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Judgment

Ally Rajabu and Others v. Tanzania

Application No. 007/2015

Separate Opinion

By

Judge Blaise Tchikaya

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Introduction

1. Like my Honourable colleagues, I have generally adopted the operative part of the judgment, Ally Rajabu and others v. United Republic of Tanzania,

on 28 November 2019. Without opposing the operative part, it is nevertheless necessary, on my part, to say that it would have been clearer for the Court to take a more straightforward line in its motives. While invalidating Tanzania's provisions on the mandatory death penalty, it left this useless "chiaroscuro" on the law applicable to the death penalty in Africa. It missed an opportunity to strengthen international law on this point. This assessment of the law on the death penalty, by distinction of category of crimes or offenses, is no longer, *de jure*, likely to be supported. This Court, the Human Rights Court, should align itself with the evolution of international law.

2. An application was presented to the Court of Arusha on 26 March 2015 by Messrs. Ally Rajabu, Angaja Kazeni alias Oria, Geofrey Stanley alias Babu, Emmanuel Michael alias Atuu and Julius Petro, Tanzanian nationals sentenced to death for murder. The question of its admissibility and that of jurisdiction did not embarrass the Court, which settled them without difficulty[1]. However, on the merits, what remained was to take a clear position on the question of mandatory sentence which was the sentence confirmed by the national judges.

3. The problem arises from the interpretation of § 108 of the judgment which reads as follows: "the Court notes that Article 4 of the Charter, while not prohibiting the death penalty, is essentially devoted to the right to life considered "inviolable" and aims to guarantee "the integrity" and therefore the sanctity of human life. The Court further notes that Article 4 of the Charter makes no mention of the death penalty"[2]. However, even though it is said, the prohibitive legal elements of punishment are now legion on the international level[3]. It is up to the judge to give them the desired effect.

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[1] AfCHPR, *Matter of Rajabu and others v. United Republic of Tanzania,* 8 December 2019, § 14-53.
[2] *Idem*., § 108.
[3] Resolution (A/RES/44/128) is titled "Elaboration of a Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty" was voted on 5 January 1990(A/44/PV.82, p.8-9).

4. This opinion will thus undertake to show the emptiness of the so-called mandatory death penalty distinction from other death sentences (I.) which feeds the judgment of Rajabu and others; next, the fact will be examined that the Court could have acceded to a system of prohibition of capital punishment in any form, as it is abundantly suggested in our opinion, Article 4 of the African Charter on Human and Peoples' Rights (II.).

I. The emptiness of the distinction between the death penalty and the so-called compulsory sentence

5. The Applicant told the Court that "by not amending Article 197 of its Penal Code, which provides for *the mandatory death penalty in the event of murder*, the Respondent State has violated the right to life and is not respecting the obligation to give effect to this right as guaranteed by the Charter"[4]. It was therefore for the Court to situate this infringement in its legal context: in addition to the right to life, the application of the death penalty was in question. As in its recent *Eddie Johnson Dexter case*, the mandatory death penalty regime was the basis for the controversy between the Applicant and the Respondent State. This distinction in this death sentence is neither operational nor justified in its legal significance. It is very relative.

6. National legislators end up with an extensive criminal power over a subject that is now regulated by international criminal law. It is known that, formally, the death penalty, as a criminal sanction, was a matter of internal public order. This is a matter of the orders of the various States which determine their penal policy and the hierarchy of the penalties inscribed in their Codes. The concept of reserved area, in all its meaning in international law, applied to those "cases which are essentially within the national jurisdiction of a State" within the

[4] *Idem.*, § 14.

meaning of Article 2(7) of the Charter (1)[5]. The distinction between the two kinds of death sentences in this case is only relative.

A) Relative and insufficient distinction between the two kinds of death sentences

7. Article 197 of the Tanzanian Penal Code provides that: "Any person convicted of murder shall be. sentenced to death". The adjective mandatory does not appear, but the legal language, without putting elements of procedure, interpreted these provisions as requiring capital punishment.

8. This punishment and its effective application, in any event, can only be made following a procedure subject to the judge's assessment. And these elements are as much present in the case of the non-compulsory death sentence, decided by the judge without legislative constraint. This is emphasized by the United Nations Human Rights Committee in the *Dexter case*, saying: "In this context, it recalls its jurisprudence and reiterates that the automatic and mandatory imposition of the death sentence, constitutes an arbitrary deprivation of life, incompatible with article 6(1) of the Covenant, provided that the death sentence is passed without the personal circumstances of the accused or the particular circumstances of the crime being taken into consideration. The existence of a *de facto* moratorium on executions is not sufficient to make the mandatory death penalty compatible with the Covenant"[6].

9. On reading these reasons given by the Committee, two elements can be noted: 1) mandatory death penalty is only an embodiment of the initial death penalty; it constitutes an arbitrary deprivation of life and 2) It is not compatible with the

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

[6] HRC *Dexter Eddie Johnson v. Ghana Communication*, 28 March 2014, g 9 and following; see also Communication No. 1406/2005, *Weerawansa* v. *Sri Lanka*, observations adopted on 17 March 2009, par. 7.2.

requirements of international human rights law. The distinction between the two is decidedly inadequate.

10. This opinion emphasizes that what is condemned in the death penalty is found *mutatis mutandis* in the mandatory death penalty. The latter is of no significant contribution to the distinction that should be made with regard to the initial death sentence. The mandatory death penalty would be like a super death sentence that would apply against supreme crimes. However, a death sentence is by definition a death sentence. The basis of this mandatory death sentence and its procedural elements are not sufficiently distinguishable, a single regime with the original death penalty was more appropriate.

B) A single legal regime is applicable

11. It begins with the 1966 Covenant[7]. The Covenant does not make any distinction: "1. No person subject to the jurisdiction of a State Party to this Protocol shall be executed. 2. Each State Party shall take all appropriate measures to abolish the death penalty within its jurisdiction"(article 1)[8]. As much as "the death penalty is an abomination for all the condemned"[9] (the words of Victor Hugo), the rule of international law refuses to distinguish it in its form: the mandatory death penalty or not. This distinction, which is not a creation of African states, also exists in the United States. The US Supreme Court in restricting the use of the death penalty in the United States has reserved it for murders of crimes against individuals and excluding accomplices whose participation is only peripheral.[10]

12. The analyses of the United Nations Human Rights Committee on the commonality of these death sentences show this. In *Eversley Thompson v. St.*

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[7] *The International Covenant on Civil and Political Rights (*ICCPR) was adopted in New York on 16 December 1966 by the UNGA in resolution 2200 A (XXI), entered into force on 23 March 1976.

[8] *UNGA Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, Resolution 44/128 of 15 December 1989

[9] Hugo V, *The last day of a condemned man (1829)*

[10] In effect in the United States, there is a similar system. See especially the Supreme Court, *Erlich Anthony Coker v. State of Georgia*, 28 March 1977; see also Supreme Court, *Patrick O. Kennedy v. State of Louisiana,* 25 June 2008: The Supreme Court of the United States ruled that the death penalty was unconstitutional under the Eighth Amendment when applied to crimes against individuals that did not cause death. This case involved a girl of less than 12 years old.

Vincent and the Grenadines, the Human Rights Committee ruled on the applicant's assertion that the mandatory nature of the death penalty and its application amounted to an arbitrary deprivation of life. The Committee stressed that "such a system of compulsory imposition of the death penalty deprives the individual of his most fundamental right, the right to life, without considering whether this exceptional form of punishment is appropriate in the particular circumstances of his life. his business". The result was that the mandatory death penalty was an arbitrary deprivation of life in violation of article 6(1) of the Covenant.[11]

13. It was perfectly possible for the African Court to consider in this case that the state of international law recommended a common system of prohibition applicable to all "kinds of death sentences". The European system which excludes reservations by Article 3 of its latest Protocol which prohibits the death penalty sets the tone. It is noted that "No derogations to the provisions of this Protocol shall be made under article 57 of the Convention". The Protocol takes care to stress that "The death penalty shall be abolished. No one shall be condemned to such penalty or executed".[12] It is further indicated that this constitutes " the final step in order to abolish the death penalty in all circumstances".[13]

14. In this decision the Court was very circumspect and "legalistic". It endeavored to observe scrupulously the normative sovereignty of the Respondent State. In its non-pecuniary measures, however, it ordered the Respondent State to "take all the necessary measures, within one year of notification of the present judgment, to abolish the mandatory death penalty its legal system ". Here lies the meaning of this opinion. This "chiaroscuro" maintained on the regime of the death penalty deserves discussion. In the state of international law, there are

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[11] See: article 6(2) of the ICCPR; *Eversley Thompson v. Saint Vincent and the Grenadines*, Communication No. 806/1998, U.N. Doc. CCPR/C/70/D/806/1998 (2000) (U.N.H.C.R.), 8.2.

[12] Article 1, 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*, Vilnius, 3 May 2002

[13] Idem., Preamble to the Protocol

no "death sentences" with variable qualifiers[14]. A single legal regime is applicable. The term "mandatory" does not alter the majority rejection of this sanction by the international community.[15] Moreover, the suppression called for by the judge, in any event, should usefully concern only the death penalty, without further distinction. As the International Court of Justice recalls, "there is a general obligation beyond the texts applicable to specific fields, at the behest of States to prevent the commission by other persons or entities of acts contrary to certain norms of international criminal law".[16] It is an obligation of conformity to the law of the people. Thus in this light, *Rajabu and others*, reflects a limited reading of Article 4 of the Charter.

II. A still limited reading of Article 4 of the Charter

15This reading will be considered before referring to the remarkable wave of abolitionism that has already taken hold of the continent.

A. The almost total movement against the death penalty in Africa should be reflected in the protection of human rights

16. The international doctrine against the death penalty was built through progressive denunciation of human rights violations, cruel, inhuman and degrading treatment on the one hand and violation of the right to life, on the

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[14] The same was true of the controversial death sentence in time of war. This aspect was discussed when, on 15 December 1980, the UN General Assembly agreed on the elaboration of a draft protocol aiming at the abolition of the death penalty. It reaffirmed its will in 1981. On 18 December 1982, the UNGA requested the United Nations Commission on Human Rights to establish the Second Optional Protocol to the International Covenant on Civil and Political Rights. The Sub-Committee on the Prevention of Discrimination and Protection of Minorities therefore had the task of working on it. The Sub-Commission's rapporteur, Marc J. Bossuyt, a Belgian expert, introduced the wartime exception, because what he said: "a greater number of States will thus be able to become parties to the Second Optional Protocol". ". See Marc Bossuyt, Guide to the Preparatory Works of the International Covenant on Civil and Political Rights, Nijhoff, Dordrecht-Boston-Lancaster, 1987, 851 p.

[15] The first International Covenant on Civil and Political Rights of 1966, which entered into force on 23 March 1976, in accordance with the provisions of Article 49, had in this respect the protection of the right was updated on the subject. The *Second Optional Protocol to the International Covenant on Civil and Political Rights*, aiming at the abolition of the death penalty 11 July 1991, in accordance with Article 8.

[16] ICJ, Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide of 9 December 1948 Advisory Opinion, 28 May 1951, Rec 1951, p. 496; quoted by Pellet 'A) "From one Crime to Another - State Responsibility for Violating Human Rights Obligations" *Studies in honour of Professor Rafâa Ben Achour- Mouvances du droit*, Konrad-Adenauer-Stiftung, 2015, tome III, pp. 317-340.

other hand. It is irrefutable that the rejection of this sentence is total today[17]. This could have two complementary explanations: the socio-political complexity of its elevation as a penal sanction and the use that could be made of it, even by a judge. The latter is not exempt from miscarriage of justice.

17. The observation shows that the African continent is part of this international movement whose goal is the abolition of the death penalty. Today, out of the 54 member states of the African Union, nearly twenty do not execute death row inmates, 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.[18]

18. It was indeed desirable that a reading of the international provisions should guide the decision of the Court. This reading should be based on international or even national jurisprudence of African states, many of which have introduced moratoria on the execution of the death penalty. A reading that could have also been based on the international normative evolution in this same field.

19. Many countries in Africa have de facto moratoria on the death penalty.[19] They refuse the fatal execution of individuals. A kind of partial death sentence is like the mandatory death penalty in that it applies to certain crimes. Those African countries that have reduced the scope of the death penalty should eliminate it. This is what Article 4 of the African Charter on Human and Peoples' Rights is already suggesting.

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[17] Breillat (D.), The global abolition of the death penalty, Concerning the Second Optional Protocol of the International Covenant on Civil and Political Rights aimed at abolishing the death penalty, *RSC*, 1991, p. 261.

[18] At this date, Congo-Brazzaville and Madagascar having abolished capital punishment in 2015 and Guinea in 2016 are the last abolitionist African States

[19] 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.

B. *Article 4 of the African Charter allowed for an interpretation against the death penalty*

20. In addition to the general opinion that the death penalty violates human rights, the right to life remains the right that is violated fundamentally and manifestly by a State order favourable to the death penalty. It is inhuman treatment and involves psychological torture. The wait between the sentence and the execution constitutes a superfluous punishment. It is observed, on the contrary, that most lifers - real - do not reoffend. Upon release, they resume a normal life.[20] We regularly quote the case of Mr. Maurice Philippe, who, while being particular, remains instructive. This man was sentenced to death in 1980, his conviction was commuted to life imprisonment in 1981 for the murder of two police officers. In prison, he studied history and, today on parole, he is a doctor in medieval history and researcher in a graduate school (EHESS, France).

21. The right to life remains the major element of Article 4 of the African Charter on Human and Peoples' Rights: "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 ". It is this article that is the subject of the Court's judgment. I agree with the purpose of the analysis, but the reasoning of the Court in § 92 remains unclear: "(...) Indeed, Article 4 of the Charter does not mention the death penalty. The Court observes that despite the international trend towards the abolition of the death penalty, in particular through the adoption of the *Second Optional Protocol to the International Covenant on Civil and Political Rights,* the prohibition of this penalty in international law is not yet absolute ". This unexplained search for the absolute and the lack of Praetorian commitment limit the Court's power of interpretation.

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[20] The position that we find in doctrine, especially Alain Pellet, Rapporteur of the French committee chaired by Pierre Truche, wrote: "the Committee is resolutely opposed to the death penalty; as abominable as the offenses, 'to use the logic of death against terrorists, which they practice without mercy, it is for a democracy to embrace the values of terrorists'; the only thing left is perpetual imprisonment." see. in Ascensio (A.), Decaux (E.) and Pellet (A.), (ed.), *Droit international pénal*, Pedone, Paris, 2000, p. 843.

22. The African Charter is not the only instrument against the capital punishment which, without mentioning the abolition of the death penalty, does not mention this suppression, but proclaims the right to life as to be protected. The Universal Declaration of Human Rights (10 December 1948) has the same approach.[21] These instruments belong to the time of the Cold War dissensions. This explains the advent of the Second Protocol, which is devoted specifically to the abolition of the death penalty. As with the 1948 Declaration, for the African Charter, the option that prevailed was "compromise". The reference to the right to life, in absolute terms, without reference to the abolition of the death penalty.[22] This last idea was nevertheless present.

23. Nigeria, which in its periodic report to the African Commission of 1993 called for the abolition of the death penalty for drug trafficking, the illegal agreements concerning petroleum products, said that the phenomenon of "death row" was incompatible with the African Charter.[23] Finally, it should be noted that the African Charter on the Rights of the Child, which has been extensively ratified, requires that the death penalty not be imposed for crimes committed by minors under the age of 18[24] and that it cannot be executed on pregnant women, or mothers of babies or young children.

24. Despite advances in international criminal law; the judgment on *Rajabu and others* seems to retrogress. It pays little attention to the Praetorian powers of the Human Rights judge to advance the protection of the right to life. There is an interpretive function of the rule of law to be implemented in order to complete and clarify the protection of the right to life that Article 4 of the African Charter

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[21] The Declaration does not mention the death penalty. Article 3 states that "Everyone has the right to life, liberty and security of person". It is in the context of the right to life that the question of capital punishment was debated during the preparatory work of the Declaration.

[22] Dieng (A.), Le droit à la vie dans la Charte africaine des Droits de l'Homme et des peuples, *Proceedings of the symposium on the right to life*, Montant (F.), Premont (D.), CIO, Geneva, 1992, pp.

[23] OUA, *Doc. CAB/LEG/24.9/49 (1990),* article 46.

[24] Article 5: "Death sentence shall not be pronounced for crimes committed by children". Article 30(e) states that "ensure that a death sentence shall not be imposed on such mothers" (Charter of 1 July 1990).

assumes. Former Judge Ouguergouz (F.)[25] is accustomed to recalling the liberal character of the *ratione materiae* jurisdiction which States wished to give to the African Court through Article 7 of the Protocol on the Establishment of the African Court, entitled "Sources of law". It is provided that "the Court shall apply the provision of the Charter and any other relevant instruments ratified by the States concerned".

25. The dispute between the Government of Guatemala and the Inter-American Commission over the emergency tribunals established in Guatemala is sufficient illustration of this problem. These courts functioned and sat secretly. The most macabre element of these courts was that they pronounced a series of death sentences, many were executed. The Government of Guatemala justified their legality by arguing that in ratifying the Convention with a reservation to Article 4(4)[26] it had done so with the intention of continuing to apply capital punishment for crimes of common law of a political nature. It was necessary for the Commission to use its power of interpretation to reject this reading and to seek the opinion of the Court.[27] The question is identical in this case of *Rajabu and others.*

26. The spirit of Article 4 of the African Charter is interpreted restrictively in that judgment. This limiting interpretation is reminiscent of Article 80 of the Rome Statute of the International Criminal Court (establishing the ICC) which states that " Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part".[28] As has been said, this approach is clearly internal.

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[25] Ouguergouz (F.), *The African Court on Human and Peoples' Rights – Focus on the first Continental Judicial Body*, *AFDI*, 2006. pp. 213-240;

[26] Inter-American Convention on Human Rights (San José, Costa Rica, 22 November 169), Article 4 entitled Right to Life 1. 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. (…) 4. In no case shall capital punishment be inflicted for political offenses or related common crimes.

[27] *Report on the Situation of Human Rights in the Republic of Guatemala*, OEA. /Ser.L/II.61, Doc. 47, *Rev.* 1, October 1983, pp. 43 to 60. v. Cerna Christina (M.), Inter-American Court on Human Rights- the first case, *AFDI*, 1983. pp. 300-312

[28] However, according to article 77 of the Statute on penalties "the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute: (a) Imprisonment for a specified number of

27. In this decision the African Court, by dint of the fact that it denounces only the mandatory death penalty, is out of step with the position which can be considered as constant of the United Nations International Law Commission. The International Law Commission has been "convinced that the abolition of the death penalty contributes to the enhancement of human dignity and the progressive extension of fundamental rights"[29]. This development is reflected in the pronouncements of the Inter-American Court, which emphasized that the lack of consular assistance is an infringement of fundamental rights. In these circumstances, it continued " the death penalty is a violation of the right not to be 'arbitrarily' deprived of one's life, in the terms of the relevant provisions of the human rights treaties (...)"[30].

28. The Court, while asking Tanzania to review its legislation on a category of death penalty - the mandatory death penalty[31] - is refusing to direct its decision to condemn the death penalty. It allows islands of tolerance to persist. On this judgment, it departs from the trend of international criminal law. As to the universality of the abolition of the death penalty, it must be recalled, without necessarily exaggerating, that in its judgment on *the North Sea Continental Shelf*[32] the International Court of Justice had carefully examined the relationship between conventional and customary standards. It considered that international conventions could produce customary accessions that were applicable.

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years, which may not exceed a maximum of 30 years; or (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".

[29] Resolution 1997/12, 3 April 1997. (24) and Resolution 1998/8, 3 April 1998.

[30] IAHRC, O.C., 1 October 1999, p. 264, § .37 et p. 268, § 141

[31] Article 197 of the Penal Code of Tanzania states that "Any person convicted of murder shall be sentenced to death"

[32] ICJ., North Sea Continental Shelf, Denmark and the Netherlands v. FRG ICJ, 20 February 1969