

Submission by the SOAS Centre for Human Rights Law in 'Request for Advisory Opinion on the Compatibility of the Death Penalty with the African Charter on Human and Peoples' Rights on Request No. 001 of 2025 by the Pan African Lawyers Union'

The Compatibility of the Death Penalty with the Right to Life and the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the African Charter on Human and Peoples' Rights

I. Introduction

1. The SOAS Centre for Human Rights Law makes this submission pursuant to the decision by the African Court on Human and Peoples' Rights, by an email communication received on 22 July 2025, to accept its request to submit an amicus curiae submission in the matter of a request for an advisory opinion on the compatibility of the death penalty with the African Charter on Human and Peoples' Rights (Request No. 001 of 2024 by the Pan African Lawyers Union).
2. The submission focuses on the issues for determination set out in paragraph 6 of the aforementioned request. It sets out evidence of the worldwide developments towards the abolition of the death penalty. Based on its examination of national, regional and international jurisprudence and other pertinent practice, the submission finds that the death penalty is incompatible with the right to life and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment under the African Charter on Human and Peoples' Rights (African Charter). Further, it concludes that States are obliged under article 1 of the African Charter to repeal any legislation or regulations that permit the imposition and/or execution of the death penalty, irrespective of whether a moratorium is already in place.

II. The Death Penalty and its Abolition in Africa

3. The death penalty existed in pre-colonial Africa but 'was not enforced as is the case today'.¹ Subsequently, it became a 'prominent feature of colonial legislation',² particularly in countries under British or French rule. Following decolonisation, several States successfully abolished the death penalty. This process has accelerated over the last decade, in which an increasing number of States abolished the death penalty for all offences or ordinary crimes, with

¹ The Working Group on the Death Penalty in Africa, African Commission on Human and Peoples' Rights, 'Study on the Question of the Death Penalty in Africa' (2011) 24. See further Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa – a Human Rights Perspective* (Pretoria University Law Press 2007); Aimé Muyoboke Karimunda, *The Death Penalty in Africa: The Path Towards Abolition* (Routledge 2014); Andrew Novak, *The African Challenge to Global Death Penalty Abolition: International Human Rights Norms in Local Perspective* (Intersentia 2016).

² Working Group Study on the Question of the Death Penalty in Africa *ibid* 25.

Zimbabwe the latest to do so.³ According to the mid-2025 report of the Working Group on Death Penalty, Extrajudicial, Summary or Arbitrary Executions and Enforced Disappearances in Africa (the Working Group), ‘out of the 54 States Parties to the Charter, 25 have abolished the death penalty for all crimes, 4 for ordinary crimes, and 15 observe a moratorium on executions’.⁴ In December 2024, ‘33 African states voted in favour of the UN General Assembly calling for a moratorium on the use of the death penalty’, the highest number ever.⁵ 18 African States have, as of 29 July 2025, become parties to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty,⁶ most recently Cote d’Ivoire and Zambia in 2024.⁷

4. This development is the outcome of a worldwide movement at the national, regional and international level towards the abolition of the death penalty. At the regional level, the African Commission on Human and Peoples’ Rights (the African Commission) has played a pivotal role in this regard. In 1999, it adopted a Resolution Urging States to Envisage a Moratorium on the Death Penalty,⁸ and established a Working Group on the Death Penalty (now the Working Group on the Death Penalty, Extrajudicial, Summary or Arbitrary Executions and Enforced Disappearances in Africa).⁹
5. In 2011, the Working Group published a ‘Study on the Question of the Death Penalty in Africa’.¹⁰ The Study noted ‘a worldwide trend towards abolition of the death penalty’¹¹ and expressed its concern over the retention of the death penalty in Africa and the reasons therefor.¹² Examining the arguments for¹³ and against¹⁴ the death penalty, the Study found that ‘the abolitionist case is more compelling than the retentionist case’.¹⁵ Notably, its finding that the death penalty lacks a deterrent effect is borne out by evidence, both in the African and international context.¹⁶ Statistics available for Africa demonstrate the lack of correlation

³ Death Penalty Abolition Act [Chapter 9:26] (2024). See further The Death Penalty Project, ‘Zimbabwe takes historic decision to abolish the death penalty’ (31 December 2024) <https://deathpenaltyproject.org/press-release-zimbabwe-takes-historic-decision-to-abolish-the-death-penalty/> (accessed 29 July 2025).

⁴ Working Group on Death Penalty, Extrajudicial, Summary or Arbitrary Executions and Enforced Disappearances in Africa, Inter-session Activity Report (October 2024-April 2025) (May 2025) para 3.

⁵ *ibid* para 4.

⁶ (Adopted 15 December 1989, entered into force 11 July 1991) 1642 UNTS 414.

⁷ See United Nations Treaty Series, at

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-12&chapter=4&clang=en (accessed 29 July 2025).

⁸ ACHPR/Res.42 (XXVI) 99 (15 November 1999).

⁹ ACHPR/RES.79 (XXXVIII) 05 (15 November 1999).

¹⁰ Working Group Study on the Question of the Death Penalty in Africa (n 1).

¹¹ *ibid* 15.

¹² The study refers to the suppression of ‘subversive activities’ ‘war on terrorism’; conservative ideas about morals and culture; specific local settings, and the effective fight against serious crime, *ibid* 22.

¹³ The study refers to the grounds of deterring crime, preventing recidivism, and representing an appropriate punishment for the most serious crimes, *ibid* 36-37.

¹⁴ The study refers to the lack of deterrence, the violation of human rights, wrong convictions, its irreversible nature and that alternative punishments provide an opportunity to reflect and reform. Furthermore, it highlights the inherently cruel, brutalising and traumatising effect on the sentencing judge, on the executioner and on the family of the condemned person, as well as the arbitrary and discriminatory fashion; its use as a tool of political repression; and the agony and cruelty of botched executions, *ibid* 36ff.

¹⁵ *ibid* 11.

¹⁶ Jeffrey Fagan, ‘Deterrence and the Death Penalty in International Perspective’ in Ivan Šimonović (ed), *Moving away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations 2015) 84, 86.

between the death penalty and lower crime rates.¹⁷ Indeed, the fact that in several instances, African countries which maintain the death penalty have higher crime rates than those which have abolished it confirms that the reasons for the prevalence of crime, particularly violent crime, must be attributed to other, particularly socio-economic and governance, factors.¹⁸

6. The Study considered a moratorium as ‘something of a halfway house between abolition and retention’,¹⁹ while highlighting the risk of its abuse.²⁰ Further, it identified the use of constitutional clauses, legislation proscribing the death penalty, and subscribing to regional and international human rights instruments requiring the abolition of the death penalty as three ways to effectuate its abolition in national legal systems.²¹
7. The African Commission has since then adopted several resolutions on the moratorium and abolition of the death penalty in Africa.²² In 2015, it adopted the Draft Protocol to the African Charter on Human and Peoples’ Rights on the Abolition of the Death Penalty.²³ In the same year, the Commission published its General Comment No 3 on the African Charter on Human and Peoples’ Rights: The Right to Life (Article 4).²⁴ Its preface called the death penalty ‘a barbaric and ineffective form of criminal justice.’²⁵ The General Comment emphasised that ‘[i]nternational law requires those States that have not yet abolished the death penalty to take steps towards its abolition in order to secure the rights to life and to dignity, in addition to other rights such as the right to be free from torture, and cruel, inhuman or degrading treatment.’²⁶ Further, it reminded these States of the multiple legal requirements applicable in respect of the death penalty.²⁷ In 2022, the Commission adopted a Resolution on the Death Penalty and the Prohibition of Torture and Cruel, Inhuman or Degrading Punishment or Treatment.²⁸ In the same year, it mandated ‘the Working Group to review the Study on the

¹⁷ See for example Enact, ‘Africa Organised Crime Index 2023: Increasing criminality, growing vulnerabilities’ (2023), particularly Appendix 3.

¹⁸ United Nations Office on Drugs and Crime, ‘Crime and Development in Africa’ (United Nations 2005). On deterrence, the report finds, at ix, that ‘Poor countries have **poorly-resourced criminal justice systems**, and Africa suffers from the world’s least favourable police- and judge-to-population ratios. This ultimately impacts on conviction rates; even if the police perform optimally, offenders in Africa are much less likely to be punished for their wrongdoings than those in the rest of the world. Such a system cannot effectively deter, incapacitate, or rehabilitate criminals’ (emphasis in original).

¹⁹ Working Group Study on the Question of the Death Penalty in Africa (n 1) 47.

²⁰ *ibid* 49.

²¹ *ibid* 54.

²² ‘Resolution Calling on State Parties to Observe a Moratorium on the Death Penalty’ ACHPR/Res.136 (XXXIV) 08 (24 November 2008); ‘Resolution on the Abolition of the Death Penalty in Africa’ ACHPR/Res. 416 (LXIV) (14 May 2019).

²³ Adopted at the 56th Ordinary Session, 21 April to 7 May 2015.

²⁴ African Commission, ‘General Comment No. 3 on the African Charter on Human and Peoples’ Rights on the Right to Life’ (Article 4) (adopted during the 57th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 4 to 18 November 2015 in Banjul, The Gambia).

²⁵ *ibid* Preface.

²⁶ *ibid* para 22.

²⁷ *ibid* paras 24-26.

²⁸ ‘Resolution on the Death Penalty and the prohibition of Torture and cruel, inhuman or degrading punishment or treatment’ ACHPR/Res.544 (LXXIII) (9 November 2022).

Death Penalty to include new thematic areas and to update available statistical data on the issue of the abolition of the death penalty in Africa.²⁹

8. In parallel, the African Commission and courts have addressed the compatibility of the death penalty in their jurisprudence at the national and regional level. The Commission found in several cases that respondent States had violated their obligations under article 4 of the Charter,³⁰ including on account of the death penalty being mandatory,³¹ the lack of adherence to a fair trial when imposing the death penalty,³² the disrespect for provisional measures,³³ and the imposition of the death penalty on children.³⁴ It considered the death penalty to be in breach of article 5 of the Charter in case of a 'failure to give notice of the date and time of execution of the victim'.³⁵
9. The African Court on Human and Peoples' Rights (African Court) held in a series of judgments that Tanzania had violated the Charter, on account of the imposition of the mandatory death penalty and the retention of hanging as a method of execution.³⁶ It also found that 'lengthy placement on death row' constituted a violation of article 5 of the Charter.³⁷ The Court also

²⁹ Resolution on the Review of the Study on the Death Penalty in Africa - ACHPR/Res.546 (LXXIII) (9 November 2022); 'Resolution on the extension of the deadline for conducting the review of the Study on the Death Penalty' ACHPR/Res.623 (LXXXII) (11 March 2025) (containing the quoted text).

³⁰ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58.

³¹ *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 334/06 (2011) para 230. The Commission, *ibid* para 232, found a violation of article 7 of the Charter but not of its article 4 as the executions had not yet been carried out.

³² *ibid* para 231; *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, Communications 137/94-139/94-154/96-161/97 (1998) para 103; *Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*, Communications 48/90-50/91-52/91-89/93 (1999) para 48. See also, *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania*, Communications 54/91-61/91-96/93-98/93-164/97_196/97-210/98 (2000) para 120.

³³ *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria* *ibid* para 103.

³⁴ *Working Group on Strategic Legal Cases v Democratic Republic of Congo*, Communication 259/02 (2011) paras 70 and 72. See also African Committee on the Rights and Welfare of the Child, *Taha Fadul, Nisreen Mustafa, Somia Shampaty and Nawras Elfatih on behalf of Abbas Mohamed AL-Nour Musa Al-Emam, Modathir Alrayah Mohamed Badawi and Fadoul Almoula Aljaili Nourallah: Taha Fadul et al v the Republic of the Sudan*, Communication 0015/Com/003/2020 (2023) para 36, finding that the imposition of the death penalty on children and their detention on death row amounted to a violation of article 5 of the African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49.

³⁵ *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v Botswana*, Communication 277/2003 (2013) para 177.

³⁶ *Ally Rajabu and Others v United Republic of Tanzania*, Application No 007/2015, Judgment (Merits and reparations) (28 November 2019) paras 92-120, and subsequent cases discussed further in Andrew Novak, 'Tanzania and the African Court spar over the mandatory death penalty and hanging: *Kambole v Attorney General* (Tanzania Court of Appeal, 2022), *Ally Rajabu v Tanzania* and fourteen other African Court decisions' (2024) 8 African Human Rights Yearbook 540.

³⁷ *Makungu Misalaba v United Republic of Tanzania*, Application No 033/2016, Judgment (Merits and reparations) (7 November 2023) para 179.

ordered provisional measures, such as requesting Ghana to abstain from carrying out the death penalty.³⁸

10. In *S v Makwanyane*, the Constitutional Court of South Africa declared the death penalty to be unconstitutional,³⁹ finding it to be arbitrary and contrary to the prohibition on cruel, inhuman and degrading punishment,⁴⁰ the right to dignity,⁴¹ and the right to life.⁴² In addition, several domestic jurisdictions within the continent - including Malawi,⁴³ Uganda⁴⁴ and Kenya⁴⁵ - have ruled that the mandatory death penalty is contrary to fundamental rights and, hence, unconstitutional. The Supreme Courts of both Uganda and Zimbabwe have held that prolonged detention on death row violates the absolute prohibition against cruel, inhuman and degrading punishment.⁴⁶
11. These developments notwithstanding, several African States retain the death penalty.⁴⁷ In their reporting procedures, both the Commission and United Nations human rights treaty bodies have raised a series of concerns about the law and practice of these States. These include having laws that stipulate the death penalty for offences which cannot be considered to fall within the scope of the 'most serious crimes'⁴⁸ and/or the mandatory death penalty for certain offences;⁴⁹ children being subject to the death penalty;⁵⁰ the prevalence of, and conditions on

³⁸ *Dexter Eddie Johnson v Republic of Ghana*, Application No 016/2017, Order for Provisional Measures (28 September 2017) (the case was eventually declared inadmissible).

³⁹ *S v Makwanyane* [1995] ZACC 3.

⁴⁰ *ibid*, paras 95, 153, 174, 196, 216, 277, 312-313, 316.

⁴¹ *ibid*, paras 144, 216, 270-271, 312-313, 316, 318.

⁴² *ibid*, paras 144, 174, 196, 213, 216, 268, 316, 318.

⁴³ *Francis Kafantayeni and others v Attorney General* [2007] MWHC 1 (27 April 2007).

⁴⁴ *Attorney General v Susan Kigula & 417 Others* [2009] UGSC 6 (21 January 2009).

⁴⁵ *Francis Karioko Muruatetu v The Republic of Kenya* [2017] KESC 2 (KLR) (14 December 2017).

⁴⁶ *Attorney General v Susan Kigula & 417 Others* (n 44) pages 47-49; *Catholic Commission for Justice and Peace v Attorney General of Zimbabwe and Others* 1993 (4) SA 239 (ZS) (24 June 1993).

⁴⁷ In 2022, the African Commission deplored 'the fact that at least 18 African States [Botswana, Cameroon, Egypt, Gambia, Ghana, Kenya, Malawi, Mali, Mauritania, Nigeria, Uganda, Democratic Republic of Congo, Somalia, Sudan, South Sudan, Tunisia, Zambia and Zimbabwe] pronounced death sentences in 2021 and that 4 [Botswana, Egypt, Somalia and South Sudan] of them carried out executions.' Resolution ACHPR/Res.544 (LXXIII) (n 28).

⁴⁸ Human Rights Committee, 'Concluding observations on the initial report of Somalia' UN Doc CCPR/C/SOM/CO/1 (6 May 2024) para 21; 'Concluding observations on the fifth periodic report of the Sudan' UN Doc CCPR/C/SDN/CO/5 (19 November 2018) para 29; 'Concluding observations on the fifth periodic report of Egypt' UN Doc CCPR/C/EGY/CO/5 (14 April 2023) para 21.

⁴⁹ Human Rights Committee, Concluding observations Sudan *ibid*; 'Concluding observations on the second periodic report of Botswana' UN Doc CCPR/C/BWA/CO/2 (24 November 2021) para 15; 'Concluding observations on the fifth periodic report of Egypt' UN Doc CCPR/C/EGY/CO/5 (14 April 2023); Committee against Torture, 'Concluding observations on the initial report of Botswana' UN Doc CAT/C/BWA/CO/1 (23 August 2022) para 23; 'Concluding observations on the fifth periodic report of Egypt' UN Doc CAT/C/EGY/CO/5 (12 December 2023) para 37.

⁵⁰ Committee on the Rights of the Child, 'Concluding observations on the initial report of South Sudan' UN Doc CRC/C/SSD/CO/1 (27 October 2022) para 26(a); Committee against Torture, 'Concluding observations in the absence of the initial report of Nigeria' UN Doc CAT/C/NGA/COAR/1 (21 December 2021) para 27; Human Rights Committee, Concluding observations Somalia (n 48); Committee against Torture, Concluding observations Egypt (n 49); African Commission, 'Concluding Observations and Recommendations - Egypt: 9th to 17th Combined Periodic Report, 2001-2017' (25 February 2021) 45 A(ii).

death row;⁵¹ the forms the death penalty can take, including hanging,⁵² as well as stoning and crucifixion as possible sanctions;⁵³ the failure to provide advance notification of the execution to families and, following executions, to hand over the body to relatives for burial;⁵⁴ and the instrumentalisation of the death penalty for repressive political and discriminatory practices.⁵⁵ The United Nations Human Rights Committee and Committee against Torture have further expressed concerns about States that, even though they had a moratorium in place, continued to impose death sentences and keep prisoners on death row.⁵⁶

III. The Death Penalty and its Abolition in International Law

12. The question forming the subject of this advisory opinion requires the Court to consider the growing regional and international trend toward the abolition of the death penalty. In order to assist the Court in doing so, this amicus brief considers the worldwide jurisprudence, treaty body and State practice evidencing the incompatibility of the death penalty with the right to life and the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. Specifically, it considers jurisprudence, treaty body and State practice which it believes may materially affect the Court's interpretation of this trend.
13. Article 7 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights stipulates that '[t]he Court shall apply the provisions of the Charter and any other relevant human rights instrument ratified by the State concerned.'⁵⁷ The latter applies particularly to the International Covenant on Civil and Political Rights and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), which had 53 and 52 African States Parties respectively as of 29 July 2025.⁵⁸
14. International law on the abolition of the death penalty has been characterised by two parallel developments, namely treaty-making and jurisprudence. The United Nations,⁵⁹ the Council of

⁵¹ Committee against Torture, Concluding observations Nigeria *ibid*; Committee against Torture, 'Concluding observations on the initial report of Somalia' UN Doc CAT/C/SOM/CO/1 (2 December 2022) para 15.

⁵² Committee against Torture, Concluding observations Botswana (n 49).

⁵³ Human Rights Committee, Concluding observations Sudan (n 48).

⁵⁴ Human Rights Committee and Committee against Torture, Concluding observations Botswana (n 49); Committee against Torture and Human Rights Committee, Concluding observations Egypt (n 49).

⁵⁵ Committee against Torture and Human Rights Committee, Concluding observations Egypt (n 49); Human Rights Committee, Concluding observations Somalia' (n 48); 'Concluding observations on the second periodic report of Uganda' UN Doc CCPR/C/UGA/CO/2 (11 September 2023) para 20.

⁵⁶ Committee against Torture, 'Concluding observations on the second periodic report of Ethiopia' UN Doc CAT/C/ETH/CO/2 (7 June 2023) para 48; Human Rights Committee, 'Concluding observations on the second periodic report of Ethiopia' UN Doc CCPR/C/ETH/CO/2 (7 December 2022) para 15.

⁵⁷ (Adopted 10 June 1998, entered into force 25 January 2004) OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

⁵⁸ See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en and https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en respectively (accessed 29 July 2025).

⁵⁹ See above (n 6).

Europe⁶⁰ and the Organization of American States⁶¹ have each adopted protocols aimed at the abolition of the death penalty. The statutes of international(ised) criminal tribunals, including the International Criminal Court, do, as a matter of principle, not vest them with the power to impose the death penalty, even for the most serious international crimes.⁶²

15. United Nations treaty bodies⁶³ as well as the Inter-American Commission on Human Rights⁶⁴ and the Inter-American Court of Human Rights⁶⁵ have found numerous violations in the law and practice of respondent States' use of the death penalty. This jurisprudence has circumscribed significantly the circumstances in which the death penalty may be lawfully imposed and executed. The European Court of Human Rights held, in 2010, in the landmark case of *Al-Saadoon and Mufdhi v the United Kingdom*, that the death penalty is inhuman and therefore contrary to article 3 of the European Convention on Human Rights (prohibition of torture and inhuman or degrading treatment or punishment).⁶⁶ In a judgment that effectively abolished the death penalty as a lawful punishment in Europe, it found that article 2 of the Convention (right to life) had been amended through subsequent practice 'so as to prohibit the death penalty in all circumstances'.⁶⁷
16. The United Nations Human Rights Committee, in its General Comment No 36, adopted a similar line of reasoning in its interpretation of the right to life and related human rights obligations of States parties to the International Covenant on Civil and Political Rights. It stated that: 'Although the allusion to the conditions for application of the death penalty in article 6 (2) suggest that when drafting the Covenant, the States parties did not universally regard the death penalty as a cruel, inhuman or degrading punishment per se, subsequent agreements by the States parties or subsequent practice establishing such agreements may ultimately lead

⁶⁰ Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty (ETS No. 114) (adopted 28 April 1983, entered into force 1 March 1985); 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 (ETS No. 187) (adopted 3 May 2002; entered into force 1 July 2003).

⁶¹ Protocol to the American Convention on Human Rights to Abolish the Death Penalty (adopted 8 June 1990, entered into force 28 August 1991) OAS Treaty Series No 73.

⁶² See article 77(1) of the Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, which has 33 African States parties as of 29 July 2025. See also article 43A(1) and (2): Sentences and Penalties under the International Criminal Jurisdiction of the Court, of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted 27 June 2014, not yet in force), which explicitly excludes the death penalty from the penalties that the Court can impose for the crimes set out in the Protocol (the Malabo Protocol).

⁶³ See jurisprudence cited in Human Rights Committee, 'General comment No 36: Article 6: right to life' UN Doc CCPR/C/GC/36 (3 September 2019).

⁶⁴ Inter-American Commission on Human Rights, 'The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition' OEA/Ser.L/V/II. Doc. 68 (31 December 2011).

⁶⁵ *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (Merits, Reparations, and Costs) Judgment of 21 June 2002, Series C No 94, paras 108-109 (mandatory death penalty); *Rodríguez Revolorio et al v Guatemala* (Preliminary Objection, Merits, Reparations, and Costs) Judgment of 14 October 2011, Series C No 387, paras 64 (freedom from ex post facto laws); *Dial et al v Trinidad and Tobago* (Merits and Reparations) Judgment of 21 November 2022, Series C No 476, para 79 (death row). See further, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)* Advisory Opinion OC-3/83 of 8 September 1983, Series A No 3; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law*, Advisory Opinion OC-16/99 of 1 October 1999, Series A No 16.

⁶⁶ *Al-Saadoon and Mufdhi v the United Kingdom*, Application No 61498/08 (2 March 2010) para 144.

⁶⁷ *ibid* para 120.

to the conclusion that the death penalty is contrary to article 7 of the Covenant under all circumstances. The increasing number of States parties to the Second Protocol to the Covenant, aiming at the abolition of the death penalty, other international instruments prohibiting the imposition of carrying out of the death penalty, and the growing number of non-abolitionist States that have nonetheless introduced a de facto moratorium on the exercise of the death penalty, suggest that considerable progress may have been made towards establishing an agreement among the States parties to consider the death penalty as a cruel, inhuman or degrading form of punishment. Such a legal development is consistent with the pro-abolitionist spirit of the Covenant, which manifests itself, inter alia, in the texts of article 6 (6) and the Second Optional Protocol.⁶⁸

17. This jurisprudence and treaty body practice is complemented by practice within the United Nations towards the abolition of the death penalty. The General Assembly has persistently adopted resolutions on a moratorium on the use of the death penalty.⁶⁹ Its 2024 resolution on the subject registered the highest ever number of positive votes, of 130 States, with 32 States voting against the resolution and 22 States abstaining.⁷⁰ Despite the concerns raised by moratoria discussed in Section VIII below, this voting can be viewed as evidence of growing State practice opposed to the death penalty. Additionally, the United Nations Secretary-General has issued regular reports on the death penalty, highlighting pertinent developments, areas of concern, as well as regional and international initiatives.⁷¹ The United Nations Human Rights Council convenes biennial high-level panel discussions on the question of the death penalty, which focus on specific aspects or developments pertaining to it.⁷² Several United Nations special procedures mandate holders have produced reports on various aspects of the death penalty, including on it amounting to cruel, inhuman or degrading treatment or punishment.⁷³
18. The Office of the High Commissioner for Human Rights has underscored the importance of the abolition of the death penalty to ensure compliance with international human rights law and human dignity: '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 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 small number of countries, largely because of the myth that 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. More work needs to be done. Worldwide abolition is

⁶⁸ Human Rights Committee, General Comment No 36 (n 63) para 51 (in-text footnotes omitted).

⁶⁹ Since its first resolution on 18 December 2007, GA/RES/62/149.

⁷⁰ A/RES/79/179 (17 December 2024).

⁷¹ See for example, 'Secretary-General's report on a moratorium on the use of the death penalty' UN Doc A/77/274 (8 August 2022).

⁷² United Nations, 'HC Türk Remarks to Biennial High-Level Panel Discussion on the Death Penalty (25 February 2025) who stated, inter alia: 'The Global South is now leading the abolition movement. I commend the government of Zimbabwe for joining 26 other countries in Africa that have abolished the death penalty'. <https://www.ohchr.org/en/statements-and-speeches/2025/02/hc-turk-remarks-biennial-high-level-panel-discussion-death-penalty?sub-site=HRC> (accessed 29 July 2025).

⁷³ 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak' UN Doc A/HRC/10/44 (14 January 2009) paras 29-48.

necessary for the enhancement of human dignity and progressive development of human rights.⁷⁴

IV. The Compatibility of the Death Penalty with Human Dignity (articles 4 & 5 of the Charter)

19. Article 4 of the Charter confirms that ‘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.’ Article 5 recognises dignity as a substantive right: ‘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’.
20. As this Court has highlighted, the Charter is unique amongst international human rights instruments in inextricably linking ‘the inviolable nature and integrity of the human being’ with the right to life.⁷⁵ This symbiosis between the right to life and the right to human dignity has been further recognised by the Commission in its General Comment No 3 on the Right to Life, in which it noted that ‘the Charter envisages the protection not only of life in a narrow sense, but of dignified life’.⁷⁶
21. More fundamentally, the Preamble to the Charter recalls the Charter of the Organization of African Unity, which stipulates that ‘freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples’. Respect for human dignity therefore rationalises and underpins the Charter as a whole. Indeed, the Commission has held that human dignity is ‘the fountain of all other rights’,⁷⁷ and that ‘respect of the dignity inherent in the human person informs the content of all the personal rights protected in the Charter’.⁷⁸ Similarly, Judge Rafaâ Ben Achour noted in *Ladislaus Chalula v Tanzania* that the right to dignity is the foundation on which all other human rights rest.⁷⁹ Thus, dignity is both an enforceable right in itself, and a fundamental value which permeates all other rights.
22. In *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia*, the Commission observed that ‘at the core of human dignity is the idea and recognition that a human being has unique worth, value and significance that is innate, and not acquired’.⁸⁰ Since dignity cannot be acquired, it follows that neither can it be lost - even through the commission of a serious crime. As the African Court held in *Makungu Misalaba v Tanzania*, ‘the right to dignity captures the very essence of the inherent worth and value that resides within every individual, irrespective of their circumstances, background, or choices. At its core, it embodies

⁷⁴ <https://www.ohchr.org/en/topic/death-penalty> (accessed 29 July 2025).

⁷⁵ *African Commission on Human and Peoples’ Rights v Kenya*, Application No 006/2012, Judgment (Merits) (26 May 2017) para 152.

⁷⁶ African Commission, General Comment No 3 (n 24) para 3.

⁷⁷ *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia*, Communication 341/2007 (2021) para 118.

⁷⁸ *The Nubian Community in Kenya v The Republic of Kenya*, Communication 317/06 (2015) para 137.

⁷⁹ Separate Opinion of Judge Rafaâ Ben Achour, Judgment in *Ladislaus Chalula v United Republic of Tanzania*, Application No 003/2018 (5 February 2025) para 11.

⁸⁰ *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia* (n 77) para 118.

and upholds the principle of respect for the intrinsic humanity of each person and forms the bedrock of what it means to be truly human'.⁸¹

23. This Court has rightly held that the mandatory death penalty constitutes an arbitrary deprivation of life, contrary to article 4 of the Charter.⁸² As a result, all death sentences are at the discretion of the sentencing tribunal. Inevitably, therefore, there will be cases where one person is sentenced to death, whereas another person in the same circumstances, but appearing before a different tribunal, is not. As was recognised by the Constitutional Court of South Africa in *S v Makwanyane*, 'to allow chance [...] to determine the life or death of a person is to reduce the person to a cypher in a sophisticated judicial lottery'.⁸³ To treat the individual concerned as a mere object in this way denies the 'unique worth, value, and significance' of human beings and hence violates his or her dignity.⁸⁴
24. Likewise Judge Rafaâ Ben Achour emphasised in *Ladislav Chalula v Tanzania* that the right to dignity entails that human beings are respected as such, and hence not treated as inanimate objects or as animals,⁸⁵ and went on to find that punishing an individual by extinguishing his life without his consent amounts to a 'flagrant violation of this universal and non-derogable right'.⁸⁶
25. The Commission has further elaborated that dignity 'entails that a human being is a moral agent possessed with the conscience and personal volition to decide what happens to his or her body'.⁸⁷ Being put to death by the State against one's will is the ultimate deprivation of such bodily autonomy, and hence amounts to a violation of the right to dignity.
26. It is acknowledged that incarceration likewise entails some encroachment on a prisoner's dignity. However, as the Constitutional Court of South Africa recognised in *S v Makwanyane*, notwithstanding the loss of their liberty, prisoners nonetheless retain all the rights to which they are entitled by virtue of their special status as human beings, subject only to limitations imposed by the prison regime.⁸⁸ Thus, imprisonment does not deprive the individual of 'those absolute natural rights relating to personality, to which every man is entitled'.⁸⁹ By contrast, the death penalty amounts to the loss of the very 'right to have rights' which distinguishes human beings from other species and makes them special.⁹⁰ The Commission has confirmed that recognition of an individual's capacity to be the holder of rights and obligations is protected under article 5.⁹¹

⁸¹ *Makungu Misalaba v Tanzania* (n 37) para 165.

⁸² *Ally Rajabu and Others v Tanzania* (n 36).

⁸³ *S v Makwanyane* (n 39) para 166.

⁸⁴ *S v Makwanyane* *ibid* para 166.

⁸⁵ Separate Opinion of Judge Rafaâ Ben Achour, Judgment in *Ladislav Chalula v United Republic of Tanzania* (n 79) para 6.

⁸⁶ *ibid* para 12.

⁸⁷ *Equality Now and Ethiopian Women Lawyers Association v Federal Republic of Ethiopia* (n 77) para 118.

⁸⁸ *S v Makwanyane* (n 39) para 143.

⁸⁹ *S v Makwanyane* *ibid* para 142.

⁹⁰ *S v Makwanyane* *ibid* para 164 (citing Stewart J in *Furman v Georgia* (1972) 408 US 238 at 306).

⁹¹ *The Nubian Community in Kenya v The Republic of Kenya* (n 78) para 140.

27. Moreover, in the African context, dignity is grounded in the distinctive human capacity to participate in harmonious communal relationships.⁹² This principle is encapsulated in the Bantu concept of *ubuntu* (also known as *botho* in Sotho-Tswana, *hunhu* in Shona and *utu* in Swahili),⁹³ but also finds expression in other African cultures.⁹⁴ By not countenancing any possibility of rehabilitation, the death penalty extinguishes altogether an individual's capacity to participate in harmonious communal relationships and hence violates the right to dignity, thus understood. This was recognised in *S v Makwanyane*, in which the Constitutional Court of South Africa held that, in focusing on the crime rather than on the person of the offender, the death penalty runs counter to the concept of *ubuntu* and hence, dignity.⁹⁵
28. The death penalty infringes the dignity not only of the offender, but also of those tasked with administering it. This has been acknowledged by the Constitutional Court of South Africa: 'It is not necessarily only the dignity of the person to be executed which is invaded. Very arguably the dignity of all of us, in a caring civilisation, must be compromised by the act of repeating, systematically and deliberately, albeit for a wholly different objective, what we find to be so repugnant in the conduct of the offender in the first place'.⁹⁶ The brutalising effect of the death penalty on the sentencing judge, the executioner and the family of the condemned person has likewise been recognised by the Working Group.⁹⁷
29. As Judge Rafaâ Ben Achour observed in *Ladislav Chalula v Tanzania*, a jurisdiction's willingness to embrace the Charter as a living instrument, evolving in line with general trends in international human rights law towards the abolition of the death penalty on account of its incompatibility with human dignity, is a testament to its vitality.⁹⁸

V. The Compatibility of the Death Penalty with the Right to Life (article 4 of the Charter)

30. Article 4 of the Charter prohibits the arbitrary deprivation of the right to life. Unlike article 6(2) of the International Covenant on Civil and Political Rights, article 4(2) of the American Convention on Human Rights, and article 2(1) of the European Convention on Human Rights, it does not make explicit reference to the death penalty as a limited exception to the prohibited taking of life. For the death penalty, as intentional deprivation of life, not to be arbitrary it must be necessary and proportionate, non-discriminatory, and compatible with the principle of dignity. International human rights law, including African human rights jurisprudence and instruments, have recognised a series of circumstances in which the death penalty would be arbitrary and hence incompatible with the right to life.

⁹² Motsamai Molefe, *Human Dignity in African Philosophy: A Very Short Introduction* (Springer 2022) 31; Thaddeus Metz, 'Human Dignity, Capital Punishment, and an African Moral Theory: Toward a New Philosophy of Human Rights' (2010) 9 *Journal of Human Rights* 81, 93.

⁹³ Metz *ibid*.

⁹⁴ Geleje, for example, documents similar philosophies in the Igbo and Dinka communities: Tsega Andualem Gelaye, 'The Role of Human Dignity in the Jurisprudence of the African Commission on Human and Peoples' Rights' (2021) 5 *African Human Rights Yearbook* 116.

⁹⁵ *S v Makwanyane* (n 39) para 260.

⁹⁶ *S v Makwanyane* *ibid* para 271.

⁹⁷ Working Group Study on the Question of the Death Penalty in Africa (n 1) 36.

⁹⁸ Separate Opinion of Judge Rafaâ Ben Achour, Judgment in *Ladislav Chalula v United Republic of Tanzania* (n 79) para 17.

31. *Irrevocable abolition*: The 'abolition of the death penalty is legally irrevocable'.⁹⁹ States that 'have abolished the death penalty ... are barred from reintroducing it'.¹⁰⁰ Further, such States 'cannot deport, extradite or otherwise transfer persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained'.¹⁰¹
32. *Legality*: Any criminal offence carrying the death penalty must conform to generally recognised principles of legality and non-retroactivity. The death penalty can therefore 'never be imposed if it was not provided by law for the offence at the time of its commission'.¹⁰² Further, criminal offences carrying the death penalty must not be 'vaguely defined' or depend, in their application, 'on subjective or discretionary considerations'.¹⁰³
33. *Most serious crimes*: The death penalty can only be imposed for the 'most serious crimes'.¹⁰⁴ This notion, which reflects the proportionality of the sentence, 'must be read restrictively' and is confined to 'crimes of extreme gravity, involving intentional killing'.¹⁰⁵ Any offences not falling within this narrow scope that carry the death penalty are therefore incompatible with States' obligations under the right to life. Further, States should 'revoke death sentences issued for crimes not qualifying as the most serious crimes and pursue the necessary legal procedures to resentence those convicted for such crimes'.¹⁰⁶
34. *Mandatory death penalty*: The imposition of the death penalty must '[i]n no circumstances ... be mandatory for an offence'.¹⁰⁷ The mandatory death penalty results in a mechanical application of the law, without providing a court with discretion to consider the personal circumstances and modalities of the crime concerned, which renders its arbitrary.¹⁰⁸
35. *Persons subject to the death penalty*: Treaties and jurisprudence recognise several categories of persons who should for various reasons be exempt from the imposition and/or execution of

⁹⁹ Human Rights Committee, General Comment No 36 (n 63) para 34.

¹⁰⁰ *ibid*; African Commission, General Comment No 3 (n 24) para 23: 'shall not reintroduce it'. See also article 4(3) of the American Convention on Human Rights: 'The death penalty shall not be reestablished in states that have abolished it'.

¹⁰¹ Human Rights Committee, General Comment No 36 (n 63) para 34. Similarly, African Commission, General Comment No 3 (n 24) para 23.

¹⁰² Human Rights Committee, General Comment No 36 (n 63) para 38. See also *Rodríguez Revolorio et al v Guatemala* (n 65).

¹⁰³ Human Rights Committee, General Comment No 36 (n 63) para 38.

¹⁰⁴ Article 6(2) of the International Covenant on Civil and Political Rights; article 4(2) of the American Convention on Human Rights; article 6 of the Arab Charter on Human Rights (adopted 23 May 2004, entered into force 15 March 2008) 12 IHRR 893.

¹⁰⁵ Human Rights Committee, General Comment No 36 (n 63) para 35; African Commission, General Comment No 3 (n 24) para 24: 'crimes involving intentional killing'.

¹⁰⁶ Human Rights Committee, General Comment No 36 (n 63) para 35.

¹⁰⁷ African Commission, General Comment No 3 (n 24) para 24.

¹⁰⁸ *ibid*; Human Rights, General Comment No 36 (n 63) para 35. See also discussion of relevant jurisprudence in *Ally Rajabu v Tanzania* (n 36) paras 97-114.

the death penalty. This rule applies to children,¹⁰⁹ persons with mental disabilities,¹¹⁰ elderly persons,¹¹¹ and pregnant or nursing mothers.¹¹² The United Nations Human Rights Committee has also exhorted States not to execute 'individuals who have suffered serious human rights violations in the past'.¹¹³

36. *Fair trial*: The imposition of the death penalty and execution of a person following an unfair trial are arbitrary and in violation of the right to life.¹¹⁴ The fair trial requirement is subject to particularly stringent scrutiny in death penalty cases.¹¹⁵ Any imposition of the death penalty must therefore be fully compliant with article 7 of the Charter, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,¹¹⁶ and the obligations pertaining to fair trials that African States incur under human rights treaties, particularly article 14 of the International Covenant on Civil and Political Rights.¹¹⁷ The court imposing the death penalty must be independent and impartial, which excludes military and special courts.¹¹⁸ Procedurally, an accused must be granted the full gamut of fair trial rights, including the right to appeal, and, separately, the right to request a pardon.¹¹⁹

37. *Foreign nationals*: Special considerations apply in the case of foreign nationals subjected to the death penalty. As recognised by the International Court of Justice, foreign nationals subject to criminal proceedings that might result in the death penalty must be provided with the

¹⁰⁹ Article 5(3) of the African Charter on the Rights and Welfare of the Child; article 37(a) of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3; article 6(5) of the International Covenant on Civil and Political Rights; article 4(5) of the American Convention on Human Rights. See also *Working Group on Strategic Legal Cases v Democratic Republic of Congo* (n 34) paras 70 and 72.

¹¹⁰ Human Rights Committee, General Comment No 36 (n 63) para 49; African Commission, General Comment No 3 (n 24) para 35.

¹¹¹ *ibid*; Human Rights Committee, General Comment No 36 (n 63) para 49; article 4(5) of the American Convention on Human Rights.

¹¹² Article 4(2)(j) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005); article 30(e) of the African Charter on the Rights and Welfare of the Child, 'expectant mothers and ... mothers of infants and young children who have been accused or found guilty of infringing the penal law and [States parties] shall in particular; ... ensure that a death sentence shall not be imposed on such mothers'; African Commission, General Comment No 3 (n 24) para 35; Human Rights Committee, General Comment No 36 (n 63) para 49: 'parents of very young or dependent children'; article 4(5) of the American Convention on Human Rights.

¹¹³ Human Rights Committee, General Comment No 36 (n 63) para 49.

¹¹⁴ African Commission, General Comment No 3 (n 24) para 24; Human Rights Committee, General Comment No 36 (n 63) para 41.

¹¹⁵ African Commission, General Comment No 3 (n 24) para 24; Inter-American Commission on Human Rights, Report on the death penalty (n 64) 25ff refers to a 'heightened level of scrutiny'. See on compliance with provisional measures, *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria* (n33) para 103.

¹¹⁶ African Commission, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' (29 May 2003).

¹¹⁷ Human Rights Committee, 'General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial' UN Doc CCPR/C/GC/32 (23 August 2007), particularly para 59.

¹¹⁸ African Commission, General Comment No 3 (n 24) para 24; Human Rights Committee, General Comment No 36 (n 63) para 45.

¹¹⁹ African Commission, General Comment No 3 (n 24) para 24; Human Rights Committee, General Comment No 36 (n 63) paras 41, 43, 46, 47. See article 6(4) of the International Covenant on Civil and Political Rights on the 'the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases'.

opportunity to access consular assistance pursuant to article 36(1) of the Vienna Convention on Consular Relations.¹²⁰ Consequently, 'a failure to promptly inform detained foreign nationals of their right to consular notification pursuant to the Convention on Consular Relations, resulting in the imposition of the death penalty, ... would violate article 6 (1) of the Covenant'.¹²¹ The 'failure to afford individuals about to be deported to a country in which their lives are claimed to be at real risk the opportunity to avail themselves of available appeal procedures' would equally violate the right to life'.¹²²

38. *Discrimination*: The death penalty must not violate the prohibition of non-discrimination. It is discriminatory where it specifically targets the conduct of certain persons on prohibited grounds, such as gender, sexual orientation, or political opinion.¹²³ It will also be discriminatory where it is disproportionately applied to certain persons on prohibited grounds, with '[d]ata suggesting that members of religious, racial or ethnic minorities, indigent persons or foreign nationals are disproportionately likely to face the death penalty may indicate an unequal application of the death penalty'.¹²⁴
39. *Political instrumentalisation of the death penalty*: The death penalty must not be imposed and/or executed to frustrate the legitimate exercise of rights. This applies particularly to its use against (i) political opponents and/or protesters who exercise their right to freedom of expression, association, or assembly; (ii) believers, particularly religious minorities, in violation of the right of freedom to religion; and (iii) others, particularly LGBT persons, whose rights, such as to equality and non-discrimination, are violated where the exercise of their rights is subject to criminalisation and the death penalty.¹²⁵
40. Without prejudice to the compatibility of the death penalty with human dignity and the prohibition of torture and other cruel, inhuman or degrading treatment or punishment under article 5 of the African Charter discussed further below in section VI, the standards set out in this section suggest that it might not be an arbitrary deprivation of life only if it is imposed for the most serious crimes, not mandatory, subject to full compliance with the right to a fair trial, not utilised for purposes that violate the exercise of pertinent rights, and non-discriminatory. These standards leave, theoretically, a narrow scope within which States may impose or execute the death penalty in a manner that may not be deemed arbitrary. However, the concerns that human rights bodies and others have raised about the use of the death penalty in African States indicate that these standards are frequently not adhered to in their entirety.¹²⁶ This is problematic, particularly in cases where the national legal system is deficient or where courts reviewing the compatibility of the death penalty with these standards focus on

¹²⁰ *LaGrand (Germany v United States of America)* Judgment, ICJ Reports 2001, p 466; *Avena and other Mexican Nationals (Mexico v United States of America)* Judgment, ICJ Reports 2004, p 12; IACHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law* (n 64).

¹²¹ Human Rights Committee, General Comment No 36 (n 63) para 42.

¹²² *ibid.*

¹²³ Human Rights Committee, General Comment No 36 (n 63) para 36.

¹²⁴ *ibid* para 44.

¹²⁵ Human Rights Committee, General Comment No 36 (n 63) paras 36 and 52.

¹²⁶ *Interights and Ditshwanelo v The Republic of Botswana*, Communication 319/06 (2015) para 66 points in this direction, where the Commission considered 'it increasingly difficult to envisage a case in which the death penalty can be found to have been applied in a way that is not in some way arbitrary. As a result, it is difficult to conceive that, if called upon in future to do so, that the Commission will find that the death penalty, however, it is executed, is any longer compatible with the African Charter'.

examining certain aspects thereof, but not the operation of the criminal justice and legal system as a whole. It also provides States with arguments that can be employed to justify the retention of the death penalty, namely purported compliance with the requirements identified. Recognising these standards may lead to ‘positions which tend not towards abolishing the death penalty but rather towards relativising the development.’¹²⁷ Such a position therefore risks running counter to the Africa-wide and international objective of progressively abolishing the death penalty.

41. In any event, the approach of narrowing the scope available for States to impose and execute the death penalty lawfully suffers from a major shortcoming, in that it insufficiently considers the incompatibility of the death penalty with human dignity, which underpins the right to life, as set out in section IV above. Consequently, even if the conditions set out in paragraphs 31-39 above are met, the death penalty is in violation of the right to life under article 4 of the Charter.

VI. The Compatibility of the Death Penalty with the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 5 of the Charter)

VI.1. The imposition of the death penalty

42. The imposition of a death sentence violates the prohibition of torture and other cruel, inhuman or degrading punishment. In *Al-Saadoon and Mufdhi v United Kingdom*, the European Court of Human Rights found that the fear of execution in itself constituted inhuman treatment, in violation of article 3 of the European Convention on Human Rights.¹²⁸ Notably, the Court reached this conclusion notwithstanding that the applicants had not yet been tried, let alone sentenced to death.¹²⁹ It follows that such fear of execution becomes even more acutely magnified when a sentence of death is actually imposed, causing immense psychological suffering both to the prisoner and his or her family.
43. International law has consistently recognised that a threat of physical harm can, without more, amount to psychological torture. In *Tibi v Ecuador*, for example, the Inter-American Court of Human Rights recognised that ‘threats and the real danger of subjecting a person to physical injury, under certain circumstances, cause such moral anguish that they may be considered psychological torture’.¹³⁰ Moreover, the European Court of Human Rights has elaborated that the psychological impact of such threats is heightened where the individual concerned is particularly vulnerable by virtue of being in the custody of the State,¹³¹ and where the threat is ‘premeditated and calculated in a deliberate and intentional manner’.¹³² Since the passing of a death sentence amounts to a calculated threat of extreme physical harm, by an entity which has both the power and the means to carry out that threat, it follows therefore that it lies at the upper extremity of the scale of harm.

¹²⁷ Dissenting Opinion of Judge Blaise Tchikaya On the Judgments in Application No 051/2016 *Nzigiymana Zabron v Tanzania* and Application No 048/2016 *Dominick Damian v Tanzania* (4 June 2024) para 40.

¹²⁸ *Al-Saadoon and Mufdhi v United Kingdom* (n 66).

¹²⁹ *ibid.*

¹³⁰ *Tibi v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Judgment of 7 September 2004, Series C No 114, para 147.

¹³¹ *Gäffen v Germany* Application No 22978/05 (3 June 2010) para 106.

¹³² *ibid* para 104.

VI.2. The 'death row phenomenon'

44. The profound psychological distress experienced by prisoners enduring long periods of uncertainty about their fate – sometimes referred to as the 'death row phenomenon' – has been documented in numerous empirical studies.¹³³ The acute anxiety suffered by those living on death row has been found to be similar to that experienced by terminally ill patients,¹³⁴ and manifests in paranoia, depression, suicidal thoughts, a loss of a sense of reality, and self-mutilation.¹³⁵ This prolonged anxiety is experienced not only by the prisoners themselves, but also by their families, who are forced to undergo a protracted period of anticipatory grief.¹³⁶
45. These effects are exacerbated by the conditions in which death row prisoners are often housed. The Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has expressed concern that conditions on death row are often worse than those for the rest of the prison population.¹³⁷ For example, the World Coalition Against the Death Penalty has documented that in one prison in Ghana, 104 death row prisoners were held in a cell designed to hold only 24 people; meanwhile in Eritrea, overcrowding was so acute that some death row prisoners were held in shipping containers and underground bunkers, with limited light or ventilation.¹³⁸ In Jinja prison in Uganda, doctors visited only twice a month, there being little incentive to provide medical care to those sentenced to die in any event.¹³⁹ In many cases, those sentenced to death have no access to education or vocational programmes, religious services, recreational activities or treatment programmes.¹⁴⁰ These concerns have been echoed by the United Nations Secretary-General, who has observed that 'conditions on death row [...] often violate the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), and may themselves amount to torture or cruel, inhuman or degrading treatment or punishment'.¹⁴¹

¹³³ See for example: Robert Johnson, 'Under Sentence of Death: The Psychology of Death Row Confinement' (1979) 5 *Law and Psychology Review* 141; Lloyd Vogelmann, 'The Living Dead: Living on Death Row' (1989) 5 *South African Journal on Human Rights* 183; Amnesty International and Legal Defence and Assistance Project, 'Nigeria: Waiting for the Hangman' (2008); Diana Peel, 'Clutching at Life, Waiting to Die: The Experience of Death Row Incarceration' (2013) 14 *Western Criminology Review* 61.

¹³⁴ Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2008) 175.

¹³⁵ Jacqueline Macalesher, 'Death Row Phenomenon and the Circumstances under which it could amount to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment', Expert Consultation: The Death Penalty – 'Most Serious Crimes', Complicity and the Question of Torture (Harvard Law School, 25-26 June 2012) 4.

¹³⁶ Margaret Vandiver, 'The Impact of the Death Penalty on the Families of Homicide Victims and of Condemned Prisoners' in James Acker, Robert Bohm and Charles Lanier (eds), *America's Experiment with Capital Punishment: Reflections on the Past, Present and Future of the Ultimate Penal Sanction* (Carolina Academic Press 1998) 613.

¹³⁷ 'Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' UN Doc A/67/279 (9 August 2012) para 42.

¹³⁸ World Coalition Against the Death Penalty, 'Living Conditions on Death Row: Detailed Factsheet' (2018).

¹³⁹ *ibid.*

¹⁴⁰ Chenwi (n 1) 113.

¹⁴¹ 'Moratorium on the Use of the Death Penalty: Report of the Secretary General' UN Doc A/75/309 (13 August 2020) para 32.

46. As a result of the combination of the profound psychological distress suffered by those living under the death sentence and the degrading conditions found on death row, both the European and Inter-American human rights courts have held that prolonged incarceration on death row constitutes cruel, inhuman and degrading treatment.¹⁴² In *Hilaire, Constantine and Benjamin v Trinidad and Tobago*, for example, the Inter-American Court of Human Rights observed that ‘the condemned is destroyed by the anticipation of the execution of the death penalty long before actually dying’.¹⁴³ The Committee against Torture has likewise on a number of occasions expressed concern about the psychological effects upon detainees of being held on death row for a prolonged period, under harsh conditions which may amount to torture or cruel, inhuman or degrading treatment.¹⁴⁴ The Supreme Courts of Uganda and Zimbabwe have similarly affirmed that lengthy detention on death row violates the absolute prohibition against cruel, inhuman and degrading punishment.¹⁴⁵
47. Notably, the African Court has gone further than its European and Inter-American counterparts, finding a violation of article 5 on account of the ‘inherent fear of impending death that [death row] convicts must grapple with’,¹⁴⁶ even where the applicant had failed to adduce any evidence as to the conditions in which he had been held.¹⁴⁷ Noting that ‘death row can induce significant psychological distress, particularly when the wait for execution is prolonged’,¹⁴⁸ the Court found that ‘detention on death row fundamentally disregards the principles of humanity and infringes upon the dignity of individuals’ since ‘the perpetual uncertainty surrounding the potential execution of the death penalty that those on death row face diminishes the core of their humanity’.¹⁴⁹

VI.3. Methods of execution

48. Regional human rights commissions and courts as well as United Nations treaty bodies have considered all forms of corporal punishment, such as whipping or amputations, as constituting cruel, inhuman or degrading punishment, if not torture.¹⁵⁰ Methods of execution such as hanging,¹⁵¹ ‘stoning, injection of untested lethal drugs, gas chambers, burning and

¹⁴² *Soering v United Kingdom and Germany* (1989) 11 EHRR 439, para 111; *Dial et al v Trinidad and Tobago* (n 65) paras 69-79. Paragraph 66 of the latter judgment additionally sets out a number of other cases in which the Inter-American Court of Human Rights has ruled, based on expert opinion, that the particular detention conditions found on death row constitute a violation of the right to personal integrity.

¹⁴³ *Hilaire, Constantine and Benjamin et al v Trinidad and Tobago* (n 65) Concurring Opinion of Judge A.A. Cançado Trindade, para 26.

¹⁴⁴ Committee against Torture, ‘Concluding Observations on the Second Periodic Report of the Democratic Republic of Congo’ UN Doc CAT/C/COD/CO/2 (3 June 2019) para 36; ‘Concluding Observations on the Initial Report of Viet Nam’ UN Doc CAT/C/VNM/CO/1 (28 December 2018) para 32; ‘Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America’ UN Doc CAT/C/USA/CO/3-5 (19 December 2014) para 25.

¹⁴⁵ *Attorney General v Susan Kigula & 417 Others* (n 44); *Catholic Commission for Justice and Peace v Attorney General of Zimbabwe and Others* (n 46).

¹⁴⁶ *Makungu Misalaba v Tanzania* (n 37) para 167.

¹⁴⁷ *ibid* para 172.

¹⁴⁸ *ibid* para 167.

¹⁴⁹ *ibid*.

¹⁵⁰ See UN Doc A/HRC/10/44 (n 73) and further, Lutz Oette, *The Transformation of the Prohibition of Torture in International Law* (Oxford University Press 2024) 81-83.

¹⁵¹ *Ally Rajabu and Others v Tanzania* (n 36) paras 118-120.

burying alive and public executions’¹⁵² have been found to cause such suffering as to violate the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. However, the practice of addressing such methods in a piecemeal fashion lacks clarity, as all modes of execution must be considered inherently cruel, inhuman and degrading.

49. The African Commission, in its General Comment No 3, exhorted States not to ‘use methods that cause unnecessary physical or mental suffering.’¹⁵³ This language implies the acceptance of ‘necessary’ suffering. It thereby echoes the logic of article 1(1) of the Convention against Torture, the last sentence of which stipulates that torture ‘does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’. However, such sanctions are considered lawful only if they are compatible with both national law and international law.¹⁵⁴ Consequently, any ‘necessary’ or ‘inherent’ pain or suffering of a sanction such as the death penalty must not itself be ‘cruel, inhuman or degrading’. If it were, it would violate article 5 of the African Charter, article 7 of the International Covenant on Civil and Political Rights, article 16 of the Convention against Torture, and other relevant provisions in international treaties, as has been explicitly recognised for corporal punishments as set out above at paragraph 48.
50. Since the death penalty entails the ultimate infliction of physical violence by the State, concerns about the compatibility of corporal punishment with the prohibition of torture must apply *a fortiori* in respect of executions. Leading international authorities have adopted the position that the death penalty constitutes an extreme form of corporal punishment causing such pain and suffering as to make it inherently cruel, inhuman or degrading, and hence prohibited under international law.¹⁵⁵ This position is reflected in international instruments such as the Istanbul Protocol.¹⁵⁶
51. The Commission emphasised that article 5 of the African Charter prohibits ‘actions which cause serious physical or psychological suffering.’¹⁵⁷ The helplessness and desperation associated with anticipating one’s certain death is known to cause high levels of anxiety and psychological distress.¹⁵⁸ In a case of extrajudicial killings, in which the victims were aware of their inescapable fate, the Inter-American Court of Human Rights found that ‘people experienced deep feelings of fear, anxiety and defencelessness [before being

¹⁵² Human Rights Committee, General Comment No 36 (n 63) para 40 (in-text footnotes including references to relevant jurisprudence omitted).

¹⁵³ *ibid* para 26.

¹⁵⁴ Gerrit Zach, Article 1, in Manfred Nowak, Moritz Birk and Giuliana Monina (eds), *The United Nations Convention against Torture and Its Optional Protocol: A Commentary* (Second Edition, Oxford University Press 2019) paras 146-147.

¹⁵⁵ See UN Doc A/HRC/10/44 (n 73); Gerrit Zach and Moritz Birk, ‘Article 16’ in Nowak, Birk and Monina (n 148) para 72. See further John Bessler, *The Death Penalty’s Denial of Fundamental Human Rights: International Law, State Practice, and the Emerging Abolitionist Norm* (Cambridge University Press 2023) who makes the case that the death penalty constitutes torture.

¹⁵⁶ Office of the High Commissioner for Human Rights, ‘Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ (2022 edition) Chapter 1, para 6.

¹⁵⁷ *Curtis Francis Doebbler v Sudan*, Communication No 236/00 (2003) para 36.

¹⁵⁸ See sources cited above at VI.2., para 44. See for a well-known literary rendering, Victor Hugo, *Le dernier jour d'un condamné*, which was originally published in 1829.

executed]’.¹⁵⁹ It is for these reasons that mock executions are recognised as a form of torture.¹⁶⁰

52. The execution itself, aimed at physically annihilating life, invariably causes physical suffering, the extent of which varies depending on the method used and the manner of the execution (as methods may not function as planned, such as in the case of botched executions, as illustrated in the following paragraph). The infliction of such violence squarely falls within the scope of prohibited sanctions articulated by the Commission in *Curtis Francis Doebbler v Sudan*: ‘There is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the Charter and contrary to the very nature of this human rights treaty’.¹⁶¹
53. The modern history of the death penalty is replete with examples of the relevant authorities and its supporters seeking to ensure, or claiming, that it is executed as ‘humanely’ as possible.¹⁶² In this process, ‘[w]ith each new invention of a technology for killing, or more precisely with each new application of technology to killing, the law has proclaimed its own previous methods barbaric, or simply archaic.’¹⁶³ Yet, ‘[i]n an endlessly repeating ritual, electrocution, gas chambers, lethal injections are each introduced with a tremendous fanfare as a painless form of death, until each is revealed to promote its own kind of suffering on the way to death.’¹⁶⁴ A detailed study of the use of the death penalty, with a particular focus on the United States of America, has demonstrated the pain associated with specific execution methods, namely hanging (‘a clumsy, inefficient, inhuman thing’)¹⁶⁵,¹⁶⁶ electrocution (‘when science fails’),¹⁶⁷ the gas chamber (‘a short and unhappy history’),¹⁶⁸ and lethal injection (‘how enviable a quiet death’).¹⁶⁹ The firing squad, for its part, has been termed ‘a vivid reminder of the brutality of state killing.’¹⁷⁰ In addition

¹⁵⁹ *La Cantuta v Peru* (Merits, Reparations and Costs) Judgment of 29 November 2006, Series C No 162, para 113.

¹⁶⁰ Istanbul Protocol (n 156) para 372(v).

¹⁶¹ *Curtis Francis Doebbler v Sudan* (n 157) para 42.

¹⁶² Austin Sarat, *Gruesome Spectacles: Botched Executions and America’s Death Penalty* (Stanford University Press 2014).

¹⁶³ Austin Sarat, ‘Killing Me Softly: Capital Punishment and the Technologies for Taking Life’ in Austin Sarat (ed) *Pain, Death, and the Law* (University of Michigan Press 2001) 43, 48, with particular reference to the USA.

¹⁶⁴ Alan Hyde, *Bodies of Law* (Princeton University Press 1997) 194.

¹⁶⁵ Text in brackets is taken from the chapter headings in Sarat, *Gruesome Spectacles* (n 162).

¹⁶⁶ *Ibid* 62: ‘The history of hanging’s evolving technologies, and their frequent mishaps, foretold the fruitless search for other humane and foolproof technologies beyond the scaffold for carrying out the business of state killing’.

¹⁶⁷ *Ibid* 89: ‘One hundred and eighteen years after the first execution by electricity, the electric chair became essentially extinct, and botched executions were, in part, the reason why’.

¹⁶⁸ *Ibid* 115: ‘By [1999], the gas chamber had become a relic of the past, in large part because of its inability to deliver on its promise to be “swift and painless ... less gruesome than hanging, entailing less suffering than shooting or beheading, or any of the other traditional ways of executions”’.

¹⁶⁹ *Ibid* 42: ‘... the history of botched lethal injections proves that it is by no means a foolproof method of killing and that its use cannot guarantee that those subjected to it ... will die quickly, quietly, and painlessly’.

¹⁷⁰ Austin Sarat, ‘The firing squad’s return is a defeat for death penalty supporters’ *Guardian* (15 April 2025).

to the pain and suffering inherent in each of these methods, they entail a risk of botched executions, as detailed studies have demonstrated.¹⁷¹

54. These considerations demonstrate that it is incoherent and inconsistent, both with respect to the jurisprudence on other forms of corporal punishment and in view of the suffering that executions invariably cause, to differentiate between methods of execution. The United Nations Special Rapporteur on Torture emphasised that, ‘there is no categorical evidence that any method of execution in use today complies with the prohibition of torture and cruel, inhuman or degrading treatment in every case. Even if the required safeguards [...] are in place, all methods of execution currently used can inflict inordinate pain and suffering. States cannot guarantee that there is a pain-free method of execution’.¹⁷²
55. Judge Tchikaya recognised in the context of the Court’s judgment in *Romward William, Deogratius Nicolaus Jeshi and Crosperry Gabriel and Ernest Mutakyawa v Tanzania* that, ‘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’.¹⁷³ He consequently urged the Court to go beyond the ‘partial’ focus on hanging, and take its ‘reasoning to its logical conclusion by purely and simply banishing the punishment in all its forms from the African legal order’.¹⁷⁴ Judge Rafaâ Ben Achour, in his individual opinion in *Ladslaus Chalula v Tanzania*, equally emphasised that the death penalty itself, and therefore all methods of execution, are incompatible with human dignity.¹⁷⁵ Judges Tchikaya and Ntsebeza, in *Mulokozi Anatory v Tanzania*, challenged the very notion of any ‘admissibility of the death penalty’ in national systems, highlighting its international rejection.¹⁷⁶
56. A growing body of empirical research has demonstrated that the cruel, inhuman and degrading nature of the death penalty - in short its inhumanity - adversely impacts on a range of persons involved in the process. This includes, depending on the specific context, ‘capital jurors, lawyers, judges, executioners, “execution team” members, prison chaplains, execution eyewitnesses, family members’.¹⁷⁷ Such impact can, certainly for family members, be such that it amounts to cruel, inhuman or degrading treatment. Beyond this

¹⁷¹ According to Sarat, *Gruesome Spectacles* (n 162) 4, and Appendix B, approximately 3% of executions in the USA are botched.

¹⁷² ‘Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ UN Doc A/67/279 (9 August 2012) para 41.

¹⁷³ Declaration of Judge Blaise Tchikaya, Judgments in *Romward William v The United Republic of Tanzania*, Application No 030/2016; *Deogratius Nicholas Jeshi v The United Republic of Tanzania*, Application No 017/2016; *Crosperry Gabriel and Ernest Mutakyawa v The United Republic of Tanzania*, Application No 050/2016 (13 February 2024) para 18.

¹⁷⁴ Declaration of the Vice-President of the Court, Judge Blaise Tchikaya, Judgment in *Gozbert Henrico v United Republic of Tanzania*, Application No 056/2016 (10 January 2022) para 3.

¹⁷⁵ Separate Opinion of Judge Rafaâ Ben Achour, Judgment in *Ladislau Chalula v United Republic of Tanzania* (n 78).

¹⁷⁶ Joint Dissenting Opinion of Judge Blaise Tchikaya and Judge Dumisa Ntsebeza, Judgment in *Mulokozi Anatory v Tanzania*, Application No 057/2016 (5 September 2023) para 25.

¹⁷⁷ Bessler (n 155) 158; Study on the Question of the Death Penalty (n 1).

legal qualification, it demonstrates the traumatic consequences that the death penalty can have and its corrosive impact on legal systems.¹⁷⁸

VI.4. The death penalty as constituting cruel, inhuman or degrading treatment of family members

57. Human rights jurisprudence and treaty body practice on the death penalty have recognised several obligations of States in respect of family members.¹⁷⁹ The Commission emphasised in its General Comment No 3 that States shall give ‘reasonable advance notice of the timing, manner, and number of executions to those involved, including those under sentence of death, their families and lawyers, and the public at large’.¹⁸⁰ Further, ... ‘[a]fter an execution, the body should be treated with respect, and, where requested, be returned to the family for burial or other funeral rites, or information about the burial or cremation should be provided.’¹⁸¹ The Human Rights Committee held in its jurisprudence that ‘[c]omplete secrecy surrounding the date of the execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress’, with the ‘failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son’s grave amount[ing] to inhuman treatment of the author, in violation of article 7 of the Covenant’.¹⁸²
58. These pronouncements provide important procedural safeguards against secret executions. However, they do not directly address the pain and suffering that the death penalty causes to family members and others close to the person condemned to it. Citing Susan Sharp’s landmark work, *Hidden Victims: The Effects of the Death Penalty on Families of the Accused*, the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary executions highlighted that: ‘Families of individuals on death row are often invisible bearers of pain and harm caused by the punishment of their relative’s death’.¹⁸³ This applies particularly to the ‘anticipatory grief’ of the ‘uncertainty and severe trauma anticipating execution’¹⁸⁴ namely the profoundly traumatic state of knowing about (and, subsequently, possibly witnessing) the killing of one’s relatives at the hands of the State.

¹⁷⁸ *ibid.*

¹⁷⁹ ‘Rights of families of victims of unlawful killings: Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Morris Tidball-Binz’ UN Doc A/HRC/59/54 (30 April 2025) para 7: ‘adopts a broad definition of family, encompassing relatives and dependents of the individual who is unlawfully killed, but also those who constitute the victim’s social family’.

¹⁸⁰ African Commission, General Comment No 3 (n 24) para 26.

¹⁸¹ *ibid.* See also *Spilg and Mack & DITSHWANELO (on behalf of Lehlohonolo Bernard Kobedi) v Botswana* (n 35) para 175-77, and further, A/HRC/RES/30/5 (1 October 2015) para 4, which called upon States to ‘ensure that children whose parents or parental caregivers were on death row, the inmates themselves, their families and their legal representatives are provided, in advance, with adequate information about a pending execution, its date, time and location, to allow a last visit or communication with the convicted person, the return of the body to the family for burial or to inform where the body was located, unless this is not in the best interests of the child’.

¹⁸² *Staselovich v Belarus*, Communication No 887/1999 (3 April 2003) para 9.2. See also Human Rights Committee, General Comment No 36 (n 63) para 56.

¹⁸³ A/HRC/59/54 (n 172) para 46.

¹⁸⁴ Bessler (n 155).

59. In finding a violation of article 5(1) of the American Convention on Human Rights,¹⁸⁵ in respect of the sister of a person subject to the death penalty, the Inter-American Court of Human Rights referred to the fact that ‘the expert witness indicated that Mr. Ruiz Fuentes’s sister experienced “vicarious trauma, manifesting a profound traumatism, because she had an inter-personal (emotional-affective), inter-subjective (identification with the suffering) and inter-emotional (high stress levels) relationship with what her brother experienced from the time of his arrest and until his death.” The expert witness concluded that Mr. Ruiz Fuentes’s sister suffered from “emotional exhaustion [...] that possibly triggered a depression during her life as an elderly person”’.¹⁸⁶
60. Children in particular can be adversely impacted, with long-term consequences, when their parent(s) or carer(s) are sentenced to death or executed.¹⁸⁷ This raises questions about the compatibility of the imposition of the death penalty on parents or carers with article 3 (best interests of the child) and article 19 (protection of children from all forms of physical or mental violence) of the Convention on the Rights of the Child,¹⁸⁸ and similar obligations in the African Charter on the Rights and Welfare of the Child (articles 4 and 16 respectively), and more broadly the right to family life. In that regard, the UN Special Representative of the Secretary-General on Violence Against Children has noted that while the loss of a parent is always traumatic, it is particularly confusing and frightening for a child where the parent’s death is attributable to the State.¹⁸⁹ As a result, the sentencing to death of a parent ‘compromises the enjoyment of a wide spectrum of children’s rights’.¹⁹⁰

VI.5. The risk of the imposition and execution of the death penalty and the prohibition of non-refoulement

61. Human rights courts and bodies have recognised that sending a person to a country¹⁹¹ (or another country, in case of chain refoulement) where that person is at a real risk of facing the imposition of the death penalty,¹⁹² exposure to the death row phenomenon,¹⁹³ or certain methods of execution¹⁹⁴ amounts to a breach of a State’s obligations under the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Such refoulement is also prohibited under article 33(1) of the United Nations Convention

¹⁸⁵ ‘Every person has the right to have his physical, mental, and moral integrity respected’.

¹⁸⁶ *Ruiz Fuentes et al v Guatemala* (Preliminary Objection, Merits, Reparations and Costs) Judgment of 10 October 2019, Series C No 384, para 190, finding of a violation at para 191.

¹⁸⁷ Daniel Cullen, ‘Forgotten Victims: Children of Parents Sentenced to Death or Executed’ (Oxford Human Rights Hub 9 June 2016) <https://ohrh.law.ox.ac.uk/forgotten-victims-children-of-parents-sentenced-to-death-or-executed/> (accessed 29 July 2025).

¹⁸⁸ *ibid.*

¹⁸⁹ ‘Question of the Death Penalty: Report of the Secretary-General’ UN Doc A/HRC/27/23 (30 June 2014) para 71.

¹⁹⁰ *ibid.*

¹⁹¹ This includes being sent to a country which may deport or remove the person to another country in which the risk is present.

¹⁹² European Court of Human Rights, *Al Saadoon and Mufdhi v United Kingdom* (n 66) paras 143-144 (in-country transfer from the United Kingdom to the Iraqi authorities).

¹⁹³ European Court of Human Rights, *Soering v United Kingdom* (n 142) para 111; Committee against Torture, ‘General comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22’ UN Doc CAT/C/GC/4 (4 September 2018) para 29(I).

¹⁹⁴ Committee against Torture, General Comment No 4 *ibid.*

Relating to the Status of Refugees¹⁹⁵ and article 2(3) of the OAU Convention Governing the Specific Aspects of Refugees in Africa,¹⁹⁶ to which most African States are parties.

VI.6. The compatibility of alternative punishments with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment

62. The abolition of the death penalty does not permit States to retain, or establish, penalties that are themselves incompatible with their obligations under the prohibition of torture and other cruel, inhuman and degrading punishment. As set out above at paragraph 48, corporal punishments have been interpreted as a violation of the prohibition. Imprisonment for life without parole as an alternative sentence may equally be incompatible with the prohibition. According to the jurisprudence of the European Court of Human Rights, life sentences must be reducible, requiring ‘a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds’.¹⁹⁷ Further, ‘the comparative and international law materials before [the Court] show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter...’¹⁹⁸ The United Nations Human Rights Committee held in its jurisprudence that ‘the lack of a possibility of review and of a realistic prospect under the State party’s current legal framework for Mr. Aliev’s life sentence to be commuted to a fixed-term imprisonment causes him continued anguish and mental stress, amounting to treatment contrary to article 7 of the Covenant’.¹⁹⁹

63. The Constitutional Court of Zimbabwe drew on the jurisprudence of the European Court of Human Rights and other international sources in *Obediah Makoni v Commissioner of Prisons and Minister of Justice Legal & Parliamentary Affairs* where it found, *inter alia*, that: ‘[a] life sentence imposed on a convicted prisoner without the possibility of parole or release on licence constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of sections 51 and 53 of the Constitution’.²⁰⁰ This judgment underscores the need to establish a review and parole mechanism for sentences of life imprisonment²⁰¹ unless, and to the extent that, the national criminal law in question provides for a shorter sentence. The Supreme Court of Kenya has further observed *obiter* that, in order to give effect to the sentencing aim of rehabilitation, a life sentence ought not necessarily to mean the natural life of the prisoner.²⁰²

¹⁹⁵ (Adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137. This applies equally to the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267, which amends the temporal and territorial scope of the Refugee Convention.

¹⁹⁶ (Adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45.

¹⁹⁷ *Vinter and others v United Kingdom* (Applications nos. 66069/09, 130/10 and 3896/10) Judgment of 9 July 2013, para 119.

¹⁹⁸ *ibid* para 120.

¹⁹⁹ *Aykhani Elbai ogly Aliev v Ukraine*, Communication No 3809/2020 (26 July 2022).

²⁰⁰ *Obediah Makoni v Commissioner of Prisons and Minister of Justice Legal & Parliamentary Affairs*, Const. Application No CCZ 48/15, Judgment No CCZ 8/16 (13 July 2016) 27.

²⁰¹ See in this regard also *Misalaba v Tanzania* (n 37) paras 173-175.

²⁰² *Francis Karioko Muruatetu v The Republic of Kenya* (n 45) para 95.

64. The Convention on the Rights of the Child stipulates, in its article 37(a), that neither the death penalty 'nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age'. In its General Comment No 27, the Committee on the Rights of the Child, 'strongly recommends that States parties abolish all forms of life imprisonment, including indeterminate sentences, for all offences committed by persons who were below the age of 18 at the time of commission of the offence'.²⁰³

VII. Systematic Considerations pertaining to an Interpretation that the Death Penalty is incompatible with the Right to Life and/or the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment under the African Charter

65. The text of the provisions pertaining to the right to life in the International Covenant on Civil and Political Rights,²⁰⁴ the European Convention on Human Rights,²⁰⁵ the American Convention on Human Rights²⁰⁶ and the Arab Charter on Human Rights (in a separate article),²⁰⁷ provide that the death penalty may under certain circumstances be lawfully imposed and executed. This has raised the question whether the death penalty can be interpreted as being incompatible with the right to life in these instruments, and, if not, whether it could be considered a form of torture or cruel, inhuman or degrading punishment. In regard of the latter, can a practice be considered as amounting to torture or other cruel, inhuman or degrading treatment or punishment if it is explicitly recognised as an exception to the arbitrary deprivation of life?
66. Significantly, the text of article 4 of the Charter, which is silent on the death penalty, does not pose this challenge. As set out above in section IV, the death penalty must be interpreted as an arbitrary deprivation of the right to life on account of its incompatibility with human dignity. Furthermore, as held by the European Court of Human Rights in the European context and alluded to by the Human Rights Committee for international law more broadly, the subsequent State practice on the death penalty can be viewed as 'establishing an agreement among the States parties [including 53 African States] to consider the death penalty as a cruel, inhuman or degrading form of punishment'.²⁰⁸

²⁰³ Committee on the Rights of the Child, 'General comment No. 24 (2019) on children's rights in the child justice system' UN Doc CRC/C/GC/24 (18 September 2019) para 81.

²⁰⁴ Article 6(2).

²⁰⁵ Article 2(1).

²⁰⁶ Article 4(2).

²⁰⁷ Article 6.

²⁰⁸ Human Rights Committee, General Comment No 36 (n 63) para 51. See also Dissenting Opinion of Judge Blaise Tchikaya, Judgments in *John Lazaro v United Republic of Tanzania*, Application No 003/2016; *Makungu Misalaba v United Republic of Tanzania*, Application No 033/2016; *Chrizant John v United Republic of Tanzania*, Application No 049/2016 (7 November 2023) para 28.

VIII. The Compatibility of Moratoria with the Right to Life and the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments (articles 4 & 5 of the Charter)

67. Whilst moratoria have the effect of staying executions, they do not prevent the passing of death sentences. Execution need not be imminent for a death sentence to cause profound psychological suffering. Notably, in *Al-Saadoon and Mufdhi v United Kingdom*, the European Court of Human Rights found that the applicants' well-founded fear of execution constituted inhuman treatment in breach of article 3 of the European Convention on Human Rights even though the applicants had not yet been tried, let alone sentenced to death.²⁰⁹
68. The fragility of moratoria means that the extreme mental anguish suffered by death row prisoners – amounting to cruel, inhuman and degrading punishment contrary to article 5 of the Charter as set out in section VI.2 above – persists so long as they remain under sentence of death. As the Working Group has noted, moratoria are often not enacted through legislation, but are instead dependent on the prerogative of the incumbent Head of State.²¹⁰ As a result, executions can be quickly resumed at any time in response to political and societal pressures. For example, in 2012, The Republic of Gambia carried out 9 executions without notice following a 27 year hiatus;²¹¹ these executions were carried out within 3 days of the public announcement of the decision to resume executions.²¹² Similarly Libya resumed executions after a 23 year de facto moratorium; Comoros after 22 years; Guinea-Conakry after 17 years; and Burundi after 12 years.²¹³ Indeed, moratoria remain fragile even in States which have expressed a commitment to abolishing the death penalty: in 2015, Chad introduced capital punishment for terrorism offences and executed ten people, despite having only a year earlier pledged to abolish the death penalty following recommendations by the United Nations Human Rights Council submitted as part of the Universal Periodic Review process.²¹⁴
69. Further, as condemned prisoners are often housed separately from the rest of the prison population in a designated section, moratoria contribute to overcrowding and, in turn, exacerbate the undignified, inhuman and degrading living conditions often found on death row, as set out in paragraph 45 above. Indeed, the Committee against Torture has specifically recognised the role of overcrowding in contributing to the cruel, inhuman and degrading conditions on death row.²¹⁵

²⁰⁹ *Al-Saadoon and Mufdhi v United Kingdom* (n 66).

²¹⁰ Working Group Study on the Question of the Death Penalty in Africa (n 1) 48.

²¹¹ Amnesty International, 'Death Sentences and Executions in 2012' (2013) 41.

²¹² VOA News, 'Gambia Confirms 9 Death Row Executions' (27 August 2012)

<https://www.voanews.com/a/gambia-executions/1496805.html> (accessed 29 July 2025); Faith Karimi, 'Gambia Vows to Execute all Death Row Inmates by September, Sparking Outcry, CNN (23 August 2012)

<http://edition.cnn.com/2012/08/23/world/africa/gambia-inmates-execution/index.html> (accessed 29 July 2025).

²¹³ Working Group Study on the Question of the Death Penalty in Africa (n 1) 49.

²¹⁴ Amnesty International, 'Death Sentences and Executions in 2015' (2015) 56.

²¹⁵ Committee against Torture, 'Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding Observations of the Committee Against Torture: Zambia' UN Doc CAT/C/ZMB/CO/2 (26 May 2008) para 19.

70. In addition, the existence of a moratorium dilutes the urgency of working towards full abolition. This is inconsistent with article 6(6) of the International Covenant on Civil and Political Rights, which anticipates retentionist States striving towards abolition in the long term. The African Commission has recognised that those States which have not yet abolished the death penalty are obliged by international law to take steps towards doing so, in order to secure the rights to life, to dignity, and to freedom from torture and cruel, inhuman or degrading treatment.²¹⁶
71. On their face, moratoria may appear to constitute a welcome step towards the abolition of the death penalty. However, their invocation as a sign of progress may mask problematic practices. This applies particularly to States in which moratoria – in contrast to full abolition – keep alive multiple ills of the death penalty, from the cruelty of its imposition to the persistence of the death row phenomenon. In these circumstances, moratoria permit the death penalty to continue haunting criminal justice systems as a legal zombie.

IX. Repeal of Laws and/or Regulations providing for the Death Penalty in Violation of the African Charter

72. As a general rule of international human rights law, States are expected to ensure that their national laws are in accordance with their treaty obligations.²¹⁷ Article 1 of the African Charter provides that States parties ‘shall undertake to adopt legislative or other measures to give effect to [the rights, duties and freedoms enshrined in this Chapter]’, which include its articles 4 and 5. The provision has played a dual role in the jurisprudence of the African Commission and Court, namely as a general obligation of States parties to bring their legislation pertaining to the death penalty in line with the Charter and as a form of reparation.²¹⁸
73. Considering that the death penalty is incompatible with articles 4 and 5 of the African Charter, States need to amend any laws and/or regulations that still provide for it. This encompasses all legislation, including criminal law, counter-terrorism law, emergency laws and similar areas of law, as the death penalty must not be imposed for any crime. In pluralist legal systems, the death penalty must be abolished in all systems of law.²¹⁹
74. Two principal legislative models are available for States to abolish the death penalty, namely its omission or an outright ban. States may either repeal legislation that provides for the death penalty or formally abolish and thereby outlaw the death penalty, or combine the two. The explicit legislative abolition of the death penalty can be enshrined in the Constitution and/or in statutory law. Both models would comply with article 1 of the African Charter provided they, effectively, abolish all forms of the death penalty.

²¹⁶ African Commission, ‘General Comment No 3 (n 24) para 22.

²¹⁷ Human Rights Committee, ‘General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) paras 13-14.

²¹⁸ See for example *Tembo Hussein v United Republic of Tanzania*, Application No 001/2018, Judgment (Merits and reparations) (26 June 2025) paras 85-87, and *Working Group on Strategic Legal Cases v Democratic Republic of Congo* (n 34) para 92(1).

²¹⁹ Human Rights Committee, General Comment No 36 (n 63) para 45 on ‘courts of customary justice’.

75. Legislative practice varies across the continent. Whereas some States have, including in response to court rulings,²²⁰ abolished the death penalty through statutory law,²²¹ others have adopted constitutional provisions that abolish or outlaw capital punishment.²²² Several States have combined the two, particularly by reinforcing the abolition of the death penalty in statutory law through a constitutional ban.²²³
76. This diverse practice demonstrates that several States have already amended their legislation with the effect of abolishing the death penalty, thereby bringing it in line with the African Charter. The model of complementing a ban and/or omission of the death penalty in statutory law with its constitutional abolition is best suited to act as a safeguard against its potential – unlawful, under the Charter and the obligations of States under other pertinent international instruments – reintroduction. Constitutional amendments typically require a qualified majority which makes them more difficult to effectuate than reforms in ordinary legislative processes. Where a State has not done so already, becoming a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, would reinforce the national abolition by complementing it with an international legal commitment.
77. Legal measures providing for a moratorium of the death penalty would not be sufficient to comply with article 1 of the African Charter, as it does not fully give effect to its articles 4 and 5. A moratorium may constitute a first step towards its abolition but, as such, leaves the death penalty forming part of the legal system concerned. Further, where not included in any pertinent pronouncement, a moratorium may not prevent judges from imposing the death penalty and prisoners from being subjected to the death row, both of which are incompatible with articles 4 and 5, as set out above in sections VI.1 and VI.2.

X. Findings

78. The death penalty is incompatible with human dignity which underpins, and informs the interpretation of article 4 and article 5 of the Charter. Its imposition, the subjection of a convicted person to the death row experience, and the methods of its execution amount to cruel, inhuman or degrading treatment and/or punishment, if not torture, in violation of article 5. The suffering caused by the imposition of the death penalty, its anticipation, and its execution for the family of the condemned person amounts to cruel, inhuman or degrading treatment incompatible with article 5. African States must consequently not impose the death penalty, imprison convicted persons on death row, or execute the death penalty. They must also not expose any person to a real risk of facing the imposition of the death penalty, death row, or the execution of the death penalty in another country.

²²⁰ See in particular South Africa which adopted the Criminal Law Amendment Act 105, 1997, following the Constitutional Court's judgement in *S v Makwanyane and another* (n 39).

²²¹ See for example The Abolition of the Death Penalty Act, 2021 (Sierra Leone); Criminal and Other Offences (Amendment) Act, 2023 (Act 1101) (Ghana).

²²² See for example article 26(2) of the Constitution of Cabo Verde (1980) and article 28(2) of the Constitution as amended in 2010; article 6 of the Namibian Constitution (1990); article 59 of the Constitution of the Republic of Angola (2010); article 8 of the Constitution of the Republic of Congo (2015).

²²³ See for example Djibouti, 1995 Penal Code and article 10 of its 2010 Constitution.

79. African States that have not yet abolished the death penalty, including States that have a moratorium in place, must abolish it in their national legal system pursuant to their obligations under articles 4 and 5, read in conjunction with article 1 of the Charter. States may do so by repealing legislation that provides for the death penalty or declare it abolished, in statutory law or constitutions, ideally combining the two modes of abolition.