in Africa*, Pub. Amnesty International, 2019, 43 p.
Breillat (D.), L’abolition mondiale de la peine de mort, Relating to the 2nd Optional Protocol on the International Covenant on Civil and Political Rights on the abolition of the death penalty, *RSC*, 1991, p.26.

30. In *the Ghati Mwita case,* the Court recognised the two trends - global and African - towards abolition of the death penalty. It held that there was:

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

31. However, the Court supports its position by arguing that:

> "At the same time, (...) the death penalty is still on the statute books of some States and no treaty on the abolition of the death penalty has been universally ratified. The Court notes that the Second Optional Protocol to the ICCPR has, to date, ninety (90) States parties out of the one hundred and seventy-three (173) States parties to the ICCPR", § 64.

32. The Court took up the same idea in the *Igola Iguna case*. It is presented as an *obiter dictum,* which was as follows:

> "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".[16]

33. Contrary to the three judgments cited above, it is argued that the mandatory death penalty constitutes a violation of the right to life as much as the death penalty itself. The problem is neither why this penalty is imposed nor how it is administered. The issue is the existence of a punishment that is inhuman and degrading to human rights.

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[16] ACtHPR, Judgment, Application No. 020/2017 Igola Iguna *v. United Republic of Tanzania,* 1 December 2022 § 55.

34. The Court also discussed the legal regime of hanging[17]. This was retained in the decision to sentence *Mr. Lazaro*. This method of punishment, including the death penalty itself, is unacceptable. In the *Ghati Mwita* decision, the operative part states that:

> "viii. Finds that the Respondent State has violated the Applicant's right to life under Article 4 of the Charter in relation to 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"[18].

35. The *Ghati Mwita* decision clarified the idea that hanging is unacceptable, unlike other ways of carrying out the death penalty. What is more, so goes the reasoning, no execution technique humanises or renders lawful the death penalty or hanging in the same way. This conclusion was also reached in the Court's decision, *Amini Juma v. Tanzania* of 30 September 2021, § 136.

36. Section 5 of the Charter therefore appears to be a provision against the existence of the death penalty in fact and in law. It states that:

> "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".

37. This provision of the Charter is unambiguous in all its content. The drafters of the Charter highlighted the three dimensions of human rights that the death penalty sets out to deny: a) Firstly, dignity, because what is denied

[17] *Mr Lazaro* denounced the fact that "his right to be treated with dignity was violated by sentencing him to death by hanging in violation of Article 5 of the Charter. The method of execution causes excessive suffering, which constitutes cruel, inhuman and degrading treatment", § 80.
[18] ACtHPR, Judgment, Application No. 012/2019 Ghati Mwita *v. United Republic of Tanzania* 1 December 2022 § 184.

by death row is ultimately, through profound alienation, the human person; b) Secondly, there is the denial of legal status, because the death penalty is a kind of legal aporia. It puts an end to a person's existence, even though his or her rights presuppose a physical presence; finally, there is the physical and moral torture denounced in Article 5. Such torture is inherent in any form of death sentence, not to mention cruel, inhuman or degrading treatment.

38. Numerous death penalty cases have been dealt with by the African Court, but so far it has drawn only inadequate conclusions. These conclusions uphold the violations observed throughout the national use of this penalty. It has been made compulsory for certain crimes.

Conclusion

39. Since the invalidation of the mandatory death penalty has so far been limited to questioning the manner in which it is imposed by national courts, the Court could have validly stated that: a) the death penalty is simply contrary to articles 4 and 5 of the African Charter on Human and Peoples' Rights; and, that b) States should take measures to expunge it from their national legislation. The Court seemed to lack this initiative of interpretation.

40. The three decisions under discussion come four years after *Rajabu et al* (2019), and a change should be expected. Kofi Annan, then Secretary-General of the United Nations (UN), said in 2000:

> "Taking a life is too absolute, too irreversible, for one human being to inflict it on another, even with the support of a legal process".[19]

41. Regretting that I was unable to obtain the support of the majority of my Honourable Colleagues, I felt it necessary to issue this Dissenting Opinion.

[19] Annan (K.), quoted by Amnesty International, 2000. V. Amnesty International, *Advocacy manual - Abolintion of the death penalty in Africa*, Pub. Amnesty International, 2019, 43 p.

Done at Algiers, this Seventh Day of the Month of November in the Year Two Thousand and Twenty-Three, the French text being authoritative.

Judge Blaise TCHIKAYA