UNIVERSITY *of the*
WESTERN CAPE

University of the Western Cape

Faculty of Law

The death penalty in Zimbabwe: A human rights perspective

By Musavengana Machaya

Student Number: 3075584

Mini-thesis submitted in partial fulfilment of the requirements for the degree of Master of Laws (Legum Magister)

Prepared under the Supervision of

Prof. Yonatan Fessha

2014

Declaration

I declare that *The death penalty in Zimbabwe: A human rights perspective* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Musavengana Machaya

Signature:……

Date:……

Supervisor: Prof Yonatan Fessha

Signature:……

Date:……

Dedication

This research is dedicated to my late parents Mr Pelias Machaya and Mrs Stella Machaya. Although you were promoted to glory, you left too early to see all these achievements (makarwa kurwa kwakanaka).

Acknowledgements

This thesis marks the end of the journey that I have travelled to obtain my Master's degree. It was not, however, a journey travelled alone. This mini-thesis has been kept on track and seen through to the completion with the support and encouragement of numerous people, including my friends and colleagues.

First of all, I would like to thank our almighty God who gave me strength, courage and wisdom to complete this research.

I am greatly indebted to my supervisor, Professor Yonatan Fessha, without whose constructive criticism and ability to explain things in a clear and simple manner this research would not have been a success. Special thanks go to Mr Dube, Mr Mupangavanhu, Professor Lenaghan, and Professor Mezmur, who helped me academically and financially to finish this research.

I would like to thank my late parents, Mr Pelias Machaya and Mrs Stella Machaya who sacrificed everything to send me to school and moulded me to be a person that I am today. To my late Grandfather, a man of great wisdom, thank you so much for being a pillar of strength in my life. To my grandmother, your prayers and love have protected me throughout this journey.

I am also grateful to all the people I have met along the way and have contributed to the development of my research. In particular, I would like to show my gratitude to the Graduate Lecturing Assistant team of 2014 for the constant checks and motivation throughout the academic year.

To Mukudzei Gumbo, Linda Gumbo, Lucy Chivasa, Thando Sibanda Donald Chikukwa, Francis Chiparawasha, Emmanuel Makwaiba, Kristen Wagner, the Mbaimbai and Doka family, thank you for your unflagging love and unconditional support throughout my life and my studies.

Finally, my deepest gratitude goes to my sister, Happiness Machaya. You are my motivation. Thank you for being strong and supporting me in the struggle to better our future.

List of abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AHRLJ	African Human Rights Law Journal
African Charter	African Charter on Human and Peoples' Rights
CAT	Convention against Torture
CIDT	Cruel inhuman and degrading treatment
CIDT	Cruel, inhuman or degrading treatment or punishment
CILJSA	Comparative and International law Journal of Southern Africa
EJIL	European Journal of International Law
ICCPR	International Covenant on Civil and Political Rights
IJHS	International Journal of Healthcare Sciences
MVFHR	Murder victim's families for human rights
OAU	Organisation of African Unity
PLOS	Public Library of Science
RES	Resolution
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Committee.
ZPS	Zimbabwe Prison Service

Key words

- Death penalty
- Human rights
- Legal perspective
- Capital punishment
- Right to life
- Human dignity
- Deterrence
- Torture
- Abolition
- International obligation

Table of Contents

Chapter 1: Introduction

1.1 Background of the study

Globally speaking, there is a clear trend that is geared towards limiting the use of the death penalty. Notably, the number of countries that either limit or abolish the use of capital punishment is on the rise. 150 countries out of the 193 United Nations (UN) member states have abolished the death penalty.[1] The use of the death penalty is, therefore, currently confined to a small minority of countries.

The death penalty was brought to Zimbabwe by the British during the colonial period.[2] According to Mbanje, "this particular form of punishment was one of the most hated forms of punishment during Zimbabwe's liberation struggle as it was often used by the white minority government against freedom fighters."[3] In fact, some argue that the main purpose of the death penalty during the colonial period was to prevent any opposition to the white minority rule.[4] Currently, the death penalty forms part of the legally sanctioned punishments in Zimbabwe.

Since 1980, 78 people have been executed in Zimbabwe through hanging. Currently, it is reported that 96 people are on the death row.[5] Although Zimbabwe retains the death penalty on books, no executions have been carried out in since 2004.[6] It has been a decade without any executions being conducted and, as a result, prisoners have been on the death row without knowing their fate.[7] The recruitment of a new hangman in 2013 has, however, revealed that Zimbabwe has no intention of joining the global trend towards the abolishment

---

1 United Nations Human Rights office of the High Commissioner *Moving away from death penalty: Lessons from national experience* (2012) 3.

2 Novack A 'Abuse of state power: The mandatory death penalty for political crimes in Southern Rhodesia 1963- 1970' (2013)19 *Fundamina* 28.

3 Mbanje P 'Amnesty petitions Zimbabwe leaders over death penalty' *The New Zimbabwe* 2012.

4 Novack A (2013)19.

5 Zhangazha W 'No plans to hang death row inmates' *Zimbabwean Independent* (2013) available at http://www.theindependent.co.zw/2013/03/01/no-plans-to-hang-death-row-inmates/ (accessed on 5 February 2014).

6 United Nations Human Rights office of the High Commissioner *Moving away from death penalty: Lessons from national experience* (2012)3.

7 Maja I 'The death penalty in Zimbabwe: Legal ambiguities' in Šimonovi´c I ed *Moving away from the death penalty: Arguments, trends and perspectives* (2014)166.

of the death penalty in the near future. In fact, although the government of Zimbabwe received calls from human rights activists to abolish the death penalty, this penalty was also retained as a form of punishment under the new Constitution, which was adopted in 2013. Although the Constitution of 2013 maintains the position that all citizens have a right to life, it also provides, under Section 48, for the death penalty as a form of punishment.[8]

The decision to retain the death penalty in Zimbabwe must be seen against the country's international and regional obligations of promoting and protecting human rights. Although Zimbabwe has not signed the Second Optional Protocol which aims at abolishing the death penalty, it has signed a number of international and regional instruments that either prohibit or limit the imposition of the death penalty. Zimbabwe has, for example, signed the International Covenant on Civil and Political Rights (ICCPR). The ICCPR, does not disavow capital punishment, but limits the imposition of a capital sentence to the most serious crime.[9] Zimbabwe is also a state party to the African (Banjul) Charter on Human and Peoples' Rights (African Charter).[10] According to the Charter, 'human beings are inviolable, every human being shall be entitled to respect for his life and the integrity for his life and the integrity of his person and no one may be arbitrarily deprived of his right.'[11] Zimbabwe is also bound by the African Charter on the Rights and Welfare of the Child under Article 5 which states that the death sentence shall not be pronounced for crimes committed by children.[12]

1.2 Problem Statement

The fact that the new constitution retains the death penalty raises the question whether the country is honouring its international and regional obligation of protecting and promoting human rights. This study seeks to determine whether the decision to retain the death penalty in the new constitution is in line with the country's international and regional obligations. In-order to answer this question, this paper shall try to provide answers to the following questions:

---

8 Section 48 of the Constitution of Zimbabwe Amendment (No 20) 2013.

9 Human Rights Forum: Human Rights Bulletin (76) *The death penalty in Zimbabwe* (2012).

10 Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

11 Article 4 of the African Charter.

12 Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

- What is the position of the death penalty under international law?
- What is the legal status of the death penalty in Zimbabwe?
- What is the status of international law in Zimbabwe?
- Whether the re-instatement of the death penalty under the new constitution is consistent with the country's international and regional obligations?

1.3 Significance of study

There has been an ongoing debate on the abolishment of the death penalty in Zimbabwe. The public, non-governmental organisations and human rights activists need clarity as to the effectiveness, justification and purpose, if any, of the retention of the death sentence in Zimbabwe. Therefore, this paper shall give an insight on whether or not the decision to retain the death penalty in Zimbabwe is line with the country's international and regional mandate of protecting and promoting human rights. This study will add to the legal literature that is grappling with the question of whether Zimbabwe is upholding its international mandate of protecting and promoting human rights.

1.4 Literature review

Amnesty International has done a detailed research on the impact, effectiveness of the death penalty in Zimbabwe, advocating for its abolishment.[13] However, the proposals were put forward prior to the adoption of the new constitution and long before the country took a step to appoint a new hangman. As a result, the report by Amnesty International has not dealt with the issue of whether the decision to retain the death penalty under the new constitution is in line with the country's international and regional obligation of safeguarding fundamental human rights.

The Human Rights Bulletin Number 76 (Human Rights Forum) provides, in detail, the discussion about the death penalty in Zimbabwe during the constitutional making process in Zimbabwe.[14] The paper also outlines the advantages and disadvantages of the death penalty in Zimbabwe. However, the paper does not discuss the obligation of Zimbabwe under international law with regard to the application of the death penalty.

---

13 Amnesty International 'Zimbabwe: Human rights agenda for the government 2013-2018' available at *http://www.amnesty.org/en/library/asset/AFR46/017/2013/en/917d9a50-160f-42f2-b2e1-6ca20fcdc0/afr460172013en* (accessed on 5 February 2014).

14 Human Rights Forum (2012).

Magade in his paper entitled, *The right to life and the death penalty*, focuses on the necessity of retaining the death penalty as a penal measure that is part of Zimbabwe's criminal justice system.[15] The report discusses the impact of the death penalty on the right to life mainly focusing on the domestic legislation and the country's criminal justice.[16] Therefore the report leaves a gap with regard to the application of the death penalty in Zimbabwe and the country's international obligations with regard to safeguarding people's rights. The report also does not mention other rights that are affected by the death penalty such as the right to dignity, right not to be treated in a cruel, inhuman and degrading manner or punishment and also the right to fair trial.

Dumbutsena in his article, *The death penalty in Zimbabwe* discusses the deterrence effects of the death penalty and the arguments advanced by retentionists on the death penalty.[17] The author also gives an overview of the effectiveness of the death penalty under the criminal justice system. Again, the article mainly focuses on the deterrence effects of the death penalty on under country's criminal justice system but leaving other factors that can be taken into consideration with regard to the abolition of the death penalty such as the country's international obligations and also constitutionality of the death penalty.[18]

Although there is a lot of literature on the abolition of the death penalty and its effectiveness in Zimbabwe, not much has been written on the decision of the new constitution to retain the death penalty from a human rights perspective. This paper fills the gap by providing a detailed discussion on whether the imposition of the death penalty under the new constitution is in line with the country's international obligation and regional obligation of protecting and promoting fundamental human rights.

1.5 Methodology

In determining whether the re-instatement of the death penalty in Zimbabwe is in line with the country's international and regional human rights obligations, the researcher uses secondary and qualitative research methods. This research shall make use of international and regional instruments that support the abolishment of the death. Secondary sources such as

---

15 Magade E *Country report on Zimbabwe for the British Embassy*. *The right to life and the death penalty (*2002).

16 Magade E *(*2002).

17 Dumbutsena E *The death penalty in Zimbabwe, Revue International de Droit Pénal* (1987).

18 Dumbutsena E (1987).

text books, journal articles, reports and newspaper articles shall also be used. In order to accomplish the objective of this research, internet sources are also relied on.

1.6 Chapter Structure

Chapter 2 deals with normative framework and the human rights perspective of the death penalty. The main focus of this chapter is to determine the position of the death penalty under the international and regional human rights instruments.

Chapter 3 focuses on the historical and current position in Zimbabwe with regard to the death penalty. The aim here is to determine whether or not the death penalty is in line with the country's international obligations and regional human rights obligations.

Chapter 4 concludes the discussion and provides few recommendations.

Chapter 2: The death penalty under international human rights law

2.1 Introduction

The death penalty or capital punishment is a legal process whereby a person is put to death by the state as punishment for a crime.[19] As a punishment that existed since time immemorial, it has been regarded as the keystone of all penal systems and the 'exemplary punishment par excellence'.[20] The death penalty is often justified on the ground that society needs to be purged of incorrigible, dangerous and undesirable persons.[21] However, nowadays capital punishment is increasingly being regarded as a barbarous punishment, which survived from 'the less enlightened and unrefined age of legal history'.[22] As a result, the abolition of the death penalty has become a central theme in the recognition and development of human rights around the world.

The main objective of this chapter is to determine the position of the death penalty under international law and determine whether the death penalty violates the rights that are protected by international and regional human rights instruments. The chapter seeks to achieve this objective by making reference to international and regional human rights instruments. Case law from the United Nations Human Rights Committee (UNHRC) and the African Commission on Human and Peoples' Rights (ACHPR) shall also be used to substantiate and clarify the position of the death penalty under international law.

The Chapter commences the discussion by briefly discussing the different methods of executions around the world. In order to facilitate a broader understanding of the death penalty as a human rights issue, this chapter then traces the transition of the death penalty from a criminal justice issue to a human rights issue. The chapter then proceeds to its main business of establishing the position of the death penalty under international and regional human rights law. It commences this part of the discussion by looking at the impact of the

---

19 Chemun UN *General Assembly Committee: Questions of the death penalty to minors* (2013)2. Crimes that can result in a death penalty are known as capital crimes or capital offenses. The term capital originates from the latin word *capitalis*, literally "regarding the head" (referring to execution by beheading).

20 The working group on the death penalty in Africa *Study on the question of the death penalty in Africa (*2012)8.

21 The working group on the death penalty in Africa (2012) 8.

22 Chenwi L *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) 28.

death penalty on the right to life and the right to human dignity. It then determines whether or not the death penalty amounts to torture or cruel, inhuman and degrading punishment. Finally, the chapter discusses whether the death penalty violates the right to fair trial.

2.2 Description of execution methods

There are different methods of execution that are used around the world. These methods of execution differ from one country to another. In Africa, the common methods of execution are stoning, hanging and firing squad.[23] Stoning is one of the oldest methods of execution. It is usually used in countries that apply *shari'a law*.[24] It usually entails a process were a person is buried up to the waist or chest and is hit by stones.[25] Death in this case is commonly caused by damage to the brain, asphyxiation or combination of injuries.[26] Hanging, a method of execution that is mostly used in Southern Africa, entails a loosely tied rope being placed around the prisoner's neck.[27] The hangman then pulls a board or opens a door that has been keeping the prisoner up or pushes him over, causing the latter to hang by his neck until he suffocates.[28] Beheading, also known as 'decapitation', is the intentional severance of the head from the body.[29] These methods of execution have been criticised as inhuman and causing a lot of pain on the prisoners.

Through the development of science and technology, the methods of execution have evolved.[30] New methods of execution such as lethal injection, electrocution and the gas chamber are increasingly being used in a number of countries.[31] Lethal injection involves, 'a combination of drugs such as saline solution, sodium thiopental, pavulon or pancurorium and

---

23 The working group on the death penalty in Africa (2012)16.

24 Bastia B etal 'Executions: Ancient methods and evolution' (2014)2 *IJHS* 97.

25 Chenwi L (2007)140. The countries which execute people through stoning are Mauritania, Nigeria and Sudan.

26 Amnesty International *When the state Kills…..The death penalty v human rights* (1989) 61.

27 Chenwi L (2007)139.

28 Chenwi L (2007)139.

29 Human Rights Advocates Report to the 22nd Session for Human Rights Council, 'The need to call for moratoriums on sentencing'. Saudi Arabia is one of the leading countries that use beheading as a form of execution available at http://www.humanrightsadvocates.org (accessed on 15 October 2010).

30 Bastia B etal 'Executions: Ancient methods and evolution' (2014)2 *IJHS* 98.

31 Butler C 'Baze v Rees: Lethal injection as a constitutional method of execution' (2009) 86:2 *Denver University Law Review* 510. Lethal injection and electrocution are regarded as the less severe methods of execution.

potassium chloride'.[32] The combination of these drugs paralyses the entire muscle system and stops the heart.[33] In this case, 'death results from anaesthetic overdose, respiratory and cardiac arrest while the condemned prisoner is unconscious'.[34] Electrocution entails the use of an electric chair with a jolt of between 500 and 200 volts of electricity, which are left to flow to the inmate's body until he or she dies.[35] In the case of death penalty by a gas chamber, "the condemned prisoner is strapped to a chair in an airtight chamber and the crystals of sodium cyanide are released into a pail, causing a chemical reaction that releases hydrogen cyanide gas."[36] "The prisoner is instructed to breathe deeply in order to speed up the process of death."[37] In this case the prisoner dies from hypoxia, which is the cutting off of oxygen circulating to the brain. Generally speaking, these modern methods of execution are regarded as less harmful when compared to the old methods of execution.[38]

From the foregoing it is clear that we have noticed a shift in the methods of execution. However, change in the application of the death penalty is not only from the old harmful methods to less painful methods of execution. What we have also witnessed is an increase call towards the abolition of the death penalty. At the centre of this discussion is a shift in the death penalty discourse that presented the latter not just as a criminal justice issue but a human rights issue as well.

2.3 The death penalty: From a criminal justice issue to a human rights issue

The issue of abolishing the death penalty has not always been regarded as a human rights issue. In the past, the death penalty was viewed as a criminal sanction, which the state had a right to impose, just like any other punishment for crime committed.[39] The death penalty was

---

32 Butler C 'Baze v Rees: Lethal injection as a constitutional method of execution' (2009) 86.

33 Butler C 'Baze v Rees: Lethal injection as a constitutional method of execution' (2009) 86.

34 Ecenbarger W 'Perfecting Death: When the state kills it must do so humanely. Is that possible?' *The Philadelphia Inquirer Magazine* 23 January 1994.

35 Hillman H "The possible pain experienced during executions by different methods" (1992) 22 *Perception 45*.

36 Weisberg J 'This is your death' *The New Republic* 1 July 1991.

37 Ecenbarger W (1994).

38 Butler C (2009) 510.

39 Murder Victim's Families for Human Rights (MVFHR) 'Why a human rights framework for death penalty abolition work?' available at *http://www.mvfhr.org/why-human-rights-framework-death-penalty-abolition- work* (accessed on 14 October 2014).

regarded as a legitimate pawn of a country's criminal justice system that was used as a method of deterring crime.

The transition of the death penalty from simply being a criminal justice issue to a human rights issue has been spearheaded by the notion that capital punishment is a major threat to fundamental human rights.[40] The genesis of this transition was the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, which provided the initial framework for development of international human rights law.[41] The debate by the United Nations (UN) General Assembly on the adoption of Article 3 of the UDHR, which provided for the protection of the right to life started to challenge the view that the death penalty is not a human rights issue.[42] After more than a decade, the ICCPR was adopted in 1966 and further extended the protection and promotion of fundamental human rights.[43] Thereafter the Second Optional Protocol to the Covenant on Civil and Political Rights, which entered into force 1991, became the first treaty that declared the sanctity of human life in an unambiguous fashion and the rejection of capital punishment.[44] With the adoption of these instruments, the discussion about the death penalty moved into the arena of human rights.[45]

However, the view that regards the death penalty as a human rights issue was resisted by a number of countries that used the death penalty as a form punishment.[46] These countries rejected the argument that judicial executions violated basic human rights.[47] They regarded the death penalty as a matter of a country's criminal justice system, which, as a matter of national sovereignty, reflected their cultural and religious values. In 1994, a resolution by the United Nations General Assembly to restrict the application of the death penalty and encourage a moratorium on executions was rejected by 74 countries.[48] These countries

40 Hood R 'Capital punishment: The USA in world perspective' (2005)3 *Centre for human rights and global justice working paper extrajudicial execution series* 6.

41 Schabas WA 'The abolition of capital punishment from an international law perspective' (2003)2 available at http://www.isrcl.org/Papers/Schabas (accessed on 14 October 2014).

42 Article 3 of the UDHR.

43 Schabas WA 'The abolition of capital punishment from an international law perspective' (2003)2 available at http://www.isrcl.org/Papers/Schabas (accessed on 14 October 2014).

44 UN General Assembly, second optional protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty 15 December 1989 A/Res/44/128.

46 Hood R *The death penalty: A world-wide perspective* 2ed (2002)18.

47 Hood R (2002)18.

48 Hood R (1996)18.

maintained the view that the death penalty was not a human rights issue. However, in 1997, the United Nations (UN) High Commission for Human Rights approved a resolution stating that the abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.[49] This resolution also led to other subsequent resolutions being passed, which aimed at establishing a moratorium on executions with the aim of abolishing the death penalty.

From the foregoing issue it is clear that the death penalty is no longer regarded as the domain criminal justice issue. It is increasingly regarded as a violation of fundamental human rights. The next focus is to determine whether the death penalty indeed violates human rights. The focus is on the right to life, right to human dignity, right not to be subjected to torture, right not to be treated in a cruel, inhuman and degrading manner and the right to fair trial.

2.4 Death penalty and the right to life

There is an ongoing debate on the impact of the death penalty on the right to life. The main issue is whether imposing the death penalty on capital crimes is a violation of the right to life. In order to answer this question, the scope and content of the right to life must be outlined.

The right to life is protected by a plethora of human rights instruments. The primary international instruments, which protect the right to life, are the UDHR and the ICCPR. Article 3 of the UDHR states that 'everyone has the right to life, liberty and security of a person.'[50] The ICCPR protects the right to life under Article 6, which provides that every individual has the right to life and prohibits any arbitrary deprivation of this right.[51] At regional level, the right to life is protected by the African Charter on Human and Peoples' Rights (African Charter). Article 4 of the Charter states that:

> 'Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of a person. No one may be arbitrarily deprived of this right.'[52]

The right to life is also generally accepted as being part of customary international law.[53] In general, thus, there is a consensus that international law guarantees everyone the right to life

---

49 United Nations Commission on Human Rights Resolution E/CN.4/1997/12 (April 3 1997)

50 Article 3 of the UDHR.

51 Article 6 of the ICCPR.

52 Article 4 African Charter.

and more specifically the right not to be arbitrarily deprived of one's life.[54] States as a result, have an obligation under customary international law to uphold the right to life. This right applies to all states regardless of whether they are party to international instruments that protect the right to life or not.[55]

The right to life is the supreme right of all human beings; 'it constitutes the irreducible core of human rights'.[56] All human rights are of no significance without the right to life as life is a pre-requisite for the enjoyment of any other human rights.[57] Accordingly, the right to life has been characterized as the 'supreme human right'.[58] Without effective guarantee of this right, all other rights of a human being would be devoid of meaning.[59] The United Nations Human Rights Committee (UNHRC) has observed that, 'the right to life is the supreme right from which no derogation is permitted even in times of public emergency that threaten the life of a

---

53 United Nations Human Rights: Office of the High Commissioner: International legal protection of human rights in armed conflict (2011)8.

54 Byrnes A 'The right to life, the death penalty and human rights law : An international and Australian perspective' (2007) 66 *University of New South Wales Faculty of Law Research Series* 32.

55 Schabas W 'International law and abolition of the death penalty' (1998) 55 *Washington and Lee Law Review* 801.With regard to the right to life, the obligation of states under international law translates into both negative and positive obligations. The negative obligation entails the duty not to take someone's life. On the other hand, the positive obligation entails the state's duty to protect the lives of its citizen.

56 H Bedau 'Abolishing the death penalty even for the worst murderers' in A Sarat (ed.) *The killing state: Capital punishment in law, politics and culture* (1999) 43. See also Schabas A 'The abolition of capital punishment from International law perspective' in Franck H *The barbaric punishment, abolishing the death penalty in Sweden, Europe and throughout the world (*2003) 8.

57 Chenwi L (2007)57.

58 Nowak M *UN Covenant on Civil and Political Rights: CCPR commentary* 2ed (2003)121

59 UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life) (1982) available at: http://www.refworld.org/docid/45388400a.html (accessed 3 June 2014). In addition to the decisions by the Human Rights Committee, the South African Constitutional decision in the case of *S v Makwanyane* also played a fundamental role in showing the importance of the right to life. The court held that 'Constitutional rights vests in every person, including criminals convicted of vile crimes.' Such criminals do not forfeit their rights under the constitution and are entitled, as all in our country now are, to assert these rights, including the right to life.' Therefore human life has infinite value or worth and so must be respected and promoted accordingly. Even murderers have to be treated in the light of the values of their lives, a value not erased by the harm or injustice their lethal violence has caused the innocent.

nation'.[60] The African Commission on Human and Peoples' Rights (ACHPR), in the case of *Forum of Conscience v Sierra Leone,* also noted that, 'the right to life is the fulcrum of all other rights'.[61] It is the fountain through which other rights flow and any violation of this right without due process amounts to arbitrary deprivation of the right to life.[62]

Now that we have identified the international and regional instruments which protect the right to life and briefly discussed the scope and content of right to life, the question is whether the protection of the right to life by these international and regional instruments includes the right not to be killed by the state. At least there seem to be a well-established consensus that the mandatory death penalty, which is the automatic imposition of a death sentence upon conviction of a crime, violates the right to life. The UNHRC, in many cases, concluded that the mandatory death penalty violates the right to life. In the case of *Kennedy v Trinidad and Tobago*, the applicant was sentenced to death as a result of a murder conviction in Trinidad and Tobago.[63] The Committee was called upon to review the mandatory character of the death penalty. The Committee found that, 'to impose the mandatory death penalty, irrespective of the circumstances of the crime, cannot justify depriving someone of the right to life under Article 6(1) of the ICCPR'.[64] In *Johnson Dexter v Ghana,* the UNHRC also noted that, 'mandatory imposition of the death penalty constitutes an arbitrary deprivation of the right to life'.[65] The Committee specifically noted that, 'mandatory death penalty violates Article 6(1) of the ICCPR in circumstances where the death penalty is imposed without

60 Chenwi L (2007)63.

61 *Forum of Conscience v Sierra Leone* , Communication 223/98 (2000) AHRLR 293 (ACHPR 2000), para 20. This case concerned the execution of 24 soldiers after trials that were allegedly flawed and in violation of Sierra Leone's obligation under the African Charter as they had no right to appeal to a higher tribunal.

62 *Forum of Conscience v Sierra Leone*.

63 *Rawle Kennedy v. Trinidad and Tobago* Communication No. 845/1999. In applying the mandatory death penalty, the court (any other sentencing authority) retains no discretion to take into account the facts of the offense or the characteristics of each individual offender; instead, each offender is sentenced to death regardless of any mitigating circumstances that may apply. An example of the application of mandatory death sentence is a situation where a country upholds mandatory death penalty for drug trafficking, a court would not be permitted to consider a defendant's lack of criminal record or the desperate circumstances that may have contributed to his decision to traffic in narcotics before imposing sentence.

64 *Rawle Kennedy v Trinidad and Tobago*.

65 *John Dexter v Ghana Human* Rights Committee Communication No 2177/2012.

regard being able to be paid to the defendant's particular personal circumstances or the circumstances of a particular case'.[66]

Another point of consensus is that the death penalty must be imposed only for the most serious crimes.[67] The problem is, however, in identifying the nature of crimes that can be regarded as serious to deserve the death penalty. The notion of seriousness of an offence may vary according to national culture, religion, tradition and political context.[68] According to the UN special rapporteur on arbitrary executions, 'most serious crimes refer to crimes committed with the intention to kill and also resulting in the loss of life'.[69] It is generally argued that economic crimes, drug related offences, victimless offences and actions relating to moral values including adultery, prostitution and sexual orientation cannot be regarded as 'most serious crimes.'[70] In *Lubuto v Zambia*, the applicant was sentenced to death for aggravated robbery.[71] The UNHRC held that, 'the crime could not be considered as the most serious crime as the use of the fire arm did not produce the death or wounding of any person'.[72] The Committee concluded that the imposition of the death penalty under such circumstances violated Article 6(2) of the ICCPR and Lubuto was entitled, under Article

66 *John Dexter v Ghana*.

67 UN Human Rights Committee (The HRC), CCPR General Comment No. 6: Article 6 (Right to Life),30 April 1982. The Committee is of the opinion that the expression "most serious crimes" must be read restrictively to mean that the death penalty should be a quite exceptional measure.

68 However, the relativist approach in determining the most serious crimes is problematic as it potentially Undermines the concept of universally applicable normative principles in international law. In 2006, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions further narrowed the interpretation of "most serious crimes" by defining them as cases where it can be shown that there was an intention to kill, which resulted in the loss of life. Durisch C *The death penalty and the ''most serious crimes'' A country by country overview of the death penalty in law and practice in retentionist states* (2013)5.

69 Report of the special Rapporteur on extrajudicial summary on arbitrary executions UN Doc/HRC/4/20 29 January 2007.

70 It means crimes such as arson, aggravated assault, burglary, robbery do not necessarily meet the criteria 'most serious crimes' since loss of life may occur without actual intent to kill. Durisch C *The death penalty and the ''most serious crimes'' A country by country overview of the death penalty in law and practice in retentionist states* (2013)5.

71 *Lubuto v Zambia,* Communication 390/1990, UN Doc. CCPR/C/55/D390/1990/ rev.1, 31 October 1995.

72 *Lubuto v Zambia.*

2(3)(a) of the ICCPR, to an appropriate and effective remedy entailing the commutation of the sentence.[73]

It is also now well-established that, 'the extradition of a prisoner from a country that abolished the death penalty to a country that imposes the death penalty constitutes a violation of the right to life'.[74] In the case of *Judge v Canada,* the UNHRC had to decide whether the extradition of a prisoner to a country that imposes the death penalty amounts to a violation of the right to life under Article 6 of the ICCPR.[75] The Committee noted that the countries that have abolished the death penalty have an obligation not to expose a person to the real risk of its application.[76] According to the Committee, 'a country that would have abolished the death penalty may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out'.[77] In this case, the Committee found Canada in violation of Judge's right to life under Article 6(1) by deporting the prisoner to the United States, where the death penalty could be imposed on him, without ensuring that the death penalty would not be carried out.[78]

From the foregoing, it is clear that the mandatory death penalty also amounts to a violation of the right to life. The extradition of a prisoner to a country that imposes the death penalty violates the right to life. It is also established that the imposition of the death penalty on non-serious crimes also violates the right to life. The question, which still needs to be addressed, is, however, whether the death penalty *per se* violates the right to life.

Some scholars have relied on the wording of international and regional instruments to determine whether the death penalty violates the right to life. The wording of Article 6 does

---

73 *Lubuto v Zambia*.

74 International Bar Association 'The death penalty under International law' A background paper to the IBAHRI resolution on the abolition of the death penalty (2008)15.

75 *Judge v Canada*, Communication 829/1998, UN Doc. CCPR/C/78/D829/1998, 20 October 2003.

76 *Judge v Canada*.

77 *Judge v Canada*.

78 *Judge v Canada*. The UNHRC, in this case, clearly noted that there is an obligation on the state where the person is imprisoned to seek assurance that the death sentence will not be carried out upon return to the country of origin.

not position the death penalty as a violation of the right to life.[79] However it is often argued that different interpretations suggest that the death penalty violates the right to life as provided under Article 6 of the ICCPR. Some rely on the term 'inherent' in Article 6 (1) and emphasize the supreme character of the right to life, a right which is not conferred on the individual by society or by the state.[80] According to this interpretation, "one's right to life cannot be taken away by the state or waived, surrendered or renounced, since a human being cannot be divested, nor can he divest himself, of his humanity."[81] Thus the General Comment on Article 6 of the ICCPR concluded that all measures of abolishing the death penalty should be considered as progress in the enjoyment of the right to life.[82] Although Article 3 of the UDHR does not mention the death penalty, the *travaux preparatoires* and subsequent interpretations of Article 3 of the UDHR by the UN General Assembly reveals, according to some scholars, that 'the death penalty is considered to be incompatible with the right to life'.[83] According to Schabas, Article 3 of the UDHR is abolitionist in outlook. By its silence on the death penalty, Article 3 of the UDHR, according to Schabas, directly envisages its abolition and implicitly admits its existence as a necessary evil.[84]

In contrast to the UDHR, which is silent on the death penalty, the relevant article of the ICCPR, which protects the right to life, provides some guidelines on the use of death penalty.[85] According to the ICCPR, the death penalty may be imposed only for the most serious crimes and must be in accordance with both the law in force at the time of the commission of the crime and the provisions of the Covenant.[86] Furthermore, the death penalty may only be imposed pursuant to a final judgment rendered by a competent court but may not be carried out against pregnant women or invoked for crimes committed by persons

79 Article 6 of the ICCPR.

80 Jayawickrama N *The judicial application of human rights, regional and international jurisprudence* (2002)36.

81 Jayawickrama N *The judicial application of human rights, regional and international jurisprudence* (2002)36.

82 UN Human Rights Committee (The HRC), CCPR General Comment No 6: Article 6 (Right to Life), 30 April 1982, available at: *http://www.refworld.org/docid/45388400a.html* (accessed on 2 June 2014).

83 UN General Assembly resolution 2393(XXIII).

84 Schabas W *The abolition of the death penalty in international law* (2002)23.

85 Article 6 ICCPR.

86 Article 6 ICCPR.

below the age of eighteen.[87] The Covenant also notes that Article 6 may not be invoked to prevent or delay the abolition of the death penalty by States Parties.[88] Procedural rules, which include the right of anyone sentenced to death to seek pardon or commutation of the sentence, must be respected.[89] In short, although Article 6 of the ICCPR protects the right to life, it allows the use of the death penalty under specific conditions.

The language of Article 4 of the African Charter on the issue of arbitrary deprivation of the right to life is similar to that of Article 6(1) of the ICCPR. [90] This indicates that, under Article 4 of the ACHPR, the death penalty is prohibited only if it amounts to arbitrary deprivation of the right to life.[91] As noted by Mbaya, article 4 of the ACHPR permits the application of the death penalty provided that it is imposed in accordance with the law.[92]

It is also often argued that, Article 4 of the ACHPR must be interpreted in light of Articles 5 (3) and 30 (e) of the African Charter on the Rights and Welfare of the Child and Article 4(2)(j) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which place restrictions on the application of the death penalty.[93] The former prohibits the imposition of the death penalty for crimes committed by children and prohibits the imposition of the death penalty on expectant mothers and mothers of infants.[94] The latter prohibits the execution of the death penalty on pregnant or nursing women.[95] Therefore, one can argue that Article 4 of the African Charter does not allow the imposition of the death penalty in all circumstances as there are restrictions provided by the African

87 Mendez J. E 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment: The death penalty and the absolute prohibition of torture and cruel, inhuman and degrading treatment of punishment' (2010) 2.

88 Article 6(6) ICCPR.

89 Article 6(4) & (5) of ICCPR.

90 Article 4 of the Organization of African Unity (OAU), African Charter on Human and Peoples' Rights 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

91 Chenwi L (2007)65.

92 Schabas W *The abolition of the death penalty in International law* (2002)355.

93 Article 4 African Charter.

94 Article 5(3), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

95 Article 4(2)(j) of the African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003.

Charter on the Rights and Welfare of the Child and also the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[96]

From the foregoing, it can be noted that the mandatory death penalty and the extradition of prisoners to a country that imposes the death penalty from a country that would have abolished the death penalty violates the right to life. The ICCPR and the African Charter however, do not prohibit the application of the death penalty. The two instruments provide strict measures under which the death penalty can be imposed. It is however of paramount importance to note that the interpretation of the wording of Article 6 of the ICCPR and Article 4 of the African Charter by different scholars point towards abolition of the death penalty as an essential measure for the protection of the right to life.

2.5 Death penalty and the right to human dignity

Another right that is deemed to be affected by the death penalty is the right to human dignity. The question is whether the death penalty violates the right to human dignity.

The right to human dignity enjoys legal protection under several international and regional human rights instruments. It is protected under Article 10 of the ICCPR.[97] Article 10 of the ICCPR applies to anyone deprived of liberty under the laws and authority of the state.[98] It states that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'[99] Apart from the ICCPR, the right to human dignity is also protected under regional human rights instruments. Article 5 of the African Charter contains specific provisions relating to human dignity.[100] It states that,

> 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'[101]

---

96 Chenwi L (2007)67.

97 Article 10 of the ICCPR.

98 Article 10 of the ICCPR.

99 Article 10 of the ICCPR.

100 Article 5 of the African Charter on Human and Peoples' Rights (1986).

101 Article 5 of the African Charter on Human and Peoples' Rights (1986).

Human dignity is the source of a person's inmate rights to freedom and to physical integrity, from which a number of other rights flow.[102] Recognising the right to dignity is an acknowledgement of the intrinsic worth of human beings.[103] Human beings are entitled to be treated as worthy of respect and concern. This right is, therefore, the foundation of many of the other rights that are specifically entrenched in international legal instruments.

The issue of the death penalty in relation to the protection of the right to human dignity is often raised with specific reference to the death row phenomenon. The death row phenomenon refers to the harmful effects of the conditions experienced by the prisoner while awaiting the execution of the sentence.[104] These conditions are often characterized by long duration of detention, total isolation in individual cells, uncertainty of the moment of the execution and deprivation of contact with the outside world, including sometimes family members and legal counsel.[105] The detrimental conditions on the death row easily lead to physical and mental deterioration, reducing some prisoners to little more than the living dead.[106] According to Hudson, 'the condition on the death row transforms a prisoner from a

102 Currie I & De Waal J *The Bill of Rights handbook* 5ed (2008) 273.

103 Currie I & De Waal J (2008) 274.

104 The place where the condemned prisoners are confined is called death row and the sole purpose of this place is to preserve those who live there so that they may be executed. Harrison K & Tamony A 'Death row phenomenon, death row syndrome and their effect on capital cases in the US' (2010) *Internet Journal of Criminology* 2. There is widespread judicial and academic acceptance of what is termed the 'death row phenomenon'. The "death row phenomenon" or "death row syndrome" is a combination of circumstances found on death row that produce severe mental trauma and physical deterioration in prisoners under those sentences. This phenomenon is a result of the harsh conditions experienced on death row, the length of time that they are experienced, and the anxiety of awaiting one's own execution. Other associated factors that contribute to the mental trauma include a cramped environment of deprivation, arbitrary rules, harassment, and isolation from others. Hudson P 'Does the death row phenomenon violate a prisoners human right under international law' (2000) 11 no 4 *EJIL* 834. The death row phenomenon results from compounded conditions endured while under a death sentence. Despite variances in perceived detention facility quality worldwide, death row conditions are generally characterized as bleak, with rigid security, isolation, limited movement, and austere conditions

105 Sadoff A 'International law and the mortal precipice: A legal policy critique of the death row phenomenon' (2009)17 *Tulane Journal of International and Comparative Law* 82.

106 Schabas W *The abolition of the death penalty in international law* (2002) 337.

human being to a caged animal'.[107] It is often argued that this treatment diminishes the prisoner's right of self-worth.[108] On the basis of this, it is often argued that the death row phenomenon violates the right to human dignity as protected under Article 10 of the ICCPR and Article 5 of the African Charter.

The right to human dignity is also often linked to the nature of execution that a country uses to carry out a death penalty. Public execution, for example, is deemed to violate the right to human dignity under international human rights law.[109] According to Schabas, 'public executions are incompatible with the right to human dignity'.[110] The process of public executions is regarded as a gruesome, sordid, debasing and brutalizing manner of treating condemned inmates.[111] Therefore public executions violate the right to human dignity, which is protected under article 10 of the ICCPR and article 5 of the African Charter.

From the foregoing, it can be noted that the death row phenomenon under certain circumstances, violates the right to human dignity. The imposition of the death penalty through public executions also violates the right to human dignity.

2.6 Death penalty and the right not to be subjected to torture

There is an on-going debate on whether the imposition of the death penalty amounts to torture, which is one of the vilest acts that one human being can do to another.[112] Some argue that the definition of torture under the Convention against Torture (CAT) does not include the death penalty and conclude that the death penalty does not violate the right not to be subjected to torture.[113] The emphasis is on whether or not the elements of torture are apparent in the death penalty.

---

107 Hudson P (2000)11.

108 Human Rights Advocates 'Death row phenomenon violates human rights' (2012) available at: *http://www.humanrightsadvocates.org* accessed on (20 August 2014).

109 The countries which conduct public executions consist of Iraq, China, Japan, the Democratic People's Republic of Korea (north), Uzbekistan, and Saudi Arabia. In most cases, executions in are usually carried out by cranes which lift the condemned person by a noose around the neck. These executions are advertised in advance.

110 Schabas W (2002)337.

111 Schabas W (2002)337.

112 Shorts E & De Than C *International criminal law and human rights* (2003)181.

113 Shorts E & De Than C (2003)181.

The right not to be subjected to torture is protected in international and regional human rights instruments. The UDHR, under article 5, protects everyone from torture or cruel, inhuman or degrading treatment or punishment (hereinafter referred to as CIDT).[114] This right is also protected under the CAT and the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.[115] At regional level, the right not to be subjected to torture is protected under Article 5 of the African Charter.[116] The Charter adopts a broader approach compared to that of other international instruments by incorporating other prohibited acts such as slavery and slave trade under the prohibition of torture.[117]

From this brief survey, it is clear that the right not to be subjected to torture is one of the fundamental rights protected under international and regional human rights instruments. What is, however, important for our purpose is whether the death penalty constitutes torture. This begs the question of what constitutes torture. Article 1 of the CAT defines torture as:

> 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or the third person has committed or is suspected of having committed or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence or a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'[118]

From the above definition, it is clear that for an act to be regarded as torture in terms of CAT, it has to satisfy three requirements. First, the act must involve a degree of pain and suffering,

---

114 Article 5 of UDHR.

115 UN General Assembly, Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 9 January 2003, A/RES/57/199. The objective of this protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

116 Article 5 of the African Charter on Human and Peoples' Rights (1986).

117 Chenwi L (2007)103.

118 UN General Assembly Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 December 1984.

which can be either physical or psychological.[119] Secondly, the act must be perpetrated by the state authorities, any person acting in such capacity or must have been instigated by a state official.[120] Thirdly, it must be done with the intention of obtaining information, inflicting pain or causing intimidation.[121] For an act to be regarded as torture, the infliction of harm is not enough. The physical and mental harm must be inflicted intentionally.

The death penalty more or less, satisfies the above three requirements outlined in the definition of torture. It obviously causes a degree of both physical and psychological suffering. It is perpetrated by state authorities and it also imposed with the intention of inflicting pain on a prisoner. However, the same definition of torture has clearly stated that torture does not include pain or suffering arising from lawful punishment.[122] Therefore, like Article 6 of the ICCPR, Article 1(1) of CAT allows for the imposition of the death penalty if it is done in accordance with the laws of the state imposing the sanction.[123] If the death penalty is a lawful punishment under the jurisdiction concerned, it would not amount to torture.[124]

Now that we have established that the death penalty is not included in the definition of torture, the focus shifts from the broad question of whether the death penalty violates the right to torture to whether the methods of execution or the 'death row phenomenon' may invoke a violation of the prohibition against torture. In this regard, it must be stated that there are specific methods of execution that constitutes torture under international and regional human rights bodies. It is now, for example, generally agreed that death penalty by hanging

119 Jayawickrama N (2002) 306.

120 Article 1(1) of CAT.

121 Article 1(1) of CAT.

122 Article 1(1) of CAT.

123 Mendez JE (2010)2.

124 Wendland L A *handbook on state obligations under the UN Convention against Torture* (2002) 29. Pain and suffering arising from inherent in or incidental to a lawful sanction falls outside the ambit of torture. However the UN Special Rapporteur on Torture proposed that, the lawful sanctions execution must not necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community such as deprivation of liberty through imprisonment which is common to all penal systems. Therefore following the global trend of the abolishment of the death penalty and the proposal by the Special Rapporteur on torture one can possibly argue that the death penalty has become a sanction that is not widely accepted and can be deemed to constitute torture.

constitutes torture.[125] Similarly, death penalty by stoning amounts to torture.[126] The UN Human Rights Committee, in the case of *Chitat Ng v Canada,* held that, 'execution by gas asphyxiation constitutes torture due to the length of time this method takes to kill a person and the availability of other less cruel methods to achieve the same objective'.[127]

The notion of the death row phenomenon, as mentioned earlier, indicates the conditions of detention of a condemned prisoner while awaiting the execution of the sentence.[128] Throughout all that time, the prisoner under the death row constantly broods over his fate.[129] "The horrifying spectra of being hanged and the apprehension of being made to suffer a painful and lingering death is, if at all, never far from his mind."[130] Therefore, waiting to be executed or wondering for a long period of time on whether or not one will be successful in avoiding execution undoubtedly causes psychological mental suffering.[131] Based on this, it is often argued that the elements of torture, such as mental pain or suffering, are apparent in the death row phenomenon.

In a nut shell, the definition of torture under Article 1 of CAT does not include the death penalty. Article 1(1) of CAT allows for the imposition of the death penalty if it is concluded with the laws of the state imposing the sanction.[132] However, methods of execution, such as hanging, stoning and the gas chamber amount to torture. The harsh conditions on the death row phenomenon may also amount to torture.

125 Mendez JE (2010)2.

126 *Jabari v Turkey, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000*. In this case, the European Court of Human Rights held that death by stoning was a violation of the prohibition on torture and that the possibility of being stoned to death would make deportation of the complainant to the Islamic Republic of Iran contrary to article 3 of the European Convention.

127 United Nations Human Rights Committee: *Chitat Ng v. Canada, Comm. No. 469/1991, 49th Session, U.N. Doc. CCPR/C/49/D/469/1991 at 16.4 (Nov. 5 1993).*

128 Hudson P 'Does the death row phenomenon violate a prisoner's human right under international law' (2000) 11 no 4 *EJIL* 836.

129 Hudson P (2000)836.

130 Hudson P (2000)836.

131 Chenwi L (2007)112.

132 Article 1(1) of CAT.

2.7 Death penalty and the right not to be treated in a cruel, inhuman and degrading manner

The main question to be addressed in this section is whether the death penalty violates the right not to be treated in a cruel, inhuman and degrading manner. The discussion commences by outlining the scope and ambit of the right not to be treated in a cruel, inhuman and degrading manner.

A plethora of international human rights instruments prohibits cruel, inhuman or degrading treatment or punishment. The right not to be treated in a cruel, inhuman and degrading manner is protected under the UDHR. Article 5 of the UDHR provides that, 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'.[133] The CAT, under Article 16, also states that, 'state parties must prevent other acts of cruel, inhuman or degrading treatment or punishment, which does not amount to torture'.[134] The ICCPR also prohibits cruel, inhuman or degrading treatment or punishment. Article 7 of the ICCPR states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'[135] In particular, no one shall be subjected, without his free consent, to medical or scientific experimentation.[136] At regional level, the right not to be treated in a cruel, inhuman and degrading manner is protected by Article 5 of the African Charter. This article states that,

> 'Every individual shall have the right to respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of cruel, inhuman or degrading punishment and treatment shall be prohibited.'[137]

The issue whether the death penalty violates the right not to be treated in a cruel, inhuman and degrading manner depends on our understanding of the meaning of cruel, inhuman and degrading punishment. The word 'cruel' can be defined as an act 'disposed to inflict pain or suffering.'[138] A punishment can be cruel either because it inherently involves so much physical pain or suffering that civilized people cannot tolerate it, or because it is excessive

133 Article 5 of the UDHR.

134 Article 16 UN General Assembly Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 10 December 1984.

135 Article 7 of the ICCPR.

136 Article 7 of the ICCPR.

137 Article 5 of the African Charter.

138 Longman Dictionary of English Language IN penguin Hutchinson Reference Library (1996).

and serves a legislative purpose that an alternative punishment could still serve.[139] It must also be noted that, "cruel punishment is not a static notion, as it reflects the evolving standards of decency that mark the progress of a maturing society."[140] This means that, 'what might not have been regarded as cruel punishment decades ago may be revolting to the new sensitivities which emerge as civilisation advances'.[141] 'Inhuman' treatment means, on the other hand, failing to conform to basic human needs or brutal.[142] 'Degrading' refers to lowering in status or stripping of honour.[143]

There are certain methods of execution that amount to a cruel, inhuman and degrading treatment. As it is indicated above, a method of execution amounts to treating prisoners in a cruel, inhuman and degrading treatment if the method goes beyond causing the least possible mental and physical suffering.[144] Based on this, there is an agreement that execution by stoning amounts to a cruel, inhuman or degrading form of punishment or treatment. This is also true with some cases of hanging, in which the prisoner does not die instantly and he or she is subjected to bludgeoning or the plucking off of the head, which constitutes, without doubt a cruel, inhuman and degrading punishment.[145] It is submitted that hanging amounts to severe physical suffering of the prisoner, thereby, violating the right not to be treated in a cruel, inhuman and degrading manner. The UN Human Rights Committee, in the case of *Ng v Canada*, has also held that, 'executions by gas asphyxiation violates Article 7 of the ICCPR as it does not meet the test of least possible physical and mental suffering'.[146] Current medical evidence also revealed that the combination of drugs used in lethal injection can cause excruciating pain.[147] Therefore, the view that lethal injection is a peaceful and painless method of execution is also questionable because even if the process is administered without

---

139 Schabas W 'International legal aspects' in Hodgkinson P & Rutherford N (eds.) *Capital punishment: Global issues and prospects* (1996)21.

140 Schabas (1996)21.

141 Chenwi L (2007) 98.

142 *Longman Dictionary of English Language IN penguin Hutchinson Reference Library (*1996).

143 *Longman Dictionary of English Language IN penguin Hutchinson Reference Library* (1996).

144 United Nations Voluntary Fund for the victims of Torture: Interpretation of Torture in the light of the practice and jurisprudence of the international bodies. (2011) available at: http://www.ohchr.org (accessed on 5 October 2014).

145 Mendez JE (2012)8.

146 *Chitat Ng v Canada , Communication No. 469/1991, UN.Doc. CCPR/C/49/D/469/1991(1994).*

147 Mendez JE(2012)8.

technical errors, the person being executed might experience suffocation.[148] Thus, the execution of prisoners by lethal injection violates the right not to be treated in a cruel, inhuman and degrading treatment or punishment.

Another aspect of the death penalty, which might violate the right not to be treated in a cruel, inhuman and degrading manner, is the prolonged confinement of prisoners on the death row as mentioned earlier, is often referred to as the death row phenomenon.[149] The UNHRC in the case of *Simms v Jamaica* noted that, 'prolonged detention on the death row may constitute cruel and inhuman treatment'.[150] The death penalty is a cruel process, which necessarily involves waiting in uncertainty for the sentence to be set aside or carried out.[151] The UN Special Rapporteur on torture also observed that, "if a person sentenced to death has to wait for long periods before they know whether the sentence will be carried out or not, the psychological effect may be equated with severe suffering, often resulting in serious physical complaints."[152]

However, there are those who argue that prolonged delay on its own does not amount to a violation of the right not to be treated in a cruel, inhuman and degrading manner. The UNHRC in the case of *Francis v Jamaica* noted that, "delay in itself will not suffice or constitute a violation of the right not to be treated in a cruel, inhuman and degrading manner."[153] The Committee noted that there must be further compelling circumstances. In this case, three factors where considered in assessing whether there had been a violation of Article 7 of the ICCPR.[154] These factors include the extent to which the delay was due to the state, the conditions on the death row and the mental condition of the prisoner. The

148 Zimmers T etal 'Lethal injection for execution: chemical asphyxiation?' (2007) 4 *PLoS Medicine* 156.

149 Death row conditions are often worse than those for the rest of the prison population, and prisoners on death row are denied many basic human necessities. Examples of current death row conditions around the world include solitary confinement for up to 23 hours a day in small, cramped, airless cells, often under extreme temperatures; inadequate nutrition and sanitation arrangements; limited or non-existent contact with family members and/or lawyers; excessive use of handcuffs or other types of shackles or restraints; physical or verbal abuse; lack of appropriate health care (physical and mental); and denial of access to books, newspapers, exercise, education, employment, or other types of prison activity.

150 *Simms v Jamaica Communication* No: 541/1993,UN.Doc.CCPR/C/53/D/541 1993/ (1995).

151 *Simms v Jamaica Communication* No: 541/1993,UN.Doc.CCPR/C/53/D/541 1993/ (1995).

152 Chenwi L 2007) 112.

153 *Francis v Jamaica*, Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994 (1995).

154 *Francis v Jamaica*.

compelling circumstances in the case of *Francis v Jamaica,* which led to the committee's finding of a violation, was that, over a period of detention on the death row that exceeded 12 years, the complainant had developed apparent signs of severe mental imbalance.[155]

The UNHRC in the case of *Stephens v Jamaica* also confirmed that, 'the view that prolonged detention on the death penalty cannot be generally considered as cruel, inhuman and degrading form of punishment if there are no other further compelling circumstances'.[156] The compelling circumstances or special circumstances mentioned in the case of *Stephens v Jamaica* are constant anxiety, agony of suspense, bad living conditions, total lack of sanitation, inadequate food, overcrowding and any other inhuman circumstances that a prisoner on the death row can experience during incarceration.[157]

The other characteristic of the death row phenomenon that is often deemed to violate the right not to be treated in a cruel, inhuman or degrading treatment of punishment is solitary confinement. Individuals held in solitary confinement suffer extreme forms of sensory deprivation, anxiety and exclusion.[158] These conditions clearly surpass the standard of lawful deprivation of liberty under international human rights law.[159] According to Mendez "solitary confinement, in combination with the knowledge of death and the uncertainty of whether or when an execution is to take place, contributes to the risk of serious and irreparable mental and physical harm and suffering to the inmate."[160] Solitary confinement used on death row, by definition, prolonged and indefinite, thus, constitutes cruel, inhuman or degrading treatment or punishment or even torture.[161]

Other harsh conditions currently employed on death rows throughout the world may

155 *Francis v Jamaica*.

156 *Stephens v Jamaica, Communication No. 373/1989, U.N. Doc. CCPR/C/55/D/373/1989 (1995).*

157 *Stephens v Jamaica*. The court however, held that prolonged detention of prisoners on the death row does not amount to treatment of prisoners in a cruel, inhuman or degrading treatment or punishment because holding delay, to be a violation of this right would convey a wrong message to state parties that retain the death penalty that they should carry out a capital sentence as expeditiously as possible. The Committee held that there were no compelling circumstances over and above the length of detention on the death row, which would turn Mr Johnson's detention into violation of articles 7 and 10 of the ICCPR.

158 Mendez JE (2012)8.

159 Mendez JE (2012)8.

160 Mendez JE (2012)8.

161 Mendez JE (2012)8.

themselves constitute violations of the prohibition of torture or cruel, inhuman or degrading treatment. The UNHRC has expressed concern over the living condition of inmates on death row in terms of visits and correspondence, cell size, food, exercise, extreme temperatures, lack of ventilation, and lack of time outside of cells as constituting violations of articles 7 and 10 of the Covenant.[162]

At regional level, the African Commission also dealt with the issue whether the death penalty violates the right not to be treated in a cruel, inhuman and degrading manner. In the case of *International Pen and Others v Nigeria*, the African Charter had to decide whether the treatment of a prisoner amounted to violation of the right not to be treated in a cruel, inhuman and degrading manner.[163] The main argument was that, the prisoner Ken Saro-Wiwa, was kept in leg irons and handcuffs and subjected to ill-treatment including beatings and being held in cells which were airless and dirty, then denied medical attention, during the first days of his arrest.[164] The African Commission found these conditions to be in violation of Article 5 of the African Charter.

From the foregoing it can be concluded that, there are certain methods of execution such as stoning, hanging and use of the gas chamber, which violates the right not to be treated in a cruel, inhuman and degrading manner. The prolonged confinement of prisoners on the death row under poor sanitation, overcrowding, inadequate food and other inhuman conditions violates the right not to be treated in a cruel, inhuman and degrading manner. Solitary confinement of prisoners under the death row also violates the right not to be treated in a cruel, inhuman and degrading manner.

2.8 Death penalty and the right to fair trial

The right to fair trial is another right that is often raised in topics dealing with the death penalty from a human rights perspective. The aim here is to determine whether the death penalty violates the right to fair trial.

---

162 Mendez JE (2012)10.

163 *International Pen and Others v. Nigeria, African Commission on Human and Peoples' Rights*, Comm. Nos. 137/94, 139/94, 154/96 and 161/97 (1998).

164 *International Pen and Others v Nigeria*.

The right to fair trial is protected under the UDHR. Article 10 of the UDHR guarantees the right of everyone, in the determination of any criminal charge against him, to a fair and public hearing by an independent and impartial tribunal.[165] Article 11(1) of the UDHR guarantees the right of everyone charged with a penal offence 'to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.'[166] Furthermore, Article 6(2) of the ICCPR provides that, 'the death sentence can only be carried out pursuant to a final judgment rendered by a competent court.'[167] The right to fair trial is also protected under Article 14 of the ICCPR. Article 14 of the ICCPR gives a full spectrum of all the rights that need to be followed in criminal matters.[168] At regional level, the right to fair trial is protected under Article 7 of the African Charter.[169]

The right to a fair trial is one of the cornerstones of a democratic society based on the rule of law.[170] It is designed to protect individuals from the unlawful and arbitrary curtailment of basic rights and freedoms, the most prominent of which are the right to life and liberty.[171] The right to fair trial also play a fundamental role to ensure that, 'all individuals are protected equally by law throughout the criminal process, from the moment of investigation or detention until the final disposition of their case.'[172] A fair trial is particularly important when the outcome could result in the state taking a person's life.[173] The general overview of the right to fair trial include, the right to equality before the law and courts, to be tried by a competent, independent and impartial tribunal established by law, to fair hearing, public hearing, to be presumed innocent.[174] The right to fair trial also entails the right not to be compelled to incriminate oneself, to be tried without undue delay, right to defend oneself in

165 Article 10 of the UDHR.

166 Article 11(1) of the UDHR.

167 Article 6(2) of the ICCPR.

168 Article 14 of the ICCPR.

169 Article 7 of the African Charter.

170 Amnesty International *Fair Trial Manual* 2ed (2014)18.

171 Chenwi L (2007)112.

172 Penal Reform International *Death penalty information Pack* (2011)20.

173 Penal Reform International (2011)20.

174 Amnesty International *Fair Trial Manual 2ed* (2014)18. These rights are protected under Article 14 of the ICCPR and also Article 7 of the African Charter on Human and People's Rights.

person or through counsel, right to be present at trial, right to an interpreter and also the right to call and examine witnesses.[175]

With regard to death penalty cases, there are certain procedural safeguards that need to be followed before the imposition of the sentence. These procedures are laid down in the ICCPR. Article 6 of the ICCPR demands a fair trial before the imposition of the death penalty under two heads, namely the protection against 'arbitrarily deprivation' of one's life and the requirement that the death penalty not be imposed when the Covenant is otherwise breached.[176] This has been interpreted by the UNHRC to mean that in all capital trials a fair trial that observes all the provisions of the ICCPR must be held, without which the death penalty may not be imposed.[177]

The UN Special Rapporteur on extrajudicial, summary of arbitrary executions reiterated that:

> 'Proceedings leading to the imposition of capital punishment must conform to the highest standards of independence, competence, objectivity and impartiality of judges and juries, in accordance with the pertinent international legal instruments. All defendants facing the imposition of capital punishment must benefit from the services of a competent defense counsel at every stage of their proceedings. Defendants must be presumed innocent until their guilt has been proved beyond a reasonable doubt, in strict application of the highest standards from the gathering and assessment of evidence. In addition, all mitigating factors must be taken into account.'[178]

There is a general consensus that the mandatory imposition of the death penalty violates the right to fair trial. Mandatory death sentences remove the ability of the courts to consider relevant evidence and potentially mitigating circumstances when sentencing an individual.[179] It precludes the court from taking into account different degrees of moral reprehensibility.[180]

---

175 Amnesty International *Fair Trial Manual 2ed* (2014)18.

176 UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, available at: *http://www.refworld.org/docid/45388400a.html* (accessed 3 September 2014).

177 UN Human Rights Committee (The HRC), CCPR General Comment No 6: Article 6 (Right to Life).

178 Report by the special Rapporteur on extrajudicial, summary or arbitrary execution *UN Doc E/CN.4/1997,60*, 24 December 1996 para 81.

179 Novack A 'Capital sentencing discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014)14 *AHRLJ* 28.

180 Novack A (2014)14 *AHRLJ* 28.

The issue of mandatory death penalty with regard to the right to fair trial was also discussed in the case of *Thompson v Saint Vincent and the Grenadines*.[181] In that case, the UNHRC noted that, 'the death sentence is different from other sentences in that Article 6(4) expressly demands that everyone under sentence of death shall have the right to seek pardon or commutation and that amnesty, pardon or commutation may be granted in all cases'.[182] Therefore, the Committee concluded that the mandatory death penalty violates the right to fair trial since it excludes the right to seek pardon or commutation of the sentence or rather give an accused person an opportunity to present his case in court.[183]

It is also now well established that a death penalty that is imposed without giving the accused adequate time and facilities to prepare for defence or an opportunity to consult with a legal counsel of choice, amounts to a violation of the right to fair trial. In the case of *Burrel v Jamaica*, the UNHRC had to determine whether the imposition of the death penalty after an unfair trial violated article 14(3)(b) and article 6 of the ICCPR.[184] The Committee concluded that there was a violation of article 14(3)(b) and article 6 of the ICCPR due to the fact that Mr Burrel was not informed that his legal aid counsel was not going to argue any grounds in support of his appeal and was not given an opportunity to consider any remaining options open to him.[185] The Committee, therefore, considered this to be in violation of the right to have adequate time and facilities for the preparation of one's defence and to communicate with the counsel of one's own choosing.[186]

---

181 *Eversley Thompson v St. Vinvent and the Grenadines*, Communication No. 806/1998, U.N. Doc. CCPR/C/70/D/806/1998 (2000).

182 *Eversley Thompson v St. Vinvent and the Grenadines*.

183 *Eversley Thompson v St. Vinvent and the Grenadines*.

184 *Rickly Burrell v Jamaica*, Communication No. 546/1993, U.N. Doc. CCPR/C/53/D/546/1993 (1996).

185 *Rickly Burrell v Jamaica*.

186 Article 14(3) (b) of the ICCPR. The interpretation by the UN HRC and the ACHPR rights reveals that, fair trial guarantees in death penalty cases must be implemented in all cases without exception. Although it is a rule aligned in the golden thread of international human rights law that, all procedural and administrative safeguards must be followed before imposing the death penalty, there is still a risk that the death penalty can be inflicted on innocent people. Criminal justice systems are not infallible. Therefore proceedings leading to the imposition of capital punishment must conform to the highest possible standards of independence, competence, objectivity and impartiality in accordance with the pertinent international standards and norms.

The UNHRC has also held that the imposition of the death penalty after undue delay violates the right to fair trial under Article 14(3) of the ICCPR, which protects the right to be tried without undue delay. In the case of *Lubutu v Zambia*, the Committee found a violation of Article 14(3) (c) of the ICCPR because the trial process took eight years.[187] The Committee then ordered that the death sentence imposed on Mr Lubuto be commuted because the sentencing after a period of eight years was regarded as an undue delay of the trial process.[188]

The imposing of the death penalty without giving the accused person an opportunity to consult with a legal practitioner of choice amounts to a violation of the right to fair trial. In the case of *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, the African Commission found a violation of Article 7(1) (c) of the ACHPR which is the right to defence.[189] The trial of the Chirwas took place before a traditional court consisting of five chiefs who had no legal training and they were tried without being defended by a legal counsel.[190] The trial court sentenced the Chirwas to death. However, the sentences were later on commuted to life in prison due to the fact that the accused persons were tried before a traditional court without a legal counsel to represent them.[191]

The denial of the right to appeal in death penalty cases is also deemed to violate the right to fair trial. In the case of *African Commission Forum of Conscience v Sierra Leone*, the ACHPR noted that the lack of the right to appeal in the case of a death sentence constitute a violation the right to fair trial protected by the African Charter.[192] The African Commission

---

187 *Lubuto v Zambia*.

188 *Lubuto v Zambia*. Fairness of the legal process has a particular significance in criminal cases, as it protects against human rights abuses and is the foundation for substantive protection against state power. The death penalty under international and regional human rights law falls short of the standards of a fair trial protected under article 14 of the ICCPR and also article 7 of African Charter on Human and Peoples' Rights because trials are usually conducted after excessive delays and in some cases defendants do not have access to legal assistance and lack of proper defence.

189 *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi, African Commission on Human and Peoples' Rights, Comm. Nos. 64/92, 68/92, and 78/92 (1995.*

190 *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi.*

191 *Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi.*

192 *Forum of Conscience v Sierra Leone African Commission on Human and Peoples' Rights* Communication No. 223/98.

in the case of *Constitutional Rights Project (in respect of Akamu and others) v Nigeria* similarly held that the denial of the right to appeal in death penalty cases violates the right to fair trial.[193]

In a nut shell, Article 6 and Article 14 of the ICCPR provide procedural safeguards that must be followed before the imposition of the death penalty. Generally, the mandatory imposition of the death penalty, failure to give an accused person adequate time and facilities to prepare for trial as well as the imposition of the death penalty after undue delay and the denial of the right to appeal in death penalty cases violates the right to fair trial.

2.9 Conclusion

This chapter has established that both international and regional instruments do not prohibit the imposition of the death penalty. However many of these human rights instruments that emphasise there are strict procedures which must be followed before the imposition of the sentence. It is also clear that the death penalty may under certain conditions violate the right to human dignity, right not to be subjected to torture, right not to be treated in a cruel, inhuman or degrading manner. It is against this background that the next chapter will determine whether the continued retention of the death penalty in Zimbabwe violate the country's international and regional obligations of protecting and promoting human rights.

193 *Constitutional Rights Project v Nigeria, African Commission on Human and Peoples' Rights*, Comm. No. 60/91 (1995) The issue of impartiality of tribunals with regard to the imposition of the death penalty was also discussed in the case of special courts in Sudan. In 2002, special Courts in the Darfur region, created in 2001 by the presidential decree to try offenders related to armed robbery, imposed death sentence after summary trials under military judges where accused where frequently denied lawyers. The crisp point in this case is that these courts could not be seen as impartial therefore the imposition of the death penalty violated the right to fair trial.

Chapter 3: The death penalty in Zimbabwe

3.1 Introduction

The death penalty is one of the oldest punishments in Zimbabwe.[194] Despite the growing consensus that the institution of capital punishment is not inherently sacrosanct and that it breaches fundamental human rights, the death penalty has been retained as a form of punishment by the new constitution.[195] The main objective of this chapter is to show the position of the death penalty under the Zimbabwean constitutional and legal framework and determine whether the application of the death penalty in Zimbabwe is in line with the country's international and regional obligations of promoting and protecting fundamental human rights.

This chapter begins the discussion by providing a brief background on the death penalty in Zimbabwe. This is followed by an outline of the current position of the death penalty in that country. The chapter the briefly discusses the status of international law in Zimbabwe. The last part of this paper seeks to determine whether the continued retention of the death penalty by Zimbabwe violates fundamental human rights.

3.2 Death penalty in Zimbabwe: A historical background

The death penalty was introduced as a form of punishment for the first time in 1963 with the adoption of the first Penal Code of the then Southern Rhodesia (Zimbabwe).[196] Under the Penal Code, the death penalty was widely used for criminal offences such as murder, rape and certain political offences.[197] The mandatory death penalty was also introduced for petrol bombing and possession of arms of war.[198] This was challenged based on S60 (1) of the 1961 Constitution of Southern Rhodesia, which protected the right not be treated in a cruel, inhuman and degrading manner.[199] However, the challenge was not successful because

---

194 Human Rights Bulletin *The Death penalty in Zimbabwe* (2012)1.

195 Chemhuru M and Masaka D 'Zimbabwe's Constitution making process and the death penalty. A philosophical reflection' (2011)5 *African Human Rights Law Journal* 126.

196 Criminal Procedure and Evidence Act Statute Law of Southern Rhodesia Volume. 1, Title 5, chapter. 31(Salisbury 1963).

197 Criminal Procedure and Evidence Act.

198 Novak A *The death penalty in Africa: Foundations and future prospects* (2014) 19.

199 Section 60(1) of the Constitution of Southern Rhodesia 1961.

S60(3) of the Constitution contained a limitation clause excluding constitutional challenge for any form of punishment that had been lawful in Southern Rhodesia before the Constitution came into force.[200] The mandatory death penalty for petrol bombing and possession of arms of war was a lawful punishment that came into effect prior to the adoption of the 1961 Constitution of Southern Rhodesia.

With the escalation of the war in Rhodesia in the 1970s, the death penalty was frequently used against the guerrilla fighters.[201] In fact the most popular form of execution during the Zimbabwean colonial period was hanging.[202] That is also why some scholars have argued that, during the war in Southern Rhodesia (Zimbabwe), the British colonial settler government used the death penalty as one of the ways of suppressing and silencing the dissenting voices among the indigenous people of Zimbabwe. "It was also used as a ploy to muzzle the right of individuals to free speech and association."[203] This suggests that the death penalty has a tainted history as it was used as a form of instilling fear amongst the Zimbabwean people and promoting white minority rule. When Zimbabwe gained independence from British colonial rule in 1980 under the so-called the *Lancaster House Constitution*, the new era, in many aspects, represented a continuation in so far as the death penalty was concerned.[204] The independent Constitution of 1980 protected the right to life but allowed for the imposition of the death penalty.[205] The post-colonial criminal justice system also inherited a wide array of capital crimes from a period of white minority rule, which included murder, conspiracy to commit murder, treason, rape and aggravated robbery. More significantly, however, individuals sentenced to death had the automatic right of appeal to the Supreme Court. They could also apply to the President requesting for pardon or commutation of the death sentence to a lesser sentence.

It was only in 2000 that a significant change towards the imposition of the death penalty was about to be introduced through a draft constitution that was prepared by the *Chidyausiku*

200 Section 60(3) of the Constitution of Southern Rhodesia 1961.

201 Novack A (2014)33.

202 Novak A 'Abuse of state power: The mandatory death penalty for political crimes in Southern Rhodesia, 1964- 1970' (2013)19 *Fundamina* 28.

203 Chakanyuka A 'The death penalty inhuman' *The Standard* 25 April 2010.

204 Lancaster House Agreement, 21 December 1979.

205 Article 1(C) of the Lancaster House Agreement, 21 December 1979.

Commission and the National Constitutional Assembly.[206] Under this draft constitution, popularly known as the Kariba draft Constitution, the death penalty could only be imposed on people convicted for murder.[207] More importantly, the death penalty, according to the draft constitution, could not be imposed on a person who was below the age of 18 years when the offence was committed as well as on pregnant women.[208] Unfortunately, the Kariba draft constitution was not adopted. As a result the position on the death penalty did not change.[209] The position was further entrenched in 2004 with the passing of the Criminal Procedure and Evidence Act. Section 337A (a) of the Act allowed the imposition of the death penalty for murder and treason.[210] It also allowed the courts to consider extenuating circumstances when sentencing.[211] The presence of extenuating circumstances meant that the court could substitute the death penalty with a lesser sentence.[212]

---

206 Kariba Draft Constitution 2000.

207 Kariba Draft Constitution 2000.

208 Section 37 of the Kariba Draft Constitution 2000.

209 The Standard ' Exposing the shortcomings of the Kariba draft Constitution' 2 July 2009 available at *http://www.thestandard.co.zw/2009/07/02/exposing-shortcomings-of-the-kariba-draft-constitution/* accessed on (3 December 2014).

210 Section 337 A of the Criminal Procedure and Evidence Act Zimbabwe Chapter 9:07 2004.

211 Section 337 of the Criminal Procedure and Evidence Act Zimbabwe Chapter 9:07 2004. This section states that 'the High Court may impose any sentence other than the death sentence when the court is of the opinion that there are extenuating circumstances or when the offender is a woman convicted of the murder of her newly born child.' Extenuating Circumstances refers to, facts surrounding the commission of a crime that work to mitigate or lessen it. Extenuating circumstances might include extraordinary circumstances, which are unusual factors surrounding an event, such as the very young age of a defendant in a murder case. In the case of Robert Chingaoma v The State, the court defined extenuating circumstances as any facts bearing on the commission of the crime which reduce the moral blameworthiness of the accused as a distinct form of his legal culpability. This doctrine of extenuating circumstances was passed to Zimbabwe legislation from the colonial masters wholly unreformed. Courts in Zimbabwe never developed a clear method of weighing aggravating and mitigating circumstances, adhering to the traditional rule placing the burden of proof on the accused. The Supreme Court permitted trial judges to either weigh all mitigating factors and aggravating factors together to determine whether extenuating circumstances existed, or to determine that extenuating circumstances existed before weighing them against aggravating factors. In most cases the Courts upheld the death sentence where extenuating circumstances appeared to exist but were outweighed by aggravating factors.

212 *Robert Chingaoma v The State* SC 105/2000. In addition, the court also laid down certain factors that

In 2007, the *Constitution of Zimbabwe Amendment No 18 act 2007* was adopted. Section 12 of the Constitution allowed for the imposition of the death penalty. [213] More importantly, the amendment allowed the president to grant a pardon to any person convicted of a criminal offence against any law.[214] This was called prerogative of mercy,[215] an automatic review of the death sentence, which takes place whether the condemned person seeks it or not.[216] It was also the last avenue of hope a convict on death penalty could use in an attempt to avoid the gallows of death.

Although the death penalty was a legal sanction in Zimbabwe, it was, on a number of occasions, challenged on the basis that it amounts to a violation of constitutionally protected rights, including the right to life, human dignity and the right not to be treated in a cruel, inhuman and degrading manner.[217] In *S v Chileya,* the Supreme Court had to decide whether the use of hanging in the administration of the death penalty violated S15 (1) of the 2007 Constitution, which prohibited inhuman or degrading treatment or punishment.[218] Unfortunately, just before the hearing, a constitutional amendment bill was published, which

---

were supposed to be considered before determining the presence of extenuating circumstances. These factors are, whether there are facts which might be relevant to extenuation such as immaturity, intoxication, belief in witchcraft. The crisp point in determining the presents of extenuating circumstances in this case was whether the above mentioned facts in their cumulative effect probably had a bearing on the accused's state of mind in doing what he did and whether such bearing was sufficiently appreciable to abate the moral blameworthiness of the accused in doing what he did.

213 Section 12 of the Constitution of Zimbabwe Amendment No 18 act 2007.

214 Section 31(I) (a) of the Constitution of Zimbabwe Amendment No 18 act 2007.

215 In short, the notion of prerogative of mercy involves that the president can generally substitute a less severe punishment for that imposed for any offence or suspend the punishment for a period of time and may impose conditions on any such pardon, respite the substitution of any offence. With regard to the application of the death penalty, the prerogative of mercy is the last stop of hope with regard to pardon or commutation of the sentence. Only a few prisoners have escaped the jaws of the sentence through this principle

216 *Nkomo* & *Another v Attorney General* 1993 (2) ZLR 422 (S). Generally speaking, the use of the word review denotes some sort of legal insights into the case, not just a mere hunch. In the Zimbabwean case, therefore, it would appear that with respect to the death sentence, the President is duty bound to consider only such petitions for mercy. However, there is no specific procedure as to how the President should exercise his powers of prerogative of mercy.

217 Kersting N *Constitution Transition: Academic Inputs for a new Constitution in Zimbabwe* (2009)85.

218 *Chileya v S* unreported case no SC 64/90 (1990).

included a controversial provision specifically upholding the constitutionality of execution by hanging.[219]

The death penalty was also challenged in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and Others*.[220] In that case, the Supreme Court had to consider whether the dehumanising factor of prolonged delay, considered in conjunction with the harsh and degrading conditions in the condemned section of the holding prison, meant that the executions themselves would have constituted inhuman and degrading treatment contrary to S15(1) of the Constitution.[221] The Court concluded that the death row phenomenon in Zimbabwe was a violation of S15 of the Constitution. Based on that, the court commuted the sentences of death to life imprisonment.[222] However, this decision was later overturned through the retrospective application of the amendment of S15(1) of the Constitution, which made it clear that a delay in the execution of the sentence of death does not amount to a contravention of S15(1) of the Constitution.[223]

In addition to the challenges brought before the courts, two former Chief Justices voiced their concern over the application of the death penalty. Chief Justice Dumbutshena argued that many of the individuals that are sentenced to death for murder should rather be given a life imprisonment term.[224] His predecessor, C.J Gubbay, also expressed his opposition to the death penalty by pointing out that, "what may not have been regarded as inhuman or

---

219 Before a judgement was given in this case, the Minister of Justice, Legal and Parliamentary Affairs Informed Parliament that any holding to the contrary would be untenable to government which holds the correct and firm view that parliament makes the laws and the courts interpret them. He added that the abolition of the death sentence was a matter for the executive and legislature and that the government will not and cannot countenance a situation where the death penalty is de facto abolished through the back door.

220 *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others* (2001) AHRLR 248 (ZwSC 1993).

221 *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others*.

222 *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others*.

223 *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others*.

224 Mudimu N 'Zimbabwe: They live by the sword, but should they die by the sword?' *Inter Press Service News Agency* 9 June 2011.

degrading a few decades ago may be revolting to new sensitivities which emerge as civilization advances."[225]

Despite the challenges brought against the death penalty, the latter remained as an integral part of the country's criminal justice system. Yet, despite the fact that 76 prisoners were executed between April 1980 and December 2003, there hasn't been a single execution since 2004.[226] This seemed to send a message to the global world that Zimbabwe is on the road towards abolishing the death penalty. However, in 2013, a new constitution was adopted in Zimbabwe, which provided for the continued imposition of the death penalty. Furthermore, a new hangman was hired in the same year. These developments seem to suggest that the death penalty is not going to be abolished in Zimbabwe anytime soon.

3.3 Current position of the death penalty in Zimbabwe

As mentioned earlier, Zimbabwe introduced a new constitution in 2013, which retained the death penalty as a legal punishment. Although S48 of the new Constitution protects the right to life, the same provision permits the imposition of the death penalty under certain circumstances.[227] Under S48, the death penalty can be imposed only on a person convicted of murder committed in aggravating circumstances in accordance with a final judgment of a competent court.[228] The constitution excludes certain groups of people from the death penalty, including women and any person who was less than 21 years old or more than 70 years when the offence was committed.[229]

According to the Constitution, any person sentenced to death has the right to seek pardon from the president.[230] The president of Zimbabwe is empowered, in terms of S112 of the Constitution, to commute the sentence of death.[231] The president, after consultation with the cabinet, may exercise the power of mercy.[232] Under this section, the president may grant a

---

225 Nkatazo L 'Man challenges death penalty' *New Zimbabwe* 7 April 2010.

226 Amnesty International *Death sentences and executions 2013* (2014)49.

227 Section 48(1) of the Constitution of Zimbabwe Amendment No 20 Act 2013.

228 Section 48 (2) (a) of the Constitution of Zimbabwe Amendment No 20 Act 2013.

229 Section 48 (c) (i) of the Constitution of Zimbabwe Amendment No 20 Act 2013.

230 Section 48(2) (e) of the Constitution of Zimbabwe Amendment No 20 Act 2013.

231 Section 112 of the Constitution of Zimbabwe Amendment No 20 Act 2013.

232 Section 112 of the Constitution of Zimbabwe Amendment No 20 Act 2013. In his case, the accused has

pardon to any person convicted of an offence against the law.[233] The president can also grant a respite from the execution of a sentence for any offence for an indefinite or specified period of time.[234]

In as much as the Constitution retained the death penalty, it has brought some important changes. The constitution has, for example, abolished the mandatory death penalty.[235] It is also of paramount importance to note that the Constitution limits the crimes punishable by death to murder committed in 'aggravating circumstances'.[236] However, the problem is that there is no legislation in Zimbabwe which defines the aggravated circumstances or the conditions under which capital punishment can be imposed. Justice Hungwe, in the case of *S v Mutsinze,* noted that, "the introduction of aggravating circumstances in the Constitution suggests that the Constitution envisages the enactment of an Act of Parliament that defines the term aggravated circumstances or sets out the conditions that constitute aggravated circumstances."[237] However, to date there is no legislation which defines the term aggravated circumstance or lay out conditions under which capital punishment can be imposed.

Another progressive step that was taken by the Constitution towards the abolishment of the death penalty is the exemption of women from the death penalty. Section 48(2)(d) of the

---

no right to a personal hearing during the deliberations over the possible commutation of his sentence, he may only submit a mercy petition. The Constitution provides that where the President exercises his discretion in the commutation of a death sentence or declines to do so, the court shall not enquire into the manner in which the President has exercised his discretion. This is another formidable discretion peculiar to Zimbabwe and adds weight to the case of abolishing the death penalty in Zimbabwe. The main point of criticism is the overriding effect of presidential powers to pardon, through a clemency order for anyone who might have been put on death row. In its strict sense, this means that the executive is entirely at liberty to exercise its discretion, and that there are never any grounds whatsoever to impugn the president's actions in granting a clemency order to a condemned prisoner, or refraining to exercise his powers of prerogative of mercy. This is a serious, if not dangerous anomaly in the country's criminal justice system and should in itself be enough to provide grounds for the quashing of the death penalty in Zimbabwe.

233 Section 112(a) of the Constitution of Zimbabwe Amendment No 20 Act 2013.

234 Section 112(b) of the Constitution of Zimbabwe Amendment No 20 Act 2013.

235 UN Human Rights office of the High Commissioner *Moving away from the death penalty lessons from national experience* (2012)4.

236 Section 48(2) of the Constitution of Zimbabwe Amendment No 20 Act 2013.

237 S v Mutsinze (Unreported case).

constitution states that capital punishment must not be imposed on women.[238] The Constitution has also abolished the 'doctrine of extenuating circumstances' and granted judges a discretion to impose a lesser sentence even in the absence of extenuating circumstances.[239] Before the introduction of the new Constitution, the imposition of the death penalty was determined by the presence or absence of extenuating circumstances. The effective abolition of the doctrine of extenuating circumstances is consistent with a global trend toward discretionary death penalty regimes.

It must be noted that it is not only the Constitution that provides the legal framework for the continued imposition of the death penalty. The death penalty is also entrenched in Zimbabwe's domestic legislation. Section 20 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] 2013 states that 'anyone guilty of treason is liable to be sentenced to death or to life imprisonment'.[240] Under section 23, anyone guilty of insurgency, banditry, sabotage or terrorism is also liable to the death sentence if the crime has resulted in the death of a person even if the death was not intended.[241] In addition, S47 (2) (a) of the Act states that, 'anyone guilty of murder must be sentenced to death unless he or she was under the age of 18 when the crime was committed or the court finds that there are extenuating circumstances'.[242] Furthermore, Section 47(3) of the Act states that, 'anyone convicted of attempted murder, or of incitement or conspiracy to commit murder, may be sentenced to death.'[243] This Act, it seems, is inconsistent with S48 of the Constitution as it does not exclude individuals below the age of 21, old people or women from the application of the death penalty.

In addition to the Criminal Law (Codification and Reform) Act [Chapter 9:23], there are also a number of laws that regulate the imposition of the death penalty. One such legislation is the Criminal Procedure and Evidence Act. Section 337 A(a) of the Criminal Procedure and Evidence Act, which was adopted in 2007, states that the High Court must pass the death

238 Section 48(2) of the Constitution of Zimbabwe Amendment No 20 Act 2013.

239 Section 48(2) of the Constitution of Zimbabwe Amendment No 20 Act 2013. The new Zimbabwean constitution abolished the doctrine and created a pure discretionary death penalty regime, requiring the prosecutor to prove aggravating circumstances meriting the special punishment of death beyond a reasonable doubt.

240 Section 20 of the Criminal Law (Codification and Reform Act) Chapter 9:23 2004.

241 Section 23 of the Criminal Law (Codification and Reform Act) Chapter 9:23 Act 23 2004.

242 Section 47(2) of the Criminal Law (Codification and Reform Act) Chapter 9:23 Act 23 2004.

243 Section 47(3) of the Criminal Law (Codification and Reform Act) Chapter 9:23 Act 23 2004.

sentence on an offender convicted of murder unless the court is of the opinion that there are extenuating circumstances.[244] Under this Act, the High Court may pass the sentence of death on an offender convicted of murder or treason.[245] Section 338 of the Act exclude a certain category of people from the death penalty, including pregnant women, men or women over the age of 70, men or women who were under the age of 18 when they committed murder or treason.[246]

In many respects, the Act echoes the constitutional provision that mandates the impositions of the death penalty. The exclusion of people above the age of 70 from the death penalty under the Criminal Procedure and Evidence Act is in line with S48 of the Constitution which also excludes any person who was above the age of 70 when the offence was committed.[247] However, provisions of the Act that mandate the imposition of the death penalty for treason, pregnant women and people who were under the age of 18 when the offence was committed are constitutionally suspect since S48 of the constitution allows the imposition of the death penalty only for murder committed in aggravating circumstances and excludes women and people who were at the age of 21 when the offence was committed.[248] The fact that the Criminal Procedure and Evidence Act maintains the doctrine of extenuating circumstances is also not consistent with S48 of the Constitution that has given judges a discretion in imposing the death penalty by abolishing the doctrine of extenuating circumstances.

Another legislation that regulates the imposition of the death penalty is the Zimbabwean Defence Act. The first Schedule of this particular Act gives courts martial power to impose the death penalty on members of the defence forces for several military offences,[249] including aiding the enemy by abandoning a post which should be defended, handing over weapons to the enemy, protecting enemy soldiers, communicating with the enemy or giving the enemy useful information, mutiny and failing to suppress a mutiny, treason or murder committed outside Zimbabwe and attempts, conspiracies or incitements to commit any of the above offences.[250] The Act does not explicitly exclude women members of the defence forces. This

244 Section 337A (a) of the Criminal Procedure and Evidence Act Chapter 9:07.

245 Section 337A (b) of the Criminal Procedure and Evidence Act Chapter 9:07.

246 Section 338 of the Criminal Procedure and Evidence Act Chapter 9:07.

247 Section 48 of the Constitution of Zimbabwe 2013.

248 Section 48 of the Constitution of Zimbabwe 2013.

249 Schedule 1 of the Defence Act of Zimbabwe Chapter 11: 02 2002.

250 Schedule 1 of the Defence Act of Zimbabwe Chapter 11: 02 2002. Furthermore, the Genocide Act also

suggests that even pregnant members of the defence force are liable to the death penalty if they commit any of the abovementioned offences.[251] This raises the question whether the defence act is consistent with S48 of the Constitution that excludes women from the death penalty.

From the brief survey of the relevant law that governs the imposition of the death penalty in Zimbabwe, it is clear that Zimbabwe belongs to a category of countries that retain the death penalty. Although the death penalty is entrenched in the domestic legislation of Zimbabwe, not a single execution has been carried out since 2004.[252] This suggests that Zimbabwe can be classified as a *defacto abolitionist* state as it has gone for 10 years without executing any person on the death row.[253] However, there are two important developments that cast doubt on the future status of Zimbabwe as a defacto abolitionist state. First, the recent constitution of Zimbabwe has retained the death penalty.[254] Second, in the same year that the new constitution reaffirmed the retention of the death penalty, the government appointed a hangman, suggesting the possibility that people on the death row might be executed.[255] There is, as a result, no doubt, that Zimbabwe firmly belongs to the group of countries that regard the death penalty as a legitimate form of legal punishment. The question is whether this is a position that is in line with the country's international and regional obligations of protecting

---

deals with the imposition of the death penalty. Section 4 of this act provides that anyone guilty of genocide involving the killing of a person is liable to the same punishment as may be imposed for murder.

251 Schedule 1 of the Defence Act of Zimbabwe Chapter 11: 02 2002. This raises the question, whether the constitution which is the supreme law of the republic, is not applicable to the defence forces in Zimbabwe.

252 Human Rights Bulletin *The death penalty in Zimbabwe* (2012)1.

253 Human Rights Bulletin (2012)1.

254 Chenwi L 'Initiating constructive debate: A critical reflection on the death penalty in Africa' (2005)XXXVIII *CILSA* 478.

255 Kututwa N 'Amnesty International Zimbabwe: Appointment of a new hangman raises spectre of imminent executions' available at: http://www.amnesty.org.au (accessed on 23 October 2014).Years of unsuccessful headhunting by the country's justice and legal affairs ended last September with a sombre announcement by Justice and Legal Affairs secretary David Mangota that, the government had secured a hangman who was "raring to go". The macabre recruitment of a new hangman is disturbing and suggests that Zimbabwe does not want to join the global trend towards abolition of this form of punishment.

fundamental rights. To answer this question, we need to first outline the place of international law under the Zimbabwean constitutional and legal framework.

3.4 The Status of international law in Zimbabwe

There are two main theories that are used to determine the relationship between international law and domestic law, namely the monistic and dualistic approach.[256] According to the monistic approach, international law does not need to be translated into national law in order to form part of the laws that govern the country.[257] The act of ratifying an international treaty immediately incorporates that international law into national law.[258] According to the dualistic approach, on the other hand, international law is not directly applied in domestic law. In this model, international law must be translated into national legislation before it can be applied by the national courts.[259] Zimbabwe follows a dualist approach. This is clear from S327 (2) of the Constitution, which provides that, 'any international convention acceded to shall be subject to approval by Parliament and shall not form part of the law of Zimbabwe unless it has been incorporated into the law by Parliament.'[260]

As indicated earlier, Zimbabwe has undertaken an obligation under a number of international and regional treaties to safeguard and protect human rights. Although Zimbabwe is not a state party to the Second Optional Protocol to the International Covenant on Civil and Political Rights, which aims at the abolishment of the death penalty, it is a state party to a number of international and regional treaties that either limit the use of the death penalty or outline the conditions under which it can be applied. Zimbabwe, for example, assented to the ICCPR on 13 May 1991. Zimbabwe signed the African (Banjul) Charter on Human and Peoples' Rights on 20 February 1986 and also assented to it on 30 May 1986. Zimbabwe is also a state party to the African Charter on the Rights and Welfare of the Child that aims at protecting the rights of children.

Besides international and regional treaties, customary international law also forms part of the law of Zimbabwe. Section 326(1) of the Constitution states that, customary international law is part of the law of Zimbabwe unless it is inconsistent with the Constitution or an act of

256 Malanczuk P *Modern introduction to international law* (2002)64.

257 Malanczuk P (2002)64.

258 Malanczuk P (2002)64.

259 Section 326 of the Constitution of Zimbabwe Amendment No 20 Act 2013.

260 Section 327(2) of the Constitution of Zimbabwe Amendment No 20 Act 2013.

parliament.[261] Section 326(2) also states that, 'when interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation that is inconsistent with that law'.[262]

Now that we have identified the international and regional instruments that Zimbabwe is a state party to, the remaining question is whether the imposition of the death penalty in Zimbabwe is in line with the country's obligations under these human rights instruments.

3.5 The death penalty in Zimbabwe and fundamental human rights

The previous chapter has clearly outlined that there are certain rights under international law that are often violated through the imposition of the death penalty. These rights are the right to life, the right to human dignity, the right not to be treated in a cruel, inhuman and degrading manner and also the right to fair trial. This chapter shall now determine whether the application of the death penalty in Zimbabwe is consistent with the latter's international and regional obligations of protecting these rights.

From the outset, it must be noted that the mandatory death penalty, which is regarded as a violation of the right to life, was abolished under S48 of the Zimbabwean Constitution.[263] The abolishment of the mandatory death penalty in Zimbabwe is in line with the country's international and regional obligations of protecting and promoting the right to life. However, although Zimbabwe abolished the mandatory death penalty, the status and application of the

---

261 Section 326(1) of the Constitution of Zimbabwe Amendment No 20 Act 2013.

262 Section 326(2) of the Constitution of Zimbabwe Amendment No 20 Act 2013. Customary International law plays an important role in maintaining globally accepted principles. The International Law Association defines 'general customary international law' as a rule or principle that is widely, consistently and uniformly practiced which gives rise to legitimate expectations in the future. This law is binding on all states, whether or not a particular State believes or consents to the rule. In other words, it is not necessary for the consent of a State for it to be bound by a rule of international law. The two requirements for a principle to be recognised as customary law are *usus* and *opinion juris*. For the requirement of *usus* to be met, the principle must be constantly used in a similar manner. The second requirement of opinio juris states that there must be a belief that is followed as a matter of law. Both of these requirements must be met for a concept or principle to be considered as a part of International law.

263 Section 48 of the Constitution of Zimbabwe Amendment No 20 Act 2013.

death penalty in that country raises the question whether treatment the country is living up to its international and regional obligation of protecting and promoting human rights.

3.5.1 Capital crimes and fundamental human rights

From our discussion in chapter 2, we have established that the death penalty per se does not violate the right to life under the international and regional instruments. The wording of Article 6 of the ICCPR and Article 4 of the African Charter on Human and People's Rights reveals that the death penalty may be imposed for the serious crimes but it must be in accordance with both the law in force at the time of commission of the crime and must not amount to arbitrary deprivation of the right to life.[264] In the previous chapter, we have also established that the term 'most serious crimes' refer to crimes committed with the intention to kill and resulting in the loss of life.

The brief survey of the laws that regulate the death penalty in Zimbabwe has revealed that the crimes which can result in the death sentence are murder, treason, insurgency, banditry, sabotage, terrorism, aiding the enemy by abandoning a post which should be defended, handing over weapons to the enemy, communicating with the enemy. Although most of these crimes can be regarded as serious crimes, it is clear that some of these crimes such as treason, sabotage and handing over weapons to the enemy do not necessarily result in loss of life. Hence, it can be argued that the imposition of the death penalty in Zimbabwe for the above mentioned crimes that do not pass the threshold test of the most serious crimes under article 6(2) of the ICCPR amount to a violation of the right to life.[265]

3.5.2 Death row phenomenon and fundamental human rights

From our discussion in the previous chapter, it has become clear that the death row phenomenon violates, under certain circumstances, the right to human dignity, right not to be subjected to torture and the right not to be treated in a cruel, inhuman and degrading manner. The detrimental conditions on the death row, which are characterized by extended periods of solitary confinement and mental anxiety, violate the right to human dignity. The question is whether the death row phenomenon in Zimbabwe violates the above mentioned fundamental

264 Article 6 of the ICCPR.

265 Article 6(2) of the ICCPR.

human rights that are protected under the ICCPR and the African Charter on Human and Peoples' Rights.

In Zimbabwe, from the passing of the death sentence, prisoners are confined to a condemned section of the prison.[266] Each prisoner is confined to a separate tiny cell under constant supervision for a minimum of 21 hours and 40 minutes.[267] Under the death row in Zimbabwe, there is a total lack of facilities with which to pass the day.[268] A condemned prisoner is allowed two periods of exercise time of 30 minutes each in one of the two exercise yards, between 09:00 and 11:00 and 13:00 and 15:00, in a group of about ten other condemned prisoners.[269] No apparatus to exercise is supplied and they are not allowed to play games. At I5: 00, the condemned prisoner is required to leave all clothing outside his cell. Thereupon, he is incarcerated, naked, until the following morning.[270] As revealed by a former prisoner, the conditions on the death row are, to the say the least, unacceptable:

> *'The few blankets that are there are tattered and I am usually cold the whole night. There is no toilet in the cell. I use a five litre container that is kept in my room the whole day and night. I am in solitary confinement for 23 hours. I am not allowed any entertainment and I am not allowed to read anything in the cell, even a newspaper. I*

266 The attitude of the Courts to delay in the execution of the death sentence varies from one jurisdiction to another. Certain Courts have held that a condemned prisoner is not entitled to rely on the delay brought about by his exploiting such avenues for appeal or reprieve as may exist. It is, however, highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that by not making the maximum use of the judicial process available the condemned prisoner would have shortened and not lengthened his suffering.

267 For prisoners on the death row, contact with fellow prisoners around the prison is not allowed they are only allowed to associate with other condemned prisoners. The prisoners in Zimbabwe spoke of being left in virtual solitary confinement in cramped and unhygienic conditions. These conditions are characterized by the absence of any meaningful contact with the outside world. *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe and Others,*

268 The prisoners are deprived of all clothing from mid-afternoon to early morning the following day. The prisoners on the death row are isolated from the outside world. Most of the prisoners totally give up on ever seeing their families. Visitations for death row prisoners are allowed after 2 weeks only. Visitations from family members are allowed periodically and only last for ten minutes. No reading materials are allowed for prisoners other than of a religious nature.

269 Death penalty Worldwide 'The death penalty in Zimbabwe' available at *http://www.deathpenaltyworldwide.org (*accessed on 24 October 2014).

270 Death penalty Worldwide 'The death penalty in Zimbabwe' available at *http://www.deathpenaltyworldwide.org (*accessed on 24 October 2014).

am out of touch with the world so much so that I do not know what day it is, what time it is and what is happening on the outside world'.[271]

In most cases, these prisoners are taunted by prison officers with impending death by hanging and constant fear of being put to death.[272] These conditions on the death row were also graphically described in the affidavit of Admire Mthombeni:

'Because you spend so much time in your cell alone you endlessly brood over your fate and it becomes very difficult, and for some people impossible, to cope with it all. The treatment meted out to you by the warders is very harsh. They are continuously hassling you and chasing you up. If you make any complaint about anything to do with the conditions you run the risk of receiving a beating. One of the warders blows a whistle. Other warders come running and without further ado they start beating you with their baton sticks. The warders are also continuously reminding you of the hanging which awaits you. They continually taunt and torment you about it. For instance, they would ask you why you are bothering to read when you are going to hang. They would also say that you are now fat enough to hang. The gallows themselves are situated within the condemned section itself'.[273]

271 Death penalty Worldwide 'The death penalty in Zimbabwe' available at http://www.deathpenaltyworldwide.org (accessed on 24 October 2014). This delay in execution causes severe trauma on the inmates and some of them loose their mind. Mazango in his constitutional challenge before the Supreme Court noted that, "the very thought that I am dying steals all my hope for the future, makes me restless and the delay traumatises me. It causes me emotional and psychological trauma. Worse still, to think that I can spend 13 years before execution, like my colleague George Manyonga, crushes me''.

272 Chibvuri B 'Zimbabwe Prisons: Foreign Prisoner Support Service save a life'. A senior game ranger with the Zimbabwe Parks and Wildlife Management Maxwell Bowa (53) who escaped the gallows after the Supreme Court quashed his death sentence recently narrated his 10 months stay under the death row. According to Bowa, most of fellow inmates on death row have lost their minds and no longer have hope and the will to live. Bowa also stated that, there are some prisoners who have been on death row for 17 years.

273 *Catholic Commissioner for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe and Others*.

In case of *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Others* the court graphically alluded to the prison conditions which death row prisoners are subjected to:

> '*The four condemned prisoners have spoken of the agony and torment they suffer. They maintain that the harsh prison conditions to which they are subjected daily add substantially to the measure of their misery. They are left virtually in solitary confinement in cramped unhygienic conditions; there is an absence of meaningful contact with the outside world; they are permitted no reading material save that of a religious nature; there is a total lack of facilities with which to pass the day; they are deprived of all clothing from mid-afternoon to early morning; they are taunted by prison officers with impending death by hanging; they are affected by the mental deterioration of some fellow inmates and by suicides and attempt thereat; they are able to hear the sounds of executions being carried out'.*[274]

In the previous chapter, we established that torture does not include pain and suffering arising from lawful punishment. However, the conditions on the death row, such as long duration of detention, uncertainty of the moment of execution and deprivation of contact with the outside world amounts to torture. The prisoners in Zimbabwe are incarcerated under deplorable conditions. The fact that the prisoners are incarcerated for 23 hours daily, without adequate food, clothing and separated from their families. Therefore the long duration of detention, total isolation and uncertainty of the day of execution for prisoners under the death row in Zimbabwe arguably amounts to torture.[275]

The death row condition in Zimbabwe arguably amounts to cruel, inhuman and degrading treatment. A treatment is cruel, as indicated earlier, if it is disposed to inflict pain or suffering.[276] The constant anxiety and agony of suspense that the prisoners on the death row

---

274 *Catholic Commissioner for Justice and Peace in Zimbabwe v Attorney General of Zimbabwe and Others*. Therefore in most cases the prisoners find the situation unbearable and difficult to cope with. To add to the unbearable conditions faced by prisoners, the gallows themselves are situated within the condemned prisoners section itself. Therefore periodical hangings for the rest of people under the death row causes prolonged argon to the remaining condemned prisoners.

275 Chenwi L (2007) 126.

276 Longman Dictionary of English Language in penguin Hutchinson Reference Library (1996).

in Zimbabwe are subjected to undoubtedly causes mental trauma. Obviously, the fear experienced when prisoners know that one of their inmates will be hanged and the terrible ordeal of hearing the sounds of executions being carried out ignites mental deterioration.[277] In addition to that, the constant beating and harassment of prisoners on the death row amounts to a cruel method of punishment or treatment. There is also no doubt that the treatment meted out to inmates also amount to 'inhuman treatment'. As established earlier, inhuman punishment means failure to meet the standards of basic human needs. In light of this definition, the prolonged confinement of prisoners on the death row in Zimbabwe with constant anxiety, agony of suspense, sleeping on concrete with lice infested blankets, total lack of sanitation, inadequate food amounts to an inhuman method of punishment.

The treatment is also arguably degrading. Degrading as mentioned earlier refers to lowering in status or stripping of honor. The fact that prisoners under the death row in Zimbabwe are incarcerated naked, with 5 litre containers as toilet facilities amounts to a degrading method of punishment. This shows that prisoners on the death row in Zimbabwe are treated as subhuman and this arguably amounts to a violation of the right not to be treated in a degrading manner.

From the foregoing, it is clear that the death row phenomenon in Zimbabwe shows that the country is not upholding its international and regional mandate of protecting the right to

277 Mbanje P '10 months on death row. Man gives a chilling account' *The Standard News Paper* 7 July 2014. During his incarceration, a typical day in his tiny cell started at eight o'clock in the morning and they were given a five litre empty container to use as a toilet pan and early in the morning we would queue up and dump our excrement in a toilet." He experienced this dehumanising act for 10 months. Sick inmates on the death row are neglected they suffered to be able to get medical attention, they must make a written application to the officer in charge and if he sees it fit, you would then be granted permission to be attended to. According to Bowa the cause of this neglect is that the prison guards see no reason to spare resources on the inmates since the ultimate fate is to die. Breakfast consisting of porridge was served in the morning while lunch of tasteless boiled cabbage or half-cooked beans was served at 11am. The prisoners are allowed a few minutes to stretch their limbs in a small concrete covered courtyard. The inmates constantly graze their knees on the hard concrete jumping around and un-winding. Supper would come at 2 pm and after that the prisoners are separated from each other until the next morning. There are no beds to sleep on but a thin, lice-infested blanket, the prisoner sit or squats in a corner seeking warmth from the cold cells during cold nights. Bowa also revealed that the cells are suffocating because they are small and at times he would feel like the walls would just squash me while he will be sleeping.

human dignity, right not to be subjected to torture and the right not to be treated in a cruel, inhuman and degrading manner. Hence it can be concluded that the death row phenomenon in Zimbabwe violates Article 5 of the African Charter on Human and People's Rights and also Article 7 of the ICCPR which protects the right not to be subjected to torture or to cruel, inhuman and degrading punishment.

3.5.3 Methods of executions and fundamental human rights

The preceding chapter has established that there are certain methods of execution which violate the right to human dignity, right not to be subjected to torture and the right not to be treated in a cruel, inhuman and degrading manner.[278] These methods are stoning, hanging, electrocution and the use of the gas chamber. Public executions also violate the right to human dignity. In short, a method of execution which goes beyond causing the least possible mental and physical suffering is regarded as amounting to treatment of prisoners in a cruel, inhuman and degrading manner.

In Zimbabwe, the death penalty is imposed through hanging. In some cases, the person to be hanged resists and the wardens then use electric prodders to subdue them. An example of such cases is the case of Chitongo, who did not die from the hanging and the wardens had to hammer him to death.[279] Being sentenced to death through hanging strips a person of the

---

278 The working group on the death penalty in Africa 'Study on the question of the death penalty in Africa' (2012) 16.

279 Magade E 'Country report on Zimbabwe: The right to life and the death penalty' available at *http://www.biicl.org/files/2306_country_report_zimbabwe_magade* (accessed on 25 October 2014). In his affidavit Mtombeni revealed that when a person was to be taken out for hanging the warders came into his cell in a group. They leg ironed him and handcuffed him. Often, the person to be hanged resisted and the warders then used electric prodders to subdue him, I saw this through the peep-hole in my cell. The warders also told us that they did this. We heard the sounds of wailing and screaming of those about to be hanged from the time they are removed from their cells at 4.00 am up to the time they were hanged at about 9.00 am. We also heard the sounds of the gallows themselves. On another occasion one of the warders showed one condemned man called Vundla a newspaper showing that he was about to be executed. We were not allowed access to any newspapers. The warder therefore deliberately showed this condemned person the newspaper to torture him. As a result, Vundla managed to climb up to the window at the top of his small cell and from there he dived on to the floor and killed himself. Many people could not cope with all this and become mentally disturbed. Woods in his book *The Kevin Woods Story: In the shadows of Mugabe's Gallows* also revealed that for more than five

sense of being human. The continued use of hanging as a method of execution in Zimbabwe violates a person's right to human dignity and the right not to be treated in a cruel, inhuman and degrading manner.

3.5.4 The death penalty and the right to fair trial

The previous chapter established that the mandatory death penalty and denial of the right to appeal in death penalty cases amount to a violation of the right to fair trial. The imposition of the death penalty after an accused is not given adequate time and facilities to prepare for defense or an opportunity to consult with a legal practitioner of choice or after an undue delay also amounts to a violation of the right to fair trial. Zimbabwe has a duty under Article 14 of the ICCPR and Article 7 of the African Charter on Human and People's Rights to protect the right to fair trial.

The death penalty under the Zimbabwean Criminal justice system is applied after the exhaustion of all the avenues to fair trial. This is consistent with the country's obligation of protecting the right to fair trial.[280] However, the main area of concern in so far as the right to fair trial and the death penalty in Zimbabwe is concerned lies in the access to legal representation. In that country, the death penalty has always been weighed against the poor. This is because the rich can afford expensive legal representation to represent them while the poor rely on state funded legal representation.[281] Most death penalty cases in Zimbabwe are dealt on pro bono basis through a state appointed lawyer.[282] In fact, most cases end up being

---

years of his incarceration he was cut off from the outside world and held in solitary confinement naked. He describes prison conditions as deadly, leaving inmates to summon all their willpower to survive. Woods noted he had to smuggle food into his cell on many occasions and endured overflowing toilets, days with no food, no electricity, no water and lice-infested blankets for months.

280 In Zimbabwe, there is an automatic right of appeal for death penalty cases under the Supreme Court of Appeal.

281 Makombe S 'The case for abolishing the death penalty' *The Zimbabwean Independent* 19 October 2009. In Zimbabwe, most of those sentenced to death are very poor citizens who cannot afford private legal representation. The human rights movement in Zimbabwe has noted that most are represented by pro bono lawyers supplied by law firms as a social service. However the down side is that it has been noted that law firms mostly makes available their most junior practitioners thereby compromising the quality of representation. Therefore in this case, it is not farfetched then to conclude that a great number could have been saved if the representation was right.

282 Makombe S 'The case for abolishing the death penalty' *The Zimbabwean Independent* 19 October

done by junior practitioners. This has reduced the chances of quality legal representation to the high profile cases.[283] Therefore, the fact that most accused people under the death penalty are not given adequate facilities or are unable to choose a legal practitioner of their choice obviously amount to a violation of the right to fair trial.

3.6 Conclusion

This chapter has established that Zimbabwe has an obligation under international and regional instruments to protect individuals against the violation of their fundamental human rights. Although the country has taken positive measures on the imposition of the death penalty, the continued imposition of the death penalty in Zimbabwe still violates fundamental human rights. The imposition of the death penalty under the current legislation in Zimbabwe amounts to a violation of the right to life. The execution of prisoners through hanging in Zimbabwe violates the right to human dignity. Furthermore, the deplorable conditions on the death row amounts to torture and also violates the right of prisoners not to be treated in a cruel, inhuman and degrading manner. The imposition of the death penalty after undue delay and the failure to give an accused person adequate facilities to prepare for trial in Zimbabwe violate the right to fair trial.

Based on the findings of this chapter, the next chapter will provide the conclusion of this research and offer recommendations in an attempt to contribute to the abolishment of the death penalty in Zimbabwe.

2009. Criminal justice systems are susceptible to human error. Zimbabwe as a country with a crippled criminal justice system, torn apart by corruption and economic challenges should not use expiratory features such as the death penalty as a penal measure. The death penalty is irreversible. Therefore, if evidence in the near future is uncovered to the contrary, this will be a clear violation of the right to fair trial since the penalty cannot be reversed.

283 Makombe S 'The case for abolishing the death penalty' The Zimbabwean Independent' 19 October 2009.

Chapter Four: Conclusion and Recommendations

4.1 Conclusion

This study critically analyzed the death penalty in Zimbabwe from a human rights and a legal perspective. It established that the death penalty, under certain circumstances, violates fundamental human rights protected under international and regional human rights instruments. It further established that Zimbabwe has an obligation under international and human rights instruments to protect and promote fundamental human rights. It is against this background that the thesis proceeded to its main purpose which is to determine whether the decision to retain the death penalty in Zimbabwe is in line with the country's international and regional human right obligations.

The study established that the decision to retain the death penalty under the new constitution is inconsistent with the country's international and regional obligation of protecting and promoting fundamental human rights. The death row in Zimbabwe coupled with bad living conditions, inadequate food, constant anxiety, and lack of sanitation and agony of suspense amount to a violation of the right not to be subjected to torture and the right not to be treated in a cruel, inhuman and degrading manner. The unreasonable delay in imposing the death penalty and also the failure to give prisoners adequate time and resources to prepare for trial violates the right to fair trial. In a nut shell, the death penalty in Zimbabwe falls short of the requirements of the ICCPR and also contradicts the African Charter to which Zimbabwe is a state party.

4.2 Recommendations

Based on the findings of the study, few recommendations are suggested. These recommendations entail the amendment of domestic legislation, which deals with the death penalty in Zimbabwe, abolishment of the death penalty, both in law and practice, and also reforming the death row conditions in Zimbabwe.

The death penalty is an irreversible method of punishment which takes away a prisoner's life. Zimbabwe, as a country with a crippled criminal justice system which is prone to mistakes, must not uphold unalterable methods of punishment such as the death penalty. Therefore, Zimbabwe must follow the global trend in abolishing the death penalty both at law and in practice.

Zimbabwe can achieve total abolition through amendment of the provisions, which deal with the death penalty under Criminal Law (Codification and Reform) Act, Criminal Procedure and Evidence Act, Genocide Act and the Defence Act. This however requires that Section 48 of the constitution be amended so as to give a full protection of the right to life without giving room for the imposition of the death penalty. While adopting the necessary procedures for the amendment of the above mentioned legislations, adopting a moratorium on the death penalty is recommended as a first step towards its abolition.

The exclusion of women and the increase of the minimum age of execution form 18 years to 21 years under the new constitution of Zimbabwe is positive step towards the abolition of the death penalty in Zimbabwe.[284] However this study recommends that, instead of promoting gender imbalance under the criminal justice system by excluding females only from the death penalty, Zimbabwe must totally abolish the death penalty through the exclusion of all categories of people from the death penalty. Since it has been a decade without executions in Zimbabwe, the sentences for prisoners who are already on the death row must be commuted to life in prison. Life imprisonment is a less harmful method which serves the same purpose as the death penalty. It is also imperative that there is need to generate literature and intervention methods, which assist policy makers in the formation of alternative punitive measures.

As a member state to the ICCPR and the African Charter on Human and People's Rights, Zimbabwe must show protection and promotion of human rights both on paper and in practice. It is recommended that, the Ministry of Justice in Zimbabwe must set up a committee which will specifically deal with human rights violations such as the treatment of prisoners and the upholding the international and regional human rights mandates during criminal trials. This also recommends that the government must raise the pro deo fees so as to ensure quality legal representation on capital cases and provide legal training for judges and lawyers in particular on human rights, with special focus on capital punishment and international and regional standards relating to the protection of fundamental human rights.

In the case the death penalty is not abolished, the issue of the death row phenomenon in Zimbabwe must be revisited. The prisoners on the death row must be treated in manner which respects their dignity and the Zimbabwean Prison Service must allow frequent visits for death row inmates from their family members and friends. Thus, the government must provide a

[284] Section 48 Constitution of Zimbabwe 2013.

platform for non-governmental organisations and human rights activists to visit places of detention in Zimbabwe so as to ensure that prisoners are not treated in a cruel, inhuman and degrading manner. In order to achieve this objective Zimbabwe must ratify and translate into domestic law the optional protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment of 2002, which establishes a system of regular visits by independent international and national bodies to places where people are deprived of their liberty in order to prevent torture and other cruel, inhuman and degrading treatment or punishment.

Civil society organisations in Zimbabwe must continue their advocacy work in favour of the abolition of the death penalty and also strengthen their public awareness programmes on the death penalty. The study also recommends the organisation of sensitisation campaigns by non-governmental organisation and human rights activists on the death penalty in order to allow the population to debate on the necessity to abolish it and also re-engage the Parliament in dialogue about the abolition of the death penalty.

[23 261 words including footnotes]

Bibliography

Articles

Bastia B etal 'Executions: Ancient methods and evolution' (2014)2 *International Journal of Health Sciences* 97-100.

Bojosi KN 'The death row phenomenon and the prohibition against torture and cruel, inhuman or degrading treatment' (2004) 4 *African Human Rights Law Journal* 303-333.

Byrnes A 'The right to life, the death penalty and human rights law: An international and Australian Perspective' (2007)66 *University of New South Wales Faculty of Law Research Series* 1-22.

Chemhuru M & Masaka D 'Zimbabwe's Constitution making process and the death penalty. A philosophical reflection' (2011) 5 No 2 *Africana Journal* 124-146.

Cunninghan MD & Vigan MP 'Death row inmate characteristics, adjustment and confinement: A critical review of literature' (2002) 20 *Behavioural Sciences and the Law Journal* 191-210.

Dumbutsena E 'The death penalty in Zimbabwe' (1987)58 *Revue International de Droit Pénal 523-533.*

Feltoe G 'Extenuating circumstances: A life and death issue' (1986)4 *Zimbabwe Law Review* 66-78.

Gerrit F 'Legal comparison, municipal law and public international law: Terminological confusion? (2013)46 *The Comperative and International Law Journal of Southern Africa* 337-364.

Goodman R 'Human rights treaties, invalid reservations and state consent' (2002) 96 *The American Journal of International Law 531*-560.

Hillman H 'The possible pain experienced during executions by different methods' (1992)22 *Perception* 745-753.

Hudson P 'Does the death row phenomenon violate a prisoner's rights under international law'(2000) 11 *European Journal of International Law* (*EJIL*) 4 833-856.

Human Rights Forum 'The death penalty in Zimbabwe' (2012)76 *Human Rights Bulletin*.

Jonas O 'Human rights extradition and the death penalty: Reflection on the standoff between Botswana and South Africa' (2013) 18 *International Journal on Human Rights* 181-205.

Magade E 'The right to life and the death penalty' (2002) Country report on Zimbabwe for the British Embassy.

Mendez JE 'The death penalty and the absolute prohibition of torture and cruel, inhuman and degrading treatment of punishment' (2010) 20 no 1 *Human rights brief* 2-6.

Novack A 'Capital sentencing discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014)14 *African Human Rights Law Journal (AHRLJ)* 24-42.

Novak A 'Abuse of state power: The mandatory death penalty for political crimes in Southern Rhodesia' (2013) *Fundamina A Journal of legal history* 1963-1970.

Sadoff A 'International law and the mortal precipice: A legal policy critique of the death row phenomenon'(2009) 17 *Tulane Journal of International and Comparative Law* 77-110.

Vogelman L 'The living dead: Living on death row' (1989)2 *South African Journal on Human Rights* 183- 195.

Zimmers TA and Koniaris LG 'Peer-Reviewed studies identifying problems in the design and implementation of lethal injection for execution' (2008) XXXV *Fordham URB Law Journal*. 919-929.

Newspaper articles

Chakanyuka W 'Death penalty: Only the poor die' *New Zimbabwe* 26 April 2010.

Ecenbarger W 'Perfecting death: When the state kills it must do so humanely. Is that possible?' *The Philadelphia Inquirer Magazine* January 23 1994.

Makombe S 'The case for abolishing the death penalty in Zimbabwe' *Zimbabwe Independent* 15 October 2009.

Makombe S 'The case for abolishing the death penalty' *Zimbabwean Independent* 19 October 2009.

Manatsa P 'Death penalty: Evaluating the exemption of women' *The Standard* 18 May 2014.

Mbanje P '10 Months on death row: Man gives chilling account' *News Day Zimbabwe* 9 July 2014.

Mudimu N 'Zimbabwe: They live by the sword, but should they die by the sword?' *Inter Press Service News Agency* 9 June 2011.

Nkatazo L 'Man challenges death penalty' *New Zimbabwe News* 7 April 2010.

Weisberg 'This is your death' *The New Republic* 1 July 1991.

Books

Amnesty International *Fair trial manual* 2ed (2014) London: Amnesty International Publication.

Amnesty International *Death penalty in english-speaking Caribbean: A human rights issue* (2012) London: Amnesty International Publication.

Amnesty International *Death sentences and executions* (2013) London: Amnesty International publication.

Amnesty International *When the state Kills: The death penalty v human rights* (1989) London: Amnesty International publication.

Andrew W '*Old time punishments'* (1991) New York: Dorset Press.

Banner S *The death penalty :An American history* (2002) Cambridge: Harvard University Press.

Chenwi, L *Towards the abolition of the death penalty in Africa: A human rights perspective* (2007) Pretoria: Pretoria University Law Press.

Currie I & De Waal *The bill of rights handbook* (2008) Cape Town: Juta & Company Ltd.

Doswald-Beck L & Henckaerts M *Customary international humanitarian law* (2009) London: Cambridge University press.

Feltoe G *A guide to sentencing in Zimbabwe* (1990) Harare: Legal Resource Foundation Zimbabwe.

Feltoe G *Zimbabwe's criminal defenders handbook* (2009) Harare: Legal resource foundation Zimbabwe.

Hood R & Hoyle C *The death penalty: A world-wide perspective* (2002) New York: Oxford University Press.

Jayawickrama N *The judicial application of human rights, regional and international jurisprudence* (2002).New York: Cambridge University Press.

Kersting N *Constitution transition: Academic inputs for a new constitution in Zimbabwe* (2009) Harare: Friedrich-Ebert-Stiftung publication.

Lepard D *International law: A new theory with practical applications* (2010) London: Cambridge University press.

Madhuku L *An introduction to Zimbabwean law* (2010) Harare: Weaver Press.

Malanczuk P *Modern introduction to international law* (2002) New York: Routledge.

Muntingn L *Guide to the UN Convention against Torture in South Africa* (2011) Cape town: Civil Society Prison Reform Initiative (CSPRI) Community Law Centre University of the Western Cape.

Muvangua N & Cornell D *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) USA: Fordham University Press.

Novak A *The death Penalty in Africa*: *Foundations and future prospects* (2014) USA: Palgrave Pivot publishers.

Raftopoulos B & Mlambo A: *Becoming Zimbabwe: A history from the pre-colonial period to 2008*: (2009) Johannesburg: Weaver press.

Schabas W *The death penalty as cruel punishment and torture: Capital punishment challenged in world's courts* (1996) Pennysylvania: North-eastern University Press.

Schabas W *International law and abolition of the death penalty* (1998) New York: Cambridge University Press.

Schabas W *The abolition of the death penalty in international law* (2002) 3ed New York: Cambridge University Press.

The working group on the death penalty in Africa *Study on the question of the death penalty in Africa.* (2014) Gambia: Baobab Printers.

United Nations Human Rights office of the High Commissioner *Moving away from death penalty: Lessons from national experience* (2012) New York: United Nations publication.

United Nations Human Rights: Office of the High Commissioner *International legal protection of human rights in armed conflict* (2011) New York: United Nations.

Woods K *The Kelvin Woods story: in the shadow of Mugabe's gallows* (2008) Johannesburg: 30 Degrees South Publishers.

Yorke ED *Against the death penalty: International initiatives and implications* (2008) Burlington: Ashgate publishers.

Zimbabwe Lawyers for Human Rights (ZLHR) *Pre-trial detention in Zimbabwe: Analysis of the criminal justice system and conditions of pre-trial detention* (2013) Harare: Law Society of Zimbabwe.

Chapters in books

Ndulo M: Zimbabwe's unfulfilled struggle for a legitimate constitutional order in Miller (ed) *Framing the state in times of transition: Case studies in constitution making* (2010)176-203 Washington DC: United States Institute of peace.

Bedau H '*Abolishing the death penalty even for the worst murderers*' in Sarat A (ed) *The killing state: Capital punishment in law, politics and culture* (1999) 40-59 New York: Oxford University Press.

Cancik '" Dignity of Man " and " Personal " in Stoic Anthropology: Some Remarks on Cicero, De Officiis I in Kretzmer and Klein: *The concept of human dignity in human rights discourse* (2002) 105-107 London: Kluwer law International.

Schabas W 'International legal aspects' in Hodgkinson & Rutherford (eds*) Capital punishment: Global issues and prospects* (1996) 17-44 London: Waterside press.

Maja I 'The death penalty in Zimbabwe: Legal ambiguities' in Šimonovi´c I ed *Moving away from the death penalty : Arguments, trends and perspectives* (2014)164-169 New York: United Nations Human Rights Office of the High Commissioner.

Cases

Achutan (on behalf of Banda) and Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi African Commission on Human and Peoples' Rights Communication No: 64/92, 68/92, and 78/92 (1995).

African Commission Forum of Conscience v. Sierra Leone African Commission on Human and Peoples' Rights Communication No: 223/98.

Bader and Others v. Sweden, 13284/04, Council of Europe: European Court of Human Rights, 8 November 2005.

Catholic commission for Justice and Peace in Zimbabwe v Attorney General and others (2001)AHRLR 248 ZwSC(1993).

Catholic Commission for Justice and Peace v A.G and Others 1993 (1) ZLR 242 (S).

Chavhunduka v The State Criminal Appeal No SC 216/2013 Judgement SC 60/2013.

Chileya v S (*1990*) SC. 64/90 (unreported).

Chingaona v *The State* Criminal Appeal 207/2001: SC 1052002.

Chitat Ng v. Canada, Communication No: 469/1991, U.N. Doc. CCPR/C/49/D/469/1991.

Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples' Rights, Communication No: 60/91 (1995).

Forum of Conscience v. Sierra Leone, African Commission on Human and Peoples' Rights, Communication No: 223/98 (2000).

Francis v Jamaica, Communication No: 606/1994, U.N. Doc. CCPR/C/54/D/606/1994 (1995).

Pinto v Trinidad and Tobago, Human Rights Council UN Doc. CCPR/C/39/D/232/1987.

International Pen and Others v. Nigeria, African Commission on Human and Peoples' Rights, Communication No. 137/94, 139/94, 154/96 and 161/97 (1998).

Jabari v. Turkey Application No: 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000.

Johnson v Jamaica Communication No: 588/1994, U.N. Doc. CCPR/C/56/D/588/1994 (1996).

Lubuto v Zambia, Communication No: 390/1990, UN Doc. CCPR/C/55/D390/1990/ rev.1, 31 October 1995.

Mbushuu and Another v The *Republic* (1995) 1 LRC 216 (CA Tanzania).

S v Makwanyane and Another (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995).

Shamayev and Others v. Georgia and Russia European Court of Human Rights: Application Number 36378/02.

Simms v Jamaica Communication No: 541/1993,UN.Doc.CCPR/C/53/D/541 1993/ (1995).

Stephens v Jamaica Communication No: 373/1989, U.N. Doc. CCPR/C/55/D/373/1989 (1995).

Legislation

Constitution of Zimbabwe Amendment No 20 Act of 2013.

Zimbabwe Criminal Law (Codification and Reform) Act [the Criminal Law Code] Chapter 9:23 Act 23 of 2004.

Criminal Procedure and Evidence Act Zimbabwe Chapter 9:07 of 2002.

Genocide Act of Zimbabwe Chapter 9: 20 Act 9 of 2000.

Defence Act of Zimbabwe Chapter 11: 02 of 2002.

Table of international and regional instruments

The African Charter on human and People's Rights (1982) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

International Covenant on Civil and Political Rights (1966) United Nations General Assembly resolution 2200A (XXI).

The Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment (1984) General Assembly resolution 39/46.

UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, United Nations, Treaty Series.

UN General Assembly, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, 15 December 1989, A/RES/44/128

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: 2006 United Nations General Assembly 57/199.

Organization of African Unity (OAU), African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990).

African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 200 resolution AHG/Res.240 (XXXI).

Internet Sources

Amnesty International 'Abolitionist and retentionist countries' available at: *http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries* (accessed on 8 July 2014).

Amnesty International 'International death penalty: The world moves towards abolition' available at *http://www.amnestyusa.org/our-work/issues/death-penalty/international-death-penalty* (accessed on 1 February 2014).

Amnesty International 'Death sentences and executions 2013' available at *http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2013* (accessed on 1 February 2014).

Amnesty International 'Zimbabwe hangman raises execution fears' available at *https://www.amnesty.org/en/news/zimbabwe-appointment-new-hangman-raises-spectre-imminent-executions-2013-02-08* (accessed on 12 July 2014).

Amnesty launch 'Time to abolish the death penalty in Zimbabwe' (2014) available at *http://www.thezimbabwean.co/news/zimbabwe/61384/amnesty-launch-time-to-abolish* (accessed on 1 February 2014).

Bulawayo 24 '97 Zimbabwean prisoners on death row' available at: *http://bulawayo24.com/index-id-news-sc-national-byo-42092.html* (accessed on 8 July 2014).

Centre for Constitutional Rights 'The death penalty is a human rights violation: An examination of the death penalty in the U.S from a human rights perspective' (2013) available at *http://ccrjustice.org/files/CCR%20Death%20Penalty%20Factsheet.pdf* (accessed on 14 July 2014).

Chibvuri B 'Zimbabwe prisons' 2003 available at: *http://www.foreignprisoners.com/prison-zimbabwe.html* (accessed on 12 July 2014).

Death Penalty Information Center 'Description of execution methods' available at *http://www.deathpenaltyinfo.org/descriptions-execution-methods* (accessed on 20 August 2014).

Death Penalty Worldwide 'Country- Zimbabwe' available at: *http://www.deathpenaltyworldwide.org* (accessed on 8 July 2014).

Death Penalty Worldwide 'Death row conditions' available at: http://www.deathpenaltyworldwide.org/death-row-conditions.cfm (accessed on 6 July 2014).

Human Rights advocates 'Death row phenomenon violates human rights' (2012). available at: *http://www.humanrightsadvocates.org* accessed on 20 August 2014.

International Bridges to Justice 'Death penalty in Zimbabwe gains recognition' available at *http://blog.ibj.org/2010/04/19/death-penalty-case-in-zimbabwe-gains-recognition/* (accessed on 8 July 2014).

Judicial Education Centre 'Glossary of legal terms' available at *http://jec.unm.edu/manuals-resources/glossary-of-legal-terms* (accessed 10 July 2014).

Legal Information Institute 'Implementation of the convention against Torture' available at *http://www.law.cornell.edu/cfr/text* (accessed on 8 July 2014).

Newsletter 'Death penalty an overview' 2014 available at *http://www.law.cornell.edu/wex/death_penalty* (accessed on 1 February 2014).

Novack A 'The death penalty and the right to life in the draft constitution of Zambia and Zimbabwe' (2013) available at *http://africlaw.com/2013/04/18/the-death-penalty-and-the-right-to-life-in-the-draft-constitutions-of-zambia-and-zimbabwe/* (accessed on 12 July 2014).

Tshosa O 'The death penalty in Botswana in the light of international law' paper presented at the first international conference on the application of the death penalty in Commonwealth Africa held in Entebbe, Uganda from 10 – 11 May 2004. available at *http://www.biicl.org/deathpenalty* (accessed on 8 July 2014).

Penal Reform International 'Death penalty information pack' (2011) available at *http://www.penalreform.org/wp-content/uploads/2013/06/PRI_DP_Info_Pack-1.pdf* (accessed on 14 August 2014).

Zhangazha W 'No plans to hang death row inmates' (2013) available at *http://www.theindependent.co.zw/2013/03/01/no-plans-to-hang-death-row-inmates/* (accessed on 5 February 2014).

Zimbabwe 'Murderer Challenges Death Penalty' available at *http://allafrica.com/stories/* (accessed on 8 July 2014).

Other Documents

Dzvinamurungu J 'Amnesty International Zimbabwe: Seminar on the death penalty: The death penalty is a violation of human rights' (2004) A paper presented at the launch of the death penalty campaign organized by the Harare youth group of Amnesty International Zimbabwe.

Mendez E 'Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment' United Nations General Assembly resolution 66/150 (2012).

Rugaza D ‘Death penalty and the crime rate in the Democratic Republic of Congo’ (Unpublished, Master of Arts Human Rights Thesis, Makerere University 2010).

Munochivei M ‘It was difficult in Zimbabwe: A history of imprisonment, detention and confinement during Zimbabwe’s liberation struggle, 1960-1980’ (Unpublished PhD Thesis University Of Minnesota 2008).

The death penalty under International law: A background paper to the IBAHRI resolution on the abolition of the death penalty (2008).

International Bar Association ‘The death penalty under International law: A background paper to the IBAHRI resolution on the abolition of the death penalty’ (2008).

UN General Assembly resolution 2393(XXIII) on capital punishment in Southern Africa 12 November 1968.

UN General Assembly Resolution 45/111 of 14 December (1990).

UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life).

United Nations High Commission for Human Rights Resolution E/CN.4/1997/12 April 3 1997).

United Nations Voluntary Fund for the victims of Torture: Interpretation of torture in the light of the practice and jurisprudence of the international bodies (2011).

UNIVERSITY of the
WESTERN CAPE

UNIVERSITY of the
WESTERN CAPE