# The divergent jurisprudence of the African Court on Human and Peoples' Rights on the death penalty in Africa

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**ABSTRACT:** The global movement to abolish the death penalty as a punishment manifests itself through legal instruments adopted at the global, regional and national levels, complemented by robust abolitionist campaigns and advocacy by civil society and non-governmental organisations. However, due to the absence of a binding legal instrument in force prohibiting the death penalty in Africa, it has been up to the African Court on Human and Peoples' Rights to interpret the existing norms through death penalty cases filed before it and, by implication, to shape the continental landscape on the subject against the global abolitionist trend. The decade-long jurisprudence of the Court on these cases has been characterised by abolitionist opinions dissenting from the majority's retentionist decisions, thus revealing judicial disunity. The Court's majority view diverges from the global abolitionist movement. This article discusses the lack of judicial consensus among members of the Court in their interpretation of international human rights norms concerning the death penalty, and their failure to reach a harmonised conclusion about its abolition on the continent. The article identifies the points of divergence as the interpretation of the wording of articles 4 and 5 of the African Charter on Human and Peoples' Rights, the question of the absoluteness of the abolition of the death penalty, and the principle of compliance of national repressive law with international law. Considering these points of divergence, the article underscores the importance of the Court to harmonise and streamline its position on the death penalty to sustain the momentum for the protection of the right to life on the continent.

## TITRE ET RÉSUMÉ EN FRANÇAIS

### La jurisprudence divergente de la Cour africaine des droits de l'homme et des peuples relative à la peine de mort en Afrique

**RÉSUMÉ:** Le mouvement mondial visant à abolir la peine de mort en tant que peine se manifeste à travers des instruments juridiques adoptés aux niveaux mondial, régional et national, complétés par des campagnes abolitionnistes robustes ainsi que par le plaidoyer de la société civile et des organisations non gouvernementales. Toutefois, en raison de l'absence en Afrique d'un instrument juridique contraignant en vigueur interdisant la peine de mort, il incombe à la Cour africaine des droits de l'homme et des peuples d'interpréter les normes existantes dans le cadre des affaires relatives à la peine de mort portées devant elle et, par conséquent, de façonner le paysage continental sur la question, en contraste avec la tendance abolitionniste mondiale. La jurisprudence décennale de la Cour sur ces affaires a été marquée par des opinions abolitionnistes en désaccord avec les décisions rétentionnistes majoritaires, révélant ainsi une absence d'unité judiciaire au sein même de la Cour africaine. La position majoritaire de la Cour diverge du mouvement abolitionniste mondial. Cet article interroge l'absence de consensus judiciaire entre les membres de la Cour dans leur interprétation des normes internationales des droits de l'homme encadrant

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IN Thomas 'The divergent jurisprudence of the African Court on Human and Peoples' Rights on the death penalty in Africa' (2025) 9 *African Human Rights Yearbook* 229-247
http://doi.org/10.29053/2523-1367/2025/v9a11

l'imposition de la peine de mort et dans l'adoption d'une conclusion harmonisée quant à son abolition sur le continent. L'article révèle que les points de divergence concernent l'interprétation de la formulation des articles 4 et 5 de la Charte africaine des droits de l'homme et des peuples, la question du caractère absolu de l'abolition de la peine de mort, ainsi que le principe de conformité du droit pénal national au droit international. À la lumière de ces points de divergence, l'article souligne l'importance, pour la Cour, d'harmoniser et de rationaliser sa position sur la peine de mort afin de maintenir l'élan en faveur de la protection du droit à la vie sur le continent.

**TÍTULO E RESUMO EM PORTUGUÊS**

**A jurisprudência divergente do Tribunal Africano dos Direitos Humanos e dos Povos relativa à pena de morte em África**

**RESUMO:** O movimento global para abolir a pena de morte manifesta-se através de instrumentos legais adotados a nível global, regional e nacional, complementados por campanhas abolicionistas robustas, bem como pela defesa da sociedade civil e de organizações não governamentais. No entanto, em África, devido à ausência de um instrumento jurídico vinculativo que proíba a pena de morte, cabe ao Tribunal Africano dos Direitos Humanos e dos Povos interpretar as normas existentes no contexto dos casos de pena de morte apresentados e, consequentemente, moldar o panorama jurídico continental sobre a questão, contrastando com a tendência abolicionista global. A jurisprudência de uma década do Tribunal nestes casos tem sido marcada por visões abolicionistas em desacordo com as decisões da maioria dos retencionistas, revelando a falta de unidade judicial dentro do próprio Tribunal Africano. A posição majoritária do Tribunal diverge do movimento abolicionista global. Este artigo questiona a falta de consenso entre os juizes do Tribunal na sua interpretação dos padrões internacionais de direitos humanos que regem os casos em que se aplicam a pena de morte e na adoção de uma conclusão uniforme sobre a sua abolição no continente. O artigo revela que os pontos de divergência dizem respeito à interpretação da redação dos artigos 4 e 5 da Carta Africana dos Direitos Humanos e dos Povos, à questão da natureza absoluta da abolição da pena de morte, bem como ao princípio da conformidade do direito penal nacional com o direito internacional. Face a estes pontos de divergência, o artigo sublinha a importância do Tribunal harmonizar e simplificar a sua posição sobre a pena de morte para manter o impulso para a proteção do direito à vida no continente.

**KEY WORDS:** death penalty; abolition; African Court on Human and Peoples' Rights; human rights; dissenting opinions; separate opinions

**CONTENT:**



# 1 INTRODUCTION

While in some African societies the death penalty is traced back to the pre-colonial era, in others it was introduced during colonial rule. However, many post-independence African states extended the application of the death penalty to offences that were not included

during colonial rule.[1] A historical examination of the death penalty in Africa can help dispel the misconception that it is solely a legacy of colonial rule, while also providing essential context for understanding the continent's abolitionist movement.[2] The global trend towards the universal abolition of the death penalty is spearheaded at the global level by the United Nations (UN) General Assembly and its treaty bodies; at the regional level it is exemplified by developments in Europe, and overall it is marked by robust abolitionist campaigns and advocacy by national and international organisations. African domestic and regional legal and human rights systems are being induced to keep pace with the changing tempo.

At the UN level, the adoption of the Universal Declaration of Human Rights (Universal Declaration)[3] in 1948 and, significantly for this article, the International Covenant on Civil and Political Rights[4] (ICCPR) in 1966 reinforced the abolitionist movement. The global trend towards abolition is particularly evident in the Second Optional Protocol to ICCPR aiming at the abolition of the death penalty (ICCPR-OP2), adopted in 1989, which lays the foundation for the global movement.[5] Although the Universal Declaration does not expressly mention the 'death penalty', the guarantee of the right to life under article 3, combined with referrals to it by numerous UN resolutions on the abolition of death penalty, strongly suggests that it favours abolition.[6]

Article 6 of ICCPR, which also guarantees the inherent right to life and prohibits arbitrary deprivation of life (article 6(1)), goes on to expressly provide for various aspects relating to the death penalty. It does not abolish it, but limits the imposition of the death penalty to the

1 Karimunda notes the lack of consensus on the existence of the death penalty as well as its actual imposition for the categories of offences. For an in-depth study of the historical and cultural background of the death penalty in Africa, see M Karimunda 'The death penalty in Africa' PhD thesis, National University of Ireland, 2011; L Chenwi *Towards abolition of the death penalty in Africa: a human rights perspective* (2007) 18, 20; A Novak 'Capital punishment in pre-colonial Africa: the authenticity challenge' (2018) 50 *Journal of Legal Pluralism and Unofficial Law* 71-93. See also S Hynd *Imperial gallows: murder, violence and the death penalty in British Colonial Africa, c 1915-60* (2023). This article draws inspiration from a keynote address by Dumisa Ntsebeza J during the Second Christof Heyns Human Rights Memorial Lecture organised by the Centre for Human Rights, University of Pretoria on 4 July 2024, https://www.youtube.com/watch?v=43eE_x_v0gc&t=2672s (accessed 2 July 2025).

2 See Karimunda (n 1) 18. Karimunda emphasises the importance of focusing on both, the question of the past and the nature of death penalty as well as the abolitionist movement in the assessment of the grounds on which the death penalty is retained today and to balance arguments on the contemporaneous developments on the death penalty in Africa.

3 Adopted 10 December 1948, GA Resolution 217A (III), UN Doc A/810 (1948) 71.

4 Adopted 16 December 1966, entered into force 23 March 1976, UN Doc A/6316 (1966).

5 See L Chenwi 'Compliance with prohibition of the death penalty in Africa' in A Adeola (ed) *Compliance with international human rights law in Africa: essays in honour of Frans Viljoen* (2022) for a comprehensive and recent account of international standards and required compliance regarding the death penalty.

6 Chenwi (n 1) 123.

most serious crimes pursuant to the law (article 6(2)); provides for the accused's right to seek pardon or commutation of the death sentence (article 6(4)); prohibits the imposition of the sentence to persons under 18 and its execution on pregnant women (article 6(5)); and prohibits invoking the provision to prevent the abolition of capital punishment (article 6(6)).[7] The international commitment to abolish the death penalty and what Chenwi terms the 'desirability' of the abolition manifests in the adoption of ICCPR-OP2, which prohibits executions and calls for measures to abolish the death penalty within the jurisdiction of state parties.[8]

By the end of 2025, ICCPR-OP2 has been acceded to or ratified by 92 of the 174 state parties to ICCPR.[9] Of these, 18 are African states.[10] While the limited number of ratifications by African states raises questions regarding their commitment to the abolition of the death penalty,[11] the accession by Zambia and Côte d'Ivoire to ICCPR-OP2 in 2024 exemplifies a growing consensus on the continent towards abolition.[12] As abolition campaigns continue, scholars and activists stress that African states that have abolished the death penalty should ratify ICCPR-OP2, to signal and confirm their irreversible commitment to abolition.[13]

At the regional level, within the African Union (AU) – the umbrella organisation of African states – there is no binding instrument requiring the abolition of the death penalty. This position is weak compared to the abolitionist stance of the Council of Europe (CoE) – the custodian of the oldest human rights system (the European human rights system).[14] Arguably, the AU position is not surprising considering the non-existence of any similar framework within the

7 Chenwi (n 1) 123 highlights remarks of the Human Rights Committee 'that "[t]he prohibition on arbitrary deprivation of life contained in article 6, paragraph 1 further limits the ability of States parties to apply the death penalty" and that article 6(6) ICCPR is reflective of the "pro-abolitionist spirit of the Covenant"'.

8 Art 1.

9 UN Treaty Collection, ch IV, Human rights, 12; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&clang=_en (accessed 7 November 2025).

10 As above; Angola, Benin, Cape Verde, Djibouti, Gabon, The Gambia, Guinea Bissau, Côte d'Ivoire, Liberia, Madagascar, Mozambique, Namibia, Rwanda, São Tomé and Príncipe, Seychelles, South Africa, Togo and Zambia.

11 Chenwi (n 1) 124.

12 See also East African Law Society and World Coalition against the Death Penalty, webinar, 'Ending the death penalty in East Africa – a call for ratification of ICCPR Second Optional Protocol' 8 October 2025, https://m.youtube.com/watch?v=MpA2JrSptLg&t=464s&pp=2AHQA5ACAQ%3D%3D (accessed 7 November 2025).

13 D Robiliard World Coalition Against the Death Penalty 'Second Optional Protocol: an irreversible mechanism for abolishing the death penalty' 7 September 2020, http://worldcoalition.org/2020/09/07/second-optional-protocol-an-irreversible-mechanism-for-abolishing-the-death-penalty-denys-robiliard/ (accessed 6 November 2025).

14 For a comprehensive account, see S Kütt 'The death penalty across borders: analysis of regional approaches and international human rights perspectives' LLB dissertation, Riga Graduate School of Law, 2024 18.

Organisation of African Unity (OAU), under which human rights was initially not a priority.[15] Also, as Demana argues, any condemnation of the death penalty was largely hinged on the OAU's vigorous stance against the apartheid regimes in Southern Africa.[16]

In Europe, the commitment to abolish the death penalty evolved over time. The CoE founded in 1949 (by only 10 members) adopted the European Convention for the Protection of Human Rights and Fundamental Freedom (European Convention) in 1950 whose additional protocols are of particular significance. These are Protocol 6 to the European Convention Concerning the Abolition of the Death Penalty (Protocol 6) adopted in 1983[17] and Protocol 13 to the Convention Concerning the Abolition of the Death Penalty in All Circumstances (Protocol 13) adopted in 2002.[18] Protocol 6 prohibits the execution of the death penalty during the time of peace[19] while Protocol 13 abolishes the death penalty in all circumstances.[20] Both prohibit reservations.[21] On this basis, the CoE set a condition for interested states to ratify the European Convention and Protocol 13 before joining the organisation and, by default, completely limits the imposition of the death penalty within the jurisdictions of its current 46 member states.[22]

Although the OAU's successor, the AU, has been a flag bearer of human rights on the continent, it has not paid heed to the call from, among others, its own organ, the African Commission on Human and Peoples' Rights (African Commission), of delegitimising the death penalty.[23] As far back as 2015, the African Commission adopted a draft Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty (African Death Penalty Abolition Protocol), committing state parties to abolish the death penalty by appropriate legislative, institutional and other measures.[24] It additionally binds states to a moratorium on the imposition and execution of the death sentence during the transitional period leading

15 See R Murray 'Historical overview: human rights in the OAU/AU' in R Murray *Human rights in Africa: from the OAU to the African Union* (2004) 7.

16 NJ Demana 'The Organisation of African Unity (OAU) and the isolation of South Africa 1963-1984' MA dissertation, Rand Afrikaans University, 1996 14.

17 Adopted 28 April 1983, entered into force 1 March 1985, ETC 114.

18 Adopted 3 May 2002, entered into force 1 July 2003, ETS 187.

19 Art 1.

20 As above.

21 Art 3.

22 Council of Europe portal 'Abolition of the death penalty in Europe', https://www.coe.int/en/web/abolition-death-penalty/abolition-of-death-penalty-in-europe (accessed 5 November 2025).

23 Adopted at the Commission's 56th ordinary session in 2015 and forwarded to the AU for adoption. However, it was not considered by the AU Specialised Technical Committee on Legal Affairs owing to the alleged lack of a legal basis for its adoption. See Chenwi (n 1) 124.

24 Art 1 African Death Penalty Abolition Protocol (on file with author). See also OO Popoola 'The influence of international human rights law on the use and abolition of the death penalty in sub-Saharan Africa' LLM dissertation, University of Kent, 2018 26.

to complete abolition enacted through domestic legislation.[25] However, by the end of 2025 – a decade later – the AU has not taken any pertinent steps to adopt this draft as an official AU treaty. The substantive provisions of the African Death Penalty Abolition Protocol are largely similar in content and objective to those under ICCPR-OP2, with the notable exception of the moratorium clause related to the transitional period leading to the legislative enactment of complete abolition.[26] ICCPR-OP2 does not bind state parties to suspend the imposition and execution of the death penalty while necessary legislation for abolition is being enacted.

A further normative gap in the AU regional human rights framework on the abolition of the death penalty stems from the absence of express condemnation of the death penalty under articles 4 and 5 of the African Charter on Human and Peoples' Rights (African Charter),[27] which mirror the previously cited provisions of the Universal Declaration and ICCPR. This contrasts with the firmly consolidated position at the European regional level marked by the adoption of the Charter of Fundamental Rights of the EU in 2000, which prohibits the imposition and execution of the death penalty as well as the extradition of a person to a state with the likelihood of subjecting them to a capital punishment.[28]

Due to the absence of a mandatory prohibition on the imposition and execution of the death penalty on the African continent, countries' positions on the death penalty vary widely. Nonetheless, a movement towards the continental abolition of the death penalty is gaining momentum. The Death Penalty Project records of the status of death penalty abolition in Africa indicate that 26 African countries have abolished the death penalty for all crimes, while four have done so for ordinary crimes, bringing the total of 'abolitionist' countries to 30.[29] This trend is also manifest in the votes recorded at the adoption of the tenth resolution for a moratorium on the use of the death penalty by the

25 Art 3 African Death Penalty Abolition Protocol.

26 An additional significant difference between the two instruments is that the African Death Penalty Abolition Protocol commits states to abolish the death penalty in all circumstances and does not, like art 2 of ICCPR-OP2, incorporate an exception for derogation on serious crimes of military nature during wartime. Apart from that, the African Death Penalty Abolition Protocol is silent regarding the option of states to make reservations while the provision of art 2 of ICCPR-OP2 necessitated the addition of a reservation clause under its art 2(1).

27 Adopted 27 June 1981, entered into force 21 October 1986 (5, 21 ILM 58 (1982)); arts 4 & 5 on the right to life and the right to dignity, respectively.

28 Adopted 7 December 2000, entered into force 1 December 2009, (2012/C 326/02), arts 2 & 19(2).

29 See Press release: 'Zimbabwe takes historic decision to abolish the death penalty' The Death Penalty Project 31 December 2024, https://deathpenaltyproject.org/press-release-zimbabwe-takes-historic-decision-to-abolish-the-death-penalty/ (accessed 25 September 2025). 'In this decade alone, [7 countries] Chad, Sierra Leone, the Central African Republic, Equatorial Guinea, Zambia, Ghana and Zimbabwe have all abolished the death penalty for ordinary crimes or for all crimes.'

UN General Assembly in December 2024.[30] Thirty-three African countries voted in favour of the resolution, compared to 29 countries in 2022. Burundi changed its vote from 'against' to 'in favour'; Gabon, Kenya, Morocco and Zambia progressed from abstaining to voting in favour; and Somalia, Seychelles, and São Tomé and Príncipe moved from a recorded 'no vote' to voting in favour of the resolution.

This article aims to contribute to discussions about the jurisprudence of the African Court on Human and Peoples' Rights (African Court) in death penalty cases.[31] The decisions of the Court on these cases have enabled it to shape the normative framework on the issue, despite being dominated by varying interpretations of relevant human rights norms among judges, that magnifies a stance that diverges from the global abolitionist trend. The Court had received over 20 death penalty cases between 2015 and 2020, all of which were submitted on allegations of violations of fair trial rights pursuant to article 7(1) of the African Charter.[32] The *Rajabu* case is the first and the most prominent death penalty case heard by the Court.[33] However, there are additional landmark cases on the subject, such as *Mulokozi Anatory v Tanzania* and *Evodius Rutechura v Tanzania*.[34] By the end of 2025, when this article was finalised, the number of death penalty cases had increased to 25 identified cases.

The following part provides an account of the Court's reasoning that expands on the *raison d'être* of its reasoning in *Rajabu,*[35] the bedrock of all subsequent decisions on death penalty matters before the Court. The ensuing part addresses factors that prevent the Court from reaching a unanimous position on the abolition of the death penalty, as such, in Africa. Finally, it concludes by highlighting the fact that all the evils that afflicted humanity – slavery, colonialism, apartheid, and so forth – were addressed through the law; in this context, the legal justifications for the death penalty effectively 'further legitimise cold-blooded killing as justice'.[36]

30 See Resolution adopted by the General Assembly on 17 December 2024 Moratorium on the use of the death penalty (A/RES/79/179) 53rd Plenary meeting of the Third Committee, UNGA 79th session, Agenda item 71(b).

31 For previous discussion on the topic, see A Novak 'Tanzania and the African Court spar over the mandatory death penalty and hanging: *Kambole v Attorney General* (Tanzania Court of Appeal, 2022), *Ally Rajabu v Tanzania* and fourteen other African Court decisions' (2024) 8 *African Human Rights Yearbook* 540-553.

32 *Evodius Rutechura v Tanzania* Application 4/2016 Dissenting opinion of Blaise Tchikaya J para 14 (*Rutechura*).

33 *Rutechura* (n 32) para 16.

34 See *Mulokozi Anatory v Tanzania* Application 57/2016 Joint Dissenting Opinion of Blaise Tchikaya J and Dumisa Ntsebeza J. See *Rutechura* (n 32) para 14.

35 *Ally Rajabu & Others v Tanzania* Application 7/2015, African Court on Human and Peoples' Rights (*Rajabu*).

36 Kütt (n 14) 19.

## 2 STRETCHING THE *RAISON D'ÊTRE* OF THE REASONING IN *RAJABU*

The death penalty cases that have been decided on merits before the African Court are all against Tanzania, a *de facto* abolitionist state,[37] with a moratorium on the execution of death sentences. This, indeed, is reflective of how Tanzania is, as Novak remarks, 'a slippery target for advocates challenging the constitutionality of the mandatory death penalty'.[38] This part takes stock of the reasoning in death penalty cases,[39] decided after the African Court's judgment in *Rajabu,*[40] to highlight the extent to which the Court sought to subsequently clarify its reasoning in *Rajabu*.

In light of existing commentaries on *Rajabu* that comprehensively detail the facts and summary of the case,[41] it suffices to recap the main question that the Court addressed in its reasoning.[42] This was 'whether the legal provision of the mandatory imposition of the death sentence in cases of murder violates the right to life guaranteed in article 4 of the Banjul Charter'.[43] Due to the absence of express reference to the death

37 A Novak 'Hanging and the mandatory death penalty in Africa: the significance of *Rajabu v Tanzania*' (2021) *African Human Rights Yearbook* 405.

38 Novak (n 37) 541.

39 Novak (n 37) 543. Novak remarks on 14 cases, namely, *John Lazaro v Tanzania* Application 3/2016 (*Lazaro*); *Deogratius Nicholaus Jeshi v Tanzania* Application 17/2016; *Amini Juma v Tanzania* Application 24/2016; *Kachukura Nshekanabo Kakobeka v Tanzania* Application 29/2016; *Romward William v Tanzania* Application 30/2016 (*Romward*); *Ghati Mwita v Tanzania* Application 12/2019 (*Mwita*); *Makungu Misalaba v Tanzania* Application 33/2016 (*Misalaba*); *Ibrahim Yusuf Calist Bonge & Others v Tanzania* Application 36/2016; *Dominick Damian v Tanzania* Application 48/2016; *Chrizant John v Tanzania* Application 49/2016; *Crospery Gabriel & Ernest Mutakyawa v Tanzania* Application 50/2016; *Nzigiymana Zabron v Tanzania* Application 51/2016; *Marthine Christian Msuguri v Tanzania* Application 52/2016 (*Msuguri*); *Gozbert Henerico v Tanzania* Application 56/2016 (*Henerico*). An additional 13 decisions include *Umalo Musa v Tanzania* Application 31/2016; *Mulokozi Anatory v Tanzania* Application 57/2016 (*Mulokozi)*); *Igola Iguna v Tanzania* Application 20/2017 (Novak does not list *Mulokozi* and *Iguna* under n 14 but gives a view on them at 554); *Ladislaus Chalula v Tanzania* Application 3/2018 (*Chalula*); *Rutechura* (n 32); *Thomas Mgira v Tanzania* Application 3/2019; *Habiyalimana Augustino and Miburo Abdukarim v Tanzania* Application 15/2016; *Joseph Mukwano v Tanzania* Application 21/2016; *Cosma Faustin v Tanzania* Application 21/2016; *Oscar Josiah v Tanzania* Application 53/2016; *Emmanuel Yusufu Noriega v Tanzania* Application 13/2018; *Tembo Hussein v Tanzania* Application 1/2018; and *Armand Guehi v Tanzania* Application 15/2015.

40 *Rajabu* (n 35).

41 See Novak (n 37) 408 and Novak (n 31) 546.

42 Specifically on the subject of the death penalty, the applicants expressly prayed, in para 14(vii), that the Court '[d]eclare that by not amending Section 197 of its Penal Code, which provides for the mandatory imposition of the death penalty in cases of murder, the Respondent State violated the right to life and does not uphold the obligation to give effect to that right as guaranteed in the Charter'. The applicants, in para 14(viii), prayed that the Court '[d]eclare that the mandatory imposition of the death penalty by the High Court and its confirmation by the Court of Appeal violates their right to life and to dignity'.

43 *Rajabu* (n 35) para 97.

penalty under article 4, the Court reasoned that to examine the legality of the death penalty through this provision would entail an assessment of whether its imposition constitutes an arbitrary deprivation of the right to life.[44]

After a recourse to case law, including the African Commission jurisprudence, the Court instituted three-pronged criteria for assessing whether the deprivation of life is arbitrary in the context of article 4.[45] Its assessment requires that the imposition of the death sentence must (i) be provided by law; (ii) be imposed by a competent court; and (iii) adhere to due process. The Court found the respondent in violation of the right to life for failing to ensure due process in sentencing.[46] It also ruled that the respondent violated fair trial rights as the mandatory nature of the death sentence stripped the domestic court of the discretion to independently evaluate the facts and apply the law. The Court also found the respondent in violation of article 5, holding that the method of execution – hanging – encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment.[47]

Notably, in cases subsequent to *Rajabu*, the Court built on fair trial guarantees to broaden the scope of rights violation caused by the imposition of death penalty under article 7 of the African Charter. While in *Rajabu* the violation of fair trial rights was hinged on the High Court's inability to uphold fairness and due process, in *Henerico,*[48] it was based on the inability of the High Court to consider the medical evaluation report on the applicant's mental status, as the Court held that it constituted a grave procedural irregularity. In another case, the Court found the respondent in violation of article 7 based on its failure to notify the applicant, in the proceedings that led to the death sentence, of his right to consular assistance despite knowing that he was a foreign detainee.[49]

At this juncture, it suffices to appreciate Novak's observation that the Court was able to extend its reasoning in *Romward,*[50] by transforming the emphasis, in determining the legality of the imposition of the mandatory death penalty, on fair trial rights into an analysis centred on human dignity under article 5.[51] Parallel to this very concept, the Court provided an extended interpretation of the right to dignity in *Misalaba*, holding as follows:[52]

44 *Rajabu* (n 35) para 96.
45 *Rajabu* (n 35) para 104. See also Novak (n 37) 410.
46 *Rajabu* (n 35) paras 109 & 111.
47 *Rajabu* (n 35) para 119.
48 *Henerico* (n 39) para 160.
49 *Zabron* (n 39) para 180.
50 See n 39.
51 Novak (n 31) 549. He is of the view that this transformed emphasis could signal a change of basis for future death penalty challenges from allegations of violation of the right to life to those of right to dignity.
52 *Misalaba* (n 39) para 165. See also Novak (n 31) 548.

> The right to dignity captures the very essence of the inherent worth and value that resides within every individual, irrespective of their circumstances, background, or choices. At its core, it embodies and upholds the principle of respect for the intrinsic humanity of each person and forms the bedrock of what it means to be truly human. It is in this sense that Article 5 absolutely prohibits *all* forms of treatment that undermines the inherent dignity of an individual.

In a similar context, the African Court endeavoured to stretch the elements of the violation of the right to dignity to include a lengthy period on death row awaiting execution. In *Mwita*, where the applicant had spent seven years on death row, [53]after the conclusion of all judicial proceedings in her case, the Court held 'that such detention and the length of time thereof have inevitably caused the applicant to endure a level of suffering that infringes upon her dignity'.[54] A similar conclusion was reached in *Msuguri*, where the time spent on death row was 12 years.[55] Equating the ensuing harm with the 'ever present shadow of death', the Court found the respondent in violation of article 5 with regard to the applicant's continued detention on death row.[56]

Occasionally, the Court has, on its own initiative (*suo motu*), raised and addressed additional rights violations that the applicant did not raise particularly concerning the legality of the conviction and the death sentence. Novak notes this trend in *Jeshi* and *Kakobeka,* where the applicant made no submission on the death penalty or hanging, and where the applicant made no submission on the right to dignity, respectively.[57] In a similar way, even though the applicant had only alleged a violation of his right to dignity in *Mulokozi,* the Court identified and ruled on a violation of the right to life based on the fact that his murder conviction and death sentence by hanging relied on a caution statement which he later retracted.[58]

## 3 THE DIVERGENCE: LACK OF CONSENSUS ON THE ABOLITION OF THE DEATH PENALTY IN AFRICA

The key factor that hinders the African Court from adopting a unanimous stance that reflects the global death penalty abolitionist movement is the divergent interpretation of the wording of article 4 of the African Charter.[59] The majority of the Court cling to the absence of

53 *Mwita* (n 39) para 88.
54 *Mwita* (n 39) para 89.
55 *Msuguri* (n 39) para 113.
56 *Msuguri* (n 39) para 116.
57 Novak (n 31) 547.
58 *Mulokozi* (n 39) para 73.
59 It is worth noting that the division of stance by the bench of international human rights law adjudicators, particularly in deliberating on matters related to the legality of the death penalty, is not a rare occurrence. In his dissent in *Lazaro*, Ntsebeza J referred to a case before the UN Human Rights Committee with a division of opinion within the tribunal.

the term 'death penalty' in the provision to interpret article 4 to 'imply that the death penalty is permissible as an exception to the right to life under article 4 as long as it is not imposed arbitrarily'.[60] The minority, comprising Tchikaya J and Ntsebeza J, are against that stance and their position is that the death penalty has no place in the human rights discourse as nothing about the death penalty is acceptable.[61] In other words, they view the right to life and the sanctity of human life as inherently incompatible with the death penalty.[62]

Against that background, while the majority of the African Court resorted to qualifying the death penalty in the meaning of article 4 with the three-pronged test, in an effort, as Novak rightly puts it, 'not to cast doubt on the lawfulness of the death penalty *per se*', the minority called this approach inadequate,[63] partial[64] and minimalistic.[65] The majority interpreted article 4 to mean that the African Charter contemplates the deprivation of life through the death penalty as long as it is not mandatory.[66] In other words, arguably, the 'mandatory' imposition is deemed the threshold for arbitrariness of the sentence. It even goes on to pronounce its decision focusing on the categories of death penalty rather than focusing, overall, on condemnation of the death penalty.[67]

In contrast, the minority judges are of the view that the death penalty has always been arbitrary,[68] and that a mandatory death penalty constitutes a violation of the right to life as much as the death penalty itself.[69] Tchikaya J further terms the denouncement of the 'mandatory' death penalty alone 'out of step'[70] with the constant conviction of the International Law Commission (ILC) for the promise of the abolition of death penalty in the enhancement of human dignity and fundamental rights.[71] He further suggests that the lack of express

60 *Rajabu* (n 35) para 98.

61 *Mulokozi* (n 39) Joint Dissenting Opinion of Blaise Tchikaya J and Dumisa Ntsebeza J para 7.

62 *Chalula* (n 39) Declaration by Blaise Tchikaya J para 5.

63 *Lazaro* (n 39) Dissenting Opinion of Blaise Tchikaya J to *Lazaro*, *Misalaba* and *Chrizant* para 38.

64 *Henrico* (n 39) Declaration by Blaise Tchikaya J para 3.

65 *Lazaro* (n 39) Dissenting Opinion of Blaise Tchikaya J to *Lazaro*, *Misalaba* and *Chrizant* para 22. See also Novak (n 31) 550.

66 *Rajabu* (n 35) para 98.

67 See *Henrico* (n 39) Declaration by Blaise Tchikaya J para 2. 'Tanzania to review its legislation on a category of death penalty – the mandatory death penalty – is refusing to direct its decision to condemn the death penalty.'

68 *Rajabu* (n 35) Separate opinion by Blaise Tchikaya J para 9.

69 *Lazaro* (n 39) Dissenting Opinion of Blaise Tchikaya J to *Lazaro*, *Misalaba* and *Chrizant* para 33. 'The problem is neither why this penalty is imposed nor how it is administered. The issue is the existence of a punishment that is inhuman and degrading to human rights.'

70 A similar sentiment was raised in *Mulokozi* (n 39) Joint Dissenting Opinion of Blaise Tchikaya J and Dumisa Ntsebeza J.

71 *Rajabu* (n 35) Separate opinion by Blaise Tchikaya J 27.

reference to the death penalty under article 4 implies that it is neither authorised nor prohibited.[72]

Therefore, according to the judge and, rightly so, in my view, the wording of the provision accords the Court the autonomy to amplify the abolitionist trend that upholds the right to life.[73] Referring to a wide range of supporting authorities, he stresses that 'the Court has at its disposal sufficient regional practice by African states to proceed, on the one hand, to an interpretation of Article 4 denying the legality of the death penalty'.[74] 'On the other hand', the judge continued, the Court could also proceed by requiring the abolition of this penalty in national legislation 'insofar as it has become contrary to human rights and to its development'.[75] Ntsebeza J reinforces this argument by further providing reasons for abolishing the death penalty.[76] These five reasons are (i) that it is irreversible and mistakes happen; (ii) that it does not deter crime; (iii) that it is often used within skewed justice systems; (iv) that it is discriminatory; and (v) that it is used as a political tool.[77]

In the very line of argument, the minority judges advance and emphasise the importance of the Court to invoke its praetorian power[78] for the adoption of an interpretation of article 4 that denies the legality of the death penalty. Tchikaya J raised this point in his separate opinion in *Rajabu*, where he finds the Court's reasoning regarding the right to life unclear and 'an unexplained search for the absolute and the lack of the praetorian commitment [that] limit the Court's power of interpretation'.[79] Once again, in his joint separate opinion to *Msuguri*, *Mwita* and *Iguna*, he stressed the importance of the Court to use its praetorian power as a catalyst for the continent to join the international movement towards the abolishment of the death penalty in order to

72 *Lazaro* (n 39) Dissenting Opinion of Blaise Tchikaya J to *Lazaro*, *Misalaba* and *Chrizant* para 23.

73 *Chalula* (n 39) Declaration by Blaise Tchikaya J para 9.

74 *Lazaro* (n 39) Dissenting Opinion of Blaise Tchikaya J to *Lazaro*, *Misalaba* and *Chrizant* para 23.

75 *Lazaro* (n 39) Dissenting Opinion of Blaise Tchikaya J to *Lazaro*, *Misalaba* and *Chrizant* para 28.

76 *Lazaro* (n 39) Dissenting Opinion of Dumisa Ntsebeza J paras 25-30.

77 Kütt (n 14) 10.

78 *Lazaro* (n 39) Dissenting Opinion of Blaise Tchikaya J to *Lazaro*, *Misalaba* and *Chrizant* para 21. It is linked to a judicious exercise, a discretion in a judge's power of interpretation geared at clarifying the meaning of the rule of law. Linked to this judicious exercise, which is reflective of the creative function of the Court, is another aspect of the spectre of *ultra petita* which has raised diverging opinions in death penalty cases before the Court. See *Rutechura* (n 32) Dissenting opinion of Blaise Tchikaya J para 26 and *Mulokozi* (n 39) Declaration by Bensaoula Chafika J.

79 *Rajabu* (n 35) Separate opinion by Blaise Tchikaya J para 21. See also para 24 where the judge notes that the Court's decision in *Rajabu* pays little attention to the Praetorian powers of the human rights judge to advance the protection of the right to life. See Novak (n 37) 413 for a similar remark on this. See also Novak (n 37) 412 as he discusses the context from a perspective of the descriptive versus normative debate in international law.

uphold the right to life.[80] In the same vein, Tchikaya and Ntsebeza JJ raised a similar argument in their joint dissenting opinion to *Mulokozi* as they remarked on *Rutechura* where they admitted to have endorsed the Court's finding of no violation of article 7 by the respondent over the applicant who had been sentenced to death by hanging for murder.[81] However, they highlighted that it would have been desirable and a welcome extension of its praetorian power had the Court taken a position on the underlying issue of the death penalty within the normative principles of the right to life.

The wording of article 4 is not the only point of divergence by the Court. There are varying interpretations of the right to dignity under article 5, particularly as pertains to methods of execution of death sentences. It suffices to note that there are lines of convergence in the appreciation of the concept of human dignity between the majority and the minority of the bench. Having regard to the extended interpretation of the concept by the Court in *Misalaba,* a similar take can be noted in a dissenting opinion to *Lazaro* by Ntsebeza J who reiterates that 'the concept of human dignity lies at the core of international human rights'.[82] Tchikaya J goes even further and clarified the wording of article 5:[83]

> This provision of the Charter is unambiguous in all its content. The drafters of the Charter highlighted the three dimensions of human rights that the death penalty sets out to deny: a) Firstly, dignity, because what is denied by death row is ultimately, through profound alienation, the human person; b) Secondly, there is the denial of legal status, because the death penalty is a kind of legal aporia. It puts an end to a person's existence, even though his or her rights presuppose a physical presence; finally, there is the physical and moral torture denounced in Article 5. Such torture is inherent in any form of death sentence, not to mention cruel, inhuman or degrading treatment.

The majority of the Court adopted, as it did with article 4, three factors for determining the violation of the right to dignity.[84] It pronounced that article 5 has no limitation clause; the prohibition must be interpreted to extend to the widest possible protection against abuse, whether physical or mental; and that personal suffering and indignity can take various forms, the assessment of which will depend on the circumstances of each case. Nonetheless, based on the reasoning of the Court in various death penalty cases, the minority deemed its conclusions that uphold the death penalty unconscionable[85] and

80 *Mwita* (n 39) Separate opinion by Blaise Tchikaya J to *Msuguri*, *Mwita* and *Iguna* para 37. See also *Rutechura* (n 32) Dissenting opinion of Blaise Tchikaya J para 8.

81 *Mulokozi* (n 39) Joint Dissenting Opinion of Tchikaya and Ntsebeza JJ para 3.

82 *Lazaro* (n 39) Dissenting Opinion of Blaise Tchikaya J to *Lazaro*, *Misalaba* and *Chrizant* para 9.

83 Blaise Tchikaya J (n 82) para 37.

84 *Mulokozi* (n 39) para 69. See also *Mulokozi* (n 39) Joint Dissenting Opinion of Blaise Tchikaya J and Dumisa Ntsebeza J para 31.

85 *Lazaro* (n 39) Dissenting Opinion of Dumisa Ntsebeza J para 8.

paradoxical.[86] The Court interprets the meaning of article 5 in determining rights violations arising from the methods used to implement the death penalty. This is addressed in his dissent to *Lazaro*, where Ntsebeza J argues that

> no termination of life, in whatever form, whether by electrocution, or by lethal injection, hanging, gas chamber asphyxiation, decapitation – none at all ... escapes being an affront to the dignity right protected by Article 5. Every killing of a human being, by another individual ... or even by the State, is, conceptually, undignified.[87]

A similar sentiment is advanced by Tchikaya J who remarks that no technique humanises or legalises the death penalty.[88] This is reinforced by Ntsebeza J in his dissent to *Lazaro*, where he contests the restriction of the violation of article 5 to the method of execution, and submits that it should be construed to the overall meaning of capital punishment for its cruel, inhumane, degrading and torturous nature.[89] Tchikaya J considers this approach of the Court contradictory as it indirectly invalidates the death penalty considering the fact that it has often been part and parcel of death row and confinement.[90] He stresses the dispensation of the discretion of the Court to place the violation in the legal context,[91] particularly by taking its reasoning to its logical conclusion through simply banishing capital punishment in all its forms from the African legal order.[92]

In addition to the foregoing, there are more aspects that raise diverging stances by the Court. These are the question of the absoluteness of the abolition of the death penalty and the principle of compliance of national repressive law with international law. Starting with the question of the absoluteness of the death penalty, notably, the Court refrained from exercising its discretion to declare the death penalty unlawful within the meaning of article 4. This restraint stems from the Court's observation that the prohibition of death sentence

86 *Romward* (n 39) Declaration of Blaise Tchikaya J in *Romward* and *Jeshi* para 8. See also Novak (n 37) 551.

87 *Lazaro* (n 39) Dissenting Opinion of Dumisa Ntsebeza J para 8. See also Novak (n 37) 551.

88 *Mwita* (n 39) Separate Opinion by Blaise Tchikaya J to *Msuguri*, *Mwita* and *Iguna* para 20.

89 *Lazaro* (n 39) Dissenting Opinion of Dumisa Ntsebeza J para 4.

90 *Mwita* (n 39) Separate Opinion by Blaise Tchikaya J to *Msuguri*, *Mwita* and *Iguna* para 13. See also *Lazaro* (n 39) Dissenting Opinion of Blaise Tchikaya J to *Lazaro*, *Misalaba* and *Chrizant* para 18. 'It defies rational understanding to assert that a person's dignity was not violated, while at the same time asserting that they were sentenced to a punishment, namely the death penalty, that human rights law rejects.' Novak (n 37) 552 puts it differently: 'Singling out hanging as an inhumane method of execution suggests that other methods were more humane; similarly, condemning only the length and conditions of confinement on death row "indirectly validated" the death penalty, which by its very nature involved confinement on death row.'

91 *Mwita* (n 39) Separate opinion by Blaise Tchikaya J to *Msuguri*, *Mwita* and *Iguna* para 36.

92 *Henrico* (n 39) Declaration by Blaise Tchikaya J para 3.

under international law remains not-absolute[93] owing to the absence of a universally ratified treaty on the death penalty.[94] The minority were certain to vigorously challenge the majority's position, substantiating their arguments with a wide range of international principles that illustrate a trend towards the abolition of the death penalty.[95] Their argument for denying the legality of the death penalty is hinged on the dire need for the Court to keep up with international law,[96] particularly considering the existing backing[97] of the social values and legal norms.

Turning next to the divergence of opinions on the principle of compliance of national repressive law with international law that, notably, arises from the tendency of the Court to defer to the domestic courts the assessment on the proportionality of the death sentence with incidents of crime. In *Mwita*, for instance, it was held that '[h]owever, since the circumstances for which the death penalty may be appropriate cannot be categorised with exactitude, the determination of incidents of crimes warranting the imposition of the death penalty must be left to domestic courts to decide on a case-by-case basis'.[98] This was also reiterated *verbatim* in *Mulokozi*.[99]

The minority judges have pronounced their position against leaving the imposition of the death penalty to the discretion of national authorities considering the principle of compliance of national repressive law with international law.[100] This is further reinforced by Chikaya J in his dissent to *Mwita,* where he invokes the Permanent Court's principle of 'non-invocability of constitutional provisions against international law' to stress on the superiority of international law to all categories of internal and material rules.[101] He advances similar views in his dissent to *Chalula* where he points at the unacceptability, even in the name of state sovereignty, of justifying the discretion of outlier states not to cooperate with an emerging clear trend such as the abolition of the death penalty.[102] The Court's tendency is deemed by the minority 'legally inadmissible and an

93 *Rajabu* (n 35) para 96. See also *Rajabu* (n 35) Separate opinion by Blaise Tchikaya J para 21; *Lazaro* (n 39) para 76; *Lazaro* (n 39) Dissenting Opinion of Dumisa Ntsebeza J para 19.

94 *Lazaro* (n 39) para 75; *Lazaro* (n 39) Dissenting Opinion of Dumisa Ntsebeza J para 18.

95 *Lazaro* (n 39) Dissenting Opinion of Dumisa Ntsebeza J paras 15-17. See also *Rutechura* (n 32) Dissenting opinion of Blaise Tchikaya J para 37 on a similar sentiment.

96 *Mwita* (n 39) Separate opinion by Blaise Tchikaya J to *Msuguri*, *Mwita* and *Iguna* para 7. *Rajabu* (n 35) Separate opinion by Blaise Tchikaya J para 28.

97 *Lazaro* (n 39) Dissenting Opinion of Blaise Tchikaya J to *Lazaro*, *Misalaba* and *Chrizant* para 28.

98 *Mwita* (n 39) Separate opinion by Blaise Tchikaya J to *Msuguri*, *Mwita* and *Iguna* para 66. See also Novak (n 37) 548.

99 *Mulokozi* (n 39) Joint Dissenting Opinion of Blaise Tchikaya J and Dumisa Ntsebeza J para 74.

100 *Mulokozi* (n 39) Joint Dissenting Opinion of Blaise Tchikaya J and Dumisa Ntsebeza J paras 29 & 38. See also *Lazaro* Dissenting Opinion of Dumisa Ntsebeza J (n 7).

101 *Mwita* (n 39) Separate Opinion from Tchikaya J para 39.

102 *Chalula* (n 39) Declaration by Blaise Tchikaya J para 11.

anachronistic to impede the global will to put an end to the death penalty with national idiosyncrasies'.[103]

# 4 CONCLUSION

The absence of a normative continental framework and coordinated scheme for the abolition of the death penalty in Africa similar to that in Europe has technically left the African Court's involvement through its case law as the only legal outlet for binding decisions.[104] Over the years, considering that by 2015 the Court had already deliberated on approximately 20 death penalty cases and the number has since increased, it has exercised its interpretation power to chart a legal landscape that defines the African stance on the global death penalty abolitionist movement, albeit at the AU level. In addition to the promising detailed initiatives to expand the *raison d'être* of *Rajabu,* it is equally encouraging to note that through the Court's interpretation and pronouncements in death penalty cases, it has evidently complemented the jurisprudence construed by the African Commission. As Novak remarks, this was through clarifying and simplifying the permissible standards articulated in the African Commission communications relating to mandatory death penalty and hanging.[105]

The significant number of compelling dissenting opinions that diverge from majority rulings, as highlighted in the article, underscores the urgent need for the Court to harmonise and streamline its position on the death penalty in correspondence with the impetus of protection of rights. In light of this need for harmonisation several aspects below could prove useful in providing guidance particularly as relating to the Court's 'alternativist' approach, as characterised by Tchikaya and Ntsebeza JJ,[106] which confers legality to the death penalty solely based on their incorporation in laws of some African states.

103 *Mulokozi* (n 39) Joint Dissenting Opinion of Blaise Tchikaya J and Dumisa Ntsebeza J para 34.

104 Considering that the death penalty is retained as a punishment for capital crimes in the statute books of some states other than Tanzania against which all cases are filed, the binding force of the decisions of the African Court on death penalty cases to states that are not party to the cases may be a subject of scrutiny. There are two limbs in attempting to address this. One is the amplification of the principle of *res interpretata* in the interpretation of the decisions of the Court as advanced by Jonas, which imposes a special duty on states to take into account the force of interpretation of the decision of the Court despite not being party to the case. See O Jonas '*Res interpretata* principle: giving domestic effect to the judgments of the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 739, 740 & 754. Two, the decisions of the African Court on the death penalty, particularly in the absence of an African Death Penalty Protocol, identifies as a pan-African jurisprudence that presents the regional position in the global abolitionist movement. This position, by implication, represents a collective resolve of all African states and not just parties to the cases from which the decisions are reached.

105 Novak (n 37) 416.

106 *Mulokozi* (n 39) Joint Dissenting Opinion of Blaise Tchikaya J and Dumisa Ntsebeza J para 21.

The issue with this approach is the fact that all historical evils that plagued the human race – slavery, Jim Crow laws in the United States, the Holocaust, apartheid, and so forth – were according to the law. As such, relying on the legality of the death penalty by a human rights court is not justice, but rather it is legitimising premeditated killing by the state, and is an insult to the legal process and a betrayal of the sacred right to life. Therefore, arguably, the position of the dissenting minority in the death penalty cases before the African Court, by implication, rightly conveys the reality that the fact that the universal abolition of the death penalty is not absolute does not exempt countries that retain it from violation of the right to life regardless of theoretical safeguards in place. This is because even though the law prescribes 'safeguards', in reality there is no 'safeguarded death penalty' or a good death penalty[107] and the law must align with observable conditions to maintain legitimacy. Ultimately, the African Court ought to pick a side that is reflective of its purpose and mandate – the strong abolitionist side.

An additional aspect that may guide the Court's harmonisation of its stance on the abolition of the death penalty in Africa emanates from best practices witnessed at the European level. The comprehensive abolitionist efforts within the CoE demonstrates a top-down scheme entailing the adoption of binding instruments, most notably Protocol 13 establishing the complete domestic abolition of death penalty as a prerequisite for accession to both the CoE and the EU. Tchikaya J supports this framework and acknowledges the importance of the adoption of Protocol 13, cemented by the *Al-Saadoon* case,[108] in the European regional abolitionist campaign as an indication of the final step towards the abolition of the death penalty in all circumstances. It is against this background that he implores the Court to take note and follow up on the global abolitionist trend.[109] More explicitly, in his Declaration for the *Jeshi* case, he expressed the view that the Court 'must declare that capital punishment is unacceptable, as the European Court of Human rights has done'.[110] While this statement may be criticised for exhibiting a very uncritical and deferential view of the European position, it also underlines the presence of a proponent of a top-down approach among the judges which, arguably, is a promising starting point for attaining a harmonised stance of the Court on the abolition of the death penalty in Africa.

107 *Mulokozi* (n 39) Joint Dissenting Opinion of Blaise Tchikaya J and Dumisa Ntsebeza J para 26.

108 ECHR *Al-Saadoon and Mufdhi v United Kingdom,* 2 March 2010 cited in *Chalula* (n 39) Declaration by Blaise Tchikaya J para 12.

109 *Rajabu* (n 35) Separate opinion by Blaise Tchikaya J para 13; *Lazaro* (n 39) Joint Dissenting Opinion of Blaise Tchikaya J para 24; *Chalula* (n 39) Declaration by Blaise Tchikaya J para 3 & 14; *Jeshi* (n 39) Declaration by Blaise Tchikaya J para 9; Tchikaya J is also in support of the adoption of EU Regulation 2019/125 'concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, 5 April 2019 essentially prohibiting trade of instruments used in the enforcement of the death penalty; see *Ghati* (n 39) Separate Opinion from Blaise Tchikaya J paras 20 & 38.

110 *Jeshi* (n 39) Declaration by Blaise Tchikaya J para 8.

In his keynote address,[111] Ntsebeza J hinted at a concept of a bottom-up scheme geared at persuading the adjustment of the jurisprudence of the Court to adopt the global abolitionist trend. He remarked that 'although there are still areas for improvement and given its evolutive character there is every opportunity that the jurisprudence of the Court may eventually be persuaded by the development by member states of the AU especially the abolitionists'. This remark envisages that initiatives at the domestic level, perhaps when the number of abolitionist states increases, might persuade the Court to also adopt an abolitionist stance. Unfortunately, that will have to be tested, and it holds less to no promise that this can be realised even in a context where states maintain the death penalty in their domestic laws under the guise of sovereignty, with the Court providing support for that position.

An approach with some chance of success is the adoption of a top-down mechanism akin to that implemented at the European regional level, that is, the AU adopting the African Death Penalty Abolition Protocol which, upon ratification, would become binding on respective member states. However, the question may be posed as to the difference the adoption of the African Death Penalty Abolition Protocol would make in practice. It still needs to be ratified by states, and it logically is more likely that the same states that have already ratified ICCPR-OP2 would also ratify the Protocol. It is an open question how many states beyond the 18 that are party to ICCPR-OP2 will accept the African Death Penalty Abolition Protocol.[112] It is also very uncertain if and when the AU policy organs will adopt the African Death Penalty Protocol, given that its adoption has been pending since 2015. In a hopeful sign that the impasse may be broken, in 2024 the Pan-African Parliament (PAP) endorsed the Protocol, and committed itself to collaborate with the African Commission and other stakeholders to advance its adoption by the AU Assembly.[113]

An equally commendable approach driven by collaborative efforts of non-governmental organisations (NGOs) and scholars is the submission of a request for an advisory opinion by the Pan African Lawyers Union (PALU) to the African Court in November 2024.[114] The request seeks the Court's advisory opinion concerning the compatibility of the death penalty with the provisions of the African

111 Keynote address by Dumisa Ntsebeza J (n 1).

112 It may be argued that the level of African participation in global treaties does not reliably predict participation in a comparable AU instrument. A clear illustration is the difference in ratification status between the Rome Statute of the International Criminal Court and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights (Malabo Court Protocol). Although the Malabo Protocol establishes a criminal law section in the African Court with jurisdiction over crimes similar to those under the Rome Statute, 33 African states have ratified the ICC Statute, but as of November 2025 only Angola had ratified the Malabo Protocol.

113 Resolution on abolition of the death penalty in Africa PAP.6/PLN/RES/05/JUN.24 adopted on 5 July 2024 during the ordinary session of the 6th Parliament 21 June-5 July 2024 para 6.

114 Request 1 of 2024 by the Pan-African Lawyers Union on 'The compatibility of the death penalty with the African Charter on Human and Peoples' Rights' (pending).

Charter. This strategic initiative provides not only the applicant and interested parties but also the Court with another platform to streamline the interpretation of human rights norms towards the abolition of the death penalty in Africa.

See also PALU Press release 'Judgment by the African Court on Human and Peoples' Rights *Ladislaus Chalula v United Republic of Tanzania*'. African organisations and experts were engaged in the planning and development of the advisory opinion. See 'Lawyers in Africa want death penalty abolished across the continent' *The Tanzania Times* 11 October 2024, https://tanzaniatimes.net/tanzania-african-lawters-want-death-penaly-abolished-across-the-continent (accessed 9 November 2025). The Advocates for Human Rights in partnership with members of the World Coalition Against the Death Penalty in Africa prepared an *amicus* brief in support of the request for advisory opinion by PALU. The Advocates for Human Rights 'The death penalty protects no one' 2 January 2025, https://www.theadvocatesforhumanrights.org/News/A/Index?id=539 (accessed 9 November 2025). SOAS Centre for Human Rights Law, University of London also submitted an *amicus* brief on PALU's request for advisory opinion before the African Court in September 2025, https://share.google/5qMOkaihpKs2CJIc (accessed 13 November 2025).