THE ABOLITION OF THE DEATH PENALTY

John Lazaro v United Republic of Tanzania (Application 003/2016) (2023) AfCHPR 335 (7 November 2023)

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Abstract

On 7 November 2023, the African Court on Human and Peoples' Rights ('the Court') handed down judgment in a matter concerning the death penalty as a method of punishment in which South African Judge, Dumisa Buhle Ntsebeza and Congolese Judge, Blaise Tchikaya, provided dissenting opinions. The dissenting opinions characterised the death penalty as being inhumane, degrading, and a direct violation of Articles 4 and 5 of the African Charter on Human and Peoples' Rights ('the Charter'). The Honourable Judges further provided that the death penalty should be abolished in the legislation of the United Republic of Tanzania and that all member states of the African Union should collectively take progressive steps towards its abolition. This case discussion advances the dissenting opinions of Ntsebeza J and Tchikaya J, and further advocates for the abolition of the death penalty. The broader objective of this case discussion is to categorise the abolition of the death penalty as customary international law, meaning that even if there is no explicit rule of international law on its prohibition, courts in their interpretation can advance its abolition by adopting a human rights perspective.

1 Brief introduction

> *Justice is never advanced in the taking of human life. Morality is never upheld by a legalized murder … True justice is restorative, it heals wounds, the death penalty only creates new wounds.*[1]

On 7 November 2023, the African Court on Human and Peoples' Rights ('the Court') handed down judgments in three matters, namely *John Lazaro*,[2] *Makungu Misalaba*,[3] and *Chrizant John*.[4] The common thread unifying the three matters was that they were judgments against the United Republic of Tanzania and centred on the imposition of the death penalty as a method of punishment. Of note is that the Court's session in September 2023 heard a significant number of matters relating to the imposition of the death penalty as a method of punishment. However, this case discussion will focus on the matter of John Lazaro ('Applicant') and the United Republic of Tanzania ('Respondent State'), in which South African Judge, Dumisa Buhle Ntsebeza and Congolese Judge, Blaise Tchikaya provided dissenting opinions.

The dissenting opinions characterised the death penalty as being inhumane, degrading, and a direct violation of Articles 4 and 5 of the African Charter on Human and Peoples' Rights ('the Charter').[5] The Honourable Judges further provided that the death penalty should be abolished in the legislation of the United Republic of Tanzania and that all member states of the African Union should collectively take progressive steps towards its abolition.[6] This case discussion advances the dissenting opinions of Ntsebeza J and Tchikaya J, and further advocates for the abolition of the death penalty. The broader objective of this case discussion is to categorise the abolition of the death penalty as customary international law, meaning that even if there is no explicit rule of international law on its prohibition, courts, in their interpretation, can advance its abolition by adopting a human rights perspective.

1 Equal Justice Initiative 'Dr Martin Luther King's moral opposition to the death penalty' https://eji.org/news/dr-martin-luther-kings-moral-opposition-to-the-death-penatly/ (accessed on 02 March 2024). See also Good News '37 Important quotes about the death penalty' 09 January 2023 https://goodgoodgood.co/articles/death-penalty-quotes (accessed on 02 March 2024).

2 *John Lazaro v United Republic of Tanzania* (Application 003/2016) (2023) AfCHPR 335 (7 November 2023).

3 *Makungu Misalaba v United Republic of Tanzania* (Application 033/2016) (2023) AfCHPR 40 (7 November 2023).

4 *Chrizant John v United Republic of Tanzania* (Application 049/2016) (2023) AfCHPR 44 (7 November 2023).

5 *John Lazaro v United Republic of Tanzania* (Application 003/2016) (2023) AfCHPR 335 (7 November 2023) *Dissenting Opinion of Tchikaya J* para 39. See also *John Lazaro v United Republic of Tanzania* (Application 003/2016) (2023) AfCHPR 335 (7 November 2023) *Dissenting Opinion of Ntsebeza J* para 47.

6 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 39. *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* paras 3, 48.

2 Background of the matter

At the core of the dispute was the imposition of the death penalty as a form of punishment for the egregious crimes committed by the Applicant. The Applicant and four other accused broke into Mr Clemence Mbasa's (his neighbour) property, where they tied him up and gagged his wife when she tried raising the alarm.[7] The Applicant and the four others demanded money from the recent sale of coffee from the neighbour.[8] When they realised that he recognised them, they brutally killed him by plunging a sword through his neck and proceeded to ensure that he was dead by dragging him across the room.[9] The deceased's wife was tortured by the Applicant and the four other accused, demanding that she show them where the money was.[10] Her abdomen and shoulders were slit using a machete and she was tied by a rope around her neck.[11] She indicated where the money was, but the Applicant and the four other accused continued to assault her until she pretended to be dead.[12] They evaded the scene with the money, whilst the deceased's wife ran outside and rang the alarm, which attracted the neighbours' attention.[13]

The Applicant was incarcerated on the same day of the event and was charged with the offence of murder, wherein he pleaded not guilty.[14] On 6 August 2010, the main trial was held, and the Applicant was found guilty of murder and sentenced to death by hanging. An appeal was filed by the Applicant, which was dismissed due to a lack of merit.[15]

3 Core issue

The Applicant's allegations included that the Respondent State violated Articles 4 and 5 of the Charter through its imposition of the death penalty.[16] According to the Applicant, Article 4 was violated by the imposition of a mandatory death penalty without having regard to the circumstances of the offender; the imposition of the death penalty outside the category of cases to which it can be applied and

7 *John Lazaro v United Republic of Tanzania* (Application 003/2016) (2023) AfCHPR 335 (7 November 2023) *Merits and Reparation* para 3.
8 As above.
9 As above.
10 *Lazaro* (n 7) para 4
11 As above.
12 As above.
13 As above.
14 As above.
15 *Lazaro* (n 7) para 6.
16 *Lazaro* (n 7) para 7.

its imposition without a fair trial. He further alleged that Article 5 was violated by the imposition of the death penalty by hanging.[17]

Articles 4 and 5 provide:

> (4) Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right;
> (5) 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.[18]

4 Majority judgment

4.1 Violation of Article 4 of the Charter

The Court had to ascertain whether the imposition of the death penalty is tantamount to an unjustifiable deprivation of the right to life. The Court considered Article 4 of the Charter and the Applicant's grounds alleging the violation thereof.[19]

The Court noted that although there have been international developments sanctioning the abolition of the death penalty, it is still the law in some states, as there has not been a universal ratification of a treaty on its abolition. Comparably, only 90 out of the 173 state parties to the International Covenant on Civil and Political Rights ('ICCPR') have ratified the Second Optional Protocol to the ICCPR, which has been instrumental in international developments abolishing the death penalty.[20] The aforementioned signifies that although there has been international support for the abolition of the death penalty, its prohibition is still not absolute.[21]

The test for ascertaining whether a death sentence is unjustifiable has been well established in international human rights jurisprudence.[22] The criteria are:

17 As above.
18 African Charter on Human and Peoples' Rights (1981) Articles 4 & 5.
19 *Lazaro* (n 7) paras 73-74.
20 *Lazaro* (n 7) para 75.
21 *Lazaro* (n 7) para 76.
22 *Lazaro* (n 7) para 77. The Court makes reference to: *International PEN & Others (on behalf of Ken Saro-Wiwa Jnr) v Nigeria* (2000) AHRLR 212 (ACHPR 1998); *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000); *Ally Rajabu & Others v United Republic of Tanzania* (Merits and Reparations) (Application 007/2015) (2019) 1 AfCLR 96 (28 November 2019); Article 6(2) of ICCPR (which provides that in states where the death penalty has not been abolished, sentence of death may only be imposed for serious crimes) and *Eversley Thompson v St Vincent & the Grenadine*, Communication 806/1998, UN Doc CCPR/C/70/D/806/1998 (2000).

(i) whether the death sentence is provided for by law;
(ii) whether the sentence was passed by a competent court; and
(iii) whether due process was followed in the proceedings leading to the death sentence.[23]

In making an assessment based on the above criteria, the Court found that, in relation to the first question, section 197 of the Respondent State's Penal Code CAP 16.RE 2002 makes the death penalty an obligatory punishment for the offence of murder.[24] In relation to the second question, section 3(2)(a) of the Criminal Procedure Act and Article 107(1)(a) of the Respondent State's Constitution authorises the High Court's jurisdiction in matters where the death penalty is an obligatory punishment.[25] In relation to the third question, in the absence of any irregularities or perceivable errors equivalent to a transgression of due process, the Court found that due process was followed in the proceedings, irrespective of the Applicant alleging the converse due to sharing legal representation with his co-accused, who divulged information incriminating him.[26] The Court took into cognisance that the Applicant received new legal representation when the issue of conflict of interest became apparent.[27]

Although the assessment met the criteria laid down, the Court recognised that the death penalty sanctioned by the Respondent State in the offence of murder does not adhere to due process because it does not permit a judicial officer discretion to evaluate other methods of punishment.[28] As such, the Court concluded that the mandatory imposition of the death penalty is tantamount to the violation of the right to life as envisaged in Article 4 of the Charter.[29]

4.2 Violation of Article 5 of the Charter

With regard to the violation of the right to dignity as envisaged in Article 5 of the Charter, the Court had to ascertain whether the Applicant's right to be treated with dignity was infringed by his sentence to death by hanging.

The Applicant contended that the manner in which the punishment was to be executed results in 'excessive suffering, which is cruel, inhumane and degrading'.[30] In addition, the Applicant also contended that the prison conditions he endured were tantamount to

23 *Lazaro* (n 7) para 77.
24 *Lazaro* (n 7) para 78.
25 *Lazaro* (n 7) para 79.
26 *Lazaro* (n 7) paras 80-81.
27 *Lazaro* (n 7) para 80.
28 *Lazaro* (n 7) para 83.
29 *Lazaro* (n 7) para 84.
30 *Lazaro* (n 7) para 85.

torture due to the overcrowded nature of the prison.[31] Furthermore, death penalty prisoners are secluded, all of which is contrary to Article 5 of the Charter.[32]

The Court revisited its jurisprudence on the imposition of the death penalty and reiterated that the death penalty by hanging is 'inherently degrading and encroaches upon dignity in respect of the prohibition of […] cruel, inhuman and degrading treatment', thus constituting a violation of Article 5 of the Charter.[33] As such, the Court concluded that the imposition of the death penalty *by hanging* is a violation of Article 5 of the Charter.[34]

Of importance is that the Court found the imposition of the death penalty due to its manner of execution (i.e. hanging) is a violation of Article 5 and not that the sentence itself is a violation of the Article.

5 Dissenting Opinion of Ntsebeza J

5.1 Violation of Articles 4 & 5 of the Charter

In his dissenting opinion, Ntsebeza J finds that the mandatory imposition of the death penalty constitutes a violation of the right to life as enshrined in Article 4 of the Charter.[35] He further concurs with the majority that the death penalty by hanging is a direct infringement of the right contained in Article 5 of the Charter.[36] However, he deviates by extending the protection offered by Article 5 to the punishment itself, rather than the method of executi[37]on. Ntsebeza J argues that the death penalty is a violation of the right to dignity, as 'it is a cruel, inhumane, degrading and torturous punishment', regardless of the manner in which it is to be executed.[38] He disagrees with the notion that the method of execution should exclude suffering or consist of the least suffering, where permissible.[39] He asserts that the death penalty as a method of punishment is 'unconscionable'.

He continues to state that at the heart of international human rights jurisprudence lies the concept of human dignity, the killing of human life in any manner and by whoever (i.e. individual or state) is

31 *Lazaro* (n 7) para 86.
32 As above.
33 *Lazaro* (n 7) para 90.
34 *Lazaro* (n 7) para 92, author's emphasis added.
35 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 3.
36 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 47.
37 As above.
38 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 4.
39 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 7.

undignified and tantamount to the infringement of the right in Article 5.[40] The imposition of the death penalty as a method of retribution further denies a person the most fundamental human right, which is the right to life, and regardless of the gravity of the crime committed, no person should be deprived thereof.[41]

Besides the death penalty's inconsistency with Article 5 of the Charter, he identifies five reasons as to why it should be abolished as a method of punishment.[42] First, the punishment is irreversible, and mistakes happen, as the judicial criminal system is fallible and there may be wrongful convictions.[43] However, when an offender is executed, there is no reversing that error.[44] Secondly, the punishment does not deter crime, and there is insufficient proof to show that the death penalty is an effective method of deterrence.[45] Thirdly, the punishment is often used in skewed justice systems.[46] In numerous cases, Amnesty International recorded that people were executed after trials that were 'grossly unfair', based on 'torture-tainted evidence' and with 'inadequate legal representation'.[47] In some countries, the sentence is imposed as mandatory retribution for certain offences and judicial officers are not given discretion to evaluate the circumstances of the crime or the offender prior to sentencing.[48] Fourthly, the punishment is discriminatory, as studies evidence that facts such as racial background, socioeconomic status and quality of legal representation have an impact on the prospects of receiving the death sentence.[49] The aforementioned subverts principles such as fairness and equal protection before the law.[50] Lastly, the punishment is used as a political tool, as the death penalty often punishes political opponents in some countries.[51]

There has been growing international jurisprudence identifying the illegality of the death penalty as a norm of customary international law within the context of the right to human dignity and the prohibition of torture and cruel, inhumane, or degrading treatment or punishment.[52] Ntsebeza J notes the decision of the South African Constitutional Court that pronounced the death penalty as a denial of humanity and a degrading form of retribution that is

40 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 8.
41 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 10.
42 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 24.
43 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 25.
44 As above.
45 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 26.
46 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 27.
47 As above.
48 As above.
49 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 28.
50 As above.
51 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 30.
52 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 15.

tantamount to the deprivation of the right to dignity.[53] He furthermore borrows from the Constitutional Court's analysis of international jurisprudence that signifies an inclination towards the abolition of the death penalty.[54]

Ntsebeza J concluded that the imposition of the death penalty as a method of retribution is an infringement of the right afforded to an individual in Article 5 of the Charter.[55] Accordingly, the death penalty is inconsistent with the Charter and should be struck off the Respondent State's legislation as a form of retribution.[56] He further urged member states of the African Union to take progressive steps towards the abolition of the death penalty and utilise other methods of punishment that respect human dignity and are in line with international human rights jurisprudence.[57]

6 Dissenting Opinion of Tchikaya J

6.1 Violation of Articles 4 & 5 of the Charter

Tchikaya J provides a uniform dissenting opinion for the matters of *John Lazaro*, *Makungu Misalaba* and *Chrizant John,* in which he notes that Articles 4 and 5 of the Charter provide adequate legal foundation to outlaw the death sentence on the one hand, whilst evoking the Court to make greater use of its powers of interpretation on the other hand.[58] Thus, he finds that the Court's reasoning in the majority judgment failed to rule on the international human rights jurisprudence relevant to the death penalty, including the opportunity to interpret the applicable African law on capital punishment.[59]

Tchikaya J maintains that it is contradictory to conclude that a person's dignity was not violated while simultaneously upholding their sentence to death.[60] The power of interpretation affords the Court the opportunity to exercise its judicial discretion to provide clarity to the rule of law.[61] The Court must assert its role and take a stance, 'it cannot abstain'.[62] Therefore, the decision rests with the Court to ascertain the meaning to be bestowed upon the provisions of Article

53 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 17. See also *S v Makwanyane and Another* 1995 (3) SA 391 (CC).
54 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* paras 33-46.
55 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* para 47.
56 As above.
57 *Lazaro* (n 5) *Dissenting Opinion of Ntsebeza J* paras 47-48.
58 *Misalaba* (n 3); *John* (n 4) and *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 3.
59 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 9.
60 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 18.
61 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 21.
62 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 20.

4 of the Charter, in the absence of prejudice to the volition of sovereign states.[63]

Tchikaya J notes that what makes Article 4 of the Charter significant is that it neither prescribes nor proscribes the death sentence as a method of punishment.[64] However, current international trends advance its abolition, as evidenced by regional and international developments.[65] The most notable international developments include the United Nations,[66] while regional developments include the European human rights system, which further advances the abolition of the death penalty through enacted protocols such as the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.[67] Furthermore, at the African regional level, out of the 55 member states of the African Union, almost 40 states are abolitionist in law and practice.[68]

With the above having been noted, Tchikaya J finds that there is adequate regional practice by African states for the Court to exercise its judicial discretion.[69] This can be done by interpreting Article 4 of the Charter as prohibiting the death penalty, while making its abolition in the national legislation of African countries a requisite, to the extent that it is inconsistent with the development of human rights jurisprudence.[70] Tchikaya J supports his findings by further noting that the Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa ('the Cotonou Declaration'), adopted in 2014 by the African Commission calls for the abolition of the death sentence in the national legislation of African states and further promotes states to ratify the Additional Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa.[71] As such, the court's stance cannot be less than that of the Cotonou Declaration.[72]

Tchikaya J concludes that the mere existence of the death sentence undermines human rights, the issue is not why or how it is executed.[73] Similar to Ntsebeza J, he concludes that the death penalty is inconsistent with the Charter and should be struck off the Respondent State's legislation as a form of retribution.[74] He also urged member states of the African Union to take progressive steps towards the abolition of the death penalty and utilise other methods

63 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 22.
64 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 23.
65 As above.
66 As above.
67 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 24.
68 As above.
69 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 28.
70 As above.
71 As above.
72 As above.
73 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 33.
74 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 39.

of punishment that respect human dignity and are in line with international human rights jurisprudence.[75]

7 Analysis and arguments

The adoption of the Universal Declaration of Human Rights ('Universal Declaration') in 1948 by the United Nations General Assembly ('the Assembly') marked the international community's formal commitment to preserving human rights.[76] The reason behind the formation of international human rights law was to unite states to protect individuals internationally.[77] Human rights are intrinsic to every individual, and all individuals are entitled to the protection afforded by these rights, irrespective of which region of the globe they are from. Accordingly, 'the rights inherent in a person born in Africa must be the same rights inherent in a person born in Europe'.[78]

As mentioned in the two dissenting opinions above, there have been notable international human rights developments sanctioning the abolition of the death penalty, notably at the United Nations level. The United Nations has been instrumental in developing international human rights jurisprudence, with the World Conference on Human Rights in Vienna adopting the Vienna Declaration and Programme of Action (Vienna Declaration), which aimed to emphasise the Universal Declaration's fundamental role in advancing human rights instruments such as the ICCPR.[79] The Vienna Declaration provides that:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[80]

75 As above.
76 M Robbins 'Powerful states, customary law and the erosion of human rights through regional enforcement' (2005) 35(2) *California Western International Law Journal* at 275.
77 Robbins (n 76) 276.
78 Robbins (n 76) 277.
79 See Vienna Declaration and Programme of Action (1993).
80 n 79, Article 5. The Vienna Declaration aligns with this paper's argument that the death penalty is not in line with human rights jurisprudence and must be abolished. Human rights being indivisible, interdependent and interrelated signifies that all human rights must co-exist in a fair and equal manner on all levels (international, regional and national). The imposition of the death penalty as a method of punishment infringes on the existence of the right to life and integrity of persons, the right to dignity and the right to be free from torture, cruel, inhumane or degrading punishment and treatment. Thus, necessitating its abolition on all levels.

As such, there are great international human rights obligations incumbent on states to ensure that the rights of individuals are promoted and protected. These rights encompass the right to life and integrity of persons, and the right to be free from torture, cruel, inhumane or degrading punishment and treatment.[81]

These rights are universally recognised human rights.[82] Furthermore, these rights are protected in several regions around the globe.[83] As noted in the two dissenting opinions above, the right to life and dignity are fundamental rights that lie at the heart of international human rights jurisprudence. The death penalty is a direct infringement of these fundamental rights, hence the necessity for its abolition.

This paper argues for the abolition of the death penalty by advancing the arguments raised in the dissenting opinions of Tchikaya J and Ntsebeza J, namely that the death penalty is outlawed by international human rights jurisprudence; that there exists sufficient regional human rights developments in line with international human rights jurisprudence to outlaw the death penalty; and that judicial decisions play a pivotal role in advancing human rights jurisprudence on the abolition of the death penalty. However, this paper takes the arguments in the two dissenting opinions further, by arguing that the three aforementioned arguments signify a rule of customary international law abolishing the death penalty.

7.1 What is customary international law?

The Statute of the International Court of Justice provides the definition of customary international law.[84] The provisions of Article 38 indicate that customary international law consists of an objective element (state practice) and a subjective element (states' attitude towards the practice).[85] As such, customary international law consists

81 My argument.
82 See International Covenant on Civil and Political Rights (1966) Articles 6 & 7.
83 See African Charter on Human and Peoples' Rights (1981) Articles 4 & 5; Charter of Fundamental Rights of the European Union (2000) Articles 1, 2, 3 & 4; and ASEAN Human Rights Declaration (2012) Articles 11 & 14.
84 See Article 38 of 1945. According to the provision, the court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognised by civilised nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
85 MP Scharf 'Accelerated formation of customary international law' (2014) 20(2) *Case Western Reserve University – School of Law* at 311.

of 'a general practice accepted as law' (*opinio juris sive necessitatis*).[86] The concept of *opinio juris sive necessitates* in the formation of a new customary rule was explained by the International Court of Justice ('ICJ') in *Northern Sea Continental Shelf* as follows:

> […]not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinion juris sive necessitates*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.[87]

Although customary international law consists of two elements, the objective and subjective elements, greater emphasis has always been placed on the former, as it is easier to ascertain.[88] However, this paper maintains that with the establishment of bodies such as the United Nations and other similar human rights regional bodies, the position changed. State practice can now be evidenced by how states vote for resolutions at international and regional bodies, which also demonstrates states' subjective attitude towards that particular rule; legislation/treaties signed by or adopted by states, which also demonstrates states' subjective attitude; and judicial decisions also impact on state behaviour thus contributing to general state practice.[89]

An important caveat is that general state practice does not necessitate universal acceptance.[90] The majority of states must undertake a consistent practice in accordance with a rule.[91] As such, for the development of customary international law, there is no set threshold for the number of participating states.[92] Scharf notes that scholars who have analysed ICJ judgments have found that some customs have been born based on practice by less than a dozen states.[93] Furthermore, should a prominent player in international law

86 See Article 38(1)(b) of 1945. See also International Committee of The Red Cross 'Customary international humanitarian law?' *International Committee of the Red Cross* 29 October 2010 https://www.icrc.org/en/document/customary-international-humanitarian-law-0 (accessed on 20 February 2024).

87 *Northern Sea Continental Shelf (Federal Republic of Germany v Denmark, Federal Republic of Germany v The Netherlands)* ICJ (20 February 1969) (1969) ICJ Report 1 para 77.

88 Scharf (n 85) 312.

89 As above.

90 Scharf (n 85) 315.

91 Robbins (n 76) 293. See also C Liu 'Regional customary international law related to China's historic rights in the South China Sea (2019) 7(2) *The Korean Journal of International and Comparative Law*.

92 Liu (n 91).

93 Scharf (n 85) 317. See also *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America)* ICJ (27 June 1986) (1986) ICJ Reports 14, the Court clarified that state practice need not provide absolute uniformity in order to translate into customary international law, consistency and generality of the state practice is imperative. At para 186, the Court held 'it is

partake in the practice, more weight is placed on their participation, thus contributing towards the formation of a custom.[94]

As such, this paper asserts that the abolition of the death penalty is customary international law and state practice has manifested itself in various ways, including resolutions by the Assembly; international treaties; decisions by international courts and quasi-judicial bodies; and regional customary practice which encompasses resolutions by regional human rights jurisprudence bodies, regional treaties, and decisions by regional courts. The aforementioned is tantamount to customary international law and will be expanded on below.

7.1.1 Resolutions by the Assembly

As noted above, the United Nations has played a significant role in the development of international human rights jurisprudence. The Assembly's resolutions 'can constitute both the subjective and objective elements necessary to establish customary international law'.[95] In determining whether a resolution by the Assembly establishes a rule of customary international law, the contents of such resolutions and the circumstances surrounding its adoption are assessed.[96] A vote on a resolution acts to establish, fortify and

not to be expected that in the practice of states the application of the rules in question should have been perfect, in the sense that states should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs ... in order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.' Furthermore, the practice need not to have been practiced for a prolonged period of time. See *Northern Sea Continental Shelf* (n 87) para 74, the Court held that 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law…'

94 Scharf (n 85) 316. He continues to state that more weight is given to the most important states in a particular area because their participation will result in them contributing more towards the development of that particular custom (316). This paper argues that the European Union's ('EU') prominent participation in the abolition of the death penalty also contributes to the prohibition of the capital punishment being customary international law. The EU is one of the most powerful actors in international law.

95 Scharf (n 85) 324.

96 Scharf (n 85) 326. Scharf continues to explain that when making an assessment, courts take into cognisance the type of resolution, as it is an important factor. Resolutions considered as recommendations are given little weight, while declarations are 'used to impart increased solemnity', and affirmations are 'used to indicate codification or crystallization of law'. Furthermore, the language used in the resolution is also important, it must be evident whether it is a declaration or a mere aspiration. He cites *Nicaragua* (n 87) as an example, where the court viewed the Assembly's Resolution 2625 regarding Friendly Relations & Co-operation among states as a customary international law generating resolution (326).

reinforce a customary rule.[97] Furthermore, statements made by states explaining how they voted in a resolution also establishes customary law.[98] As noted by the ICJ in *Nuclear Weapons Advisory Opinions*, the Assembly's resolutions have normative value even though they are not binding.[99]

As such, resolutions taken at the Assembly concerning the death penalty signify an established rule of customary international law abolishing the death penalty. A resolution supporting a moratorium on the death penalty as capital punishment was adopted by the Assembly on 18 December 2007 where 104 states voted in favour of the resolution, 34 against and 29 abstained.[100] What made the 2007 resolution significant was that it was the first of its kind, since attempts to pass similar versions were rejected in 1994 and 1999, evidencing growing state practice and changes in state attitude towards the rule.[101] The eighth Assembly meeting held on 16 December 2020 further supports this change, where a resolution supporting a moratorium on the death penalty was passed, wherein 123 states voted in favour, 38 voted against, 24 countries abstained, and eight countries were absent.[102] The resolution in 2020 evidenced increased support for the abolition of capital punishment,[103] further cementing its abolition as a rule of customary international law.

7.1.2 International treaties

Treaties also foster the establishment of customary rules in various ways. First, treaties codify and explicate customary international law by reflecting existing customary law or contributing towards its progressive development.[104] Secondly, the negotiation process involved in treaty creation solidifies customary international law rules as indicated in the text before it comes into effect.[105] Lastly, a rule

97 As above.
98 As above.
99 *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (8 July 1996) (1996) ICJ Report 3 at 226. See also D Pascoe & S Bae 'Latest developments in the UNGA death penalty moratorium resolutions 18 May 2021' https://blogs.law.ox.ac.uk/research-and-subject-groups/death-penalty-research-unit/blog/2021/05/latest-developments-unga-death (accessed on 15 May 2024), who emphasise on the 'significant moral weight' resolutions carry, together with domestic courts of abolitionist states and adherence to the ICCPR.
100 International Bar Association 'The death penalty under international law: A background paper to the IBAHRI Resolution on the Abolition of the Death Penalty' (2008) at 15 https://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/abolition-of-the-death-penalty (accessed 2 March 2023).
101 International Bar Association (n 100).
102 Pascoe & Bae (n 99).
103 As above.
104 Scharf (n 53) 319.
105 As above.

reflected in a treaty may suggest itself to states who then conform thereto in practice even if they are not a party.[106]

As noted in the majority judgment and in the two dissenting opinions, the Second Optional Protocol to the ICCPR has been instrumental in international developments abolishing the death penalty.[107] This paper maintains that the Second Optional Protocol codifies the abolition of the death penalty and contributes towards its progressive development. With 90 out of 173 state parties to the ICCPR, the Second Optional Protocol solidifies a rule of customary international law abolishing the death penalty and further evidence consistency in state practice abolishing capital punishment.

Internationally, there have also been trends advancing the abolition of the death penalty.[108] These international trends have been accepted as law in some states.[109] The 20th century began with only three states that had permanently abolished the death penalty, and in 2021, it was recorded that more than two-thirds of states around the world had abolished capital punishment in law or practice.[110] Records further show that approximately three states per year abolish the death penalty, evidencing consistency in the state practice, further solidifying the abolition of the death penalty as a rule of customary international law.[111]

7.1.3 Decisions by international courts and quasi-judicial bodies

The role of courts in developing customary rules is pivotal, as they can analyse the significance of a resolution to determine whether it is a rule of customary law, and they can also interpret treaties to give clarity to their meaning in law and impact on states' behaviour.[112] Hence, this paper argues that it is also through the court's judgments

106 Scharf (n 53) 320.
107 See Lazaro (n 7) para 75; Lazaro (n 5) *Dissenting Opinion of Ntsebeza J* para 18; Lazaro (n 5) *Dissenting Opinion of Tchikaya J* para 29.
108 As above.
109 As above.
110 See Amnesty International 'Death Penalty 2021: Facts and figures' *Amnesty International* 24 May 2022 https://www.amnesty.org/en/latest/news/2022/05/death-penalty-2021-facts-and-figures/ (accessed on 2 March 2024). Amnesty International further records that as of 2021, 108 states had abolished the death penalty in law for all crimes, 144 states had abolished the death penalty in law or practice, while only 55 states retained the death penalty. See also BBC News 'How many countries still have the death penalty, and how many people are executed?' *BBC News* 25 January 2024 https://www.bbc.com/news/world-45835584 (accessed on 2 March 2024). According to BBC News, in 2022, six (6) states further abolished the death penalty either fully or partially and in 2023, parliament in two (2) states voted to abolish the capital punishment.
111 International Bar Association (n 100) 9. See also Amnesty International (n 110).
112 Scharf (n 85) 312.

and quasi-judicial bodies' decisions that the death penalty is outlawed.

In the absence of an explicit rule of international law prohibiting the death penalty, courts play a fundamental role, as the exercise of their judicial discretion and powers of interpretation can necessitate the abolition of the death penalty. This is done by the courts preserving and upholding rights such as the right to life and dignity, as capital punishment is a direct infringement of those rights.[113]

International courts have excluded the death penalty even for the most egregious crimes, and international human rights jurisprudence bodies have encouraged the abolition of the death penalty.[114] In the landmark decision of the Human Rights Committee ('the Committee') in 2003, it was decided that Canada was obligated to ensure that the death penalty would not be executed against a deportee, and the Committee remarked as follows:

> For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they 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 will not be carried out.[115]

Although the decisions of the Committee are not binding, states have taken action adhering to its decisions, signifying the pivotal role that judicial and quasi-judicial bodies play in the development of a rule of customary international law.[116]

7.2 Regional customary practice

Customary rules can be general or particular, with the latter not being binding on all states, but rather on states of that particular region.[117] As such, this paper concurs with the argument in the dissenting opinion of Tchikaya J that the African continent has sufficient regional customary practice at its disposal to outlaw the death penalty. However, this paper takes the argument further by providing that regional customary practice signifies the existence of a rule of

113 See Lazaro (n 5) *Dissenting Opinion of Tchikaya J* paras 18, 21, 20, 22.

114 International Bar Association (n 100) 10. See also R Hood 'Capital punishment: The USA in world perspective' (2005) 3 *Center for Human Rights and Global Justice Working Paper: Extrajudicial Executions Series* at 6.

115 *Roger Judge v Canada*, Communication 829/1998, UNHR Committee (13 August 2003), UN Doc CCPR/C/78/D/829/1998 (2003) para 10.4.

116 My argument.

117 Liu (n 91). Liu also adds that particular international customary law may also be formed by states from different regions around the world on the basis of shared common interest.

customary international law abolishing the death penalty.[118] Similar to customary international law, regional customary law can also be established through resolutions taken by human rights bodies, treaties and judicial decisions in a region.

7.2.1 Resolutions by the African Commission on Human and Peoples' Rights

There have been several resolutions taken at the regional level that have signified the African Commission on Human and Peoples' Rights' ('the Commission') commitment to the abolition of the death penalty. The Commission's Resolutions ACHPR/Res.42 (XXVI) 99; ACHPR/Res.136 (XXXXIV) 08; ACHPR/Res. 375 (LX) 2017 and ACHPR/Res. 483 (XXXI1I) 2021, have urged state parties to the Charter to ratify the Second Optional Protocol of the ICCPR abolishing the death penalty and to further place a moratorium on the death penalty.[119] Furthermore, resolution ACHPR/Res. 416 (LXIV) 2019 on the right to life, encouraged state parties to the Charter who have placed a moratorium on executions to take further measures for the abolition of the capital punishment in their domestic legislation.[120]

Most recently, at the 73rd public ordinary session from 20 October to 9 November 2022, the Commission recalled its commitment to uphold and preserve human rights in Africa, including to the protection of the rights enshrined in Articles 4 and 5 of the Charter.[121] Regarding its commitment to advance the right to life and dignity, the Commission encouraged those state parties to the Charter that maintain the death penalty to uphold the right to life, dignity, and the prohibition of torture in line with regional and international human rights jurisprudence; to curtail death sentences for all persons on death row; to take progressive steps towards the abolition of the death penalty; and that state parties with a moratorium on all executions to implement legislative measures promoting the total abolition of the death penalty.[122] The Commission further requested all state parties to include information on measures taken to abolish the death penalty domestically in their Periodic Reports and to further

118 This paper argues that regional practice also signifies the existence of a rule of international customary law, as it has been said that the unification of different regions on the basis of common interest can also establish customary international law. See Liu (n 91).

119 African Union 'Resolution on the death penalty and the prohibition of torture and cruel, inhuman or degrading punishment or treatment – ACHPR/Res.544 (LXXIII) 2022' https://achpr.au.int/index.php/en/adopted-resolutions/544-resolution-death-penalty-and-prohibition-torture-and-cruel (accessed on 23 May 2024).

120 African Union 'Resolution on the death penalty and the prohibition of torture and cruel, inhuman or degrading punishment or treatment – ACHPR/Res.544 (LXXIII) 2022' https://achpr.au.int/index.php/en/adopted-resolutions/544-resolution-death-penalty-and-prohibition-torture-and-cruel (accessed on 23 May 2024).

121 African Union (n 119).

122 As above.

support the adoption of the African Union's draft Additional Protocol to the African Charter on the abolition of the Death Penalty in Africa.[123]

As such, the resolutions by the Commission signify regional commitments to abolish the death penalty. These resolutions are in line with international human rights jurisprudence, signifying the existence of a rule of customary international law abolishing the death penalty.

7.2.2 Regional treaties

There have been several protocols taken at an African regional level encouraging the prohibition of the death penalty. For instance, Article 4(2)(j) of the Protocol on the Rights of Women in Africa ('the Maputo Protocol') to the African Charter urged states to ensure that the death penalty is not to be applied to pregnant or breastfeeding women, where it is still applied.[124] While the Maputo Protocol did not necessitate the total abolition of the death penalty, it constituted progressive steps towards the total abolition of capital punishment, as several protocols were developed thereafter.[125]

Two regional conferences relating to the Death Penalty in Africa were convened in September 2009 and in April 2010, where it was recommended that a Protocol on the abolition of the Death Penalty in Africa must be drafted.[126] The adoption of that Regional Protocol by member states of the African Union was supported in the Continental Conference on the Death Penalty held in Benin in 2014.[127] In April 2018, the African Regional Congress against the Death Penalty was held, where the adoption of the draft Additional Protocol to the African Charter on the abolition of the death penalty gained support from member states.[128] As noted in a separate opinion of Tchikaya J, out of the 55 member states of the African Union, nearly 40 states are abolitionist in law or practice, which evidences a regional commitment to the abolition of the death penalty.[129]

Comparably in Europe, the Charter of Fundamental Rights of the European Union protects the right to human dignity in Article 1, Article 2 protects the right to life and explicitly prohibits the death penalty, Article 3 protects the right to integrity of the person and

123 As above.
124 As above. See also Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa (2003).
125 African Union (n 119).
126 As above.
127 As above.
128 As above.
129 *Lazaro* (n 34) *Dissenting Opinion of Tchikaya J* para 24. See also *Ghati Mwita v United Republic of Tanzania* (Application No. 012/2019) (2022) AfCHPR 44 (1 December 2022) *Separate Opinion of Tchikaya J* para 36.

Article 4 prohibits torture and inhumane or degrading treatment or punishment. The right enshrined in Article 2 is strongly protected by the European Union ('EU') to the extent that, as a requirement of membership, the EU requires all member states to abolish the death penalty.[130] Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe in 2002, also abolishes the death penalty in Article 1. The Council of Europe and the EU vehemently oppose the death penalty, as they consider its abolition as enhancing dignity and progressive development of human rights.[131]

The above evidence strong regional commitments in line with international human rights jurisprudence to abolish the death penalty, also signifying the existence of a rule of customary international law abolishing the capital punishment.

7.2.3 Judicial decisions

As noted in the dissenting opinion of Tchikaya J, courts have an inherent power of interpretation, which allows them to exercise their judicial discretion to clarify the meaning of a rule of law.[132] The provisions of Article 4 of the Charter neither proscribes nor prescribes the death sentence as a method of punishment,[133] which leaves sufficient room for the court to provide clarity on the death penalty through its power of interpretation. In clarifying the meaning of a rule of law, courts 'need to keep pace with the evolution of international law'.[134] The supremacy of international law accords it applicability in all domestic procedural and substantive laws of states. These international undertakings are entered into and settled by states amongst themselves, who sequentially have to conform their domestic laws to these international commitments.[135] Accordingly,

130 International Bar Association (n 100) 12.
131 As above.
132 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 21.
133 *Lazaro* (n 5) *Dissenting Opinion of Tchikaya J* para 23. States who retain the death penalty also have similar provisions in their human rights declarations/ protocols. Therefore, if courts exercise their judicial discretion of interpretation, they can necessitate the abolition of the death sentence as it infringes on the right to life, dignity and not to be subject to torture or to cruel, inhumane or degrading treatment or punishment. For example, in the ASEAN Human Rights Declaration, Article 11 provides that every person has an inherent right to life which is protected by the law, and Article 14 provides that no person shall be subject to torture or to cruel, inhumane or degrading treatment or punishment. ASEAN states are strongly retentionist, with only two (2) states out of ten (10) having outlawed the death penalty. See S Petcharamesree et al 'ASEAN and the Death Penalty: Theoretical and Legal Views and a Pathway to Abolition' in S Petcharamesree et al (eds) Unpacking the Death Penalty in ASEAN (2023).
134 Mwita (n 129) para 7.
135 Mwita (n 129) para 39. Tchikaya J continues to state that adhering to and conforming to international commitments does not tantamount to states renouncing their sovereignty.

states must not enact domestic laws that are contrary to their international human rights obligations, such as legalising the death penalty as a method of punishment, as it is contradictory to international human rights jurisprudence. Courts can exercise their judicial powers to ensure that states fulfil their international human rights obligations, thus developing and signifying the existence of a rule of customary international law.

8 Concluding Remarks

This paper has argued that there is sufficient state practice evidencing a rule of customary international law abolishing the death penalty. Growing trends in international and regional human rights jurisprudence bodies towards the abolition of the death penalty all evidence the existence of a rule of customary international law on the abolition of the death penalty. These sources include resolutions by international and regional human rights bodies, international and regional treaties, judicial decisions of international and regional courts, and decisions of quasi-judicial international and regional bodies.

The broader categorisation of the abolition of the death penalty as customary international law encourages states to adopt progressive methods of punishment that are in line with human rights jurisprudence. Punishment that is cruel, inhumane, and degrading, such as the death penalty, should not be legalised by states. As enunciated by the South African Constitutional Court in *Makwanyane,* the Biblical precept of 'an eye for an eye, and a tooth for a tooth' has been long outgrown.[136] True justice is restorative and involves a balancing process, where deterrence, prevention and retribution are weighed against other methods of punishment available to the state.[137]

As concluded in *Makwanyane*, 'everyone, including the most abominable of human beings, has the right to life.'[138] Thirty years later, the same conclusion is reiterated.

136 n 53, para 29.
137 Makwanyane (n 53) para 35.
138 n 53, para 392.