

The death penalty in Africa

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Summary

This article examines the situation of the death penalty in Africa. It does so by addressing three main questions: First, to what extent is the death penalty in Africa in fact an issue about which one should be particularly concerned? Second, what are the restrictions on the death penalty in Africa? Third, what is to be done to strengthen the restrictions on the death penalty in Africa? In addition, the article examines the question whether article 4 of the African Charter on Human and Peoples' Rights and its related provisions will inspire the abolition of the death penalty. It is suggested that challenging mandatory death sentences, advancing procedural challenges, open debate on alternatives to the death penalty, and improving the national criminal justice system will strengthen restrictions on the death penalty in Africa. The article concludes that positive criminal justice reform rather than moralistic condemnation is the most effective route to the eventual abolition of the death penalty in Africa.

1 Introduction

In many regions of the world, the battle lines around capital punishment are clearly drawn. Moral arguments, both for and against, have been developed against a background of settled legal principle and hard facts that have been established in intense debates supported by claims and counterclaims. In Africa as a whole, however, the situation of the death penalty, both legally and in fact, is less than entirely clear. This paper seeks to contribute to remedying this situation by posing a series of

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questions. In the first instance, these questions address the factual issues of the prevalence of the death penalty in Africa and the official stance adopted towards it by African governments. They then turn to restrictions, both international and regional, on the widespread use of the death penalty that may be in force in some parts of Africa. Finally, the questions consider steps that may be taken to limit, if not abolish, the death penalty in Africa as a whole. The answers to many of these questions are of necessity only preliminary, but it is hoped that addressing them in a continent-wide perspective will reveal patterns and trends that might be obscured by a focus on a single nation or region.

2 Factual issues

The first question is simply: To what extent is the death penalty in Africa in fact an issue about which one should be particularly concerned? The factual basis of an answer to this question is that 11 African countries are abolitionist for all crimes and another 10 are abolitionists in practice.¹ That leaves 32 countries that retain the death penalty. Not all of these latter countries perform official executions every year. In 2001, death sentences were imposed in 23 countries, but executions took place in only six. However, at least one African country not included amongst these six resumed executions in 2002.²

There is no escaping the reality that the majority of the inhabitants of Africa live in countries where official policies support the maintenance of the death penalty and which are prepared to implement it from time to time. The extent to which most African countries are prepared to profess a pro-death penalty policy internationally is clear from the fact that in 2002 only two African states, Mauritius and South Africa, were prepared to sponsor the cautiously abolitionist resolution of the United Nations (UN) Commission on Human Rights on 'The question of the death penalty',³ while 23 states signed a formal statement of disassociation.

¹ The figures referred to were derived from information provided to the author by Eric Prokosch of Amnesty International and Nicola Browne of the Centre for Death Penalty Studies at the University of Westminster in March 2003. I am very thankful to both of them. To the figures they provided, I added one country, Malawi, to the number of countries that are abolitionist in practice, as there have been no executions in Malawi for a decade. The states that are abolitionist for all crimes are Angola, Cape Verde, Djibouti, Guinea-Bissau, Ivory Coast, Mauritius, Mozambique, Namibia, Sao Tomé and Principe, Seychelles and South Africa. The states that are abolitionist in practice are Burkina Faso, Central African Republic, Congo (Republic), The Gambia, Madagascar, Malawi, Mali, Niger, Senegal and Togo. (In 2004, Amnesty International recognised Algeria, Benin and Tunisia as abolitionist states as well: See <<http://web.amnesty.org/pages/deathpenalty-abolitionist3-eng>> (accessed 2 April 2004).)

² Uganda; see <<http://web.amnesty.org/report2003/2af-index-eng>> (accessed 2 April 2004).

³ E/CN 4/RES/2002/77.

Add to this that only six African states are parties (and a further two signatories only) to the Second Optional Protocol to the International Covenant on Civil and Political Rights (CCPR), aiming at the abolition of the death penalty. It is clear that at the international level most African states appear to be committed to the retention of the death penalty.

Official policies are not the only factors that determine the imposition and implementation of the death penalty in Africa. While in all countries in the world there are mechanisms of informal justice and while in many there are gangland killings or even political assassinations in which persons are 'sentenced to death' by unofficial tribunals and then executed by criminal gangs or political movements, this is particularly widespread in some parts of Africa. Informal 'justice' has manifested itself in brutal killings, mass executions and even genocide, not only in Rwanda, Sierra Leone and Liberia, but also in the more conventional civil wars in the Congo, Angola and Côte d'Ivoire and, in a variant form, in Algeria and Sudan. But even where there is not formally an internal or an external armed conflict, weak, if not failed, states have major problems of their own that impact directly on the death penalty. In many parts of Africa there is not just a temporary breakdown of law and order, but the fatal weakening and subsequent criminalisation of the state itself by the deep institutionalisation of corruption.⁴ In such circumstances, abolitionist stances (Côte d'Ivoire, for example, is listed as an abolitionist state), or even restrictions on the death penalty to which many states adhere, may be of little significance to their citizens. There is much reason for people to be worried about the death penalty in many African countries, not only as an abstract moral issue but also as something that may be capriciously applied to them, either by the state or by their fellow citizens.

3 Restrictions on capital punishment

The picture is, however, not entirely gloomy, for there are limits on capital punishment in Africa that are peculiar to Africa. What are these restrictions on the death penalty in Africa? This question can be answered at various levels.

The first is at the level where direct international intervention intersects with African law enforcement. A good example of this happening is through the International Criminal Tribunal for Rwanda (ICTR). Its influence on the place of the death penalty is fraught with paradox. After the genocide in Rwanda, the government of Rwanda formally requested the UN to set up an international tribunal to try the perpetrators. The Security Council of the UN, shamed perhaps by its

⁴ J-F Bayaart, S Ellis & B Hibou *The criminalisation of the state in Africa* (1999).

failure to take action earlier, agreed. When the Council came to debate the details of the provisions governing the new tribunal, however, the government of Rwanda, which had a seat on the Council as a non-permanent member, opposed the creation of the new tribunal in the form that it was put forward. The reason for its opposition was that the new tribunal did not have the power to impose the death penalty, while the death penalty would remain a competent sentence in Rwanda.⁵ Nevertheless, the Security Council persisted and the ultimate penalty that the ICTR can impose remains life imprisonment.⁶

The continued interaction between the stances adopted by the Tribunal and the Rwandan authorities has been interesting. In 1996 Rwanda adopted Organic Law 8/96, which excluded the death penalty for all except the instigators, planners and organisers of genocide.⁷ The ICTR, which is required by its Statute 'to have recourse to the general practice regarding prison sentences in the courts of Rwanda',⁸ is not technically bound by this law, which was passed after its Statute was adopted. Nevertheless, the Tribunal has referred to it on a number of occasions, most recently in the case of *Elizaphan and Gérard Ntakirutimana*, the priest father and doctor son both convicted of genocide.⁹ In their case, the fact that they would not have qualified for the maximum penalty in Rwanda may have played a part in ensuring that the maximum penalty that the ICTR can impose, life imprisonment, was not imposed on them either.

In Rwanda, the practical effect of the 1996 law is most probably that the courts will not impose the death penalty for ordinary murders as, if it cannot be imposed on ordinary *genocidaires* but only on the ringleaders, its applicability to domestic murder must be suspect. However, the Penal Code has not been amended to reflect this. At least for the time being, the death penalty remains part of Rwandan life. Public executions of persons convicted of genocide were held in Kigali in 1998. There have

⁵ P Akavahan 'The International Criminal Tribunal for Rwanda: The politics and pragmatics of punishment' (1996) 90 *American Journal of International Law* 501; D van Zyl Smit 'Punishment and human rights in international criminal justice' (2002) 2 *Human Rights Law Review* 1 8.

⁶ Art 23 (1) Statute of the International Criminal Tribunal for Rwanda.

⁷ WA Schabas *The abolition of the death penalty in international law* (2002) 250.

⁸ Art 23(1) Statute of the International Criminal Tribunal for Rwanda.

⁹ *Prosecutor v Elizaphan & Gérard Ntakirutimana* ICTR-96-10-T & ICTR-96-17-T, 21 February 2003 paras 885 & 886. The Tribunal referred to the Rwandan Organic Law in several earlier cases too, although the outcome was not always a lesser sentence: See *Prosecutor v Kambanda* ICTR 97-23-S, 4 September 1998 paras 18–22; *Prosecutor v Serushago* ICTR 98-39-S, 5 February 1999 para 17 & ICTR 98-39-A, 6 April 2000 paras 29–31; *Prosecutor v Kayishema & Ruzidana* ICTR 95-1-T, 21 May 1999 para 6; *Prosecutor v Rutaganda* ICTR 96-3-T, 6 December 1999 para 453; *Prosecutor v Musema* ICTR 96-13-T, 27 January 2000 paras 983–984; *Prosecutor v Ruggio*, ICTR 97-32-T, 1 June 2000 paras 28–31.

been no executions since then and the President indicated in 2002 that consideration would be given to the abolition of the death penalty. Until that happens, the impact of the ICTR on the politics of the death penalty in Rwanda remains open, but it is at least plausible to argue that it has had a restraining influence.

One can be cautiously optimistic about the potential restraining influence of the new quasi-international tribunal in Sierra Leone.¹⁰ The Special Court for Sierra Leone is a hybrid institution, in the sense that it was created by the UN to try both offences under international criminal law and domestic offences. It has been established in Sierra Leone with the active co-operation of the government of Sierra Leone and is staffed by a mixture of international and Sierra Leonean judges. Most importantly for the purposes of this paper, the Special Court will not be able to impose the death penalty, but will be limited to imposing imprisonment.¹¹ In practice, there have been no executions in Sierra Leone since 1999. The thinking is that since this new Court, with at least equivalent status to the highest domestic courts of Sierra Leone, will not be able to impose the death penalty, the death penalty will cease to be imposed by purely municipal courts for ordinary murder. Whether it will have this effect without formal changes to the law allowing the death penalty in Sierra Leone, remains to be seen, but the fuller integration of the Special Court into the legal fabric of Sierra Leone than is the case for the equivalent Tribunal for Rwanda is a cause for optimism.

The second limit is to be found in the African Charter on Human and Peoples' Rights (African Charter or Charter), which is undoubtedly the most important pan-African human rights instrument.¹² The key provision of the Charter for purposes of evaluating the death penalty is article 4. It provides: 'Human beings are inviolable. Every human shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

On its face, the reference to arbitrary deprivation of the right to life in article 4 mirrors article 6(1) of CCPR, which allows, subject to substantive and procedural objections, for the imposition of the death penalty. The allusion to article 6 of CCPR is important because it indicates that the African Charter can be interpreted in the light of the Covenant, all the more so since the vast majority of African states are parties to the Covenant. This view is strengthened by the provision in the Charter itself that provides that the Charter 'shall draw inspiration from international

¹⁰ R Cryer 'A "Special Court" for Sierra Leone?' (2001) 50 *International and Comparative Law Quarterly* 435–446; S Beresford & AS Muller 'The Special Court for Sierra Leone: An initial comment' (2001) 14 *Leiden Journal of International Law* 635.

¹¹ Art 19 Statute of the Special Court for Sierra Leone.

¹² One could also find limits on the death penalty in the African Charter on the Rights and Welfare of the Child (OAU Doc CAB/LEG/24 9/49 (1990)).

law on human and people's rights', including international instruments such as the Universal Declaration of Human Rights.¹³

Article 6 of CCPR goes on to lay down procedural and substantive standards that must be followed in those countries that retain the death penalty. Article 4 of the African Charter, in contrast, does not refer to the death penalty directly. However, the specific safeguards in respect of the death penalty contained in article 6 of CCPR can easily be read into the African Charter, a process which is aided by other provisions of the Charter — article 3(2), which grants every individual equal protection of the law; article 5, which prohibits torture and cruel, inhuman or degrading punishment and treatment; and article 7, which guarantees fair trial rights, for example.

The bigger question is whether article 4 of the African Charter and its related provisions will inspire the abolition of the death penalty. International human rights scholars have been on hand to provide such inspiration. Thus, William Schabas argues that the African Charter should be interpreted in the light of the underlying abolitionist trend that he discerns in UN instruments that deal with the death penalty.¹⁴

Manfred Nowak goes further. He suggests that the declaration by the South African Constitutional Court that the death penalty is inconsistent with the right to life, as contained in article 11 of the 1996 South African Constitution, might be a precedent for the interpretation of the African Charter as an abolitionist text, as neither the Charter nor the South African Constitution mentions the death penalty directly.¹⁵ As I will argue later, there is much that can be learnt throughout Africa from the value system implicit in the South African death penalty judgment. Nowak, however, goes too far when he draws a direct parallel between article 4 and the South African constitutional provision. Although neither the African Charter nor the South African Constitution refers directly to the death penalty, the latter is even terser than the former. The South African Constitution provides without qualification that '[e]veryone has a right to life'.¹⁶ Had the South African provision paralleled the African Charter more closely, some South African Constitutional Court judges may well have found that provision for the

¹³ Art 60 African Charter.

¹⁴ Schabas (n 7 above) 256.

¹⁵ M Nowak 'Is the death penalty an inhuman punishment?' in TS Orlin, A Rosas & M Scheinin (eds) *The jurisprudence of human rights law: A comparative interpretative approach* (2000) 42–43.

¹⁶ Art 11 of the 'final' Constitution of the Republic of South Africa, Act 108 of 1996. The death penalty was declared unconstitutional by the South African Constitutional Court in *S v Makwanyane & Another* 1995 3 SA 391 (CC) because it infringed against the so-called 'interim' Constitution of the Republic of South Africa, Act 200 of 1993. Art 9 of the latter Constitution recognised the right to life in virtually identical terms, so that nothing turns on differences in the wording of the two Constitutions.

non-arbitrary deprivation of the right to life allowed the retention of the death penalty.¹⁷

In parentheses, it should be noted that bolder South African judges may also, of course, have found their way round this obstacle. At least two options present themselves. The one would have been to argue, as at least one South African judge did, that in its imposition in South Africa and elsewhere, the death penalty is inherently arbitrary.¹⁸ The second option would be to go even further and to argue that, if the exception for non-arbitrary deprivation of life meant that the death penalty should be allowed, it should, in modern constitutional jargon, be read down. The death penalty, the argument would run, infringes against the rights to life and human dignity, which are the fundamental values of the African Charter from which there can be no derogation. A similar bold argument was adopted by the Hungarian Constitutional Court, when it was faced by a clause in the Hungarian Constitution which provided, like the African Charter but unlike the South African Constitution, for an exception to the right to life when deprivation of it was not arbitrary. Notwithstanding this provision, the Hungarian Court held that the rights to life and human dignity did not allow the death penalty, as to recognise it would be to deny the essence of these rights.¹⁹

Inspired boldness has not been the hallmark of the African Commission on Human and Peoples' Rights (African Commission or Commission), which is the body responsible for propagating the principles of the African Charter and enforcing them. Indeed, several scholars have commented generally on the relative inefficacy hitherto of

¹⁷ O'Regan J remarks specifically in her concurring judgment in *Makwanyane* (n 16 above) that the terse formulation of the right to life in the South African Constitution 'is not one which has been used in the constitutions of other countries or in international human rights conventions. In choosing this formulation, the drafters have specifically avoided either expressly preserving the death penalty, or expressly outlawing it. In addition, they have not used the language so common in other constitutions, which provides that no one may be deprived of life arbitrarily or without due process of law.* To the extent that the formulation of the right is different from that adopted in other jurisdictions, their jurisprudence will be of less value. The question is thus left for us to determine whether this right, or any of the others enshrined in chapter 3, would *prima facie* prohibit the death penalty.' (At 505F–506A para 324. A footnote in the original at the point indicated by the asterisk refers *inter alia* to article 4 of the African Charter.) I do not wish to imply that this finding would necessarily have led to O'Regan J not following a bold course, had the South African Constitution been worded differently.

¹⁸ See the separate concurring judgment of Ackermann J in *Makwanyane* (n 16 above) 453D paras 153 et seq.

¹⁹ Decision of the Hungarian Constitutional Court No 23/1990 (X 31) AB. See, in particular, in addition to the rather formulaic decision of the Court, the fully argued concurring judgment of Sólyom P.

the Commission.²⁰ This may change. For the moment, though, one must recognise that the Commission has never been presented with a direct challenge to the death penalty in an individual case. The closest that the Commission has come to addressing the question of abolition generally was at its meeting in Kigali in 1999, where it adopted a 'Resolution Urging States to Envisage a Moratorium on the Death Penalty'.²¹ A close reading of this resolution suggests, however, that the Commission did not regard the death penalty as inherently contrary to the African Charter. Instead, its concern was primarily with it being implemented without the necessary due process safeguards being in place. The wording is very careful. States that maintain the death penalty are urged to comply fully with their obligations under the Charter. The closest that the resolution comes to requiring specific action is when it calls upon state parties that still have the death penalty to —

- (a) limit the imposition of the death penalty only to the most serious crimes;
- (b) consider establishing a moratorium on executions of the death penalty; [and]
- (c) reflect on the possibility of abolishing the death penalty.

Even this mild resolution was not unanimously adopted and seems to have had relatively little effect.²²

The African Commission potentially may have had more impact where the challenge to the death penalty was on procedural grounds. For example, the Commission held that the trial of the Nigerian activist Ken Saro-Wiwa violated the due process provisions of article 7 of the African Charter and was thus arbitrary and in contravention of article 4 as well.²³ The difficulty was that the Commission only released this well-reasoned judgment in October 1998. Saro-Wiwa had, however, been executed in November 1995 and the Nigerian authorities had ignored the request of the Commission for his execution to be stayed while it considered his petition. Similarly, in 2001 the authorities in Botswana went ahead with the execution of Mariette Bosch before she could fulfil her intention of appealing to the Commission.²⁴

²⁰ See the summary of these views and the critical re-evaluation of them in GJ Naldi 'Future trends in human rights in Africa: The increased role of the OAU?' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice, 1986–2000* (2002) 10–12; CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice 1986–2000* (2002) 178.

²¹ Thirteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, OAU Doc AHG/Dec 153 (XXXVI) annex IV.

²² For a fuller account of the resolution, see Schabas (n 7 above) 359–60.

²³ *International Pen & Others (on behalf of Ken Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

²⁴ 'Bosch hanged in secret' *Mail & Guardian* 3 April 2001.

The failure of the Commission to achieve results in these high-profile cases should not be seen as total failures because they have set procedural benchmarks in capital cases. These have been underlined in other decisions that have held that expedited appeal procedures²⁵ and, of course, summary executions²⁶ infringe both articles 7 and 4 of the Charter. The impact of the Charter may be stronger when it comes to be interpreted by the future African Court on Human and Peoples' Rights, as the Protocol on the establishment of the Court provides specifically for provisional measures to be adopted in cases of extreme gravity and urgency.²⁷

Thirdly, there may be limits on the death penalty at the national constitutional level. In this regard, the first prize from the point of view of an abolitionist is undoubtedly a constitution that specifically outlaws the death penalty. Instances of such constitutions are those of Namibia²⁸ and Mozambique.²⁹ In both cases the political dynamics at the time these post-independence constitutions were drafted, favoured outright and explicit abolition of the death penalty in the constitution as a counterpoint to what was seen as a symbol of colonial repression.

Even at such historic moments when a constitution is setting down new national values, explicit espousal of an abolitionist position is often seen as carrying high political costs. This was the case in South Africa, where in the early 1990s the then government and the liberation movements engaged in a careful egg dance around the question of capital punishment. Thus it was President De Klerk in his historic speech of 2 February 1990 who first signalled real change.³⁰ The speech was noteworthy, not only because he underlined effectively for the first time his government's commitment to radical political change by announcing the unbanning of the liberation movements and the release from prison of its leaders, but also because he coupled this with an announcement that the question of the death penalty would be revisited. This did not mean abolition, however. Although no further executions took place after November 1989, the law relating to capital

²⁵ *Constitutional Rights Project v Nigeria (II)* (2000) AHRLR 248 (ACHPR 1999).

²⁶ *Amnesty International & Others v Sudan* (2000) AHRLR 297 (ACHPR 1999).

²⁷ Art 27 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights. There is no equivalent provision in respect of the Commission, except for Rule 111 of the Rules of Procedure of the Commission. That less direct rule has, however, not proved to be effective.

²⁸ Art 6 Constitution of Namibia.

²⁹ Art 7(2) Constitution of Mozambique.

³⁰ *Cape Times* 3 February 1990.

punishment was amended in 1990.³¹ It retained the death penalty but did away with mandatory sentences of death and restricted the potential application of the death penalty to the most serious crimes. No major party seems to have pushed for inclusion, on the Namibian model, of a clause outlawing the death penalty in the Constitution, nor did the new government move to use its large majority in parliament to abolish the death penalty.

The strategy instead was to leave the matter to the Constitutional Court. For the politicians, this had the advantage that they would not have to take direct responsibility for a decision to outlaw the death penalty. The Court would be responsible. This may be why Chaskalson P prefaced his leading judgment in the *Makwanyane* case, where the court eventually decided that the death penalty was unconstitutional, with the following comment:³²

It would undoubtedly have been better if the framers of the Constitution had stated specifically, either that the death sentence is not a competent penalty or that it is permissible in circumstances sanctioned by law. This, however, was not done and it has been left to this Court to decide whether the penalty is consistent with the Constitution.

In the end the strategy was highly successful. The Court articulated the abolitionist arguments carefully and very fully, and anchored them in the fundamental values of the right to life, human dignity, equality and legality that are the cornerstones of the whole constitutional order.³³ Because of this, the *Makwanyane* decision is a strong precedent that will be very hard to overturn. Its deep roots in fundamental principles also make it relatively invulnerable to being upset by a constitutional amendment — more so perhaps than a simple provision outlawing the death penalty that could be replaced by its converse. Also, it seems that South African politicians have found it easier to support the Court in general terms than to defend explicitly abolitionist positions in public.³⁴

However, this strategy is not always successful. In Tanzania, the constitutionality of the death penalty was upheld and a judgment of a lower court overturned on the basis that, while the death penalty was an

³¹ See the Criminal Law Amendment Act 107 of 1990. The formal abolition of the death penalty was effected by the Criminal Law Amendment Act 105 of 1997, which followed the decision of the Constitutional Court discussed below.

³² *Makwanyane* (n 16 above) 402B para 5.

³³ For a particularly perceptive comment on the value of the way in which the principles underlying the decision in *Makwanyane* are spelled out, see BE Harcourt 'Mature adjudication: Interpretative choice in recent death penalty cases' (1996) 9 *Harvard Human Rights Journal* 255.

³⁴ Opportunistically the National Party, of which (by now) former President De Klerk was the leader, subsequently called for a referendum on the death penalty, but the new government of President Mandela used its parliamentary majority to defeat this call: See J Hatchard & S Coldham 'Commonwealth Africa' in P Hodgkinson & A Rutherford (eds) *Capital punishment: Global issues and prospects* (1996) 155–192.

inherently cruel, inhuman and degrading punishment,³⁵ it was saved by a constitutional limitations clause that allowed derogations for legitimate purposes.³⁶ If society decided the death penalty was a legitimate form of deterrence, that was sufficient.³⁷

Finally, on the subject of the current constitutional realities in Africa, it should be noted that even a constitution that specifically endorses the death penalty might in another provision provide a basis for restricting its use. An example of such a constitution is that of Zimbabwe, which was specifically amended in 1990 to ensure that the death penalty could not be challenged directly.³⁸ Nevertheless, in *Catholic Commission of Justice and Peace in Zimbabwe v Attorney-General Zimbabwe and Others*³⁹ the Zimbabwean Supreme Court considered the continued validity of the death sentences of four men who had been held on death row in terrible conditions for long periods. In coming to its decision, the Court relied extensively on international case law, including innovative decisions based on instruments that, like the Constitution of Zimbabwe, made specific provision for the death penalty. Thus, for example, it referred with approval to the decision of the European Court of Human Rights in the *Soering* case.⁴⁰ In that decision the European Court had prevented the extradition of the applicant to the United States, notwithstanding the explicit exception to the right to life in the European Convention on Human Rights 'for the execution of a sentence of a court following conviction of a crime for which the penalty is provided by law'.⁴¹ The European Court held that if the applicant were to be sentenced to death in the United States he might, because of a delay in his execution, suffer from the death row syndrome, which would be a form of inhuman and degrading treatment outlawed by the European Convention. Similar interpretations have been given to the constitutions of Caribbean states, which recognise the death penalty and prohibit inhuman and degrading punishments.⁴² Following similar precedents, the Supreme Court of Zimbabwe went on to interpret the prohibition on inhuman or degrading punishment or treatment in

³⁵ Thus offending arts 13(6)(d) & (e) of the Tanzanian Constitution.

³⁶ See *Mbushuu v Republic* [1995] 1 LRC 216.

³⁷ See the discussion in R Hood *The death penalty: A worldwide perspective* (2002) 41. In *Makwanyane* (n 16 above) 441D–F para 115, Chaskalson P disagrees with the conclusion and argues that the state would need to prove that the death penalty is a more effective deterrent than, say, life imprisonment for this argument to succeed.

³⁸ *Hatchard & Coldham* (n 34 above) 170.

³⁹ 1993 4 SA 239 (ZSC).

⁴⁰ *Soering v United Kingdom* (1989) 11 EHRR 439.

⁴¹ Art 2(1) European Convention on Human Rights and Fundamental Freedoms.

⁴² *Pratt & Morgan v The Attorney General of Jamaica* [1994] 2 AC 1; *Lewis & Others v The Attorney General of Jamaica & Another* [2001] 2 AC 50.

the Constitution of Zimbabwe in the same way and set aside the death sentences that had been challenged before it.⁴³

4 Strategic initiatives

My third question is: What is to be done to strengthen the restrictions on the death penalty in Africa?

Certainly, to follow on immediately from the Zimbabwean judgment, much can be achieved by arguing by analogy with other jurisdictions. Since that decision, there have been further developments in the law relating to the death penalty in the Caribbean and Central America, suggesting fresh arguments about restricting the implementation of the death penalty, even where technically it still may be imposed. This can be done by challenging mandatory sentences of death, ensuring that the death penalty is limited only to the most serious crimes and advancing procedural challenges not only in respect of delays, but also on matters such as adequacy of legal representation and the manner in which the prerogative of mercy is exercised.⁴⁴

It may be particularly valuable to strengthen the jurisprudence of the African Commission and the future African Court that will interpret the African Charter, by drawing their attention to the jurisprudence of the Inter-American Commission on Human Rights. The latter should be seen as a body applying, like its African counterparts, a regional instrument that restricts rather than denies outright the application of the death penalty.⁴⁵ For this strategy conducted at the level of ideas to be effective, the institutions that support the African Charter will themselves have to operate speedily and efficiently. It is to be hoped that recent developments, such as the replacement of the OAU by the new African Union, will lead to reorganisation of the delivery mechanisms in this regard — although precisely what form this will take is not yet clear.

Secondly, restriction of the death penalty can occur best if there is an open debate on alternatives to the death penalty. In my view, such a debate must be informed by the same concern for human rights as the debate about the death penalty itself. This is particularly important when as an alternative life imprisonment is considered. American abolitionists have been prepared to support Life Without Parole — referred to as

⁴³ n 38 above.

⁴⁴ See in general L Blom-Cooper 'The Privy Council and the death penalty in the Caribbean: A study in constitutional change' (1998) 4 *European Human Rights Law Review* 368–418.

⁴⁵ See, eg, *Michael Edwards, Omar Hall, Brian Shorter & Jeronimo Bowleg v The Bahamas* (2002) 9 IHRR 383, which declares that mandatory death penalties, inadequate mercy procedures, delays in trials and unavailability of legal aid all violate various provisions of the American Declaration on Human Rights and the Duties of Man.

LWOP or even LWOP + R (Life Without Parole plus Restitution) — as the only alternative to the death penalty that the public is likely to accept. Such support is a desperate gamble on the part of the abolitionists, for a true LWOP sentence, even under ideal prison conditions, comes close to being a death sentence in instalments. In many, if not most African contexts, the possibility exists that a life sentence may in a literal sense be a fate worse than death. In the late 18th century, Beccaria wrote approvingly about the life sentence in contrast to death:⁴⁶

A great many men contemplate death with a steady, tranquil gaze; some out of fanaticism, some out of vanity, which attends us again and again to the very edge of the grave, some out of a last desperate effort to free themselves from life and misery; but neither fanaticism nor vanity can subsist among the fetters and the chains, under the rod, or under the yoke or in the iron cage, where the desperate man rather begins than ends his misery.

This may be an accurate description of life imprisonment in many African states, but not one that can easily be squared with an argument that a life sentence so implemented would meet the standards of the African Charter or indeed of any other international human rights instrument or national bill of fundamental rights. A similar challenge to life imprisonment was raised in Namibia. In a little known judgment in the High Court of that jurisdiction, *S v Nehemia Tjijo*, Levy J robustly expressed the view that life imprisonment was unconstitutional. Life imprisonment was simply a sentence of death and therefore prohibited by the Constitution. Moreover, it was also to be outlawed as a ‘cruel, inhuman and degrading punishment’.⁴⁷ As Levy J explained: ‘It removes from a prisoner all hope of his or her release . . . Take away his hope and you take away his dignity and all desire he may have to continue living.’ Nor could one rely on possible release to ameliorate life sentences. Levy J continued sternly:⁴⁸

The fact that [a life prisoner] may be released on parole is no answer. In the first place, for a judicial officer to impose any sentence with parole in mind, is an abdication by such officer of his function and duty and to transfer his duty to some administrator probably not as well equipped as he may be to make judicial decisions. It also puts into the hands of the Executive, where the sentence is life imprisonment, the power to detain a person for the remainder of his life irrespective of the fact that the person may be reformed and fit to take his place in society . . . Life imprisonment makes a mockery of the reformative end of punishment.

⁴⁶ C Beccaria *Dei Delitti e Delle Pene* (1764) published as *Of crimes and punishments* (translated by J Grigson) collected with A Manzoni *The column of infamy* (1964) 47. For a discussion of Beccaria’s contradictory attitude to life imprisonment, in spite of his support for the abolition of the death penalty, see D van Zyl Smit, *Taking life imprisonment seriously in national and international law* (2002) 5–7.

⁴⁷ *S v Nehemia Tjijo*, unreported, but reproduced in *S v Tcoelib* 1996 1 SACR 390 (NmS) 396.

⁴⁸ As above.

In the face of this broadside, other prisoners argued that the life sentences imposed on them were unconstitutional. In *S v Tcoeb*⁴⁹ the Supreme Court of Namibia was forced to consider carefully whether life imprisonment was a constitutionally acceptable alternative to the death penalty. Its answer was carefully nuanced. The Supreme Court did not reject the notion that a life sentence could be unconstitutionally severe if it were enforced without concern for the human dignity of the offender. Following the leading German case on life imprisonment,⁵⁰ the Court found that human dignity required that every prisoner, including those serving life sentences, had to have a reasonable prospect of release. This meant that there had to be a mechanism for considering the release of each prisoner serving a life sentence and the operation of this mechanism had to meet constitutional standards of due process. The existing regime for lifers and the mechanism for considering their release had to be remodelled in the light of these constitutional imperatives. With these caveats, however, life imprisonment remained a constitutionally viable ultimate penalty in Namibia.

The importance of this decision is that it defends a modified form of life imprisonment as an alternative to the death penalty, while casting the debate about both the death penalty and its acceptable alternatives in the framework of the underlying values of the Namibian Constitution. In this respect, it highlights also the importance of engaging in the debate about values. Like the South African Court in its death penalty decision, *Makwanyane*, it also engages with fundamental values.

Such a general engagement with the values that might lead to a re-evaluation of the death penalty, is a third way in which the scope of the death penalty may eventually be restricted. As has already been suggested, arguments by analogy with other human rights systems outside Africa have their place. However, there is a need also to engage with indigenous value systems, including those of the Islamic North. This is happening to some extent with the challenges from within Africa to the death penalty that has been imposed in terms of Shari'a law in Northern Nigeria on a woman convicted of adultery.⁵¹

In the *Makwanyane* judgment, engagement with wider African values was attempted in at least two ways. The one, adopted by a number of judges, was to emphasise the concept of *ubuntu*, of communal humanity,⁵² as a concept underlying both the right to life and to dignity

⁴⁹ 1996 1 SACR 390 (NmS).

⁵⁰ BVerfGE 45 187, discussed in D van Zyl Smit 'Is life imprisonment constitutional? The German experience' (1992) *Public Law* 263–278.

⁵¹ 'SA lawyers to help save Nigerian mother' *Cape Argus* 25 August 2003 10; 'Mbeki urges Obasanjo to intervene' *Independent Online* 10 September 2003; 'Nigeria's Bauchi state slams adultery stoning' *Independent Online* 18 September 2002.

⁵² See *Makwanyane* (n 16 above) *per* Langa J 482B para 224. See also *per* Chaskalson P 446F para 131, *per* Madala J 483I–484A para 237, *per* Mohamed J 488G para 263, *per*

and as an overarching idea in the new South African Constitution. The other, adopted by Sachs J in particular, was to engage with those African critics who argued that abolitionism was un-African and to show that, although pre-colonial Africa had had its share of bloody wars, historically the systematic use of the death penalty was not part of indigenous Southern African culture.⁵³ Both strategies run the risk of being conceptually shallow and ahistorical, but they need not be either. What is required is a more careful scholarly investigation of both strategies.

Finally, a fourth way in which the death penalty can be restricted in Africa is by improving national criminal justice systems as well as human rights compliant mechanisms and making them more efficient. In many African countries, rulers retain the death penalty, even if they do not use it, because they fear that the time will come when using their power to implement the death penalty will be the only way to demonstrate their authority. This tendency may be most obvious in coup-ridden, politically unstable states. However, it is equally a problem in countries where there is a perception that the state is powerless to act with other means against crime and corruption. Human rights activists may find it hard to see their function as making a vital arm of the state, ie the criminal justice system, more efficient. However, this can be done in a way that makes the system more compatible with human rights norms and standards at the same time.

An efficient criminal justice system and a strong and prosperous state are not sufficient to ensure that the issue of the death penalty will be addressed, as the example of the United States indicates all too clearly. However, the converse is true. In a state that is failing to exercise its authority, there is unlikely to be opportunity for reform in this area. Only in a stable and relatively prosperous state is there a real prospect of the civic confidence necessary seriously to apply the human rights principles that underlie any move towards restricting or abolishing the death penalty. Particularly where elected politicians have expressed their personal opposition to the death penalty — the President of Malawi,⁵⁴ and more recently the Minister of Justice of Kenya⁵⁵ are two examples — their ability to act on their beliefs may be influenced

Mokgoro J 500h–501F paras 307–308, and *per* Sachs J at 516G para 374. For further scholarly analysis of *ubuntu*, see R English 'Ubuntu: The quest for an indigenous jurisprudence' (1996) 12 *South African Journal on Human Rights* 641–8.

⁵³ *Makwanyane* (n 16 above) *per* Sachs J 516I–519C paras 376–385. See also the comments of Hatchard & Coldham (n 34 above) 155–157 on the relationship between existing African practices and the death penalty.

⁵⁴ Letter from the President of Malawi, Dr Bakili Muluzi, to the World Council of Churches 5 December 1998; reported in *e-jubilee* 7 on 11 December 1998 and quoted by Paralegal Advisory Services Malawi in unpublished paper 'The quality of justice: Trial observations in Malawi' presented to the First World Congress on the Death Penalty (not dated).

⁵⁵ 'Kenya death row prisoners freed' *CNN.com* 25 February 2003.

crucially by such wider political circumstances. If they are unable or unwilling to act on their beliefs, the danger is all too real that the state will revert to applying the death penalty actively again. It may well be that positive criminal justice reform rather than moralistic condemnation is the most effective route to the eventual abolition of the death penalty in Africa.