

**Declaration of Judge Blaise Tchikaya
in Judgments**

Application No. 030/2016, *Romward William v. The United Republic of Tanzania*

Application No. 017/2016, *Deogratius Nicholaus Jeshi v. The United Republic of Tanzania*

Application No. 050/2016, *Crospery Gabriel and Ernest Mutakyawa v The United Republic of Tanzania*

13 February 2024

1. On 13 February 2024, the African Court handed down four decisions, three of which relate to the death penalty. The first relates to *Romward William*¹ who, having been sentenced to death, challenged before the African Court the absence of fair justice and the violation of his right to dignity. The second decision relates to *Deogratius Nicholaus Jeshi*.² As to the third decision, it is particularly noteworthy because it involved two people, *Crospery Gabriel and Ernest Mutakyawa*³, who were sentenced to death. What these three judgments have in common is that they all uphold the death penalty, with hanging as method of execution.

2. This Declaration, which dissents from the majority decision of the Court in the three aforementioned judgments, seeks to provide an iterative reminder of, first,

¹ *Romward William*, a Tanzanian national, was incarcerated in Butimba prison in Mwanza awaiting execution of the death sentence handed down against him. He alleged a violation of his right to non-discrimination, his right to life and his right to dignity in proceedings before the domestic courts. It should be noted that: " It emerges from the record that, on 9 June 2012, the Applicant assaulted his father-in-law with a *machete* fatally wounding him, after which he fled". ACtHPR, *Romward William v. Tanzania*, 13 February 2024, v. § 3 and 4.

² On 11 August 2003, the Applicant and two other individuals, who are not appearing in the case, burgled a home in the village of Kishao. During the burglary, which went badly wrong, they killed the owner of the house: ACtHPR, *Judgement*, § 3.

³ ACtHPR, *Crospery Gabriel and Ernest Mutakyawa v. Tanzania*, 13 February 2024: The applicants in this case were accused of forcing their way into a family home and inflicting injuries on certain members of the family with machetes. They seriously injured a seven-year-old child, who died on 5 April 2009 at Bukoba regional hospital. They were arrested and charged with murder by the Bukoba High Court. On 03 July 2014, the High Court convicted the Applicant of the offence of murder and sentenced him to death by hanging.

the state of international human rights law on this nagging question of the death penalty, and, second, the discomfort it causes with regard to one of its known methods of execution: hanging.

3. Essentially, it is about restating⁴, in the context of the three judgments, my opposition to the death penalty⁵. This position was stated for the first time in 2019 as follows: “the mandatory death penalty is only an embodiment of the initial death penalty but an avatar of the initial death penalty; it constitutes an arbitrary deprivation of life(...) It is not compatible with the requirements of international human rights law”.⁶ The three Applicants challenged before this Court, *mutatis mutandis*, the violation of their rights, rights, including the rights to life, in the proceedings before domestic courts, which resulted in the death penalty.

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4. The purpose of this Declaration is, to denounce, first, the inadequacy and inhumanity of the death penalty and second, the wait-and-see attitude of this Court. The Court’s attitude is a wait-and-see one to the extent that it denounces the irregularity of the mandatory nature of the death penalty imposed by the Respondent State, without calling into question the very principle of the death penalty.
5. Since *the Rajabu et al. case* of 2019, the Court decidedly has not taken the time to consider the legal regime sanctioning the death penalty, in order to declare it, in its entirety and in all its forms, contrary to human rights.
6. In the present cases, the Court falls back on its 2022 position, in particular in three cases with identical decisions on 1 December 2022,⁷ namely, *Marthine*

⁴see in particular, Dissenting opinion in ACtHPR, *Thomas Mgira and Umalo Mussa*, 13 June 2023.

⁵Schabas (W.), *The abolition of the death penalty in International Law*, Grotius, Cambridge, 1993, 384 p.; *Communication Dexter Eddie Johnson v. Ghana*, 28 March 2014, p. 9 *et seq.*

⁶ Dissenting opinion under ECHR, *Radjabu and others v. Tanzania*, December 8, 2019, § 9.

⁷ ACtHPR, *Marthine Christian Msuguri v. Tanzania; Igola Iguna v. Tanzania, Ghati Mwita v. Tanzania*, 1 December 2022.

Christian Msuguri, Igola Iguna and Ghati Mwita. In the said decisions, the Court, once again, only condemned the mandatory nature of the death penalty. This Court, which is a human rights court, should keep pace with the evolution of international law.

7. As long as it is the task of international justice to develop the clarity of human rights and to strengthen them, it is worth remembering that the death penalty is incompatible with the right to life, and the sanctity and protection thereof.
8. It is therefore paradoxical that in these three decisions handed down on 13 February 2024, the Court maintained the old legal regime by validating a variant of the death penalty. Capital punishment, particularly in States such as the Respondent State, entails lengthy procedures, anguish and torment that rob individuals of all humanity. This constitutes cruel treatment. We must declare that capital punishment is unacceptable, as the European Court of Human Rights has done.
9. On 3 May 2002, the Council of Europe adopted Protocol No. 13 of the European Convention on Human Rights on the abolition of the death penalty in all circumstances. This text, without any reservations or derogations, prohibits the death penalty, even in times of war or imminent danger of war. It therefore goes much further than Protocol No. 6 on the abolition of the death penalty.
10. Unless it can be explained, there are no disparate regimes or dual regimes in human rights. All persons throughout the world stand to benefit from this level of protection of the right to life. It is the universal principle of human beings and the universal character of the favourable rights accruing to them, wherever they may be in the world.
11. The universalisation of the protection of the right to life was already in the making in the 2005 decision of the European Court of Human Rights (ECHR). In its decision of 12 May 2005, the Grand Chamber of the ECHR, in *Öcalan v Turkey*, declared that: “the capital punishment (...) in peacetime is an unacceptable form of punishment that is no longer permissible under Article 2

of the European Convention". The Court concluded that "the imposition of the death sentence (...) following an unfair trial by a court whose independence and impartiality were open to doubt amounted to inhuman treatment in violation of Article 3 of the European Convention".

12. The judgments in *Romward William v. Tanzania*, *Deogratius Nicholaus Jeshi v. Tanzania* and the *Crospery Gabriel and Ernest Mutakyawa v. Tanzania* of 13 February 2024 are not in tandem with the current trends of international law. The European human rights system unambiguously prohibits the death penalty⁸. It provides:

"No reservations may be made under Article 57 of the Convention in respect of the provisions of the Convention".⁹

13. This Protocol stresses that:

"The death penalty shall be abolished. No one shall be condemned to such a penalty or executed".¹⁰

The main idea is the abolition of "the death penalty in all circumstances".

14. The three judgments handed down by this Court clearly appear to be contrary to international law. Firstly, international law repudiates capital punishment as unlawful and rejects it in all its forms. Secondly, abolitionist as it is, the international community adopted at the same time, in December 2022, *Resolution A/RES/77/222 for a universal moratorium on the use of the death penalty*. Adopted by the UN General Assembly on 15 December 2022, this resolution did not have the desired impact at the domestic level.

15. The 2022 Resolution calls upon all States that still maintain the death penalty:

"To progressively restrict the use of the death penalty and not to impose capital punishment for offences [...] To reduce the number of offences for which the

⁸ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, on the abolition of the death penalty in all circumstances, 1 July 2003.

⁹ Article 3

¹⁰ Article 1

death penalty may be imposed [...] To establish a moratorium on executions with a view to abolishing the death penalty...”

The death penalty is clearly rejected.

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16. As in most of the Court’s previous decisions on the death penalty, the three decisions in question involved hanging.

17. Hanging is in fact chosen as the method of execution in all three decisions, in particular, *Romward William*, which states that:

“On 11 June 2012, the Applicant was arrested and charged with murder before the High Court of Tanzania sitting at Tabora. On 26 June 2015, he was convicted and sentenced to death by hanging. On 29 June 2015, the Applicant filed an appeal to the Court of Appeal, which was dismissed on 26 February 2016”.

18. Yet all methods of enforcing the death penalty, without exception, are cruel: the bullet to the head, stoning, the electric chair, lethal injection, asphyxiation, and hanging. The latter was rejected, not only for religious reasons, but also undoubtedly because hanging offended human faith. It has been said that hanging “*is frightening because it threatens that the body will not be resurrected on Judgment Day, even though the confession of those condemned to death was authorised from 1397 onwards*”.¹¹

19. Execution by hanging is clearly considered an affront to human rights.¹² The ECHR condemned the United Kingdom when, on 31 December 2008, the country ignored a request from the ECHR not to hand over to the Iraqi authorities *Faisal Hussain Al-Saadoon and Khalef Hussain Mufdhi*, former

¹¹ CriminoCorpus, *Crimes et chatiment, Crimes et justices au Moyen Âge - Crimes et châtiments*, published in 2023, point 4.

¹² In December 2008, the ECHR found that two defendants were “at real risk of an unfair trial followed by execution by hanging”. The Court ruled that the two plaintiffs had been subjected to inhuman and degrading treatment. The handing over to the Iraqi authorities of two Iraqis accused of the murder of British soldiers, who were facing hanging, constitutes inhuman treatment. ECHR, *Al-Saadoon and Mufdhi v. United Kingdom*, 20, § 6:

Sunni dignitaries of the Baath Party. Arrested by the British in Iraq, the two individuals, who were accused of taking part in the murder of two British soldiers shortly after the invasion of Iraq in 2003¹³, were held in an Iraqi prison near Baghdad.

20. It was alleged that “detention by British forces in Basra and their transfer by those forces to the custody of the Iraqi authorities fell within the jurisdiction of the United Kingdom and gave rise to violations of their rights under Articles 2, 3, 6, 13 and 34 of the Convention and Article 1 of Protocol No. 13”. After all, the risk of being condemned and hanged was not negligible.

21. In August 2022, the United Nations Committee against Torture pointed out that hanging in Botswana was a method of execution that accentuated the cruelty of the situation and was inhuman¹⁴.

22. To give credit where credit is due, it must be said that the Court clearly states in its operative part that:

“Holds that the Respondent State violated the right to life and the right to dignity in relation to the mandatory imposition of the death penalty”.¹⁵

23. However, as we have said, while this may convey the impression of a limitation placed on the death penalty, its mandatory nature paradoxically reinforces it, thus making it “permissive”. It effectively becomes mandatory, with a massive impact on the right to life as regards the offences in question. In the criminal justice system of the Respondent State, effective enforcement has become random and uncertain.

24. The *Romward William* decision of 13 February 2024, like the others, exhibits this sort of “half-hearted tone” when it orders the Respondent State to:

¹³ *Revue générale du droit*, 2010, p.17342

¹⁴ United Nations Committee against Torture, *Concluding observations*, Botswana, CAT/C/BWA/CO/1, para. 23 and 24, 23 August 2022. See also United Nations General Assembly, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/67/279, para. 40, 09 August 2012.

¹⁵ ACTHPR, *Deogratius Nicholaus Jeshi v. Tanzania*, 13 February 2024, point viii of the operative part.

“take all necessary constitutional and legislative measures to repeal the mandatory nature of the death penalty from its Penal Code within six (6) months of the date of service of this judgment”¹⁶,.

25. The operative part of the same judgment shows that the death penalty is maintained, in that it only condemns hanging, the method of execution:

“Holds 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”.¹⁷

26. I therefore declare, as in my previous opinions, and in opposition to the majority decision of the distinguished Honourable Colleagues, that in terms of compliance with international human rights law, the three decisions of 13 February 2024, *Romward William v. Tanzania; Nicholaus Jeshi v. Tanzania* and *Crospery Gabriel and Ernest Mutakyawa v. Tanzania*, are questionable.

27. As was so rightly said by one of our contemporaries, the late abolitionist Robert Badinter,

“The death penalty does not defend society, it dishonours it”.

28. By virtue of this, I can remind you that the law against the death penalty has been strengthened as no fewer than six texts positively enshrine the international ostracization of the death penalty:

- First, the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*.¹⁸

¹⁶ Point X of the operative part; see also ACtHPR, *Deogratius Nicholaus Jeshi v. Tanzania*, 13 February 2024.

¹⁷ *Idem.*, point IX of the operative part.

¹⁸ This text was adopted in December 1989 and came into force on July 16, 1991.

- *Second, the Protocol to the American Convention on Human Rights*, which deals with the abolition of the death penalty¹⁹.
- *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (European Convention on Human Rights) on the abolition of the death penalty²⁰.
- *Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental on the abolition of the death penalty in all circumstances*.²¹
- *The Rome Statute* of 31 July 1998, establishing the International Criminal Court, which does not include the death penalty as an applicable penalty.
- Finally, *the International Convention on the Rights of the Child*, adopted by the UN General Assembly on 20 November 1989. Article 37(a) of the Convention states that: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age”.²²

29. There is no need to dwell on the applicability of the international rule prohibiting the death penalty. It applies *de facto* and *de jure* because it reflects a clear and humane evolution in international law. It carries with it an “*affectio juris sive necessitates*” that will have an impact on those States that say they have not yet adopted this prohibition. This rule therefore calls for an objective application of human rights. Internationalist doctrine underlines this:

“The norm (...) is not based on the expression of a will but on the conviction that a rule exists”²³.

¹⁹ The 1991 text has been ratified by 12 Latin American states.

²⁰ Adopted and entered into force in March 1985, it has been ratified by 46 of the 47 member states of the Council of Europe. It abolished the death penalty in peacetime.

²¹ Drawn up by the Council of Europe, Protocol No. 13 to the European Convention on Human Rights (ECHR) prohibits the death penalty in all circumstances. Opened for signature on May 3, 2002. It came into force on July 1, 2003, three months after the deposit of the 10th instrument of ratification.

²² An African Charter on the Rights and Welfare of the Child was adopted at the 26th Conference of Heads of State and Government of the Organization of African Unity in July 1990. Article 5 states 1. Every child has an inherent right to life. This right shall be protected by law. This right shall be protected by law. 2. States Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child. 3. Death sentence shall not be pronounced for crimes committed by children.

²³ Carreau (D.), *Droit international*, Paris, Pédone, 1997, pp. 472-473.

30. The Arusha Court surprisingly clings to its position expressed in the *Ally Rajabu and others* judgment of 28 November 2019. Time has passed, but the Court has not embraced any new position. 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. This case law from 2024 represents the death throes of an inhumane and anachronistic sanction: the death penalty.

Judge Blaise Tchikaya



Done at Arusha, this Thirteenth Day of February in the year Two Thousand and Twenty-Four, the French text being authoritative.

