

# AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

## Dissenting Opinion of Judge Dumisa Ntsebeza Judgment in *Application No. 003/2016* *John Lazaro v. United Republic of Tanzania*

**7 November 2023**

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## **A. INTRODUCTION**

### **i. An Overview of the Lazaro Case**

1. At its 70<sup>th</sup> session held at Arusha from 4<sup>th</sup> - 29<sup>th</sup> September 2023, the Court heard the case of *John Lazaro v. United Republic of Tanzania*.<sup>1</sup> Once

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<sup>1</sup>ACTHPR, *John Lazaro v. United Republic of Tanzania*, Application No. 003/2016. 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

again, the death penalty was at the heart of the matter. The Applicant is a national of Tanzania, who at the time of filing his Application before the Court, was awaiting execution of the death penalty after having been convicted of murder and sentenced to death. Upon his appeal, his conviction and sentence were upheld by the Court of Appeal, the highest court in the Respondent State, on 6 August 2010. He alleged violation of his rights in the course of the proceedings before the domestic courts.

2. He alleged the violation of both his right to life and the right to dignity as protected under Articles 4 and 5 respectively of the African Charter on Human and People's Rights (Charter). Under the right to life, he averred that the Respondent State had violated his right by imposing a mandatory death penalty without considering the circumstances of the offender; imposing the death penalty outside the category of cases to which it can be applied; and by imposing of the sentence without a fair trial.
3. I fully concur with the Court's conclusion in the Rajabu case, that the death penalty as imposed by the courts of the Respondent State in instances of murder, such as the case in the present Application, does not provide a judicial officer any discretion to consider alternative forms of punishment.<sup>2</sup> Furthermore, the mandatory imposition of the death penalty by the Respondent State constitutes a violation of the right to life contemplated in Article 4 of the Charter.<sup>3</sup>

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before the Court. The withdrawal of the Declaration had no bearing on pending cases, including the present case.

<sup>2</sup> *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, § 110.

<sup>3</sup> The United Nations Human Rights Committee has stated that "the mandatory and automatic imposition of the death penalty constitutes an arbitrary deprivation of life in violation of article 6, paragraph 1, of the [ICCPR], in circumstances where capital punishment is imposed without any possibility of taking into account the personal circumstances of the accused or the circumstances surrounding the crime in question". The United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "in no case should the law make capital punishment mandatory, regardless of the facts of the case" and the Special Rapporteur, that "the mandatory imposition of the death penalty, which excludes the possibility of imposing a lighter sentence in any circumstances, is incompatible with the prohibition of cruel, inhuman or degrading treatment or punishment". In its resolution 2005/59, adopted on 20 April 2005, the United Nations Human Rights Committee urged

**ii. The death penalty by hanging: an inhuman, degrading, form of punishment that violates Article 5 of the African Charter**

4. With regard to the violation of Article 5 of the Charter, I also fully concur with my learned brothers and sisters that the method of execution of the death penalty by hanging, where such a penalty is permitted, is “inherently degrading” and “encroaches upon dignity in respect of the prohibition of ... cruel, inhuman and degrading treatment”. It thus follows that I agree with the Court’s conclusion that death by hanging constitutes a violation of the right to dignity under Article 5 of the Charter. My point of departure, however, is that the violation of Article 5 should not only be restricted to the method of execution, i.e, by hanging, but should be construed to mean that capital punishment, in and of itself, is a violation of Article 5 inasmuch as it is a cruel, inhumane, degrading and torturous punishment.
5. My contention, therefore, is that the Court should not have limited itself to finding a violation with regard only to the method of execution, but should have gone a step further to pronounce itself on the death penalty being a cruel inhumane degrading punishment that should be prohibit. It should be struck from the domestic legislations as a punishment, given the wording of Article 5 of the Charter, which provides as follows:

“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”.
6. This dissent therefore, seeks to opine that the death penalty, as a form of punishment, constitutes a violation of Article 5 of the African Charter. I opine that the death penalty is not, and never has been, a solution to deviant

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States that continue to apply the death penalty to "ensure that ... the death penalty is not imposed ... as a mandatory sentence".

human behaviour. That, inter alia, is one of the reasons I have opted to differ, respectfully, from the majority view of my learned Honourable Judges of the Court on this subject.

7. It is worth noting that the facts of this case are similar to those in a landmark case decided by the Court, in the matter of *Ally Rajabu*,<sup>4</sup> in terms of the disputed facts of gang murder, the proceedings, the Respondent State and the criminal sanction: death sentence by hanging. In the *Rajabu* case the Court observed that "... many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto.<sup>5</sup> 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,---a notion with which I do not agree--- methods of execution must exclude suffering or involve the least suffering possible.<sup>6</sup> In the same case, the Court observed that hanging a person is one of such methods and it is therefore inherently degrading. Furthermore, having found that the mandatory imposition of the death sentence violates the right to life due to its arbitrary nature, this Court further observed that, the method of implementation of that sentence, that is by hanging inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment. As a consequence of the above, the Court found that the Respondent State had violated Article 5 of the Charter.

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<sup>4</sup> *Ally Rajabu and Others v. United Republic of Tanzania* (merits and reparations) (28 November 2019) 3 AfCLR 539, §§ 118-120.

<sup>5</sup> See *Jabari v. Turkey*, Judgment, Merits, App No 40035/98, ECHR 2000-VIII (deporting a woman who risked death by stoning to Iran would violate the prohibition of torture); *Chitat Ng v. Canada*, Comm. No.469/1991,491h Sess., U.N. Doc. CCPRICI49IOI469/1991 (Nov. 5 1993), H.R. Comm., 16.4 (gas asphyxiation constitutes CIDT due to length of time to kill and available alternative less cruel methods). The United Nations Human Rights Council describes stoning as a particularly cruel and inhuman means of execution, Human Rights Council Res. 2003/67, Question of the Death penalty, E/CN.4/RES/2003/67 at para 4(i) (Apr.24,2003); Human Rights Council Res. 2004/67, Question of the Death Penalty, E/ CN.4/RESi2004167 al para 4(i) (Apr. 21 2004); Human Rights Council Res. 2005/59, Question of the Death Penalty, E/CN.4/RES/2005/59 at para 7(i), 4(h) (Apr 20 2005)

<sup>6</sup> See *Chitat Ng*, op. cit., 16.2

8. In this case, I go a step further as I did in the Mulokozi Case. I point out that the Court's conclusion in upholding the death penalty is unconscionable, respectfully submitted, to say the least.<sup>7</sup> In my view, I argue that Article 5 of the Charter is impacted in these death sentence cases, not only because of the manner of effecting the death sentence, that is by hanging, but also because even as a form of punishment, it is one that is cruel, inhuman, unusual and degrading and is thus inconsistent with the dignity right protected by Article 5. Furthermore, no termination of life, in whatever form, whether by electrocution, or by lethal injection, hanging, gas chamber asphyxiation, decapitation—none at all---, escapes being an affront to the dignity right protected by Article 5. Every killing of a human being, by another individual, ---- or even by the State, is, conceptually, undignified.
9. The concept of human dignity lies at the core of international human rights law, and many argue that the death penalty undermines this fundamental principle. The death penalty inflicts severe physical and psychological suffering on the individual being executed, and can also cause emotional distress to their families and loved ones.
10. Furthermore, opponents of the death penalty---- such as myself-----, argue that it denies individuals the inherent right to life, which is considered one of the most fundamental human rights. They contend that even those who have committed serious crimes should not be deprived of this right, as it is the basis for all other human rights. Taking a person's life through state-sanctioned execution is a violation of their dignity and denies them the opportunity for potential rehabilitation or redemption.

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<sup>7</sup> *Joint Dissenting Opinion of Judge Blaise Tchikaya and Judge Dumisa Ntsebeza of Mulokozi Anatomy v. United Republic of Tanzania, Application No. 057/2016, 23 June 2023.* "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." Paragraph 38

11. Some of the execution methods include death by hanging,<sup>8</sup> beheading, lethal injection, the Guillotine<sup>9</sup>, Shooting, Electrocutation,<sup>10</sup> Lethal injection<sup>11</sup> and Stoning to death, Gas asphyxiation etc. All of these methods are not devoid of pain. Moreover, mistakes or errors can be made, and history has shown that this has been, and will be so. These factors inevitably impact on the mental status and well-being of a person sentenced to death.
  
12. Thus, the majority's reliance on Article 5 only in-so-far as qualifying the violation of the dignity right by the manner of executing capital punishment, by hanging only, is arguably misplaced, in my respectful opinion. It is not ONLY because of the manner of execution that renders the death sentence incompatible with the dignity sought to be protected in Article 5 of the Charter. It is the punishment itself, the taking of life, this time by the State, that puts it, as a form of punishment, at odds with Article 5 of the Charter. It is an affront to dignity because the killing of anyone, this time around by the State, in whatever form, is an insult to the dignity of the individual punished thereby. The only way the rights contemplated in Articles 4 and 5 could be upheld and protected would be if the death sentence itself was interpreted by the Courts as inconsistent with the rights of the individual contemplated in Articles 4 and 5 of the Charter.

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<sup>8</sup> Carried out in countries in Africa, Asia, and the Middle East, hanging is defined as suspending someone in the air as a form of execution. Death either occurs through decapitation or through strangulation, depending on the length of the rope compared to the weight of the prisoner.

<sup>9</sup> The Guillotine, one of the older methods of execution, was introduced in France in 1792. This device fixes the head between two logs with a heavily weighted knife suspended a couple of feet in the air. This method of execution was introduced to make the process of execution "by means of a machine," making it "as painless as possible."

<sup>10</sup> Execution by electrocution occurs when a prisoner is strapped to an electric chair with a "metal skullcap-shaped electrode" attached to their scalp or forehead. Following these actions, the prisoner receives a jolt of electricity up to 2000 volts for up to 30 seconds, until the prisoner is dead.

<sup>11</sup> Lethal Injection consists of an anesthetic alongside chemicals used to paralyze the prisoner and stop the heart. This form of punishment exists in China and Vietnam. The United States also uses the lethal injection, with the most recent execution taking place on September 24th, 2020. "Christopher Vialva was sentenced to death for the 1999 murders of Todd and Stacie Bagley." Vialva's execution was the 1,526<sup>th</sup> in the United States since 1976, 10<sup>th</sup> in the federal system, and the 1,346<sup>th</sup> person executed by means of lethal injection.

13. In light of the above, it is my considered opinion therefore that the Court should take the position that the death sentence cannot be consistent with the Charter or any other human rights instruments that United Republic of Tanzania has ratified, and the Charter is one of them. The Respondent State should therefore strike it off its legislations as the ultimate form of punishment.

## **B. INTERNATIONAL REJECTION OF THE DEATH PENALTY INSUFFICIENTLY EXPRESSED BY THE JUDGMENT**

### **i. Personal and Institutional Perspectives**

14. I reiterate my position above, that the death sentence by whatever means is an affront to the right to dignity sought to be protected by Article 5 of the Charter. I argue that by extension of the interpretation of the right to dignity in Article 5 of the Charter, the interpretation must mean more than just the hanging of a person as an execution method to qualify as an affront to dignity but that the affront to dignity is in the punishment itself. It is the sort of punishment in relation to which there is no margin of error. If one gets killed, and it is discovered years, or even days later that one was wrongfully killed, the discovery of the error of killing will be too late. It will have been the killing of the innocent, and that, by any standard, is unconscionable. In this section, I highlight some of the views of notable personalities and entities that echo my position.

15. The *UN Special Rapporteur, of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, reported to the General Assembly<sup>12</sup>, that “To date, the death penalty

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<sup>12</sup> Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, submitted in accordance with General Assembly resolution 66/150. Sixty-seventh session (9 August 2012)- <https://www.childlinesa.org.za/wp-content/uploads/un-interim-report-of-the-special-rapporteur-on-torture-and-other-cruel-inhuman-or-degrading-treatment-or-punishment-august-2012.pdf> . Paragraphs 74-78

has been treated under the provisions concerning the right to life, and therein as an exception provided for by international law. A new approach is needed as there is evidence of an evolving standard within international bodies and a robust State practice to frame the debate about the legality of the death penalty within the context of the fundamental concepts of human dignity and the prohibition of torture and cruel, inhuman or degrading treatment or punishment. This evolving standard, along with the resulting illegality of the death penalty under such prohibition, is developing into a norm of customary law, if it has not already done so". The Special Rapporteur finds that 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.

16. "The prohibition of torture and cruel, inhuman or degrading treatment and the strict adherence to safeguards constitute absolute limits on the use and enforcement of the death penalty. It may still be theoretically possible to impose and execute the death penalty without running afoul of the absolute prohibition of torture and cruel, inhuman or degrading treatment, but the rigorous conditions that States must apply for that purpose make the retention of capital punishment not worth the effort. Even with such conditions, States cannot guarantee that in all cases the prohibition of torture will be scrupulously adhered to. Death by stoning or gas asphyxiation is already clearly prohibited under international law. Furthermore, there is no categorical evidence that any method in use today can be said to comply with the prohibition of torture and cruel, inhuman or degrading treatment. The death row phenomenon is a violation of article 7 of the International Covenant on Civil and Political Rights, and of article 1 or article 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, depending on the length of isolation and severity of conditions. The anxiety created by the threat of death and the other circumstances surrounding an execution, inflicts great psychological pressure and trauma on persons sentenced to death. A prolonged stay on death row, along with the accompanying conditions, constitutes a violation of the prohibition of torture itself."



17. In this chapter, I find it apt to borrow from the *South African Constitutional Court*,<sup>13</sup> where it observed that “Death is the most extreme form of punishment to which a convicted criminal can be subjected. Its execution is final and irrevocable. It puts an end not only to the right to life itself, but to all other personal rights which had vested in the deceased under Chapter Three of the Constitution. It leaves nothing except the memory in others of what has been and the property that passes to the deceased's heirs. In the ordinary meaning of the words, the death sentence is undoubtedly a cruel punishment. Once sentenced, the prisoner waits on death row in the company of other prisoners under sentence of death, for the processes of their appeals and the procedures for clemency to be carried out. Throughout this period, those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows. Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty. It is also an inhuman punishment for it "...involves, by its very nature, a denial of the executed person's humanity and it is degrading because it strips the convicted person of all dignity and treats him or her as an object to be eliminated by the state.”<sup>14</sup>
18. In the *Lazaro* case,<sup>15</sup> the Court recalled its observation on the global trends towards the abolition of the death penalty, represented, in part, by the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR).<sup>16</sup> At the same time, however, it noted 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.<sup>17</sup> The Court further observed that as at 28 June 2023, the

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<sup>13</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995): <https://www.saflii.org/za/cases/ZACC/1995/3.html>

<sup>14</sup> *Furman v. Georgia*, [1972] USSC 170; 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

<sup>15</sup> Paragraphs 75-76

<sup>16</sup> *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*, (merits and reparations) (28 November 2019) 1 AfCLR 96. Notably, the Respondent State is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights.

<sup>17</sup> 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 – A/77/247: Report of the Secretary

Second Optional Protocol to the ICCPR had ninety (90) State Parties out of the one hundred-seventy-three (173) State Parties to the ICCPR.<sup>18</sup>

19. With regard to the framing of Article 4 of the Charter, the Court noted that, despite 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, the prohibition of the death sentence in international law is still not absolute.<sup>19</sup>
20. Similarly, a number of studies have been undertaken by abolitionists of the death penalty, to the effect that the death penalty is the ultimate cruel, inhuman and degrading punishment. For instance, *Amnesty International* opposes the death penalty in all cases without exception regardless of who is accused, the nature or circumstances of the crime, guilt or innocence or method of execution. It observes that the death penalty breaches human rights, in particular the right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment.<sup>20</sup>
21. According to the *Office of the UN High Commissioner for Human Rights (OHCHR)*, the use of the death penalty is not consistent with the right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment. There is a growing consensus for universal abolition of the death penalty. Some 170 States have abolished or introduced a moratorium on the death penalty either in law or in practice. Despite this abolitionist trend, the death penalty is still employed in a small number of countries, largely because of the myth, I respectfully opine, that

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General on a moratorium on the use of the death penalty, published on 8 August 2022. See <https://www.ohchr.org/en/node/103842>.

<sup>18</sup> <https://indicators.ohchr.org/>

<sup>19</sup> *Ally Rajabu and Others v. United Republic of Tanzania*, (merits and reparations) (28 November 2019) 1 AfCLR 96.

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<https://www.amnesty.org/en/what-we-do/death-penalty/#:~:text=The%20death%20penalty%20is%20the,innocence%20or%20method%20of%20execution>

it deters crime. A few states also still permit use of the death penalty for crimes other than those of extreme gravity involving intentional killing, including for drug-related crimes or terrorism charges. It surmises that worldwide abolition is necessary for the enhancement of human dignity and progressive development of human rights.<sup>21</sup>

22. The *Delegation of the European Union* has highlighted the lack of humanity towards implementing the death penalty for the condemned and leaves no room for judicial mistakes. On top of that, the road to the application of capital punishment is often marked by experiences of torture and ill-treatment. It has observed that in many cases, physical and psychological torture is applied to obtain confessions, which contributes to deteriorating health conditions. This clearly points to the impact of the capital sentence on someone's mental health. The anguish of anticipating execution, added to harsh conditions while on death row, are two of the elements most commonly experienced. Painful execution methods further contribute to the inhuman aspect of it, causing harm not only to the condemned, but also to their families.<sup>22</sup>
  
23. This *Amnesty International* publication illustrates that the conditions of detention for prisoners sentenced to death are often harsh. It reports that daily prison routine is often strictly enforced and even small breaches of discipline, such as shouting or lying down outside rest hours, are liable to punishment. Closed-circuit cameras are installed in some cells of prisoners under sentence of death. This very harsh regime is not substantially relaxed even for prisoners who have spent several years or decades under sentence of death. *Amnesty International's* concerns about the death penalty, in general, summarizes arguments which have been made in recent years by abolitionists and describes cases of prisoners who have

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<sup>21</sup> Death penalty | OHCHR: <https://www.ohchr.org/en/topic/death-penalty>

<sup>22</sup> Delegation of the European Union to Burkina Faso Death Penalty: a degrading path marked by torture | EEAS: [https://www.eeas.europa.eu/eeas/death-penalty-degrading-path-marked-torture\\_en?s=86](https://www.eeas.europa.eu/eeas/death-penalty-degrading-path-marked-torture_en?s=86)

been executed or currently face execution. Some of these prisoners may have been convicted unfairly. In this publication, *Amnesty International* calls on the Japanese government immediately to end the use of the death penalty and to abolish the death penalty in law as a matter of urgency. Pending abolition of the death penalty it calls on the government to end all forms of cruel, inhuman and degrading treatment or punishment of prisoners under sentence of death and to commute all death sentences.<sup>23</sup>

## ii. Reasons To Abolish the Death Penalty

24. I reiterate my position that the death penalty, being an inconsistent punishment as envisaged under Article 5 of the Charter, should completely be abolished. It is not sufficient to place a moratorium on its application because of the mental anguish it continues to exert to those sentenced to die. Any time, the moratorium can be reversed. Like many others, I am particularly keen to see the abolition of the death penalty for the following reasons:

### a. It is irreversible and mistakes happen

25. Execution is the ultimate, irrevocable punishment: the risk of executing an innocent person can never be eliminated. Since 1973, for example, more than 191 prisoners sent to death row in the USA have later been exonerated or released from death row on grounds of innocence. Others have been executed despite serious doubts about their guilt.<sup>24</sup> A significant concern is the risk of executing innocent individuals. The criminal justice system is not infallible, and there have been cases where wrongful convictions have occurred. Once a person is executed, there is no possibility of rectifying

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<sup>23</sup> Amnesty International | The Death Penalty: A Cruel, Inhuman and Arbitrary Punishment: <https://www.refworld.org/docid/3ae6a9dd4.html>

<sup>24</sup><https://www.amnesty.org/en/what-we-do/death-penalty/#:~:text=The%20death%20penalty%20is%20the,innocence%20or%20method%20of%20execution>

such a miscarriage of justice. This risk of irrevocable error raises serious ethical and moral concerns about the death penalty. Additionally, the processes are not clean, and they are fraught with mistakes leading to the tortuous and horrific death of some inmates.

**b. It does not deter crime**

26. Countries that execute commonly cite the death penalty as a way to deter people from committing crime. This claim has been repeatedly discredited, and there is no evidence that the death penalty is any more effective in reducing crime than life imprisonment without the possibility of parole.

**c. It is often used within skewed justice systems**

27. In many cases recorded by *Amnesty International*, people were executed after being convicted in grossly unfair trials, on the basis of torture-tainted evidence and with inadequate legal representation. In some countries death sentences are imposed as the mandatory punishment for certain offences, meaning that judges are not able to consider the circumstances of the crime or of the defendant before sentencing, such as the Respondent State in this case.

**d. It is discriminatory**

28. The death penalty is often applied disproportionately to marginalized groups, such as racial and ethnic minorities and individuals from disadvantaged backgrounds. This raises concerns about discrimination and unequal treatment before the law. Studies have shown that factors such as race, socioeconomic status, and quality of legal representation can influence the likelihood of receiving a death sentence. Such disparities undermine the principles of fairness and equal protection under the law.

29. Many countries and international organizations have recognized these concerns and have abolished or placed a moratorium on the death penalty. They argue that alternative forms of punishment, such as life imprisonment without the possibility of parole, can adequately protect society without violating the right to be treated with dignity and humanity. In the United States, about 43% of all executions have involved people of colour, 55% currently awaiting the death penalty, all while only accounting for 27% of the general population. When comparing defendants, one fact to note is that “as of October 2002, 12 people have been executed where the defendant was white and the murder victim black, compared with 178 black defendants executed for murders with white victims.” According to the ACLU, “a system racial bias in the application of the death penalty exists at both the state and federal level.”<sup>25</sup>

**e. It is used as a political tool**

30. The authorities in some countries use the death penalty to punish political opponents.

**C. INTERNATIONAL JURISPRUDENCE ON TORTURE, INHUMANE DEGRADING TREATMENT AND THE DEATH PENALTY**

31. The death sentence is a form of punishment that puts an end to life which has been used throughout history by different societies. It has long been the subject of controversy. The movement away from the death penalty gained momentum during the second half of the present century with the growth of the abolitionist movement. In some countries it is now prohibited in all circumstances; in some it is prohibited save in times of war, and in most countries that have retained it as a penalty for crime, its use has been restricted to extreme cases.

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<sup>25</sup> The Death Penalty is Inhumane – UAB Institute for Human Rights Blog: <https://sites.uab.edu/humanrights/2021/03/25/the-death-penalty-is-inhumane>

32. According to *Amnesty International*, 1,831 executions were carried out throughout the world in 1993 as a result of sentences of death, of which 1,419 were in China, which means that only 412 executions were carried out in the rest of the world in that year.<sup>26</sup> Today, capital punishment has been abolished as a penalty for murder either specifically or in practice by almost half the countries of the world including the democracies of Europe and our neighbouring countries, Namibia, Mozambique and Angola. In most of those countries where it is retained, it is seldom used.<sup>27</sup>
33. Like my other learned colleagues, I find that the international and foreign authorities are of value because they analyse arguments for and against the death sentence. I will therefore borrow from the extensive comparative legal analysis made by the esteemed South African Constitutional Court in the case of *S v Makwanyane and Another*<sup>28</sup> of other domestic and international courts as follows:
34. The analysis illustrates that the European Court of Human Rights (ECtHR) has consistently held that the death penalty constitutes a violation of the right to dignity protected under the European Convention on Human Rights (ECHR). The Court's jurisprudence has established that the death penalty is incompatible with Article 3 of the ECHR, which prohibits torture, inhuman or degrading treatment or punishment.
35. The ECtHR has reasoned that the inherent cruelty and irreversibility of the death penalty inherently violates an individual's right to dignity. It has emphasized that the purpose of Article 3 is to protect individuals from treatment that goes against their inherent worth and dignity as human

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<sup>26</sup> Amnesty International, *Update to Death Sentences and executions in 1993*, AI Index ACT 51/02/94.

<sup>27</sup> See generally, Amnesty International, *The Death Penalty: List of Abolitionist and Retentionist Countries* (December 1, 1993), AI Index ACT 50/02/94.

<sup>28</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995): <https://www.saflii.org/za/cases/ZACC/1995/3.html>

beings. In the landmark case of *Soering v. the United Kingdom* (1989), the ECtHR held that the extradition of an individual to a country where he or she faces a real risk of being subjected to the death penalty would violate Article 3. The Court concluded that such a situation would expose the individual to inhuman and degrading treatment due to the anguish and torment caused by the prospect of facing execution.

36. The ECtHR has consistently reaffirmed this position in subsequent cases, stating that the death penalty violates the prohibition of inhuman and degrading treatment in all circumstances. It has held that the abolition of the death penalty is desirable for the protection of human dignity and to ensure the effective protection of human rights.
37. *The Inter-American Court of Human Rights (IACtHR)* has not explicitly issued jurisprudence specifically addressing the death penalty as a violation of the right to dignity under the American Convention on Human Rights (ACHR).<sup>29</sup> However, it is important to note that the IACtHR has consistently held that the death penalty violates other provisions of the American Convention, such as the right to life (Article 4), the right to humane treatment (Article 5), and the right to a fair trial (Article 8). These decisions imply that the death penalty may also touch upon the right to dignity, as dignity is a fundamental principle underlying human rights protections.
38. The IACtHR has stressed the importance of protecting human dignity in its jurisprudence on various issues. It has held that states have an obligation to respect and ensure the dignity of every person within their jurisdiction. The court's interpretation of other provisions, such as the prohibition of torture and other cruel, inhuman, or degrading treatment or punishment (Article 5), can be seen as indirectly relating to the concept of dignity. Furthermore, the IACtHR has emphasized the need for the death penalty

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<sup>29</sup> As at September 2021,



to be imposed and executed in accordance with strict procedural safeguards to prevent cruel, inhuman, or degrading treatment. The court has expressed concerns about the potential for arbitrariness, discrimination, and lack of due process in death penalty cases. While the IACtHR's jurisprudence has not explicitly addressed the death penalty as a violation of the right to dignity, its broader stance on the protection of human rights and the principles underlying the American Convention suggest that the court considers the preservation of human dignity as a crucial aspect of its decision-making.

39. Although the *United States Constitution* does not contain a specific guarantee of human dignity, it has been accepted by the United States Supreme Court that the concept of human dignity is at the core of the prohibition of "cruel and unusual punishment" by the Eighth and Fourteenth Amendments.<sup>30</sup> For Brennan J. this was decisive of the question in *Gregg v. Georgia*. The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity."<sup>31</sup>
40. In *Germany*, the *Federal Constitutional Court* has stressed this aspect of punishment. Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The state] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.<sup>32</sup>

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<sup>30</sup> *Trop v. Dulles*, *supra* note 61, at 100. See also, *Furman v. Georgia*, *supra* note 34, at 270-281 (Brennan, J., concurring); *Gregg v. Georgia*, *supra* note 60, at 173; *People v. Anderson*, *supra* note 62, at 895 ("The dignity of man, the individual and the society as a whole, is today demeaned by our continued practice of capital punishment.").

<sup>31</sup> *Gregg v. Georgia*, *supra* note 60, at 230 (Brennan, J., dissenting) (quoting his opinion in *Furman v. Georgia*, at 273). See also, *Furman v. Georgia*, *supra* note 34, at 296.

<sup>32</sup> [1977] 45 BVerfGE 187, 228 (*Life Imprisonment case*) (as translated in Kommers, *supra* note 18, at 316).

41. The *Canadian Supreme Court in Kindler v Canada*<sup>33</sup> also recognised that capital punishment constitutes a serious impairment of human dignity.<sup>34</sup> The majority of the Court held that the validity of the order for extradition did not depend upon the constitutionality of the death penalty in Canada, or the guarantee in its Charter of Rights against cruel and unusual punishment. The Charter was concerned with legislative and executive acts carried out in Canada and an order for extradition neither imposed nor authorised any punishment within the borders of Canada.
42. The issue in *Kindler's* case was whether the action of the Minister of Justice, who had authorised the extradition without any assurance that the death penalty would not be imposed, was constitutional. It was argued that this executive act was contrary to *section 12* of the Charter which requires the executive to act in accordance with fundamental principles of justice. The Court decided by a majority of four to three that in the particular circumstances of the case the decision of the Minister of Justice could not be set aside on these grounds. In balancing the international obligations of Canada in respect of extradition, and another purpose of the extradition legislation - to prevent Canada from becoming a safe haven for criminals, against the likelihood that the fugitives would be executed if returned to the United States, ----- the view of the majority was that the decision to return the fugitives to the United States could not be said to be contrary to the fundamental principles of justice. In their view, it would not shock the conscience of Canadians to permit this to be done.
43. Ng and Kindler took their cases to the *Human Rights Committee* of the United Nations, contending that Canada had breached its obligations under the ICCPR. Once again, there was a division of opinion within the tribunal. In *Ng's* case it was said: "The Committee is aware that, by definition, every

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<sup>33</sup> (1992) 6 CRR (2d) 193 SC.

<sup>34</sup> The Canadian Supreme Court was concerned with the extradition from Canada to the United States of two fugitives, Kindler, who had been convicted of murder and sentenced to death in the United States, and Ng who was facing a murder charge there and a possible death sentence

execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of article 7 of the covenant".<sup>35</sup>

44. The Committee also held in *Kindler's* case that prolonged judicial proceedings giving rise to the death row phenomenon do not per se constitute cruel, inhuman or degrading treatment. There were dissents in both cases. Some Commissioners in the *Ng's* case held that asphyxiation was not crueller than other forms of execution. Some held that the provision of the International Covenant against the arbitrary deprivation of the right to life took priority over the provisions of the International Covenant which allow the death sentence, and that Canada ought not in the circumstances to have extradited Kindler without an assurance that he would not be executed.
45. The court observed that although articles 6(2) to (5) of the International Covenant specifically allow the imposition of the death sentence under strict controls "for the most serious crimes" by those countries which have not abolished it, it provides in *article* 6(6) that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant. The fact that the International Covenant sanctions capital punishment must be seen in this context. It tolerates but does not provide justification for the death penalty.
46. Despite these differences of opinion, what is clear from the decisions of the Human Rights Committee of the United Nations is that the death penalty is regarded by it as cruel and inhuman punishment within the ordinary meaning of those words, and that it was because of the specific provisions of the International Covenant authorising the imposition of capital punishment by member States in certain circumstances, that the words had to be given a narrow meaning".

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<sup>35</sup> *Ng v Canada*, *supra* note 23, at 21.

## D. CONCLUSION

47. Following the illustration of the trends in moving towards an abolition of the Death penalty, it is my considered opinion that the death penalty is not only a clear violation of Article 5 of the African Charter in relation to the method of execution by hanging as implemented by the Respondent State, but it is also a violation of the same Article, because it is inherently cruel, irreversible, and has a potential for error. It also has no demonstrable deterrent effect. Finally, its discriminatory application undermines the fundamental principles of human rights, justice, and equality.
48. I therefore also join the opponents of the death penalty in urging the Member States of the African Union to take progressive steps towards the abolition of the death penalty, and to apply alternative forms of punishment that respect human dignity and adhere to international human rights norms. By doing so, they will be upholding the principles enshrined in the Charter.

**Judge Dumisa Buhle Ntsebeza**



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

