

Separate Opinion of Judge Rafaâ Ben Achour

1. I agree with the entire operative part of the judgment in the matter of *Emmanuel Yusufu alias Noriega v. United Republic of Tanzania* (Application No. 013/2018).
2. However, I reiterate my opinion expressed in regard to the judgment in the matter of *Ladislav Chalula v. United Republic of Tanzania* (Application No. 003/2018) delivered on 5 February 2025, concerning the violation of the right to the dignity inherent in the human being, a right guaranteed by Article 5 of the Charter. The grounds for the violation of this right put forward by the Court¹ do not convince me:

“The Court reiterates its position that in accordance with the very rationale for prohibiting methods of execution that amount to torture or cruel, inhuman and degrading treatment, the prescription should be that methods of execution must exclude suffering or involve the least suffering possible in cases where the death penalty is permissible²
3. Having found that the mandatory imposition of the death sentence violates the right to life due to its obligatory nature, the Court holds that, as the method of implementation of that sentence, that is, hanging, inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment”.³
4. Given the above, the Court finds that the Respondent State violated the Applicant’s right to dignity and not to be subjected to cruel, inhuman or degrading punishment and treatment guaranteed under Article 5 of the Charter regarding the imposition of the death sentence by hanging”.
5. In my view, the reason for the violation of the right to human dignity is not the method of implementation of the death penalty in the present case, namely, hanging, but precisely the death penalty itself. Hanging is undoubtedly a barbaric and cruel method, as are all methods of execution of the death penalty, including

¹ §§ 115, 116 and 117 of the judgment

² *Rajabu and Others v. Tanzania* (Merits and Reparations), § 118

³ Ibid. §§ 119 and 120.

the so-called mild methods, and therefore constitutes a flagrant affront to the dignity of the human person.

6. What I would like to stress is that if the method of carrying out the death penalty violates the right to dignity, the same applies, and *a fortiori*, to the death penalty itself. The Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty⁴, is extremely clear on this point when it solemnly proclaims as follows:

“Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights,
Recalling Article 3 of the Universal Declaration of Human Rights, adopted on 10 December 1948, and Article 6 of the International Covenant on Civil and Political Rights, adopted on 16 December 1966,
Noting that Article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable”.

7. In the same vein, and in its General Comment No. 6, the Human Rights Committee emphasizes regarding Article 6 of the ICCPR⁵ that: “in general terms, abolition is referred to in this article in terms that unambiguously suggest that abolition is desirable.” The same reasoning applies to Article 4 of the African Charter.
8. The death penalty is indeed an arbitrary, inhuman, cruel and degrading punishment that is counter to human dignity. The inviolability of human dignity has been proclaimed by international human rights instruments since the adoption of the Universal Declaration of Human Rights in 1948. In this regard, the Secretary-General of the United Nations declared loud and clear, on the occasion of the World Day against the Death Penalty on 9 October 2014, that “[T]he death penalty is a cruel practice that undermines human dignity [...]. It is unjust and incompatible with human rights”.

⁴ Sébastien Touzié (Dir), *The universal abolition of the death penalty, Proceedings of the conference of 9 and 11 October 2014*, Paris, Pedone, 2016.

⁵“No one may be arbitrarily deprived of life”

9. The right to human dignity implies that human beings are treated as such, not as an inanimate thing or an animal, which, in any case, must itself also be treated with dignity.
10. All contemporary human rights protection instruments guarantee the right to the dignity of the human person in virtually the same terms. The tone was set by the Charter of the United Nations.⁶ In the second sentence of the Preamble, “the peoples of the United Nations are determined [...] to reaffirm faith [...] in the dignity and worth of the human person”. The Constitution of UNESCO followed by affirming that “human dignity requires that the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern”. Subsequently, the UDHR in its first recital, and especially in its Article 1, proclaims that “all human beings are born free and equal in dignity”.
11. I would not like to multiply the quotes, but would simply point out the main instruments guaranteeing, *inter alia*, the right to dignity, namely:
 - the Four Geneva Conventions on humanitarian law of 12 August 1949 (common Article 3);⁷
 - the Two International Covenants on Human Rights, 1966;⁸
 - the United Nations Convention against Torture, Inhuman, Cruel and Degrading Treatment;⁹

⁶ See: Rafaâ Ben Achour, “*The Charter of the United Nations: Foundation of the international human rights order*”, Tunisian Legal and Political Sciences Review, No. 1, 2017 – 1, §§17 – 25.

⁷ “[a]re and remain prohibited, at all times and in all places, with regard to the persons mentioned above: [...] attacks on personal dignity, in particular humiliating and degrading treatment”;

⁸ International Covenant on Civil and Political Rights, 16 December 1966, (entered into force 23 March 1976) and International Covenant on Economic, Social and Cultural Rights, 16 December 1966, (entered into force 3 January 1976).

⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, (entered into force 26 June 1987).

- Protocol No. 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, relating to the abolition of the death penalty in all circumstances of 3 May 2002¹⁰;
- the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights¹¹.

12. At the level of Africa, the African Charter on Human and Peoples' Rights in its Article 5 affirms "the right to the respect of the dignity inherent in a human being and to the recognition of his legal status; and in its Article 19, "equal dignity and the same rights for peoples". Similarly, the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in its Article 3 recognizes for every woman, the right to respect for the inherent dignity of the human being, and to the recognition and protection of her human and legal rights. Furthermore, the Constitutive Act of the African Union of 11 July 2000, refers in its Preamble to "the heroic struggles waged by our peoples and our countries for political independence, human dignity and economic emancipation".
13. This important treaty mechanism demonstrates the fundamental nature of the right to dignity among all human rights. It is undoubtedly the bedrock of all rights. As Henri Bandolo Kenfack notes, "[T]he notion has then become a universal and operational legal concept to designate what is human in man, which deserves to be protected, in the sense that anything that tends to deny the humanity of man will be considered an attack on this dignity".¹²

¹⁰ "Convinced that the right of everyone to life is a fundamental value in a democratic society, and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings."

¹¹ Adopted in San Salvador, El Salvador on 17 November 1988, at the Eighteenth Regular Session of the General Assembly: "Everyone has the inalienable right to respect for his life and [...] this right may not be suspended for any reason whatsoever."

¹² Henri Bandolo Kenfack: "*Human Dignity and the Question of the Abolition of the Death Penalty in the Age of Terrorist Threat*", La Revue des droits de l'homme [Online], 17, 2020, §:7 "the Court notes that the question of the death penalty, in the context of Article 4 of the Charter, is whether the imposition of this penalty constitutes an arbitrary deprivation of the right to life. 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 the death penalty in international law is not yet absolute". Judgment of 28 November 2019, Application No. 007/2015, *Rajabu and Others v. United Republic of Tanzania*, § 96.

14. Punishing an individual by taking his life is a flagrant attack on this universal and non-derogable right. In this perspective, Nadia Bernaz rightly emphasizes that “Death, the withdrawal of life from a person who does not desire the withdrawal would be an atrocity in itself, an unworthy behaviour in principle, a lack of respect for the human person”.¹³ For the Inter-American Court, “[t]he 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”.¹⁴ Similarly, the Commission on Human Rights (replaced by the Human Rights Council) declared itself: “convinced that the abolition of the death penalty contributes to the strengthening of human dignity and to the progressive expansion of fundamental rights”.¹⁵
15. In all its judgments on applications where the “mandatory” death penalty, still in force in Tanzania, was pronounced against those accused of various homicides, our Court has regularly and rightly held that this penalty constitutes a violation of the right to life enshrined in Article 4 of the Charter,¹⁶ which is also consistent with the jurisprudence of the Human Rights Committee on the issue of the mandatory death penalty.¹⁷ In some judgments, it has even hinted at an opening for developments in the global and African trend towards the abolition of the death penalty. In its *Ghati Mwita* judgment, the Court:

“Recognizes the global trend towards the abolition of the death penalty, illustrated, in part, by the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR). [...]. The Court notes that the Second Optional Protocol to the ICCPR currently has ninety (90)

¹³ Nadia Bernaz, “*International Law and the Death Penalty*”, Paris, La Documentation française, 2008, §. 23.

¹⁴ IACHR, O.C., 1 October 1999, p. 264, § 37 and p. 268 §141.

¹⁵ Res.1997/12, 3 April 1997 and Res. 1998/8 of 3 April 1998. See: Amnesty International, *Human Rights v. Death Penalty: Total or Partial Abolition in Law and Practice*, London, December 1998, AI Index: ACT 50/13/98.

¹⁶ ...”the Court holds that the mandatory nature of the imposition of the death penalty as provided for in Section 197 of the Penal Code of Tanzania constitutes an arbitrary deprivation of the right to life. The Court therefore finds that the Respondent State has violated Article 4 of the Charter. *Rajabu and Others v. United Republic of Tanzania*, cited above, § 114.

¹⁷ For the Committee: “the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any opportunity to take into account the personal circumstances of the accused or the circumstances of the particular offence.” *Weerawansa v. Sri Lanka*, Comm. 1406/2005, U.N. Doc. CCPR/C/95/D/1406/2005 (HRC 2009).

States Parties out of the one hundred and seventy-three (173) States Parties to the ICCPR.

“With specific reference to Africa, the Court monitors developments in the situation on the continent regarding the application of the death penalty. For example, in 1990, only one country (Cape Verde) abolished the death penalty. As of today, out of the fifty-five (55) Member States of the African Union, twenty-five (25) have abolished the death penalty in their legislation, fifteen (15) have adopted a long-term moratorium on executions and fifteen (15) have continued to apply the death penalty. Most recently, in 2020, Chad abolished the death penalty, followed by Sierra Leone in 2021 and the Central African Republic and Equatorial Guinea in 2022”.

16. Unfortunately, the Court has not learned from this trend and has not asked itself why so many countries have either abolished the death penalty or declared a moratorium, *de facto* or *de jure*, on the implementation of the death penalty.¹⁸ The Court itself, seized of applications in which the death penalty was pronounced against the Applicants, has systematically issued orders indicating provisional measures, *suo motu*, ordering the Respondent State to stay implementation of the death penalty.
17. However, our Court has, to date, never dared to take the step of affirming the incompatibility of the death penalty with the right to life and with the right to dignity. By an overly restrictive interpretation and a “minimalist approach” of Articles 4 and 5 of the Charter¹⁹, the Court has always refused to consider that

¹⁸ On 17 December 2024, the 79th session of the UNGA, by 130 votes in favour, 32 against and 22 abstentions voted on a draft Resolution on the Moratorium on the death penalty. It declared itself “Convinced that a moratorium on the use of the death penalty contributes to respect for human dignity and to the enhancement and progressive development of human rights and considering that there is no conclusive evidence of the deterrent value of the death penalty”.

¹⁹ See in this regard the individual or dissenting opinions of Judge Blaise Tchikaya, in particular in the judgments: *Ally Rajabu and Others v. United Republic of Tanzania* 28 November 2019; *Lucien Ikili Rashidi v. United Republic of Tanzania* 28 March 2019; *Evodius v. United Republic of Tanzania* 26 February 2021; *Thomas Mgira v. United Republic of Tanzania* 3 June 2023; *Umalo Mussa v. United Republic of Tanzania* 13 June 2023; *John Lazaro v. United Republic of Tanzania*; *Makangu Misalaba v. United Republic of Tanzania*; *Chrizant John v. United Republic of Tanzania* 7 November 2023; *Gerald Koroso Kalonge v. United Republic of Tanzania*, *Kija Nestory Jinyamu v. United Republic of Tanzania*, *Lameck Bazil v. Republic of Tanzania*, *Rashidi Romani Nyerere v. United Republic of Tanzania* 13 November 2024.

the death penalty constitutes, in itself, an attack on the dignity of the human person.

18. However, as underscored in paragraph 12 above, the Court has, in several judgments, highlighted the worldwide trend towards the abolition of the death penalty and the observation of a moratorium on its implementation.
19. In my opinion, it is time for the Court's jurisprudence to evolve on the issue of the right to dignity as regards the death penalty by aligning itself with the general trend in international human rights law in this area.²⁰ There is no intangible and immutable jurisprudence. The evolution of jurisprudence is proof of the vitality of a jurisdiction and a demonstration that law is a living and evolving discipline.

Judge Rafaâ Ben Achour



²⁰ See : Adrien Donneaud, « Peine de mort et droits de l'homme entre enjeu géopolitique et impératif éthique », *Études sur la mort, Thanatologie*, Centre international des études sur la mort, 2012, n° 147, p : 9 - 24 ; Anca Ailincăi, Charlotte Piveteau, Nordine Drici (Dir), *Peine de mort et droits de l'homme Pour des standards internationaux de protection spécifiques aux personnes passibles de la peine de mort ou condamnées à mort*, Paris Pedone, 2024