

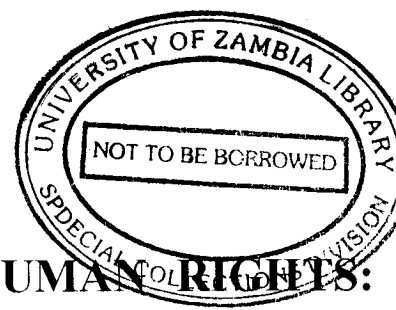
**CAPITAL PUNISHMENT AND HUMAN RIGHTS:  
THE DEATH PENALTY AS A VIOLATION OF THE  
RIGHT TO LIFE**

**By**

**LWIINDI C. HATWIKO**

**UNZA**

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# **CAPITAL PUNISHMENT AND HUMAN RIGHTS: THE DEATH PENALTY AS A VIOLATION OF THE RIGHT TO LIFE**

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*Being a dissertation submitted to the School of Law of the University of Zambia in partial fulfillment of the examination requirements for the award of the degree of Bachelor of Laws (LL.B)*

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**THE UNIVERSITY OF ZAMBIA  
SCHOOL OF LAW**

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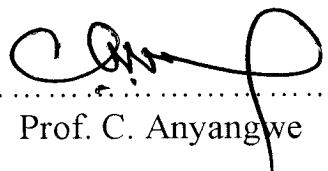
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## DECLARATION

I, **LWIINDI C. HATWIKO** – Computer Number 21075506, do hereby declare that this dissertation is my authentic work and that I have not in any manner used any person's work without acknowledging the same to be so. This is the first submission of this work. It is not the subject of any previously submitted work in any University.

I bear absolute responsibility for errors, defects or any omissions therein.

Date..... 24<sup>th</sup> January, 2008.....

Signature..... Hatko.....

*“We all have dreams. But in order to make dreams come into reality, it takes an awful lot of determination, dedication, self-discipline and effort.”*

Jesse Owens, 1936 Olympic Gold Medalist

## **DEDICATION**

*To my late daughter, Malama “Boo” Nathalie Chungu,  
with whom I shared the best ten months of my life.*

## ACKNOWLEDGEMENTS

Embarking on research such as this, is no easy task, more especially after the immediate loss of a child. But there have been numerous people around me who have helped me to carry on and see this work to completion.

*To my three mothers, Regina, Doreen & Olive:*

It's obvious to say that I'm here because of you! Yet I'm truly who I am because of you. Thank you for always believing in me and for supporting me even when it hurts. There's not enough room on this page to express how I love you.

*To my grandparents, Bernard Roy & Margaret Chiboola:*

Thank you for all the love and care through the years.

*To my sisters Tiwo & Milambo, and brothers Chuchu & Mukungo:*

You mean so much to me. I love you all.

*To my aunts & uncles:*

Thank you for the love, care and support throughout the years.

*To all my cousins:*

You might all be younger than me, but thank you for the many important things that I learn from you guys.

*To the memory of Boo:*

I will cling to the love we shared and the inspiration you were until the day I can hold you again.

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Jean, you are like a sister to me. Thank you for staying with me during my trying moments, and the love and comfort you continue to be. Let's stick together, forever!

*To the Class of 2007:*

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To all of you, too numerous to mention, for the assistance rendered in one way or the other, to see this work to completion.

*Most importantly, to my ever-loving and merciful Heavenly Father, who still gives me life to this day, and remains true to his promises.*

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## **ABSTRACT**

The criminal laws of various countries still impose the death penalty for some offences which are considered to be very serious. As a result, many people have been sentenced to death. This goes against the concept of the protection of human rights, as the right to life of such individuals is taken away from them. However, many efforts have been made over the past decade towards abolishing the death penalty. There is hope that these efforts could finally pay off.

# CHAPTER ONE

## Background to the Study of Capital Punishment and Human Rights

### 1.1 Introduction

Capital punishment, also known as the death penalty, is the execution of a convicted criminal by the state as punishment for crimes known as capital crimes or capital offences.<sup>1</sup> Historically, the execution of criminals and political opponents was used by nearly all societies, both to punish crime and suppress political dissent.

Among countries around the world, all European (except Belarus) and many Pacific Area States have abolished capital punishment. In Latin America, most states have completely abolished the use of capital punishment, while some countries, however, like Brazil, allow for capital punishment only in exceptional situations, such as treason committed during wartime. The United States, most of the Asian states (for instance Japan) and some African states (for instance Zambia and Botswana), retain it.<sup>2</sup>

However, in most places that practice capital punishment today, the death penalty is reserved as punishment for grave offences such as murder, treason and aggravated robbery. In some countries, sexual crimes, such as adultery and sodomy carry the death penalty, as do religious crimes such as apostasy, the formal renunciation of one's religion.

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<sup>1</sup> Wikipedia, the Free Encyclopaedia

<sup>2</sup> [www.amnesty.org](http://www.amnesty.org)

Capital punishment is a very contentious issue. Different arguments have been advanced for and against it. Supporters of capital punishment argue that it deters crime, prevents recidivism, and is an appropriate form of punishment for the crime of murder. Opponents of capital punishment argue that it does not deter criminals more than life imprisonment, violates human rights, leads to executions of some who are wrongfully convicted, and discriminates against minorities and the poor.

## **1.2 Statement of the Problem**

Capital punishment, sadly, still exists in some countries, today, despite developments in international human rights law urging all states to abolish it. There have been many calls on all states to uphold, protect and promote human rights.

Human rights are rights inherent in mankind's nature, and without which human beings cannot exist.<sup>3</sup> They are the basis of human existence and are fundamental to the whole livelihood of a human being. Human rights are basically those rights that human beings enjoy simply by virtue of being born human. Human rights are a set of universal entitlements that individuals enjoy irrespective of their sex, nationality, religion, culture and other status, that are also proclaimed by international law.

Flowing from this, it is without question that the right to life is the supreme human right. This is because any other human right depends on the continued enjoyment of the right to life by a particular person. It is one right that many international human rights treaties do not allow derogations from, even during emergencies.

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<sup>3</sup> Wallace, R.M.M. International Law. 4<sup>th</sup> ed. 2002. P. 210

The most important thing, therefore, is for all countries in the world to protect and promote the right to life. The human rights issue concerning capital punishment can be addressed most effectively by exerting pressure on retentionist states (countries that use the death penalty), to abolish it.

### **1.3 Purpose of the Study**

This dissertation seeks to examine the disparity between the need to promote and protect human rights vis-à-vis the right to life, as provided under the major human rights instruments, and the continued existence of capital punishment in some states. Its aim is to find out how the death penalty seriously impedes the overall need for the protection of human rights, so as to properly recommend appropriate remedial measures.

### **1.4 Objectives of the Study**

The main objective of this dissertation is to give an analysis of the death penalty from a human rights perspective. Such an examination is considered to be useful in determining the efforts employed in strengthening its abolition, as well as determining whether or not the international community of states is doing its utmost best to have the death penalty abolished.

#### **Specific Objectives**

1. To establish that the right to life is the supreme human right
2. To establish the extent of capital punishment.
3. To find out what measures international and regional human rights treaties and organizations have taken to abolish capital punishment.

4. To find out whether the continued carrying out of the death penalty in some countries violates most state constitutions and international treaties on human rights.

### **1.5 Research Questions**

1. Does capital punishment really violate human rights?
2. Has the international community of states done its utmost best to ensure that the death penalty is abolished by all states?

### **1.6 Scope and Limitations of the Study**

This research will examine capital punishment at a global level and provide an analysis based on both international and regional human rights instruments and organizations. The study will cover different jurisdictions and national constitutions.

A limitation of this study is the concept of state sovereignty. Most states consider the issue of capital punishment to be a matter of domestic jurisdiction. Another general limitation is on the powers of international treaties, that springs from the normal principle of the law of treaties, *pacta tertiis nec nocent nec prosunt*; a treaty cannot bind non-parties. Also, most of the recommendations of human rights monitoring bodies have no legally binding effect.

### **1.7 Methodology**

This research involves the use of both primary and secondary sources of data. The primary sources will include statutes (both national and international) as well as case law.

Provisions of various international human rights instruments and documents will also be very useful.

Secondary sources will include textbooks, commentaries, articles in law journals and the internet. Most of the work will be done using writings by eminent authors and will involve desk research.

### **1.8 Structure of the Dissertation**

The work is divided into six chapters.

Chapter one lays the background to the study. It contains the problem statement, the purpose of the study, study objectives and the scope and limitations of the study.

Chapter two defines the right to life, and shows how it is guaranteed and protected in the various international human rights treaties and some national constitutions.

Chapter three shows the worldwide pattern of the use of capital punishment and discusses the arguments for and against the death penalty. It also discusses the rationale for punishment generally.

Chapter four discusses the efforts employed by the international community of states towards the abolition of the death penalty.

Chapter five discusses how capital punishment could constitute torture, cruel or inhuman or degrading treatment or punishment, contrary to the Convention Against Torture and several other human rights treaties.

Chapter six concludes with the general conclusions and suggested remedial measures.

# CHAPTER TWO

## The Right to Life

### 2.1 Introduction

The concern on the death penalty is a concern on the most important of all human rights, as human life is the subject and object of all rights. International human rights law characterizes the right to life as the supreme human right.<sup>1</sup> The life of an individual is respected because all other rights are contingent on it. It is, therefore, not surprising that the major international human rights instruments as well as national constitutions attach great importance to this right to life. This introductory chapter shall define the right to life and show how it is protected by various human rights documents.

### 2.2 Definition of the Right to Life

*Right to life* is a phrase that describes the belief that a human being has an essential right to live, particularly that a human being has the right not to be killed by another human being. The concept of a right to life is central to debates on the issues of capital punishment, euthanasia, self-defence and war.

The right to life is the most basic of all human rights. In **Forum of Conscience V. Sierra Leone**<sup>2</sup>, it was stated inter alia that “*the right to life is the fulcrum of all other rights. It is the fountain through which other rights flow. And any violation of the right without due*

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<sup>1</sup> Paragraph 1 of the General Comment No. 6 (16<sup>th</sup> Session) adopted by the UN Human Rights Committee on 27 July, 1982.

<sup>2</sup> (2000) AHRLR 293

*process amounts to arbitrary deprivation of life.*” Literally, human rights mean the rights of humans or the rights of man.<sup>3</sup> The source of human rights is thus the human being, human nature, or humanity.<sup>4</sup> Human rights are those fundamental and inalienable rights which are essential for life as a human being.

A right is simply a proper claim to something, or an authority to do something, or an interest.<sup>5</sup> Life, on the other hand, is the existence of an individual human being or animal.<sup>6</sup> The right to life of an individual attaches right at the moment of conception; embryos and fetuses are human beings which have a right to life. This is the more reason why some jurisdictions criminalize abortion and oppose embryonic stem cell research.

A right to life, therefore, is the right to exist as a human being. The right to life, however, in any imaginable human rights convention, goes beyond the meaning of a right to bare existence. Suppose someone is placed in a very small cage and thereafter kept alive on bread and water: such a person is alive but is scarcely possessed of a life even minimally worth living. At the very least, the right to life is the right to a certain quality of life, to life of a certain kind – in which actual satisfactions occur, and efforts are made to realize genuine possibilities of flourishing.<sup>7</sup> Conditions that a certain quality of life requires, include, a right to privacy, a right to freedom of conscience and freedom of expression. The concept of the right to life embodies the idea of a certain quality of life, which encompasses the idea of correlative kind of treatment that upholds and sustains that

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<sup>3</sup> Anyangwe, C. Prof. Introduction to Human Rights and International Humanitarian Law. 2004. P. 1

<sup>4</sup> Ibid

<sup>5</sup> Ibid, P. 2

<sup>6</sup> Soanes, E. & Angus Stevenson. (Eds) Concise Oxford English Dictionary. 11<sup>th</sup> ed. 2004. P. 823

<sup>7</sup> Author unknown. Google Website. Giving Meaning to Rights: The Need for Definition and Interpretation in Concepts of Human Rights. P. 1

quality. Although dying is one of the things that is an inevitable part of living, no one, not even the state, must deliberately take a human life.

With the recent developments in the world, an attempt to re-define the right to life was made by the Human Rights Committee. The Human Rights Committee is not a United Nations (UN) organ in the strict sense, but a treaty monitoring body, that is, it is established by a treaty (Article 28 of the ICCPR), with the task of monitoring the compliance of States Parties with their obligations under the treaty.<sup>8</sup>

In General Comment Number 6 (16<sup>th</sup> Session ) adopted by the Human Rights Committee on 27<sup>th</sup> of July, 1982, the Committee took a broad definition of the right to life and discussed its scope in areas such as the reduction of infant mortality, increasing life expectancy, especially by adopting measures which eliminate malnutrition and epidemics, states of emergency, wars, acts of mass violations, acts of genocide, thermo nuclear wars, missing and disappeared persons, arbitrary killings and the death penalty. In fact, in this general comment, the Committee expressly stated that the right to life had been previously, narrowly interpreted. It therefore set standards for all States Parties to the ICCPR, aimed at enhancing the protection of the right to life. From the Committee's resolutions, the internationally recognized elements of the right to life are as follows:

Firstly, the right to life is closely related to the protection and promotion of human rights in general. In Resolution 1983/43 of the Human Rights Committee adopted by the UN General Assembly on March 9, 1983, it was stated that the right to life is closely inter-related with rights such as the right to peace, the right to a safe and healthy environment,

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<sup>8</sup> Hanski, R. & Markku Suksi. An Introduction to the International Protection of Human Rights: A Textbook. 2<sup>nd</sup> ed. 1999. P. 91

and the right to development. This resolution further stated that in fact, these other rights take their cue from the right to life, since this is the primordial human right. Ramcharan<sup>9</sup>, also argues on this point that the establishment of an environment conducive to the respect for human rights and fundamental freedoms in general diminishes the risk of excesses committed against the lives of individuals. He argues further that where the right to life or any other right, such as the right to food or health is violated, it is necessary not only to attack the manifestations of such violations, but their root causes as well. For instance, the right to food is protected by giving an individual food, hence such individual will not die from hunger and therefore, his or her right to life would have been protected. The effective protection of human rights is also closely related to, and affected by the level of implementation of human rights standards directed at regulating situations in which threats to life are particularly susceptible. In Ramcharan's view, these standards include the norms for the protection of human rights during states of emergency; norms regarding the treatment of prisoners and detainees; norms regarding torture, disappearances and arbitrary or summary executions.

Secondly, the right to life encompasses not merely the protection against the intentional or arbitrary deprivation of the right, but also places a duty on each government to pursue policies which are designed to ensure access to the means of survival for every individual within its jurisdiction. Dr. Bernard Kouchner, France's former Minister for Health and Humanitarian Affairs, once remarked:

*“Humanitarian assistance constitutes without question both a right and a duty.... It is a natural right not to die too soon and to be saved*

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<sup>9</sup> Ramcharan, B.G. (Ed). *The Right to Life in International Law: International Studies in Human Rights*. 1985. P. 100

*from death in those situations where intervention is technically possible.”<sup>10</sup>*

If after its best efforts, in good faith, a government is unable to meet the survival requirements of its people, then the residue duty rests upon the international community to assist through appropriate forms of international co-operation. In this regard, the Committee refused to accept a situation where millions of children the world over, as the case is today, continue to die each year on account of hunger and disease, and in which millions of human beings have their life span drastically reduced.

Thirdly, the Human Rights Committee in its General Comment of 1982, also urged all states to protect the right to life by avoiding the use of weapons of mass destruction, such as nuclear weapons. This imposes at the very least, a duty upon states to negotiate in good faith in order to achieve disarmament and adopt safeguards concerning the use of weapons of mass destruction.

Finally, but not the least, human rights education is vital. Human rights education enhances knowledge about human rights and the mechanisms for their protection. It also promotes values, beliefs, and attitudes that encourage individuals to uphold their own rights and those of others. Education makes an essential contribution to the prevention of human rights abuses and conflict and helps create a society in which all persons are valued and respected.

The other issue which is critical to the right to life is abortion. In some countries, abortion is a crime. The right to life under the American Convention, for instance, extends to the foetus. The Convention provides that *the right shall be protected by law and in general*

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<sup>10</sup> UN Document – Notes for Speakers: Human Rights. 1993. P. 39

from the moment of conception.<sup>11</sup> Therefore, the convention does not permit abortion. Although the African Charter is silent on the right of the foetus, some African states, such as Zambia, also criminalize abortion. Article 12(3) of the Zambian constitution<sup>12</sup> provides:

*“A person shall not deprive an unborn child of life by termination of pregnancy except in accordance with the conditions laid down by an Act of Parliament for the purpose.”*

Further, the Termination of Pregnancy Act (TPA)<sup>13</sup>, allows abortion only in circumstances where it is to save the life of the mother or indeed to ensure her good health.<sup>14</sup> This drives home the point that the right to life of an unborn child is also so important that it should be protected as much as possible.

### **2.3 Guarantees of the Right to Life**

With the emergence and progressive development of the law of modern human rights, most jurisdictions guarantee to all persons the right to life, and this guarantee extends to the unborn child. According to Tikhonov, the definition of the right to life is one which is found in most constitutions. He writes:

*“The most important peculiarity of the first stage in the conceptualization of the right to life and its consolidation in international law consists in its traditional interpretation, as it were, in the spirit of the Habeas Corpus and other constitutional instruments. The distinctive features of such an interpretation is: on the one hand, the strictly individual nature of this right while on the other hand – accentuation of the predominantly*

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<sup>11</sup> Article 4 of the American Convention on Human Rights (1969)

<sup>12</sup> Chapter 1 of the Laws of Zambia

<sup>13</sup> Chapter 304 of the Laws of Zambia

<sup>14</sup> S. 3(1) of the TPA

*intra-state aspects thereof. This is confirmed, in our view, by the existing international legal instruments.”<sup>15</sup>*

It is, therefore, not surprising that most writers cite provisions of various documents on human rights in defining the right to life.

The American constitution guarantees the right to life. The unqualified right to life vests in every person by section 9 of the American constitution. An individual’s right to life has been described as ‘*the most fundamental of all human rights*’ and was dealt with in that way by the judgment of the Hungary Constitutional Court declaring capital punishment to be unconstitutional. The challenge to the death sentence in Hungary was based on section 54 of its constitution which provides:

(1) *In the Republic of Hungary everyone has the inherent right to life and to human dignity, and no one shall be arbitrarily deprived of these rights.*

The constitution of Zambia also protects the right to life. It provides in Article 12(1):

*“A person shall not be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted.”*

A guarantee of the protection of the right to life is found in the Universal Declaration of Human Rights (UDHR), the first pillar of twentieth-century human rights law, and intended as a “*common standard of achievement for all peoples.*”<sup>16</sup> Article 3(1) states that, “*everyone has the right to life, liberty and security of the person.*” As a statement of goals and principles, the Universal Declaration was a giant step.

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<sup>15</sup> Ramcharan, B.G. (Ed). *The Right to Life in International Law: International Studies in Human Rights*. 1985. P.99

<sup>16</sup> UN General Assembly Proclamation, 1948.

The International Covenant on Civil and Political Rights (ICCPR), takes the Universal declaration a step further by making provisions legally binding and opening the door to international monitoring of human rights practices. A classical guarantee of the right to life is found in Article 6(1) of the ICCPR, which provides:

*“Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of this life.”*

It is evident from the above wording that much emphasis is put on the individual, as is the case with the rest of the civil and political rights.

Similar protections of the right to life are to be found in the regional human rights treaties. The European Convention on Human Rights (ECHR) contains a provision guaranteeing the right to life. Article 2 protects the right of every person to their life. The article contains exceptions for the cases of lawful executions and deaths as a result of “the use of force which is no more than absolutely necessary” in defending one’s self or others, arresting a suspect or fugitive, and suppressing riots or insurrections.

Article 4 of the American Convention on Human Rights (ACHR) is in the largest sense couched in similar terms as the ICCPR of 1966. The said article gives a precise guarantee of the right to life. Article 4 of the convention provides:

*“Every person has the right to have his life respected. This right shall be protected by law, and in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”*

From the provision, it is clear that the right to life is supposed to be protected by the law of each member state. There is an obligation on every member state to enact laws that would guarantee the right to life. Most importantly, the provision states that life begins

from the moment of conception and so protection starts from there. This, however, is controversial, as different jurisdictions hold varying views on the status of a foetus.

The African Charter on Human and Peoples' Rights (ACHPR) gives a broad and imprecise guarantee of the right. Article 4 which protects the right to life says:

*“Human beings are inviolable .Every human being shall be entitled to respect for his life and integrity of his person. No one shall be arbitrarily deprived of this right.”*

This is a markedly different formulation compared to the other regional human rights treaties. It refers to human beings, but does not provide clearly who a human being is.

#### **2.4 Importance of the Right to Life**

As pointed out earlier, the basic international standards of the right to life are contained in Article 3 of the Universal Declaration of Human Rights (UDHR), Article 6 of the International Covenant on Civil and Political Rights (ICCPR), Article 2 of the European Convention on Human Rights (ECHR), Article 4 of the American Convention on Human Rights (ACHR), and Article 4 of the African Charter on Human and Peoples' Rights (ACHPR). Guarantees on the right to life are also provided for in several protocols on humanitarian law, as well as the Genocide Convention. Article 23 of the Hague Convention on Land Warfare<sup>1907</sup>, for instance provides:

*“... it is especially prohibited to kill or wound an enemy who having down arms, or having no longer means of defence has surrendered.”*

Thus, in war situations, an enemy soldier who surrenders must not be killed; the hostile government must protect his right to life.

Upon examination of these various human rights instruments, it is observed that there are marked differences in the way they each protect the right to life. The differences are most noticeable in regard to the wording. One thing is for sure: they all attach great importance to the right to life. The right to life is the same everywhere. Some documents refer to this right as the ‘*right to life*’, while others refer to this right by the phrase ‘*respect for life*.’ Although the language used in these various documents may be different, the aim seems to be the same – the protection of the right to life, which should not be deprived arbitrarily, but through due process of the established court system of a state, which is impartial and independent.

The ICCPR, ACHR and the ECHR require the right to life to be ‘protected by law’ while the ACHPR calls for the ‘right to life of every human being to be respected.’ In addition, the ECHR refers to certain instances where deprivations may be permitted. The document provides that no one should be deprived of his life except in a situation where “it is in execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.” The ICCPR also deals with the issue of the death penalty. It provides:

*“Anyone sentenced to death should have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted and in all cases.”*<sup>17</sup>

Under the American Convention, the right to life is non-derogable.<sup>18</sup> This right to life is so important. In a dissenting view of the UNHRC in **Kindler’s Case**<sup>19</sup>, committee member B. Wennergren also stressed the importance of the right to life:

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<sup>17</sup> Article 6(4) of the ICCPR

<sup>18</sup> Scott, D. The Inter- American Court of Human Rights. 1992. P.147

<sup>19</sup> (1991) 67 S.C.C. ed. 1

*“The value of life is immeasurable for any human being, and the right to life enshrined in article 6 of the Covenant is the supreme human right. It is the obligation of States Parties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction.”*

As such, everyone has the right and duty to challenge the law of death penalty because it is a violation of the basic and God-given human right, the right to life. All types of human beings in any state, condition and circumstances are entitled to the right to life.

## **2.5 Conclusion**

This chapter has defined the right to life and has established that it is the supreme human right. It has also discussed the broader definition of the right to life, which is credited to the Human Rights Committee. The right to life is protected by both international documents and national constitutions. The major human rights instruments, these being the UDHR, ICCPR, ECHR, ACHR and ACHPR provide guarantees of the protection of the right to life, as well as set the minimum standards of this right, which States Parties to these instruments must observe, and where possible, they must protect the right more than these documents recommend. It has been established further that the right to life is so important that under some treaties, for instance, the American Convention, the right is non-derogable.

# CHAPTER THREE

## The Existence of Capital Punishment

### 3.1 Introduction

Capital punishment, as a form of punishment, has been practiced from the early stages of history. Capital punishment exists worldwide. Historically, the execution of criminals and political opponents was used by nearly all societies – both to punish crime and to suppress political dissent.

This chapter shall discuss the existence of capital punishment the world over. It shall further look at some of the reasons why some countries still retain this form of punishment despite recent international human rights law developments which agitate for its abolition. The reasons as to why capital punishment must be abolished will also be discussed.

### 3.2 The Death Penalty Worldwide

There are a number of selective observations about capital punishment among states today and about its regulation under international law instruments, that has inevitably been influenced by the human rights movement. At least since the end of the Second World War, when human rights became a particular priority, there has been a consistent trend towards abolishing the death penalty, in law or in practice.<sup>1</sup> In 1977, 16 countries were abolitionist, while the figure has since now gone up to 128. Currently, 89 countries have abolished capital punishment for all offences, 10 for all offences except under

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<sup>1</sup> Except otherwise noted, the statistics in this comment are taken primarily from the Google Website, Wikipedia, the free encyclopaedia, as of June, 2007.

special circumstances, and 30 others have not used it for at least 10 years. A total of 68 countries retain it.

Among countries around the world, all European (except Belarus) and many Pacific Area States, including Australia, New Zealand and Timor Leste, and Canada have abolished the use of capital punishment, while some countries, however, like Brazil, allow for capital punishment only in exceptional situations, such as treason committed during wartime. The latest country to abolish the death penalty for all crimes was Albania in early 2007.

The use of the death penalty is becoming increasingly restrained in retentionist countries. Retentionist states include the Muslim states and such significant countries as the USA, China, Japan, Russia, South Korea, Taiwan and Singapore.<sup>2</sup> Other retentionist states are Guatemala, most of the Caribbean states, India, and the majority of democracies in Africa, for instance, Zambia and Botswana.<sup>3</sup>

Some countries had earlier suspended executions for long periods, but have subsequently resumed practicing the death penalty. Notably, the US had suspended executions in 1973 but resumed them in 1977. There was no execution in India between 1995 and 2004, and Sri Lanka recently declared an end to its moratorium on the death penalty but has not performed any executions. The Philippines had re-introduced the death penalty in 1993 after abolishing it in 1987, but abolished it again in 2006.

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<sup>2</sup> Steiner, H.J. & Philip Alston. *International Human Rights in Context: Texts & Materials*. 2<sup>nd</sup> ed. 2000. P.32

<sup>3</sup> *Ibid*, P.33

In most places that practice capital punishment today, the death penalty is reserved as punishment for premeditated murder, espionage, treason, or as part of military justice. In some countries, sexual crimes, such as adultery and sodomy, carry the death penalty, as do religious crimes such as apostasy, the formal renunciation of one's religion. In many retentionist states, drug trafficking is also a capital offence. In China, human trafficking and serious cases of corruption are also punishable by death. In militaries around the world, courts-martial have imposed the death sentence for offences such as cowardice, desertion, insubordination and mutiny. The number of crimes subject to capital punishment, however, has been on the rise in some countries, most notably, the USA.

### **3.3 The Purpose of Punishment**

To afford a clear apprehension of the subject of this work, which subject is capital punishment, it is necessary that what punishment is should be clearly understood, as well as its purpose. Punishment is a penalty imposed on a defendant duly convicted of a crime by an authorized court.<sup>4</sup> Punishment may also be defined as a response of the criminal law, on behalf of society, to a defendant's wrongful behaviour.<sup>5</sup> It indicates, by punitive means, that the defendant has done something wrong and the punitive sanctions imposed by the court are proof that the defendant did something prohibited by the criminal law.<sup>6</sup> People are punished only for doing what is wrong, and the state is the appropriate agent for carrying out punishment.

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<sup>4</sup> Martin, E.A. (ed). Oxford Dictionary of Law. 5<sup>th</sup> ed. 2001. P. 397

<sup>5</sup> Kulusika, S.E. Text, Cases & Materials on Criminal Law in Zambia. 2006. P.795

<sup>6</sup> Ibid

The question that arises is: why do we punish those who contravene the rules of the criminal law? There are a number of different aims and purposes underlying the justification for the imposition of legal punishment. The traditional debate among theorists over the purpose of legal punishment has been between partisans of the 'retributive' and 'utilitarian' theories. The retributive position is that a criminal merits his just punishment because he has done something morally or socially evil, thus taking revenge on behalf of both the victim and society as a whole.<sup>7</sup> The imposition of punishment is justified by the disapproval of the criminal behaviour of the culprit. His or her suffering or discomfort at the hands of the criminal law is said to result from his or her misconduct. The retributive position is an old one and does not command much assent in intellectual circles, but there seems little reason to suppose that it does not continue to retain a strong hold on the popular mind.

The retributive view, however, has been opposed by the utilitarians, who hold that criminal law imposes punishment against anti-social behaviour, not only for the sake of punishment, but in order to prevent or reduce crime.<sup>8</sup> These argue that the main justification of punishment is its preventive or deterrence effect on criminals or would-be offenders. Punishment is aimed at deterring the criminal from repeating his offences or deterring others from committing similar acts.

Other practical purposes served by this important social institution of punishment are the rehabilitation or reform of the offender, and public protection. The aim of rehabilitation is to reform the offender, so that they are less likely to commit offences in the future –

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<sup>7</sup> Elliott, C. & Frances Quinn. *English Legal System*. 4<sup>th</sup> ed. 2002. P. 303

<sup>8</sup> *Op cit*, P. 796

either because they learn to see the harm they are causing, or because, through education, training and other help, they find other ways to make a living or spend their leisure time.<sup>9</sup> This is advocated by behaviourists, who place more emphasis on the situation of the offender, rather than the nature of the offence in the determination of the appropriate punishment, or the reformists who tend to advocate treatment rather than punitive punishment as the better means of reducing crime. Also, by placing an offender in custody, you prevent them from committing further offences and the public are thereby protected. However, while this has merits where highly dangerous offenders are concerned, it is an extremely expensive way of dealing with crime prevention and, since prison is often the place where criminals pick up new ideas and techniques may be ultimately counter-productive.

### **3.4 The Justification for Capital Punishment**

Among all the issues that criminal punishment raises, none has been the subject of greater controversy than capital punishment. For centuries, law enforcement agencies, defence counsel, criminologists and philosophers, religious figures, and the general public have argued about this issue from many different perspectives. It has also become an important issue in political campaigns in democracies.

Why are some states still keeping capital punishment on their statutes? There are basically two reasons which international law has recognized as to why some states still retain the death penalty even today.

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<sup>9</sup> Op cit, P. 305

Firstly, as noted in the United Nations Document No. A/37 406 of 30<sup>th</sup> September, 1992<sup>10</sup>, states consider capital punishment to be, like most of the issues related to the constitution and the penal code, a matter within their domestic jurisdiction and a way of proving their sovereignty. Therefore, even if they are sometimes ready to accept an obligation to abide by certain international regulations such as one requiring them to abolish the death penalty, they will not renounce their freedom of the decision as to whether this penalty should be retained or abolished.<sup>11</sup> As former Secretary General of the UN, Boutros Boutros Ghali wrote in ‘An Agenda for Peace’, his 1992 report to the Security Council, the meaning of sovereignty is changing:

*“The time of absolute and exclusive sovereignty... has passed; its theory was never matched by reality. It is the task of leaders of states today to understand this and to find a balance between the need of good internal governance and the requirements of an ever more interdependent world.... One requirement for solutions to these problems lies in commitment to human right....”*<sup>12</sup>

The debate over sovereignty has arisen largely because rights violations can have consequences that go beyond national borders – and also out of simple concern for human misery. Surely, can the world watch idly as rights are violated and people suffer and die?

Secondly, international law considers the death penalty as a moral and political question, one that goes beyond political debates. Sapienza observes:

*“Nevertheless, even if only for purposes of record, one may say that retentionists tend to consider capital punishment as the only means*

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<sup>10</sup> This was a report by the Secretary General of the UN, containing answers from states to a note verbale inviting them to submit comments and observations on the elaboration of the Second Optional Protocol to the ICCPR, which aims at abolishing the death penalty by the States Parties.

<sup>11</sup> Ibid

<sup>12</sup> Ibid

*of dealing with incorrigible individuals, a a general deterrent from crime and as the only way of just retribution for particularly serious crimes.*"<sup>13</sup>

Retentionist states argue that the death penalty is a deterrent by instilling fear in anyone who might consider committing a capital offence. This argument, of course, does not justify the existence of capital punishment in some states. It is argued that capital punishment is not the only deterrent measure available; other penalties, such as life imprisonment are sufficient deterrence.<sup>14</sup>

Furthermore, regarding its deterrent value, it is well established by statistical studies that there is indeed not enough evidence to support it. For instance, in the Gibson and Klein Data<sup>15</sup>, it was difficult to tell whether the homicide cases had increased or reduced in England owing to the abolition of capital punishment in 1965. Zimring and Hawkins observed the following on the deterrent effect of capital punishment in line with the Klein Data:

*"Our analysis of these data points up a general problem in the content analysis of before-and-after crime rates... The change, of and by itself, can produce changes in the nature of content of the crime rate. These changes, which will be independent of changes in gross crime rate, may seem to provide a measure of the effects of policy changes but will in fact be an unreliable index as to whether the change in punishment policy has achieved any significant measure of crime prevention."*<sup>16</sup>

Capital punishment, then, does not appear to have a specific influence on the amount or trend of the kind of crime it is supposed to deter people from committing.

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<sup>13</sup> Ramcharan, B.G. (Ed.) *The Right to Life in International Law: International Studies in Human Rights*. 1985. P.294

<sup>14</sup> Steiner, H.J. & Philip Alston. *International Human Rights in Context: Texts & Materials*. 2<sup>nd</sup> ed. 2000. P.51

<sup>15</sup> This was an analysis of data concerning the abolition of capital punishment in England in 1965 which was carried out by Gibson and Klein of the Home Office in 1969. Their task was to consider whether the homicide cases had increased or reduced after the abolition of the death penalty and looks at the period between 1957 to 1969.

<sup>16</sup> Zimring, F.E. & G.J. Hawkins. *Deterrence - The Legal Threat in Crime Control*. 1973. P.290

The death penalty is also imposed by some states as it is felt that death is a just retribution for certain crimes – that the criminal has forfeited his right to life by his actions. The righteous anger of family and friends of for instance, a murder victim, reinforced by the public abhorrence of vile crimes, is easily translated into a call for vengeance.

But capital punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. We have long outgrown the literal application of the biblical injunction of '*an eye for an eye, and a tooth for a tooth*'. Punishment must, to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it. The state, therefore, does not need to engage in the cold and calculated killing of people in order to express moral outrage at their conduct. A very long prison sentence is also a way of expressing outrage and visiting retribution upon the criminal.<sup>17</sup>

Retentionist states are also of the opinion that the death penalty protects society from dangerous people, and that since maintenance of the convict is at the expense of the state, it is better then, that criminals are eliminated

### **3.5 Arguments against the Death Penalty**

It cannot be disputed that the arguments advanced in favour of the death penalty have certain values. Yet, they do not necessarily lead to justifying the death penalty – the taking away of a human life.

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<sup>17</sup> Steiner, H.J. & Philip Alston. International Human Rights in Context: Texts & Materials. 2<sup>nd</sup> ed. 2000. P.53

Human persons enjoy some degree of dignity: they are intelligent, free, subjects of human rights. The right to life has an overwhelming value that overshadows all the arguments of the death penalty. This right is inherent in the human person created in the image of God.

The killing of a human being cannot be used to reach some particular purpose: for instance, the purpose to punish an offender, to revenge, to give a lesson to the others or to repair a disrupted order. Killing is itself evil. To use an intrinsically evil action to reach a good end is to indulge in the Machiavellian principle that *the end justifies the means*.<sup>18</sup>

Furthermore, capital punishment leads to the executions of some who are wrongfully convicted. The death penalty is irreversible. Many are the risks that make it possible to condemn innocent people. But if an alleged offender but innocent person has been condemned to life imprisonment, there is still the possibility of one day being proven innocent. But once killed, no court, however supreme, can raise one from death. A case from the USA illustrates this point concisely. The Governor of the US State of Illinois, George Ryan, declared a moratorium on executions in January 2000. His decision followed the exoneration of the 13<sup>th</sup> death row prisoner found to have been wrongfully convicted in the state since the USA reinstated the death penalty in 1977. Announcing the moratorium, Governor Ryan said:

*"I cannot support a system which, in its administration, has proven so fraught with error and has come so close to the ultimate nightmare, the state's taking of innocent life... Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate."*<sup>19</sup>

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<sup>18</sup> Agostoni, T. May The State Kill? 1999. P.22

<sup>19</sup> Ibid, P.39

Capital punishment also discriminates against minorities and the poor. Poor and powerless people are the ones who are easily executed. Rich people who have committed a crime have certain possibilities; they can fabricate a case against a poor man by buying false witnesses and they can also afford to hire not only the most famous lawyers in the nation, but also different companies of lawyers which are able to confuse the case, at least on technicalities. Then, though the rich man is sentenced to death, he will be released.

Another important advantage of the abolition of the death penalty is the fact that many prisoners may change their heart and vision of life. Through a programme of re-education mainly given by visiting religious persons, some prisoners become truly repentant. Also, they are determined to continue their good behaviour once released.

Lastly, but not least, the cause of the high incidence of violent crime cannot simply be attributed to the failure to carry out the death sentences imposed by the courts. Homelessness, unemployment, poverty and the frustration consequent upon such conditions are other causes of the crime wave.<sup>20</sup>

Capital punishment could, however, be justified in the military context. Militaries impose the death sentence for offences such as cowardice, desertion, insubordination and mutiny.

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<sup>20</sup> Steiner, H.J. & Philip Alston. *International Human Rights in Context: Texts & Materials*. 2<sup>nd</sup> ed. 2000.P.52

Surely, while the right to life of an individual must be protected, people who fail or betray their country, especially in war times ought to be punished.

### **3.6 Conclusion**

Capital punishment, sadly, still exists in the world today despite recent international human rights law developments urging all states to abolish it. Since the end of the Second World War, however, there has been a consistent trend towards abolishing the death penalty. Almost all the European states are abolitionist. Retentionist states include the US, China, India and Zambia.

Punishment serves different purposes. These include the retributive, deterrence, rehabilitation and public protection purposes. Retentionist states feel that maintaining the death penalty in defiance of international law developments is a way of proving sovereignty as well as answering the moral deterrent value question of capital punishment. Of course, these reasons do not justify the death penalty as the purportedly best form of justice. Therefore, more pressure has to be exerted on such states if the human rights issue concerning capital punishment is to be addressed.

Since the right to life has an overwhelming value that overshadows all the arguments in favour of the death penalty, this form of punishment must be abolished. Capital punishment does not deter criminals more than life imprisonment, violates human rights, may lead to executions of some who are wrongfully convicted, and discriminates against minorities and the poor. Capital punishment could however, be justified in the military context.

## **CHAPTER FOUR**

# **Pressure From International and Regional Human Rights Treaties and Organizations to Abolish Capital Punishment**

### **4.1 Introduction**

Of late, there has been growing pressure on states to abolish capital punishment. This pressure has generally come from international treaties and organizations on human rights. Indeed, there has been great success on this aspect of human rights law, especially in the Western World where most countries in Europe have abolished the death penalty. England, for instance, abolished the death penalty for murder in 1965 when the Murder (Abolition of Death Penalty) Act was enacted. This Act came into operation on 9<sup>th</sup> November 1965.

The United States of America presents an exciting case. Of the 52 states, some have abolished it while others like Texas and California still have capital punishment on their statutes. In Africa, there has been generally slow progress towards the abolition of the death penalty.

This chapter shall discuss the international and regional human rights treaties which agitate for the abolition of the death penalty. Also to be discussed are human rights non-governmental organizations which are fighting for the same cause.

## 4.2 The United Nations

Within the international community, the UN has been a forum for debate on capital punishment since its inception in 1945. Initially, the death penalty was debated to be included in the initial draft of the UDHR, but was eventually left out.<sup>1</sup> It was believed that the issue would be better dealt with by the Declaration on Civil and Political Rights.<sup>2</sup> In 1968, the General Assembly included safeguards related to the death penalty in the preamble of the UDHR. However, it was not until 20<sup>th</sup> December, 1971 that the UN General Assembly officially took the stand against the practice by declaring that executions by the state violated the third article of the UDHR. It was stated thus:

*“In order fully to guarantee the right to life provided for in Article 3 of the UDHR, the main objective to be pursued is that of progressively restricting the number of offences for which capital punishment may be imposed with a view to the desirability of abolishing this punishment in all countries.”*

Further, in the face of steadily growing world public opinion in favour of full abolition of capital punishment, the General Assembly in 1989, adopted the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty which does, for States Parties, prohibit use of the death penalty.<sup>3</sup> This was an addition to the terms agreed upon in the ICCPR. Also, at the UN General Assembly’s 62<sup>nd</sup> session in October 2007, a resolution calling for a universal ban was introduced as a step towards the abolition of the death penalty. Endorsement by the General Assembly of this resolution is a significant milestone towards achieving the goal of a death penalty-free world.<sup>4</sup>

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<sup>1</sup> Agostoni, T. *May the State Kill?* 1999. P. 13

<sup>2</sup> *Ibid*

<sup>3</sup> Anyangwe, C. *Prof. Introduction to Human Rights and International Humanitarian Law.* 2004. P. 37

<sup>4</sup> Wikipedia, the Free Encyclopaedia as of 17<sup>th</sup> November, 2007.

The UN Commission on Human Rights (UNCHR) has also joined in the fight for the abolition of the death penalty.<sup>5</sup> For instance, the UNCHR Resolution 1997/12 called upon all states that had not yet abolished the death penalty to restrict the number of offences for which it may be imposed. The resolution further urged all states that had not yet abolished the death penalty to abolish it.

Later in April 1998, the UNCHR again adopted a resolution for the third year running on the death penalty. It called on all states that still maintained the death penalty “*to establish a moratorium on executions, with a view to completely abolish the death penalty.*”<sup>6</sup>

This is a stronger-worded resolution than was previously adopted in the years before. It included the recommendations that all non-violent financial crimes, non-violent religious crimes or expressions of conscience should not be included as crimes punishable by death. It also recommended that all persons suffering from any mental disorder should not be sentenced to death or executed.

This kind of pressure has, of course, yielded tremendous results.

#### **4.3 The International Covenant on Civil and Political Rights (ICCPR)**

The ICCPR was adopted in 1966, but entered into force ten years later in 1976. This treaty guarantees a large number of civil and political rights. Most importantly, this Covenant details the right to life. The ICCPR does not prohibit capital punishment. It however imposes strict limitations on its use.<sup>7</sup>

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<sup>5</sup> Amnesty International. *The Death Penalty Worldwide: Developments in 1988*. P. 21

<sup>6</sup> Resolution 1998/8

<sup>7</sup> Anyangwe, C. Prof. *Introduction to Human Rights and International Humanitarian Law*. 2004. P. 36

The right to life is qualified by various exceptions, restrictions and limitations. The ICCPR also imposes an absolute and immediate obligation on each State Party to respect and ensure this right to all individuals within its territory and subject to its jurisdiction, and to adopt necessary legislative or other measures.

According to Nowak<sup>8</sup>, Article 6 of the ICCPR is phrased already in a language aiming finally at the abolition of capital punishment. This is, of course, true because of the many limitations or restrictions as to when capital punishment has to be implemented. Article 6(2) of the ICCPR, for instance, directs States Parties to the Covenant to impose the death penalty only in situations where the crime committed is '*most serious*' and such punishment is '*in accordance with the law in force at the time of the commission of the crime...*' This punishment should only be carried out in pursuant to a final judgment rendered by a competent court. In other words, this kind of punishment should never be carried out before the convict is given a chance to appeal to the highest court of the land. A further limitation of the ICCPR is that found in Article 6(4), which provides that a state should pardon the convict, or commute the sentence to a lesser charge so that the convict can be either imprisoned for life or just serve a term of years, or indeed, granted amnesty. Another limitation, obviously, is that a state should not impose the death penalty on persons who are below the age of eighteen when the crime was committed, as well as pregnant women.<sup>9</sup> Also, Article 6(6) expresses clearly a strong presumption in favour of the abolition of the death penalty by stating that:

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<sup>8</sup> Orlin, S. et al (eds). *Jurisprudence of Human Rights Law: A Comparative Interpretative Approach*. 2000. P.28

<sup>9</sup> Article 6(5)

*Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.*

It is interesting that most of these limitations have found their way into some of the regional human rights instruments, as will be shown later, as well as in the laws of some states. The legislators have recognized the fact that such a punishment is undesirable hence the many restrictions on its imposition.

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

This particular Protocol aims at abolishing the death penalty. Its preamble reads in part:

*“...Believing that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights*

*. Noting that article 6 of the International Covenant on Civil and Political Rights refers to abolition of the death penalty in terms that strongly suggest that abolition is desirable.*

*Convinced that all measures of the abolition of the death penalty should be considered as progressive in the enjoyment of the right to life.*

*Desirous to undertake hereby an international commitment to abolish the death penalty.”*

The strong language used in the preamble of this Protocol is reflected in the entire Protocol. This suggests the importance of the abolition of the death penalty to international human rights lawyers. Article 2(1) of the Protocol, for instance, explicitly rejects any reservations to be made except one made at the time of ratification or

accession.<sup>10</sup> The idea is to ensure that the States Parties to it abolish capital punishment. In fact, such reservations must be related to the deprivations of the right to life in war times only.

By implication, therefore, any ratification or accession to this Protocol must lead to the abolition of the death penalty by the ratifying or acceding state, it is not only difficult to invoke a reservation, but a reservation is limited to war times only. 49 states have so far ratified this Protocol.<sup>11</sup>

#### **4.4 The European Convention for the Protection of Human Rights and Fundamental Freedoms**

The Convention for the protection of human rights and fundamental freedoms, also known as the European Convention on Human Rights (ECHR), was adopted under the auspices of the Council of Europe in 1950, to protect human rights and fundamental freedoms. The Council of Europe has continued to raise strong warnings against states that retain the death penalty, and a moratorium on the death penalty is a condition of membership in the Council of Europe. All 47 member states of the Council of Europe are parties to this Convention and new members are expected to ratify the Convention at the earliest opportunity. As stated earlier, most of these countries have already abolished the death penalty. England and German are classical examples.

This European regional body has developed similar strategies as the UN and the ICCPR.

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<sup>10</sup> Article 2 of the Protocol provides: The State Party making such a reservation shall at the time of ratification or accession communicate to the Secretary General of the United Nations the relevant provisions of its national legislation applicable during war time.

<sup>11</sup> See Office of the United Nations High Commissioner for Human Rights, Status of Ratification of the Principal International Human Rights Treaties, [www.unhchr.org](http://www.unhchr.org).

The ECHR also imposes limitations as to when the death penalty can be imposed on an individual. Article 2(1) of the treaty, for instance, imposes a duty on the States Parties to invoke the death penalty only in circumstances where an individual has been sentenced by a competent court and such a penalty must be recognized by law.

Further, the Convention has written its own protocols related to the death penalty. Protocols No. 6 of 1983 (abolition in time of peace) and 13 of 2000 (abolition in all circumstances) to the ECHR expressly provide for the abolition of the death penalty in Europe. The sixth protocol, however, authorizes the States Parties to make legal exceptions in respect of acts committed in time of war or of imminent threat of war. This particular protocol has been ratified by 35 member states of the Council of Europe. Even though these protocols are optional and have only been signed by a handful of countries, there is a growing number of countries which continue to abolish the death penalty from their legislation, or are taking action towards that goal.

#### **4.5 The American Convention on Human Rights (1969)**

The American Convention on Human Rights (ACHR) does provide some language that suggests the possibility of an eventual regional prohibition of capital punishment.<sup>12</sup> This can be seen from the provisions of Article 4 of the Convention. The significance of this provision was interpreted in the advisory opinion of the Inter- American Court of Human Rights.<sup>13</sup> In that decision, the Court concluded by a unanimous vote that the convention imposes an absolute prohibition on the extension of the death penalty and that,

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<sup>12</sup> Rosas, A. & Jan Helgesen. (eds). *Human Rights in a Changing East/West Perspective*. 1990. P.146

<sup>13</sup> *Inter-American Court of Human Rights*

consequently, the Government of a State Party cannot apply the death penalty to crimes for which the penalty was not previously provided for under its domestic law.

Thus, Article 4, as interpreted by the Inter-American Court, serves to block the extension of the death penalty and ban its growth by ratifying states. Paragraph 3 makes the decision to abolish the death penalty irreversible on the part of ratifying states; thus arguably making the prohibition of capital punishment a progressive goal of the Inter-American system. Further, Article 4(4) prohibits the infliction of capital punishment '*for political offences or related common crimes*' and paragraph 5 bans its use for '*persons who, at the time the crime was committed were under 18 years of age or over 70 of age, nor shall it be applied to pregnant women.*'

About twenty-five member states of the Organization of American States (OAS) have ratified or acceded to the Convention. It is well known that one of the most powerful voices within the international community, the USA, is a retentionist state. The USA is not a signatory to this treaty.

#### **4.6 The African Charter on Human and Peoples' Rights (1981)**

The African Charter on Human and Peoples' Rights (ACHPR) does not elaborately deal with the death penalty. Article 4 of the Charter broadly protects the right to life. But unlike other conventions, it does not prohibit the death penalty. The Charter, however, sanctions the death penalty – a clear indication that the treaty is not in support of capital punishment, although it fails to spell out the internationally recognized elements of that right as couched in other treaties, particularly the ECHR.

The African continent, however, has not been dormant on the need to abolish capital punishment, despite its slow progress. At the November 1999 session of the African Commission on Human and Peoples' Rights held in Kigali, the Commission adopted a resolution expressing their concern that some African member states were imposing the death penalty in instances that did not meet international standards. Thus they were not in full compliance with their obligations to the ACHPR.<sup>14</sup> The Committee urged those countries that retained the death penalty to ensure that they complied fully with the obligations set out under the Charter. They further urged all states retaining capital punishment to:

- (a) Limit the imposition of the death penalty to only serious crimes,
- (b) Consider establishing a moratorium on executions, especially in cases where there may not have been full compliance with international standards for a fair trial, and
- (c) Reflect on the possibility of abolishing the death penalty.

As Africa entered into the year 2000, many countries abolished the death penalty. It is important to note that many of them are not only some of the poorest in Africa, but suffer a disturbingly high crime rate.<sup>15</sup> Many African countries are taking positive steps towards the abolition of the death penalty, including Malawi, which in 1997 commuted all death sentences to life imprisonment. The former president of Malawi, Dr. Bakili Muluzi, in his

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<sup>14</sup> Agostoni, T. *May the State Kill?* 1999. P. 17

<sup>15</sup> *Ibid.*, P. 16

speech to the Eighth General Assembly of the World Council of Churches in Harare in December 1998 promised never to sign the death penalty for a fellow human being.<sup>16</sup>

Rwanda has become the latest country to abolish the death penalty, accelerating the worldwide trend towards ending capital punishment. Other countries continue to maintain the penalty for various reasons, although they are making progress towards establishing a moratorium.

#### **4.7 Other International Organizations**

The contributions of intergovernmental bodies, non-governmental organizations (NGOs) and countless individual lawyers, journalists and other activists have helped greatly to further respect for human rights throughout the world. Among NGOs, Amnesty International (AI) and the Human Rights Watch are noted for their opposition to capital punishment.<sup>17</sup>

Amnesty International is an independent worldwide voluntary movement, which is concerned solely with the protection of human rights involved in each case, regardless of either the ideology of the government or the beliefs of the victims. AI opposes the death penalty in all cases on the grounds that it is a violation of the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment, as proclaimed in the UDHR. AI campaigns for the abolition of all legislation providing for the death penalty. It appeals to all individual governments and works with the UN and other bodies to abolish the death penalty worldwide. AI's progress has been dramatic. For instance, it has extremely been concerned about the imposition of the death penalty after trials which

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<sup>16</sup> Ibid

<sup>17</sup> Unless otherwise indicated, data on this comment is from Wikipedia, the Free Encyclopaedia, as of November 17, 2007.

fail to conform to international standards of fair trial. It has documented the imposition of capital punishment after unfair trials in many countries including Burundi, Chad, Egypt, Liberia and Libya. AI also drew the attention of the African Commission on this matter, and urged it to address this issue as a matter of priority. Despite these pleas from AI, executions have continued. An example is the execution of Ken Saro-Wiwa and eight other members of the Ogoni ethnic group in 1995. AI is also a member of the World Coalition against the Death Penalty.

The Human Rights Watch is a United States based international NGO. It produces research reports on violations of international human rights norms as set out by the UDHR and other internationally accepted human rights norms. This is intended to draw international attention to abuses and to put pressure on governments and international organizations to reform. It carries fact-finding missions to investigate suspect situations and generate coverage in local and international media. The Human Rights Watch made recent headlines when it spoke against mass killings and government imposed famines during the last decade of former executed Iraq leader, Saddam Hussein's rule. It has also published extensively on the Rwandan Genocide of 1994. The Human Rights Watch, however, has been criticized for having a pro-Western bias.

The European Union (EU) is also one of the international bodies leading the campaign for a world moratorium on the death penalty. Abolition is considered a central value to the EU. As way back as 1998, the General Affairs Council of the EU adopted a policy towards third countries on the death penalty. Its aim is for the promotion of the abolition

of the death penalty in non-member states. It has offered bilateral and multilateral co-operation to those states working towards a moratorium and in due course abolition of the death penalty.

The EU has also made the abolition of the death penalty an integral part of its human rights policies. It strengthens international activities in opposition to the death penalty, and works where capital punishment still exists, towards universal abolition. The EU further insists that capital punishment be carried out only in accordance to the minimum standards set out in the international treaties and calls for its use to be restricted.

There are also some individual human rights activists and journalists who openly condemn capital punishment and advocate for its abolition in their works, despite its majority public support. In the U.S, for instance, surveys have long shown a majority in favour of capital punishment. An ABC News survey in July 2006 found 65 percent in favour of capital punishment, consistent with other polling since 2000.

#### **4.8 Conclusion**

With recent developments in international human rights law, there has been great pressure from international organizations and regional human rights bodies on all states in the world to abolish the death penalty. The most notable international human rights organizations fighting this cause include the UN, the UNCHR, AI, the Human Rights Watch, and intergovernmental bodies, such as the EU.

As for international treaties, this chapter has established that they have also been very instrumental in calling for the abolition of the death penalty. This, they have done, by restricting its application to serious offences, as well as the many limitations as to when it

should be imposed. The ICCPR is the most outstanding treaty in this regard as it also imposes a duty on States Parties to comply with its provisions, while the ACHPR has made slow progress. Individual citizens have also contributed on the calls for the abolition of the death penalty.

It has also been established that this pressure has indeed succeeded in that most countries in the EU, and even here in Africa, have abolished capital punishment.

## CHAPTER FIVE

# Capital Punishment as Constituting Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment

### 5.1 Introduction

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also referred to as the Convention Against Torture (CAT) of 1984 expressly prohibits torture and other cruel, inhuman or degrading treatment or punishment. It holds States Parties responsible for preventing torture and making it legally punishable. No exceptional circumstances may be invoked to justify torture, nor can a torturer be excused by virtue of having acted under orders. The ICCPR also prohibits torture or cruel or degrading treatment or punishment in Article 7.

Regional instruments have also strongly condemned torture and human rights violations in general. The African Charter on Human and Peoples' Rights (ACHPR) prohibits torture under Article 5. In the Americas, the prohibition of torture is contained in Article 5 of the American Convention on Human Rights (ACHR). Article 3 of the European Convention on Human Rights (ECHR) also prohibits torture or inhuman or degrading treatment or punishment.

It has been argued that prisoners on death row awaiting execution are usually subjected to other harsh conditions, thus they do not retain all other human rights which are not expressly taken away by the fact of their detention. The methods employed in executing

persons condemned to suffer capital punishment have also been condemned by international human rights lawyers. Some international human rights law experts have however argued that if one has been executed in accordance with the human rights law standards, then one would not have been subjected to cruel, inhuman or degrading treatment.

This chapter shall discuss the death row phenomenon as dealt with by various jurisdictions, and the methods of execution. It shall establish that they both amount to cruel, inhuman and degrading treatment within the meaning of most human rights documents.

## **5.2 The Death Row Phenomenon**

Death row is the phenomenon of prisoners sentenced to death who spend many years in prison, often in the parts of prisons reserved for those under death sentence, as they prosecute appeals and seek stays of execution – and the death penalty itself.<sup>1</sup> According to Schmidt<sup>2</sup>, the term death row phenomenon refers to the situation and treatment of individuals sentenced to death and awaiting execution for many years under particularly harsh conditions of detention. One concerned citizen once said that criminals must be spared the mental anguish that they suffer every day each time they hear clanking of the prison metal gates.<sup>3</sup> Prisoners challenge the legality of executions after the death row experience and challenge the legality of capital punishment itself, under several state

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<sup>1</sup> Steiner, H.J. & Philip Alston. *International Human Rights in Context: Text and Materials*. 2<sup>nd</sup> ed. 2002. P. 18

<sup>2</sup> Orlin, S. et al. (eds). *Jurisprudence of Human Rights Law: A Comparative Interpretative Approach*. 2000. P. 47-48

<sup>3</sup> This was a contribution in the Post Newspaper of Saturday, May 26, 2007, urging President Mwanawasa never to sign a death sentence for a human being.

constitutional provisions and under the international human rights instruments. The challenges differ among different countries and over time, and rest on a few widespread constitutional provisions. The death row phenomenon has also been condemned the world over, and different jurisdictions have dealt with this issue.

### **5.2.1 The United Nations Human Rights Committee (UNHRC)**

The UNHRC was one of the first international bodies to address the death row phenomenon under international Law.<sup>4</sup> It is a body of 18 independent experts which may determine individual complaints from citizens of states which have ratified the First Optional Protocol to the ICCPR. Although its decisions are not legally binding *stricto sensu*, they constitute highly authoritative decisions which States Parties are expected to implement.<sup>5</sup>

The Committee has received individual complaints on the death row phenomenon. In most of these complaints (most of which have come from the Caribbean region), the complainants have argued that the length of their detention on death row constitutes cruel, inhuman and degrading treatment, contrary to Article 7 of the ICCPR. It has been held in a substantial number of cases that the harsh conditions undergone by prisoners on death row might amount to inhuman treatment in violation of Article 7 of the ICCPR. However, it has also been held that prolonged periods of detention on death row do not per se constitute cruel, inhuman or degrading treatment. On 5<sup>th</sup> April 1989, the

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<sup>4</sup> Ibid, P. 48

<sup>5</sup> The Committee's decisions do not confer an enforceable right upon the complainant in the event of a favourable decision by the Committee.

Committee adopted its views in the case of **Pratt and Morgan V. Jamaica**.<sup>6</sup> The two Jamaican citizens had been sentenced to death in January 1979 for a murder they had committed in October 1977. In their complaint submitted to the HRC in 1986, they claimed, inter alia, that the length of their detention on death row constituted cruel, inhuman and degrading treatment, contrary to Article 7 of the ICCPR. The Committee addressed their claim in the following terms:

*“In principle, prolonged judicial proceedings do not per se constitute cruel, inhuman and degrading treatment even if they can be a source of mental strain to the convicted prisoners. However, the situation could be otherwise in cases involving capital punishment and assessment of the circumstances of each case would be necessary.”*

The Committee concluded that there had been no violation of Article 7 of the ICCPR, as the applicants in this case had not sufficiently substantiated their claim. This decision was, however, reversed by the Judicial Committee of the Privy Council.

One of the reasons why the Committee is reluctant to hold that the prolonged stay of one on the death row is contrary to Article 7 of the ICCPR is because if they did so, states would execute the convicts immediately after judgment was passed. This is why the Committee usually holds that it is the conditions in prison in which persons on death row live, which are contrary to Article 7 of the ICCPR, as opposed to their prolonged stay.

The Committee further observed in **Errol Johnson V. Jamaica**<sup>7</sup>, that:

*“Life on death row, harsh as it may be, is preferable to death... therefore, the Committee should avoid adopting a line of jurisprudence which conveys a message to States Parties retaining the death penalty that they should carry out a capital sentence as expeditiously as possible after it was imposed.”*

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<sup>6</sup> Communication Nos. 210/1986 & 225/1987, views adopted on 6 April 1989, Official Records of the HRC. 1988/89. Vol. II, 419-23

<sup>7</sup> Communication No. 588/1994, views adopted on 22 March 1996. UN Doc. CCPR/C56/588/1994

In this case, Errol, a Jamaican citizen, together with a co-defendant, Irvine Reynolds, were convicted for the murder of one Reginald Campbell, and sentenced to death. They claimed that they were victims of violations by Jamaica of Articles 6, 7 and 10 of the ICCPR. Their claim failed.

### 5.2.2 The European Court of Human Rights (ECHR)

All member states of the Council of Europe that have signed the European Convention on Human Rights are under the jurisdiction of the ECHR in Strasbourg, France. The ECHR dealt with the issue of the death row at length in the **Soering Case**.<sup>8</sup> Soering was a German national who was sought for two murders committed in Virginia. He fled to Europe but was arrested for an unrelated offence in the United Kingdom. Shortly afterwards, he was indicted on two murder charges in Virginia, and the United States sought his extradition under the 1972 Extradition Treaty with the UK. Germany, which had abolished the death penalty, also sought his extradition since, as Soering's country of origin, it had jurisdiction to try him for crimes pursuant to Section 7, subsection 2 of the German Criminal Code. The UK sought assurance from the US that if surrendered, Soering would not be executed. Instead of providing the requisite assurance, the US only forwarded an affidavit from the District Attorney for Bedford County in Virginia to the effect that he would convey the wish of the UK government to the presiding judge. Later, a UK judge held that Soering could be extradited, and appeals against the decision were dismissed. At this point, the applicant turned to the European Commission of Human Rights that existed then, but was later done away with through restructuring introduced by Protocol No. 11.

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<sup>8</sup> Judgment of 7 July 1989, Publications of the ECHR, Series A, No., 161

In the proceedings before the European Commission, Soering contended that his extradition from the UK to the US would amount to a violation of Article 3 of the ECHR by the UK, in that the conditions of detention at Mecklenburg State Prison, where he would be incarcerated if sentenced to death in Virginia, were particularly harsh and thus inhuman and degrading. The ECHR unanimously concluded that there was a real risk that the court in Bedford County, Virginia, would sentence Soering to death and that, if surrendered, Article 3 of the ECHR would be violated by the UK. This court, too, like the UNHRC, stressed that the conditions of detention at Mecklenburg State Prison constituted cruel, inhuman and degrading treatment. This case clearly shows that the continued stay of one on the death row violated most provisions of international human rights instruments.

### **5.2.3 The Supreme Court of the United States of America**

The US Supreme Court is held in very high esteem due to the caliber of its judges and judgments. The Supreme Court of the US has never directly addressed the issue of delay in carrying out the sentence of death. However, a far more progressive and compassionate approach is evident in the various court opinions of the USA.<sup>9</sup> In the **People V. Anderson**<sup>10</sup>, the Supreme Court of California was there concerned with whether the death sentence violated Article 6 of the state's constitutional prohibition against cruel or unusual punishment. In holding that it did, Wright CJ stressed the torturous nature of delay involved in the carrying out of the death penalty. The California State Constitution was later amended in a manner which overruled the decision, by

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<sup>9</sup> Steiner, H.J. & Philip Alston. *International Human Rights in Context: Text & Materials*. 2<sup>nd</sup> ed. 2000. P. 21

<sup>10</sup> (1972) 493 P. 2d 880

exempting the death penalty from the prohibition against cruel or unusual punishment. Nevertheless, the observations of Wright CJ remain entirely opposite. Also, in the **Clarence Lackey Case**<sup>11</sup>, a case brought before the Supreme Court from Texas in April 1995, the court stayed the execution and directed a lower federal district court in Texas to hear statements by two British lawyers. The lawyers argued that the prisoner's execution after 17 years of detention on death row constituted cruel and unusual punishment within the meaning of the Fifth Amendment of the US Constitution. The lower court was directed, in particular, to review whether state prosecutors in Texas had been responsible for the extensive delay in the petitioner's execution. Further periods of detention on death row of 12 years<sup>12</sup>, of over 13 years<sup>13</sup> and of over 16 years<sup>14</sup> were deemed to be so prolonged as to make the execution of the prisoners contrary to the Fifth Amendment of the constitution. It was pointed out emphatically in the majority of these decisions that the delay in execution of the death penalty was due, above all, to the skillful and persistent efforts of the prisoner's lawyer to exhaust all available avenues of appeal.

Some State Supreme Court opinions have also pointed out to the relevance of delays in the execution of a death sentence, including detention on death row, as a relevant ground for constitutional challenges to the death penalty itself. This kind of approach was adopted, for instance, by the Supreme Court of Massachusetts in **District Attorney for Suffolk District V. Watson**<sup>15</sup> in which it was held that for the death penalty to be violative of the state's constitution which prohibited cruel punishment, the delay and pain

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<sup>11</sup> Reuters Press Release, 28 April, 1995.

<sup>12</sup> Chessman V. Dickson (1960), Court of Appeal for the Northern Circuit

<sup>13</sup> Potts V. State (1989), Supreme Court of the State of Georgia

<sup>14</sup> Richmond V. Lewis (1991) 948 F. 2d 1473

<sup>15</sup> (1980) Mass 411 N.E. 2d 1274

of waiting for execution was an important part of the rationale. As expressed in the opinion of the Chief Justice:

*“The mental agony is, simply and beyond question a horror.... We know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect inevitable long wait between the imposition of the sentence and the actual infliction of death.”*

#### 5.2.4 The Supreme Court of Canada

By the year 2000, the Supreme Court of Canada had dealt with the death row phenomenon in two cases which were decided in 1991, and which displayed facts and legal issues in many ways similar to those discussed by the ECHR in the Soering case.<sup>16</sup> In the case of **Joseph Kindler V. Minister of Justice**<sup>17</sup>, the Supreme Court of Canada refused by a narrow majority of four to three, to block the extradition of Kindler from Canada to the State of Pennsylvania, where he had been convicted of first degree murder and kidnapping. The jury had recommended the imposition of the death penalty. Before sentencing, Kindler had managed to escape and fled Canada. For the court majority, Justice La Forrester took the view that:

*“While the psychological stress inherent in the death row phenomenon cannot be dismissed lightly, it ultimately pangs in comparison to the death penalty. Besides, the fact remains that a defendant is never forced to undergo the full appeal procedure, but the vast majority choose to do so. It would be ironic if the delay caused by appellant’s taking advantage of the full and generous avenue of the appeals available to him should be viewed as a violation of fundamental justice.”*

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<sup>16</sup> Orlin, S. et al. (eds). Jurisprudence of Human Rights Law: A Comparative Interpretative Approach. 2000. P. 58

<sup>17</sup> (1991) 67 S.C.C. ed. 1

### 5.2.5 The Supreme Court of India

The Supreme Court of India, like the US Supreme Court, is also of the highest esteem. Although the Indian Constitution does not have specific provisions which prohibit torture or inhuman and degrading treatment, the Supreme Court of India, since the 1980s, has filled this void by interpreting the Bill of Rights in the Indian Constitution in light of the international norms, notably Article 7 of the ICCPR and Article 3 of the ECHR. For instance, it was observed by the court in **Vatheeswaran V. State of Tamil Nadu**<sup>18</sup> as follows:

*“It is true that a period of anguish and suffering is an inevitable consequence of sentence of death. But a prolongation of it beyond the necessary period for appeal and consideration of reprieve is not. And it is no answer to say that the man will struggle to stay alive. In truth, it is this ineradicable human desire which makes prolongation inhuman and degrading. The anguish of alternating and despair, the agony of uncertainty, the mental, emotional and physical integrity and health of the individual are described in the evidence of the effect of the delay.”*

With this reasoning, therefore, the court allowed the appeal and commuted the death sentence to life imprisonment. In fact, in obiter dictum, the court suggested that a delay exceeding two years should be deemed sufficient to trigger the application of Article 21 of the Indian Constitution. However, this obiter dictum was overturned by the court in the case of **Sher Singh and Others V. The State of Punjab**.<sup>19</sup> In this case, the Supreme Court observed that it was quite normal for appellate proceedings to exceed two years and that it would be inconceivable if an individual, under the sentence of death, could ultimately delay execution to such an extent by filing frivolous proceedings.

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<sup>18</sup> AIR 1983 S.C. 361

<sup>19</sup> (1983) 2 S.C.R. 583

### 5.2.6 The Constitutional Court of South Africa

On 6<sup>th</sup> June, 1995, South Africa's new Constitutional Court handed down a remarkable judgment, declaring that the death penalty was contrary to South Africa's then interim constitution. This was in the case of **The State V. Makwanyane and Mchunu**.<sup>20</sup> The two appellants were convicted of murder and sentenced to death by the Witwatersrand Local Division of the Supreme Court. The Appellate Division postponed hearing of the appeals against the death sentence until the new post apartheid constitutional court decided the question of its constitutionality under the transitional 1993 constitution. The judgment concluded that the death penalty constituted cruel, inhuman and degrading punishment within the meaning of Section 11(2) of the country's interim constitution of the time. This provision though not textually identical, is very similar to that found in all contemporary human rights instruments and most national constitutions.

### 5.2.7 The Supreme Court of Zimbabwe

Similarly, much earlier in June 1993, the Supreme Court of Zimbabwe also handed down a remarkable judgment addressing the death row phenomenon. This was in the case of **The Catholic Commission for Justice and Peace in Zimbabwe V. The Attorney General and Others**.<sup>21</sup> The case concerned four men who were convicted of murder and were scheduled to be hanged. When served with warrants for their executions in 1993, they argued that the executions would be unconstitutional because of the dehumanizing factor of prolonged delay, viewed in conjunction with the harsh and degrading conditions of inmates who were confined to the condemned section at the Harare Central Prison.

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<sup>20</sup> (1995) 1 LRC 269

<sup>21</sup> SCZ, Judgment No. S.C. 73/93

The Supreme Court held that the execution was unconstitutional. The court said that the applicants had standing to bring the application as it was a violation of Section 15(1) of the Zimbabwean Constitution.

### **5.3 The Methods of Execution**

There are various methods used to execute prisoners sentenced to death. Some of these methods include hanging with a rope, stoning to death, lethal injection, use of an electrocuting chair and use of gas asphyxiation.<sup>22</sup> Most of these methods employed to execute people have been condemned.

Provisions of international documents which prohibit the subjection of a person to cruel, inhuman or degrading treatment, have themselves been the centre of controversy. After having interpreted these provisions, some international human rights law experts have argued that if one has been executed in accordance with the international human rights law standards, then one would not have been subjected to cruel, inhuman or degrading treatment. They have submitted further, that one would only be subjected to cruel, inhuman or degrading treatment if aggravated methods of execution like stoning to death or death on the wheel were employed. In relation to the methods of execution, the Human Rights Committee, in its General Comment on torture, gave the following as the standard:

*“The death penalty...must be carried out in such a way as to cause the least possible physical and mental suffering.”*<sup>23</sup>

In some cases, however, this standard has presented difficulties to the Committee itself especially when it comes to defining it. This arises simply because the Committee cannot

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<sup>22</sup> Wikipedia, the Free Encyclopaedia

<sup>23</sup> General Comment No. 20 (44<sup>th</sup> Session) of 3 April, 1992, UN Doc. HRI/GEN/1 Rev. 3, 31-33 at Para. 6

easily identify which methods of execution will cause ‘*the least possible physical and mental suffering.*’

Some methods of execution, however, have been held by the Committee to be in conformity with the above standard, while others have been held to the contrary. In **Kindler V. Canada** <sup>24</sup>, the HRC held that execution by means of lethal injection was below the threshold of cruel, inhuman or degrading punishment. In the landmark decision of **Charles Chitat Ng V. Canada** <sup>25</sup>, on the other hand, the Committee ruled that the execution by gas asphyxiation as practiced in California violated Article 7 of the ICCPR. The majority in this case argued that:

*“The Committee is aware that by definition, every execution of a sentence of death may be considered to constitute cruel and inhuman treatment within the meaning of Article 7 of the Covenant; on the other hand, Article 6, paragraph 2, permits the imposition of capital punishment for the most serious crimes...in the present case, the author has provided detailed information that execution by gas asphyxiation may cause prolonged suffering and agony and does result in death as swiftly as possible, as asphyxiation by cyanide gas may take over 10 minutes. The State Party had the opportunity to refuse these allegations on the facts; it has failed to do so...in the instant case and on the basis of the information before it, the Committee concludes execution by gas asphyxiation, should the death penalty be imposed on the author, would not meet the test of ‘least physical and mental suffering’, and constitutes cruel and inhuman treatment in violation of Article 7 of the Covenant.”*

It is very clear that use of gas asphyxiation to execute people who have been condemned to suffer capital punishment is in violation of Article 7 of the ICCPR. This applies also to other methods such as hanging, which is not only brutal, but makes the victim feel a lot

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<sup>24</sup> Communication No. 470/1991, views adopted on 30 July 1993, Official Records of the HRC 1992/93, Vol. II, P. 559-72

<sup>25</sup> Communication No. 469/1991, views adopted on 5 November 1995. Report of the HRC, UN Doc. A/1995/40, Vol. II, P. 189-220

of pain before he or she finally dies. This poses a challenge on states that retain capital punishment to use lesser brutal methods of execution. What constitutes a lesser brutal method is however, a matter of debate.

#### **5.4 Conclusion**

This chapter has discussed the death row phenomenon and how courts of different countries have dealt with it, including the UNHRC. Most of these decisions have held that the experiences of one on death row constitute cruel, inhuman and degrading treatment or punishment, which is prohibited in all international human rights treaties and some national constitutions. The same courts, in other instances, have held to the contrary. Some of the methods employed in carrying out the death penalty have also been discussed, as well as the arguments advanced concerning this issue. There has also been an international standard set for carrying out executions, but defining it poses great difficulty.

# CHAPTER SIX

## Conclusions and Recommendations

### 6.1 Conclusions

First and foremost, it has been established that the right to life is the supreme human right. This is because any other human right depends on the continued enjoyment of the right to life by a particular person. The right to life, like most rights, is recognized by States Constitutions and international treaties. These attach great importance to this right, and impose a duty on states to enact legislation and create a conducive environment in which the right to life would be protected to the maximum. International treaties which protect the right to life include the UN, the 1966 ICCPR, the ECHR of 1950, the ACHR of 1969, and the 1981 ACHPR.

It has been established, too, in chapter three, that capital punishment still exists today, despite developments in international human rights law calling for its abolition. Almost all European countries have abolished capital punishment, while the USA retains it. Punishment is an institution of the criminal law. Various reasons have been advanced as to its purpose. Punishment is used to punish someone for their misconduct, as well as to prevent or deter criminals or would-be offenders from committing similar acts. Other aims of punishment are the rehabilitation of offenders and protection of the public. Capital punishment is a very contentious issue. Supporters of capital punishment argue that it deters crime, prevents recidivism, and is an appropriate form of punishment for the crime of murder. Opponents of capital punishment argue that it does not deter criminals

more than life imprisonment, violates human rights, leads to executions of some who are wrongfully convicted, and discriminates against minorities and the poor.

Indeed, the international community of states is doing its utmost best to have capital punishment abolished. There has been growing pressure on retentionist states to abolish the death penalty. This is evident in the many limitations in the various human rights documents and also safeguards as to the carrying out of capital punishment. This pressure has mainly come from the UN, regional human rights treaties and non-governmental organizations, most notably, Amnesty International.

Chapter five has established that capital punishment constitutes cruel, inhuman and degrading treatment or punishment. This is because the continued stay on the death row by persons sentenced to death violates most constitutions and international treaties on human rights. The conditions in prisons for these people as well as the mental anguish they go through not knowing the day they will be executed, constitute cruel, inhuman and degrading treatment. This applies also to most methods employed to execute people sentenced to death.

## **6.2 Recommendations**

While it is acknowledged that there is nothing illegal with a state carrying out the death penalty (Article 6(2) of the ICCPR), this form of punishment must be abolished as it violates most human rights documents and state constitutions.

The human rights provisions must be amended so that they provide no exceptional circumstances in which the death penalty would be permitted. Article 6 of the ICCPR must be amended because it allows the carrying out of the death penalty, and this has brought a conflict between the rulings of the Human Rights Committee, which is a creation of the ICCPR, and the provisions of the ICCPR itself. The Committee has ruled in various cases that the death row phenomenon and methods of execution are contrary to Article 7 of the ICCPR, while capital punishment may be legal, according to Article 6(2) of the ICCPR. Life imprisonment is sufficient punishment for people who commit grave offences.

In addition, there should be no reservations, in particular to the ICCPR, for all those provisions which seek to protect the right to life. The UN also, should never allow a state like it did with the USA when it entered a reservation on Article 7 of the ICCPR in 1992.

The universal system of human rights has the United Nations Commission on Human Rights (UNCHR) as its monitoring body. The Commission does this by establishing various special rapporteurs and working groups. Notwithstanding its competences, the Commission's powers remain limited. The Commission has no competence to enforce its findings, it only makes recommendations. Also, Commission delegations have no mandatory authority to enter a territory or examine witnesses. These limitations should be removed. The Commission's decisions should have legally binding effect and no restrictions must be placed on its officers in carrying out their work, in order to achieve the overall protection of human rights. The Commission must also be empowered to

impose other enforceable mechanisms such as economic sanctions and diplomatic relations, as employed by the UN Security Council.

In order to ensure the abolition of the death penalty, one possible measure would be for financial institutions, such as the International Monetary Fund (IMF) and the World Bank, to attach conditions such as a moratorium on the death penalty. The IMF and World Bank should attach ratification or accession to the Second Optional Protocol to the ICCPR as a condition for financial assistance. They should ensure that such states adhere to the Optional Protocol.

Here in Zambia, the death penalty must be expressly prohibited by amending Article 12(1) of the Constitution, and sections 43, 201 and 294(2) of the Penal Code, which allow the imposition of the death penalty on convicts. Other alternative punishment such as life imprisonment would suffice, even for grave offences. Zambia must also ratify the Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty.

Zambia needs to do more than simply enacting legislation for the protection and promotion of human rights. Implementation is also critical. In Zambia, there are many institutions involved in the protection and promotion of human rights. One such institution is the Human Rights Commission (HRC), which is constitutionally established. The Commission, however, suffers many draw backs. Therefore, there is need to strengthen its powers to enable it deal more effectively with cases of human rights abuses. Thus, it should be empowered to enforce its own recommendations and impose sanctions on perpetrators of human rights abuses. The Commission should also be

given a right to intervene in cases pending before the courts to avoid maladministration of justice, such as undue delay in disposing cases and harsh prison conditions. Lastly, the HRC should be adequately funded in order to enable it to function more effectively.

The key issue is that policy makers in all states must have the will to express their commitment to the welfare of their people into a set of rules and principles that promote justice, peace and solidarity and build a suitable climate for the respect of human rights, such as the right to life. Human rights are of little value if they are not translated into practical reality.

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