

The Human Rights Implications of the Application of the Death Penalty in Zimbabwe

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by

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DECLARATION

I..... hereby declare that this research dissertation for the Master 's of Law (LLM) at the University of Venda hereby submitted has not previously been submitted by me or any other person for a degree at this or any other University. This is my own work in design and execution, and that all materials contained herein have been duly consulted.

Signed

Date

DEDICATION

This research work is dedicated to my lovely parents, Mr. Dennis Makanda and Ms. Julia Bettina Sidimeli and my lovely daughter Masingita Vuthlarhi Maluleke, without whose unrelenting support and encouragement I would not have completed this research.

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LIST OF ABBREVIATIONS AND ACRONYMS

ACERWC:	African Committee of Experts on the Rights and Welfare of a Child
ACRC:	African Charter on the Rights of the Child
ACHPR:	African Charter on Human and Peoples' Rights
ACHPR-OP:	Protocol to the African Charter on the Death Penalty
ACoHPR:	African Commission on Human and People's Rights
AFCHPR:	African Court on Human and Peoples' Rights
CAT:	Convention Against Torture
CEDAW:	Convention on the Elimination of all forms of Discrimination Against Woman
CERD:	Committee on the Elimination of Racial Discrimination
CESCR:	Committee on Economic, Social and Cultural Rights
CoAT:	Committee Against Torture
CoEDAW:	Committee on the Elimination of all Forms of Discrimination Against Woman
CoRC:	Committee on the Rights of a Child
CPEA:	Criminal Procedure and Evidence Act of Zimbabwe
CRC:	Convention on the Rights of the Child
GPA:	Global Political Agreement
GVT:	Government
HRC:	Human Rights Committee
HRD:	Human Rights Defenders
HRWZ:	Human Rights Watch, Zimbabwe
ICERD:	International Convention on the Elimination of all forms of Racial Discrimination
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICCPR:	International Covenant on Civil and Political Rights
ICCPR-OPT 2:	Second Optional Protocol to the International Covenant on Civil and Political Rights
ICJ:	International Court of Justice
MDC:	Movement for Democratic Change
NGO:	Non-Governmental Organisation
PDP:	People's Democratic Party
OHCHS:	Office of the High Commissioner for Human Rights
UDHR:	Universal Declaration on Human Rights

UNHRC:	United Nations Human Rights Council
UNHRS:	United Nations Human Rights Systems
UPR:	Universal Periodic Review
USA:	United States of America
UN:	United Nations
ZANU-PF:	Zimbabwe African National Union- Patriotic Front
ZLHR:	Zimbabwe Lawyers for Human Rights

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ABSTRACT

Capital punishment has been widely applied by countries since time immemorial. The concept, however, is highly controversial. That is, on the one hand, the anti-abolitionist states argue that it is an effective form of punishment, on the other side; the abolitionist states contend that it is an unjustifiable infringement of people's fundamental right to life. There have been calls, both regionally and globally, for a moratorium on the death penalty. The Second Optional Protocol to the International Covenant on Civil and Political Rights was promulgated as a move towards the abolition of the death penalty in all countries and states in the world. Article 1 (2) of the instrument states that, "Each state party shall take all necessary measures to abolish the death penalty within its jurisdiction". At regional level, Article 4 of the African Charter on Human and Peoples' Rights provides that all human beings are inviolable and entitled to the respect and integrity of their person. As such, no one may be deprived arbitrarily of this right. In addition, Article 1 of the Protocol to the African Charter provides that the death penalty shall not be applied by state parties in their territories or any person within their jurisdiction.

Despite the current global and regional trends towards the abolition of the death penalty and its inherent controversy, Zimbabwe remains anti-abolitionist, and entrenched the death penalty in section 48 (2) of its 2013 Constitution. Adopting a doctrinal research methodology, the study critically analyses section 48 (2) (d) of Zimbabwe's Constitution, and examines how it affects key fundamental rights as well as the way forward in the light of the international human rights standards on the death penalty.

Keywords: Capital punishment, African Charter, 2013 Constitution, Human rights, Zimbabwe

CHAPTER ONE: BACKGROUND OF THE STUDY

*The taking of life is too absolute, too irreversible, for one human being to inflict it on another, even when backed by legal process. — Former United Nations Secretary-General Ban Ki-moon.*¹

1.1 Background of the Study

The death sentence is an irreversible form of punishment that has claimed many prisoners' lives over a long period of time.² The laws pertaining to it were first established in the fifth century (BC), where it was done through crucifixion, drowning, stoning to death, burning the convict alive and impalement.³ Since then, the penalty has been applied over centuries to date. But, it has now become a subject of debate between the abolitionist and anti-abolitionist states, with the latter arguing that it is an effective form of punishment while the former contend that capital punishment is morally wrong and can never be justified.⁴

Zimbabwe is one of the African countries where the death penalty is retained in the criminal justice system.⁵ It should be noted that before Zimbabwe was colonised (in 1890), the criminal justice system then was based on the traditional laws as practiced by the inhabitants within a specific Chieftaincy.⁶ The system was grounded on the principle of retribution and open-jury court. This ensured that the aggrieved party was compensated, while an open jury court ensured the public's involvement in the dispensation of justice.⁷ That is, the Shona or the Ndebele customary laws emphasised on compensation, where the accused, for example, was made to pay a certain head of cattle, in addition to a wife to the plaintiff.⁸ This was done so as to appease the aggrieved family, while the murderer remained in the Chief's Court, serving his additional punishment.⁹ This system was used to deter would-be offenders,¹⁰ a scenario that signifies that the death penalty was non-existence in Zimbabwe's pre-colonial societies.¹¹

¹N Pillay, Moving away from the Death Penalty lesson from national experience, available at <http://www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf>, (accessed 9 September 2015).

² BI Orchia 'Justification for and the abolition of capital punishment under human rights law' LLB hons Thesis, University of Ilorin, 2011, 3.

³ History of the death penalty, available at <http://www.deathpenaltyinfo.org/part-1-history-death-penalty> (accessed 06 September 2015).

⁴ A Bahati, The death penalty debate 2010 session 4, available at http://www.justice.gov.za/ent-s4_bahati. Pdf (accessed 8 September 2015).

⁵ Zimbabwe Criminal Law codification and reform Act chapter 9:23 of 200 (sections 20, 23 & 47) 4.

⁶ 'Pre-colonial Great Zimbabwe v Post-colonial Zimbabwe' *The Patriot* 3 June 2001.

⁷ Pre-colonial Great Zimbabwe v post-colonial Zimbabwe (note 6 above).

⁸ 'Scrap death penalty, chiefs urge government' *The Herald* 20 January 2016.

⁹ Scrap death penalty (note 8 above).

¹⁰ Scrap death penalty (note 8 above).

¹¹ AB Chikwanha 'The trajectory of human rights violation in Zimbabwe' (2009) No 202 *Institute for Security Studies Paper 2*.

However, during the early years of colonialism, the black majority was subjected to inhumane treatment, land dispossessions, segregation and exploitation.¹² For instance, the inhuman treatment of the natives by the white settlers created racial division and tensions, which eventually led to the mid-1890s uprisings.¹³ These uprisings were a manifestation of the natives' irritation of being systematically denied their fight to their forefathers' lands. Consequently, two Zimbabwean spirit mediums, Sekuru Kaguvi and Ambuya Nehanda, were hanged in 1898 for being rebellious against the British South Africa Company (BSAC) rule.¹⁴

In that period, the death penalty was used as a tool for social control and coercion, and as punishment for treasonous crimes.¹⁵ Kaguvi and Nehanda became the icons of the natives' struggle against the colonial rule. They were sentenced to death because they were deemed to have instigated subversive activities against the Company rule.¹⁶ This was a way of suppressing dissenting voices among the indigenous people. As a result, there was animosity between the indigenous people and the white settlers.¹⁷ From 1891 to 1980, the legal rules that applied in Southern Rhodesia, then Rhodesia (Zimbabwe) were the same as those that obtained in the Cape Colony, the Union of South Africa and South Africa until 1994. These were based on the Roman Dutch Law and the English Law.¹⁸ Consequently, the death penalty legalities were incorporated as part of the native law system.¹⁹ It is, therefore, not surprising that during the Zimbabwe's 1960 - 1980 liberation struggle the death penalty was applied against freedom fighters charged with treason. This was done in terms of section 337 (b) of the Criminal Procedure and Evidence Act,²⁰ which provides that:

Subject to section three hundred and thirty-eight, the High Court may pass sentence of death upon an offender convicted of treason.²¹

The above provision has not been changed. Treason remains one of the crimes punishable by death in Zimbabwe. During the liberation struggle, treason was not the only crime punishable by death. Offences such as incitement to commit murder, terrorism and genocide, among others, carried the death penalty.²² For instance, Emmerson Mnangagwa (the current

¹² M Chemhuru & D Masaka 'Zimbabwe's Constitution Making Process and the Death Penalty: A Philosophical Reflection' (2011) Vol. 5 No 2, *Africana Journal* 124.

¹³ B Dube 'Roman Dutch and English law: The indispensable law in Zimbabwe' (2014) Vol. 5 No 4, *Afro Asian Journal Of social science* 8.

¹⁴ Chemhuru & Masaka (note 12 above) 127.

¹⁵ Chemhuru & Masaka (note 12 above) 126.

¹⁶ Chemhuru & Masaka (note 12 above) 126.

¹⁷ A Novak 'Abuse of state power: The mandatory death penalty for political crimes in Southern Rhodesia 1963 – 1970' (2013) Vol. 19 No 1, *Fundamina: A Journal of Legal History* 28-47.

¹⁸ Dube (note 13 above) 1.

¹⁹ Dube (note 13 above) 2.

²⁰ Zimbabwe Criminal Procedure and Evidence Act (Chapter 9:07) as amended up to Statutory instrument 41A/2004.

²¹ Section 337 (b) Zimbabwe Criminal Procedure and Evidence Act (note 20 above).

²² Section 47 Zimbabwe Criminal Procedure and Evidence Act (note 20 above).

Zimbabwe President)²³, who was part of the liberation struggle was imprisoned for 'terrorist' activities and sentenced to death, but escaped execution due to age (he was under 21 at the time of his arrest).²⁴

When Zimbabwe became independent in 1980, the death penalty formed part of the Lancaster House Constitution in 1979.²⁵ Section 12 of that Constitution explicitly stated that, "It shall be lawful for a person to be killed following a death sentence imposed on him/her by a court of law". Crimes punishable by death were murder, rape and crimes relating to political violence.²⁶

The Criminal Law Codification Act²⁷ expanded the application of the death penalty for attempted murder and incitement crimes in 2004. Section 192 of the Act provides that:

Subject to this Code and any other enactment, a person who is convicted of incitement, conspiracy or attempting to commit a crime shall be liable to the same punishment to which he or she would have been liable had he or she committed the crime concerned.

The provision implies that attempting to commit a crime is now equal to committing the actual crime. Categorically, section 47 (3)²⁸ provides that:

A person convicted of attempted murder or of incitement or conspiracy to commit murder shall be liable to be sentenced to death or to imprisonment for life or any shorter period.

It is, however, interesting to note that since 2005 Zimbabwe has not carried out any executions due to difficulties in finding a suitable candidate to administer the death penalty.²⁹ However, the courts have continued to hand down death sentences.³⁰ The last person to be executed was Mandlenkosi Never Masina Mandla,³¹ who was executed in July 2005 for committing murder. Before that, in 2004, two serial armed robbers and convicted murderers, Stephen Chidhumo and Edgar Masendeke,³² had been executed. Ever since the last execution in 2005, efforts by some prisoners to get off death row have failed. For instance, in 2009, a prisoner by the name Shephard Mazango was sentenced to die by hanging for robbing and hacking a man to death. He has been on death row since then.³³ Efforts such as

²³ Mnangagwa stance on death penalty influenced by experiences' *Newsday* 8 February 2016.

²⁴ Maodza T, 'Zim to eliminate death penalty-Mnangagwa' *The Herald* 23 February 2016.

²⁵ Zimbabwe Constitution Order 1979 S.I. 1979/1600 of the United Kingdom.

²⁶ Section 12 Zimbabwe Constitution Order 1979 (note 25 above).

²⁷ Section 192 Zimbabwe Criminal Law codification and reform Act (note 5 above).

²⁸ Section 47 (3) Zimbabwe Criminal Law codification and reform Act (note 5 above).

²⁹ Zimbabwe struggles to find hangman' *Time Live* 15 January 2016.

³⁰ Chiripasi T, 'Global group signs petition to block executions of poacher killer' *Voice of America/Zimbabwe* 1 October 2013.

³¹ The death penalty, available at <http://www.the-lawhub.co.zw/the-death-penalty>, (accessed 15 March 2015).

³² Mbanje P, '10 Months on death row: man gives chilling account' *The Standard* 7 July 2014.

³³ Zulu B, 'Controversy builds over death penalty in Zimbabwe Africa' *Voice of America/ Zimbabwe* 14 July 2014.

raising constitutional arguments in the Supreme Court, seeking for a presidential pardon and filing an emergency motion have all failed.³⁴

Amnesty International has indicated that there are many condemned inmates who have spent many years awaiting execution under difficult and undesirable conditions.³⁵ The handing down of death sentences by Zimbabwean courts have resulted in an increase in the number of death row inmates who are being kept under harsh prison conditions.³⁶ The harsh conditions include abuse habits, torture and assaults by the guards. Moreover, there are reports of insufficient food, water, electricity, clothes, and daily necessities, leading to prisoners being malnourished. Additionally, it is alleged that prisons have poor health conditions and are often over-crowded, which sometimes leads to the spread of diseases such as tuberculosis, measles and diarrhoea.³⁷

The 2013 Zimbabwean Constitution retained the death penalty, even though its legal scope is reduced only to the crime of murder committed in aggravating circumstances. Section 48 (2) (d) of that constitution³⁸ says:

A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and – d) ... the penalty must not be imposed or carried out on a woman.³⁹

Although the legal scope has been reduced, the reality is that in addition to the retention of capital punishment in the Zimbabwe's latest Constitution, there is a state of reluctance towards its enforcement.

Zimbabwe, together with many countries, has been urged to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR-OP2),⁴⁰ and the Optional Protocol to the African Charter on Human and People's Rights (ACHPR-OP)⁴¹ which aim at abolishing the death penalty. Although Zimbabwe is reluctant to ratify these protocols, it is party to the International Covenant on Civil and Political Rights (ICCPR).⁴² At

³⁴ '97 Zimbabwe prisoners on death row' *Bulawayo* 24 30 January 2014.

³⁵ Amnesty international Zimbabwe, Prison and Detention: 2011 Centre conditions U.S.Dep. Of State Human Rights Report, available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?dliid=186257> (accessed 1 February 2016).

³⁶ '15 death row inmates hire Biti for constitutional court fight' *AllAfrica news* 10 January 2016.

³⁷ Amnesty international Zimbabwe (note 35 above).

³⁸ Constitution of Zimbabwe Amendment 20 Act 2013.

³⁹ Section 48 (2) (d) 2013 Constitution of Zimbabwe Amendment (note 38 above).

⁴⁰ Second Optional Protocol to the International Covenant on Civil Political Rights on the Abolition of the death penalty adopted with resolution 44/128 by the United Nations General Assembly as of 15 December 1989.

⁴¹ Optional Protocol to the African Charter on Human and People's rights Adopted at the 55th Ordinary Session of the African Commission on Human and Peoples' Rights held from 28 April to 12 May 2014 in Luanda, Angola.

⁴² International Covenant on Civil and Political Rights, adopted 16 December 1966 by General Assembly Resolution 2200 (XXI), UN. Doc A/6316 (1966) 999 UNTS 171, entered into force on 23 March 1976, article 6. Zimbabwe accessed this instrument on the 13th May 1991.

the continental level, Zimbabwe is a State Party to the African Charter on Human and Peoples' Rights (the African Charter),⁴³ which safeguards the right to life as monitored by the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (the African Court).

There are other instruments and treaty monitoring bodies at regional levels. These have the provisions to guarantee, hence the necessity to abolish capital punishment. These instruments include the African Charter on the Rights and Welfare of the Child (ACRC),⁴⁴ which is monitored by the Africa Committee of Experts on the Right and Welfare of the Child (the Committee), and the Protocol to African Charter on Human and Peoples' Rights of Women in Africa.⁴⁵ Generally, the international human rights law sets out obligations for signatories to respect, protect and fulfil human rights for all without any kind of discrimination.⁴⁶ Thus, there is a legal duty on Zimbabwe to protect, respect and fulfil human rights free from discrimination. These obligations must be fulfilled regardless of any political, economic and cultural systems.⁴⁷

1. 2 Problem Statement

Zimbabwe is party to international and regional human rights instruments such as the ICCPR and the African Charter, which aim at promoting and respecting human rights. While the former instrument allows for the protection of the inherent right to life, and thereby dismissing any arbitrary deprivation of that right, the African Charter provides that every human being is entitled to respect for his or her life. Though Zimbabwe is yet to ratify the ICCPR-OP2 that aims at abolishing the death penalty, a legal problem is created in the section 48 (2) (d) of the 2013 Zimbabwean Constitution, which permits the death penalty. This sets Zimbabwe against its obligations in the international human rights law arising from the instruments, which it has ratified.

It is against this backdrop that the study investigates the human rights implications of the application of capital punishment in Zimbabwe, in the light of international human rights law relating to the death penalty.

⁴³African (BANJUL) Charter on Human Rights and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986, article 4. Zimbabwe signed this instrument on the 20th February 1986.

⁴⁴ African Charter on the Rights and Welfare of the Child OAU Doc. CAB/LEG/24.9/49 (1990). entered into force Nov.29 1999, article 5.

⁴⁵ Protocol to African Charter on Human and Peoples' Rights of Woman in Africa CAB/LEG/66.6 (Sept. 13, 2000) Entered into force Nov.25 2005.

⁴⁶ Vienna Declaration and Action of 1993 UN Doc. A/CONF.157/23; 32 ILM 1661 (1993) paragraph 5.

⁴⁷Vienna Declaration and Program of Action (note 46 above).

1.3 Aim of the Study

The aim of this study is to critically analyse the capital punishment provision in Zimbabwe and examine its negative implications for the protection and observation of the fundamental rights of individuals as guaranteed under the international human rights law.

1.4 Objectives of the Study

The following constitute this study's objectives;

1. To determine whether the anti-abolitionist vs. abolitionist debate on the death penalty can be reconciled or permitted under international human rights Law.
2. To examine whether section 48 (2) (d) of the 2013 Zimbabwean Constitution is compatible with the obligations of the state of Zimbabwe under international human rights law.
3. To examine the human rights implications of capital punishment in Zimbabwe.
4. To examine the remedial options opportunities available for convicts sentenced to death in Zimbabwe.

1.5 Research Questions

This study answered the following main question;

- Is the retention of the death penalty in the Zimbabwean Constitution compatible with the international human right laws, and if not, what are the human rights implications thereof?

To effectively answer the above main question, the study answered these secondary questions as well;

1. Can the anti-abolitionist vs abolitionist debate about the death penalty be reconciled or permitted under international human rights law?
2. Is section 48 (2) (d) of the Zimbabwean Constitution compatible with the obligations of the state of Zimbabwe under international human rights law?
3. What are the human rights implications of capital punishment in Zimbabwe?
4. What are the opportunities within the African Human Rights system, international and domestic system to address the death penalty in Zimbabwe?

1.6 Literature Review

The United Nations High Commission (2012) report⁴⁸ observes that the death penalty results in many wrongful deaths. The report notes that the anti-abolitionists perceive the death penalty as a deterrent effect. The United States National Academy of Sciences' survey

⁴⁸ Pillay (note1 above).

research, however, demonstrates that the death penalty does not have that effect.⁴⁹ A debate delivered by Bahati⁵⁰ further buttresses the argument that the death penalty has no deterrent effect as it discusses the concept of human dignity and the right to life through cases in Tanzania. It also maintains that the death penalty is inherently cruel, inhuman, a degrading punishment that offends the right to life and human dignity.

Chenwi's work highlights some issues regarding the death penalty in Africa.⁵¹ The work sets out the nature of problems about the death penalty by providing its historical background.⁵² As is this study, Chenwi's explored the right to life in relation to death penalty. The work, however, differs from the current study in that while the author discusses the death penalty in Africa, this research focused on Zimbabwe, making it an in-depth case.⁵³ More importantly, the constitution of Zimbabwe, a unit of analysis in this study, was formulated in 2013, six years after Chenwi's work. Thus, this research goes further than Chenwi's work, in the context of an in-depth analysis.

Chemhuru and Masaka advocate for the abolition of the death penalty in Zimbabwe. These two opine that the death penalty is not in line with the respect for human life.⁵⁴ They challenge the legislators to devise better ways of punishment, which will result in Zimbabwe joining progressive nations that have abolished the death penalty.⁵⁵ Chemhuru and Masaka contend that the death penalty remains inhuman, degrading and unjust, and further argue that it is contrary to the global world order of freedom, peace and development.⁵⁶ Their work was relevant to this study as it advocates for the abolition of the death penalty in Zimbabwe as well. However, despite the helpful information it provided, the paper came two years before the final 2013 Constitution and, therefore, does not specifically deal with the sections designated for this research.

Chikwanha explores human rights violations in Zimbabwe and asserts that these violations were inherited from a colonial system, which had no respect for protecting basic human rights. This study also argues that the use of arbitrary power by the state has led to the violation of human rights, which includes the right to life, among others. Chikwanha's work emphasises on the fact that for one to understand the human rights violations in Zimbabwe,

⁴⁹ Deterrence and the Death Penalty, National Research Council of the National Academies, The National Academies Press (2012). The United States National Academy of Sciences provides independent advice to the government on matters related to science and technology, available at <https://www.nap.edu/catalog/13363/deterrence-and-the-death-penalty> (accessed 18 October 2016).

⁵⁰ The death penalty debate (note 4 above).

⁵¹ L Chenwi *Towards the abolition of the death penalty in Africa* (2007) 1.

⁵² Chenwi (note 51 above) 2.

⁵³ Chenwi (note 51 above) 4.

⁵⁴ Chemhuru & Masaka (note 12 above) 4.

⁵⁵ Chemhuru & Masaka (note 12 above) 126.

⁵⁶ Chemhuru & Masaka (note 12 above) 126.

the starting point is the character of its former colonial state.⁵⁷ Similarly, Novak's study traces the historical background of capital punishment in colonial Zimbabwe and its application.⁵⁸ It explains why capital punishment was applied in colonial Zimbabwe. Novak affirms that capital punishment was used as a tool for social control by the British settlers and for political crimes, so as to prevent political dissent.⁵⁹ In a different study, Novak traces the historical background of the death penalty in Africa, stipulating that the death penalty has been practised since pre-colonial days in societies that practised the Islamic mode of punishment called *hudud*,⁶⁰ where he analyses the mandatory death penalty in about 30 of these countries.⁶¹ The author's observations were useful here in that they provided a platform for a comparative analysis of facts. However, Novak's two studies offer little insight on the situation in Zimbabwe, and the human rights implications of its death penalty. The two studies are general in nature, hence were of limited use to this one.

Novak also examines the use of extenuating circumstances in Zimbabwe and other countries.⁶² He stipulates that the doctrine opposes the current human rights rules, as it increases arbitrariness, weakness on the defence counsel and it is not in line with a global trend on death penalty regimes.⁶³ In contrast, this study argued that the Zimbabwe version of a death penalty dovetails with that of the global trend, which states that death sentence on murder cases is only applicable when committed in aggravating circumstances.⁶⁴ Novak's work provides conditions in which the death penalty may be applied globally. His study is, however, different from this one in that the previous former focuses mainly on the conditions for the application of the death penalty, whereas the latter focuses on the conditions for the application of the death penalty only in Zimbabwe.

Hart stirs a powerful debate against the application of the death penalty.⁶⁵ The philosopher argues that not only does the death penalty impose suffering on the criminal, but it also does so on many other people. Hart observes that the death penalty causes an intolerable risk, which cannot be expunged, for instance, if an innocent person has been executed. Thus, an entire justice system is distorted by the nature of the death penalty. Hart's work was of great importance here in that it highlights the implications of the application of the death penalty, a relevant aspect to this research.

⁵⁷ Chikwanha (note 11 above) 4.

⁵⁸ Novak, Abuse of state power (note 17 above) 3.

⁵⁹ Novak, Abuse of state power (note 17 above) 4.

⁶⁰ A Novak *the death penalty in Africa* (2014) 15, 68.

⁶¹ A Novak *The global decline of the mandatory death penalty: Constitutional Jurisprudence and legislature reform in Africa, Asia and the Caribbean* (2015) 31-35.

⁶² A Novak 'Capital sentencing discretion in Southern Africa; A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014) Vol.14 No 1, *African Human Rights Law Journal* 24- 42.

⁶³ Novak *The death penalty in Africa* (note 60 above) 1.

⁶⁴ Novak *The death penalty in Africa* (note 60 above) 34.

⁶⁵ H.L.A Hart *Punishment and responsibility* (1968) 89.

Maja's paper analyses the extent to which Zimbabwe has complied with the recommendations passed by the UN General Assembly on the moratorium on the use of the death penalty. However, like as discussed above, Maja does not discuss the options available to Africa's regional human rights bodies over those on the death row in Zimbabwe.⁶⁶ This study discussed the human rights implications of the death penalty in Zimbabwe.

The international law dealing with the death penalty includes the ICCPR.⁶⁷ In 1989, the General Assembly adopted an International Covenant, which is the Second Optional Protocol to the ICCPR.⁶⁸ The protocol clearly states that the death penalty violates human rights, and specifically the right to life. In 2007,⁶⁹ a resolution instituting a moratorium on executions with the aim of abolishing the death penalty was adopted by the United Nations General Assembly at its 62th session meeting.⁷⁰ At that meeting, reference was made to Article 3 of the Universal Declaration, which stipulates that, 'Everyone has the right to life, liberty and security of a person.' It is generally regarded as the customary international law,⁷¹ binding all its member states. It is of paramount importance to note that states are naturally bound by customary international law, irrespective of whether the state has codified these laws domestically or through treaties. The customary international law has been defined by the International Court of Justice Statute in Article 38 (1) (b) as, "Evidence of a general practice accepted as law". Consequently, Zimbabwe is bound by the Universal Declaration of Human Rights obligations as it is a signatory to this. Section 34 of the Zimbabwean Constitution provides that the international instruments to which Zimbabwe is a party, must be incorporated into its domestic laws.

Furthermore, Article 6 of the ICCPR was referred to at the 62th session meeting, an important provision that aims at the total abolition of the death penalty. In 2008,⁷² a resolution which increased the support for the 2007 resolution was adopted. At the 65th session meeting in 2010, a third resolution⁷³ on the moratorium on the use of the death penalty was adopted by the United Nations. Article 6 of the ICCPR is relevant in this discussion in that it encourages the member states to abolish the death penalty if they still have it.

⁶⁶ I Maja 'Moving away from the death penalty, arguments, trends and perspectives' in I Simonovic (ed) *The death penalty in Zimbabwe; legal ambiguities* (2015) 180.

⁶⁷International Covenant on Civil and Political Rights (note 42 above).

⁶⁸Second Optional Protocol to the International Covenant on Civil Political Rights on the Abolition of the death penalty (note 40 above).

⁶⁹Second Optional Protocol to the International Covenant on Civil Political Rights on the Abolition of the death penalty (note 40 above).

⁷⁰The international views on the death penalty', available at <http://www.deathpenalty.org/article.php?id=81>.(accessed 10 March 2015).

⁷¹ Universal Declaration of Human Rights adopted by General Assembly Resolution 217A (III), (1948) UN Doc A/810.

⁷²UN General Assembly Resolution 63/168. Preamble 62/149 December 2007; 'Moratorium on the use of the death penalty' (UN Doc A/63/293 and corr.1.)

⁷³ UN General Assembly Resolution 65/206. Preamble 62/149 18 December 2007 and 63/ 168 of 18 December 2008; 'Moratorium on the use of the death penalty' (UN Doc A/65/456/Add.2.Part ii).

The death penalty has featured in the case law of the regional human rights system and the international courts. International cases on the subject include *Soering v United Kingdom and Germany*⁷⁴ and *Pratt v Attorney-General for Jamaica et al.*⁷⁵ In the *Soering* case, it was found out that the death penalty constituted cruelty, inhuman or degrading treatment. In 2004, the International Court of Justice (ICJ), in the case concerning *Avena and other Mexican Nationals (Mexico v the United States of America)*, requested an order to stay the execution of five Mexican citizens on the death row in the United States and called for the review of other 51 death row inmates' cases.⁷⁶ It is worth noting that decisions made in other countries are not binding on Zimbabwe's courts, but are regarded as 'persuasive' authority.⁷⁷

At regional level, Article 4 of the African Charter provides that, "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". The African Commission has placed the abolition of the death penalty at the heart of all its debates. During its 56th ordinary session in 2015, it adopted a draft regional protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa.⁷⁸ This draft protocol aims at assisting its members to stop the application of the death penalty.⁷⁹ From a political point of view, this protocol is meant to show the will of the African governments to openly deal with the question of the death penalty. From a legal point of view, once the protocol is finalised and adopted, it will have binding effects on states that ratify it.

There are several constitutions that provide for the right to life as a non-derogable right; such as the South African and the Malawian Constitutions. The South African one⁸⁰ enshrines and entrenches the Bill of Rights, which provides the right to life, and human dignity as non-derogable rights, which are accordingly protected by the courts. The Malawian Constitution⁸¹ provides the right to life as a non-derogable right as provided in section 44 (1). There are many cases in Africa that have dealt with the death penalty. Examples of these are *S v Makwanyane*⁸² in South Africa and the *Republic v Mbushuu*⁸³ and another in Tanzania. In the *Makwanyane* case, the Constitutional Court of South Africa affirmed that the imposition of the death penalty was a serious infringement of one's fundamental rights. This was a landmark judgment by the Constitutional Court of South Africa, which declared the death penalty as

⁷⁴ July 1989 Series A Vol 161 11 EHRR 439.

⁷⁵ *Pratt v Attorney-General for Jamaica et al* (1993) 4 ALL ER 372.

⁷⁶ *Avena and Another Mexican Nationals (Mexico v United States of America)* ICJ report 2004, pg 12.

⁷⁷ *Georgina Njodzi v Lorraine Matone* HH 37-16 HC 11253/14.

⁷⁸ Protocol to the African Charter on Human and Peoples' rights on the abolition of the death penalty in Africa 56th ordinary session (note 40 above).

⁷⁹ Donatelli M, African Commission adopts draft protocol on abolition of the death penalty, available at <http://www.worldcoalition.org/Abolition-of-the-death-penalty-at-the-heart-of-African-Commission-session.html> (accessed 18 October 2016).

⁸⁰ Act 106 of 1996.

⁸¹ Act No 20 of 1994.

⁸² *S v Makwanyane* 1995 (3) SA 391 (cc).

⁸³ *Republic v Mbushuu* (1994) 2 LRC 335.

unconstitutional. In the *Mbushuu case*,⁸⁴ the Appeal Court indicated that the death penalty constituted an infringement of the fundamental rights as provided in the Tanzanian Constitution. The above literature offered insight on trends that were useful in this study. As stated above, these cases mentioned have a persuasive effect on Zimbabwe's death penalty abolishment. As a result, they were of importance to this study.

1.7 Methodology

The research adopts a doctrinal research methodology, also known as 'black-letter law'. Chynoweth⁸⁵ defines the doctrinal research as a research which is concerned with the construction of legal doctrines through the analysis of legal rules.⁸⁶ The doctrinal research methods are characterised by a rigorous study of legal rules. It mainly analyses legal principles, rules or doctrines in the statutory instruments, their application and development.⁸⁷ The researcher took section 48 (2) (d) of the 2013 Zimbabwe Constitution as a starting point and the focal point in this study. The study consulted primary sources of law, such as international and regional instruments on capital punishment, and the instruments relating to the rights associated with capital punishment, including the ICCPR, ICCPR-OP 2 and the African Charter. Secondary sources surveyed included articles, books, case law, papers, reports, newspaper articles and journals. The doctrinal approach also accommodates a comparative study. According to Vibhute and Aynalem:

The doctrinal comparative legal research involves the comparative study of comparable laws or legislation from different jurisdictions. It exhibits the lessons that can be learnt from each other's failures and achievements.⁸⁸

However, the study engages a vertical comparative approach, which entails a comparison of international standards on the death penalty with its application on Zimbabwe's domestic law. It is crucial to note that the horizontal comparison, that is, comparing Zimbabwe legal environment with trends in other African states, which have abolished the death penalty, would not bring an immediate remedy to the prisoners who are awaiting death in Zimbabwe's prisons. The advantage of a vertical comparison, however, is that a resort can be made to the regional or international level by individuals on the death penalty in Zimbabwe's prisons. Notwithstanding, references were made to other legal systems, where appropriate.

⁸⁴ *Mbushuu case* (note 83 above).

⁸⁵ P Chynoweth *Legal research* (2008) 29.

⁸⁶ Chynoweth (note 85 above) 29.

⁸⁷ Chynoweth (note 85 above) 30.

⁸⁸ K Vibhute & F Aynalem *Legal Research Methods* 2009 73.

1.8 Overview of Chapters

1.8.1 Chapter One

This Chapter provides a general introduction to the entire study and covers the following issues: background to the study, the statement of the problem, aim of the study, literature review, research methodology, research schedule and the Chapter outline.

1.8.2 Chapter Two

Chapter Two examines the position of the international human rights law on death penalty vis-a-vis the anti-abolitionist and abolitionist debate.

1.8.3 Chapter Three

Chapter Three establishes the recognition of the death penalty in Zimbabwe as a violation of international human rights law, such as the rights to human dignity, life, equality, fair trial and freedom from torture as guaranteed under the international human rights instruments and the Zimbabwe Constitution. Furthermore, the Chapter examines the status of human rights treaties in Zimbabwe.

1.8.4 Chapter Four

The Chapter examines the opportunities in the UN Human Rights System, African Human rights System and the domestic system to address the application of the death penalty in Zimbabwe.

1.8.5 Chapter Five

This Chapter is devoted to the conclusions and recommendations of the study.

1.9 Definitions of technical terms

1.9.1 Humane

Humane may be defined as what is 'earthly', an earthling, or generally speaking, means what is proper to the kind 'we' are, or to the species of rational animals, referring in particular, to their kindness (humanity and their fallibility ('all too human')).⁸⁹

⁸⁹ Human dignity, available at http://eprints.maynoothuniversity.ie/392/1/Human_Dignity.pdf (accessed 03 September 2015).

1.9.2 Dignity

According to Black and Garner⁹⁰ dignity may be defined as the state of being noble and dignified.

1.9.3 Capital punishment

Capital punishment may be defined as price, fine, punishment imposed upon a person by the authority of the law and the decision and sentence of a court for the crime committed by the criminal.⁹¹

1.9.4 Extenuating circumstances

Extenuating circumstances may be defined as an unusual or changeable event that prevents performance⁹² and renders a crime less evil or reprehensive. They do not lower the degree of an offence, although they might reduce the punishment imposed. For example, young age of an offender. Simply stated, it means to represent a fault or an offence as less serious.⁹³

1.9.5 Mitigating circumstances

Black and Garner define mitigating circumstance as a fact or situation that does not validate or excuse a wrongful act or offence, but that decreases the degree of culpability and thus may reduce the damages (in a civil case) or the punishment (in a criminal case). A fact or situation that does not bear on the question of defendant's guilt, but that is considered by the court in imposing punishment and especial in decreasing the severity of a sentence.⁹⁴ The circumstances in which the court may consider include youthfulness, mental capacity, or childhood abuse so that they reach a reasonable and moral sentence.⁹⁵

1.9.6 Aggravating circumstances

Aggravating circumstances may be defined as a situation which increases the degree of liability or culpability for a criminal act. Moreover, it refers to a situation relating to a criminal offence which the courts consider when imposing punishment, (especially a death sentence).⁹⁶ In simple terms, it means circumstances that increase the seriousness of a given crime, which will increase the wrong doer's penalty or punishment. For example, a crime committed with a dangerous weapon, the judge has to find the account to be true beyond reasonable doubt.

⁹⁰ HC Black & BA Garner *Black's law dictionary* 2004 488.

⁹¹Black & Garner (note 90 above) 223.

⁹²Black & Garner (note 90 above) 260.

⁹³ Meaning of extenuating, available at <http://www.dictionary.reference.com/browse/extenuating?s=t> (accessed 3 November 2015).

⁹⁴Black & Garner (note 90 above) 260.

⁹⁵ J Wily *Webster's New World Law Dictionary* 2010.

⁹⁶Black & Garner (note 90 above) 259.

1.9.7 Human rights

Human rights are freedoms and immunities, which any human being cannot be denied and benefits that, according to modern values (esp. at an international level); all human beings should be able to claim as a matter of right in the society in which they live.⁹⁷

1.9.8 Moratorium

The term moratorium means a suspension of a certain activity.⁹⁸

1.9.9 Treason

The term has been defined as attempting to take over the government of the state, either by making war against the state or by materially supporting its enemies.⁹⁹ This is a crime of betraying one's country, especially by trying to kill or overthrow the sovereign or government.¹⁰⁰

1.9.10 Incitement

Incitement has been defined as an act of provoking influencing on, or inspiring or of persuading another person to commit a crime.¹⁰¹ Moreover, it refers to an act of provoking unlawful behaviour or advising someone to behave unlawfully.¹⁰²

⁹⁷Black & Garner (note 90 above) 758.

⁹⁸Black & Garner (note 90 above)1031.

⁹⁹Black & Garner (note 90 above)1538.

¹⁰⁰ 'Treason definition', available at <http://www.merriam-webster.com/dictionary/treason> (accessed 10 November 2015).

¹⁰¹Black & Garner (note 90 above).777.

¹⁰²W K Timmerman *Incitement in International Law* (2014)14.

CHAPTER TWO: THE ANTI- ABOLITIONISTS AND ABOLITIONISTS DEBATE VIS-A-VIS INTERNATIONAL HUMAN RIGHTS LAW ON THE DEATH PENALTY

2.1 Introduction

The previous Chapter provided an overview of this research. As already stated, the death penalty has many controversies. This Chapter examines the position of the international human rights law on death penalty vis -a-vis the anti- abolitionist and the abolitionist debates. These debates may also be raised with regards to the death penalty in Zimbabwe. The Chapter expounds whether the death penalty can be reconciled or permitted under the international human rights law.

2.2 The anti- abolitionist and the abolitionist debate

Capital punishment may be defined as a price, fine, or punishment imposed on a person by the authority of the law as a decision and sentence made by the court for the crime committed.¹⁰³ There is no change on the arguments for and against the death penalty so far. The abolitionists advocate for its abolition, while the anti-abolitionists call for its retention. The abolitionists argue that the death penalty infringes upon the fundamental rights, while the anti-abolitionists contend that it is an effective form of punishment.

Their arguments and counterarguments could be gleaned from the following; incapacitation, deterrence, retribution, rehabilitation, ultimate warning, closure to the victim, the fright of death, application without cruelty, the best answer to murder, wrongful conviction or innocence, irrevocable mistake, public opinion, cost effective, just punishment to crimes against human rights, anti-poor, discriminatory, arbitrary and a platform of political repression, the death penalty is not prohibited by the international instruments, African traditional beliefs and that the death penalty is immoral. These are discussed in detail below, in the order they appear above.

2.2.1 Incapacitation

Incapacitation is one of the reasons given by the anti- abolitionists for the stay of the death penalty. In their view, punishment is aimed at preventing the occurrence of a crime.¹⁰⁴ That is, the offender must be eliminated if we are to have a safe and free society. Following the incapacitation rhetoric, one is made to believe that the death penalty is necessary to rid society of the most atrocious criminals. In their reasoning, the anti-abolitionists argue that the death penalty protects the public against serial killers, for example, since ‘no executed prisoner would ever kill again’. In contrast, the abolitionists dismiss such arguments, pointing out that these are lame and baseless excuses that violate the fundamental principle of

¹⁰³ Black & Garner (note 90 above).

¹⁰⁴ GNK Vukor-Quarshie ‘Criminal law study guide’ LLB hons, University of Venda, 2013 14.

proportionality¹⁰⁵ hence should be dismissed with the contempt they deserve. For their wisdom, the abolitionists reason that the provisions on incapacitation fail to predict the gravity of the crime, thus unsuitable for the prevention of serious crimes.

2.2.2 Deterrence

The anti-abolitionists also parade 'deterrence' as one of their key defence strategies for the retention of the death penalty. Their beliefs here are rooted in 'Hedonism', a psychologically inclined understanding that a person seeks pleasure, and avoids pain.¹⁰⁶ Here, the anti-abolitionists posit that if murderers are sentenced to death and subsequently executed, potential murderers would think twice before committing murder, for fear of losing their life as well.¹⁰⁷ Their argument is premised on the belief that people fear death more than anything else. Haag backed this contention thus:

Even though statistical demonstrations are not conclusive, and perhaps cannot be, capital punishment is likely to deter more than other punishments because people fear death more than anything else. They fear most death deliberately inflicted by law and scheduled by the courts. Whatever people fear most is likely to deter most. Hence, the threat of the death penalty may deter some murderers who otherwise might not have been deterred. And, surely the death penalty is the only penalty that could deter prisoners already serving a life sentence and tempted to kill a guard, or offenders about to be arrested and facing a life sentence. Perhaps they will not be deterred. But, they would certainly not be deterred by anything else. We owe all the protection we can give to law enforcers exposed to special risks.¹⁰⁸

Furthermore, the anti -abolitionists assert that cruel murderers must be executed in order to prevent them from murdering again. Additionally, the anti- abolitionists argue that the death penalty, as a deterrent, helps to prevent future crime.¹⁰⁹ Moreover, the anti-abolitionists pronounce that since the death penalty is a finality on its own, it is more feared than life imprisonment and will therefore deter prospective murderers.

On the other hand, the abolitionists oppose the above arguments, saying that statistical evidence does not prove that the death penalty works.¹¹⁰ Moreover, they argue that the death penalty does not deter¹¹¹ the criminal from committing a crime. Their argument is informed by the question; why do criminals still commit murder if it is true that the death penalty deters? Against this unanswered question, the abolitionists have concluded that the death penalty is

¹⁰⁵ M Duker & M Malsch *Incapacitation: trends and new perspectives* (2016) 49.

¹⁰⁶ GNK Vukor-Quarshie (note 104 above) 15.

¹⁰⁷ Argument for and against the death penalty, available at <http://deathpenaltyinfo.msu.edu/> (accessed 10 November 2016).

¹⁰⁸ Ernest van den Haag, a Professor of Jurisprudence at Fordham University.

¹⁰⁹ DB Muhlhausen, Pros of the death penalty, available at <http://deathpenalty.procon.org/view.answers.php?questionID=000983> (accessed 9 February 2017).

¹¹⁰ Capital punishment, available at http://www.bbc.co.uk/ethics/capitalpunishment/for_1.shtml (accessed 3 November 2016).

¹¹¹ Listverse, 5 arguments against and for the death penalty, available at <http://listverse.com/2013/06/01/5-arguments-for-and-against-the-death-penalty/> (accessed 27 November 2016).

not an effective crime deterrent strategy, and, therefore, is worth practising any more. Their view is that life imprisonment equally dissuades potential murderers from committing heinous murders. In light of the above, the abolitionists insist that the death penalty should not be used in countries that have a history of violence.¹¹² Donohue (an abolitionist), stated that there is no slight evidence to prove that the death penalty reduces homicide.¹¹³ Conclusively, (the death penalty),¹¹⁴ “It is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment.”¹¹⁵ Moreover, the abolitionist states’ leadership has publicly proclaimed that the death penalty is not an effective deterrence. Burundi’s Prosecutor-General (Mr. Valentin Bagorikunda), for example, corroboratively said that the death punishment is not an effective deterrent of murders.¹¹⁶

2.2.3 Retribution

Another strategy of the anti-abolitionists for the retention of capital punishment is retribution.¹¹⁷ Their line of reasoning here is retrospective in nature. It is a tit for tat sort of punishment, an eye for an eye approach to scare-off would-be murderers.¹¹⁸ The argument is that criminals who commit the most heinous murders must be executed.¹¹⁹ Thus only a guilty person deserves to be punished. Furthermore, by taking into cognizance the brutality of the crime committed, anti-abolitionists argue that the punishment must be commensurate with the crime committed. To them, real justice requires that a guilty person should suffer for his or her wrongdoing, and that punishment should be directly proportionate to what he/she did. In the case of murder, the anti-abolitionists argue that, death is appropriate.¹²⁰

Conversely, the abolitionists see the death penalty as vengeance rather than retribution, hence a morally uncertain concept.¹²¹ They proclaim that the death penalty is not a rational response or solution to a dire situation. To them, this becomes the perpetuation of a vicious cycle of violence, which inevitably, destroys both parties. As a replacement, the abolitionists advocate for the life imprisonment of murderers, a punishment they feel better suits any form of crime committed, murder included.¹²²

¹¹²Pillay (note 1 above).

¹¹³JJ Donohue, There's No Evidence That Death Penalty Is a Deterrent against Crime, available at <http://deathpenalty.procon.org/view.answers.php?questionID=000983> (accessed 9 February 2017).

¹¹⁴Deterrence and the Death Penalty, National Research Council of the National Academies, The National Academies Press (2012). The United States National Academy of Sciences provides independent advice to the government on matters related to science and technology (note 49 above).

¹¹⁵C Hoyle & PR Hood *The Death Penalty: A Worldwide Perspective* (2008) 20.

¹¹⁶Pillay (note 1 above).

¹¹⁷ML Radelet & MJ Borg ‘The Changing Nature of Death Penalty Debates’ (2000) Vol.26 Annual Review of Sociology 120.

¹¹⁸Vukor- Quarshie (note 104 above) 10.

¹¹⁹Radelet & Borg (note 117 above).

¹²⁰Capital punishment (note 110 above).

¹²¹Radelet and Borg (note 117 above).

¹²²Capital punishment (note 110 above).

2.2.4 Rehabilitation

Here, the anti-abolitionists postulate that although the death penalty cannot rehabilitate the condemned back to society,¹²³ the punishment has the potential to make them express remorse, to repent and experience a spiritual rehabilitation.¹²⁴ Conversely, the abolitionists¹²⁵ dispute this line of thought, pointing out instead, that the death penalty has no potential for the doomed to express remorse. They claim that the death penalty would never return the prisoner to society after death. Ryan,¹²⁶ (an abolitionist), argues that it is illogical to execute people because of their criminal behaviour, and this type of punishment must be struck out. His position here is that rehabilitation is irrelevant to death penalty cases. Ryan argues that the modern understanding of rehabilitation is focused on the offender's impact on society after such rehabilitation. To him, rehabilitation is irrelevant in that the executed individuals would never be alive again, hence no more impact on society as is insinuated by the anti-movement.

2.2.5 An ultimate warning

The anti-abolitionists argue that the death penalty is an ultimate warning for would be murderers. They argue that life imprisonment is not as harsh as the death sentence. In their support, Barshay notes the following:

The death penalty is a warning, just like a lighthouse throwing beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down.¹²⁷

As shown above, the death penalty is seen as the ultimate warning.¹²⁸ This supports the anti-abolitionists' views that the death penalty is a warning signal to would be criminals that if they commit murder, they would be put to death, hence would be discouraged to do so. Additionally, they argue that the death penalty is an ultimate warning against all crimes. The abolitionists contend that the death penalty does not teach or give any lesson to the condemned¹²⁹ since they would be dead. There is, therefore, no lesson in which he or she would learn as he or she would be dead by then. As a result, abolitionists claim that it is not possible to rehabilitate a person by killing that individual.

¹²³ MJ Ryan *Death and Rehabilitation* (2012) 1246.

¹²⁴ A statement made by Thomas Aquinas one of the greatest theological thinkers of the 13th century.

¹²⁵ Ryan (note 123 above).

¹²⁶ Ryan (note 123 above).

¹²⁷ Pros of the death penalty, available at <http://www.prodeathpenalty.com/dp.html> (accessed 11 December 2017).

¹²⁸ Listverse (note 111 above).

¹²⁹ Listverse (note 111 above)

2.2.6 Closure on the victim

The anti-abolitionists argue that the death penalty is the suitable punishment for the condemned since it provides a closure and relief to the victims.¹³⁰ The anti-abolitionists further explain that the victim would no longer have a role to play and, therefore, the one who has murdered should face a severe punishment for the crime done. They point out the grief caused to the victim's family, suggesting that relief would only come if the murderer meets the same fate as well. While the victim and his/her family could not be re-united, the death penalty would bring justice and closure to them.

The abolitionists dispute that such execution would provide relief and put an end to the emotional trauma to the victim's family.¹³¹ According to Redmond, most often, these families do not get the relief which they expected after the execution. She elaborates that,

Taking a life does not fill that void, but it is generally not until after the execution that the families realise this. Not too many people will honestly say publicly that it did not do much, though, because they have spent most of their lives trying to get someone to the death chamber.¹³²

In addition, the abolitionists assert that the anti-abolitionists rely on a form of punishment that is based on vengeance, which is an archaic way of solving crime problems.

2.2.7 The fright of death

The anti-abolitionists state that the death penalty is all that would-be offenders fear.¹³³ Schuessler¹³⁴ argues that offenders do not fear life imprisonment, but rather fear death. The abolitionists, however, disagree, pointing out that the state condemns the practice of murder and, yet, it commits the very same act through the death penalty. They maintain that the imposition of the death penalty deprives an individual the right to life and other human rights.

2.2.8 Application without cruelty

The anti-abolitionists dispute that the death penalty is cruel.¹³⁵ Fesser,¹³⁶ argues that the death penalty is not brutal in the sense that it is similar to when a state runs a lottery, which randomly chooses a few who are unlucky, for the ultimate penalty from all those convicted of the crime of murder. He adds that the death penalty filters and selects the worst of the worst criminals. In contrast, the abolitionists are of the view that the death penalty is a cruel way of

¹³⁰ Listverse (note 111 above).

¹³¹ The death penalty a balanced debate, available at <http://www.angelfire.com/wy/intellectualloafing/discussionsfolder/myessaysfolder/deathpenaltyfolder/deathpenaltyessay.htm> (accessed 11 November 2016).

¹³² L Redmond, the place for vengeance, available at www.prodeathpenalty.com (accessed 27 November 2016).

¹³³ Listverse (note 111 above).

¹³⁴ KL Schuessler *The deterrent influence of the death penalty* (1952) 54.

¹³⁵ Listverse (note 111 above).

¹³⁶ Associate Professor of Philosophy at Pasadena City College.

punishment¹³⁷ and that the imposition of the death penalty makes the justice system guilty of cruelty towards those who commit murder. The abolitionists point to the methods used to execute criminals as evidence of its cruelty. These include the lethal injection, electrocution, firing squad, hanging and gassing.¹³⁸

Electrocution¹³⁹ involves fastening the condemned into an electric chair and allowing the electricity to be directly conducted into the brain. Before the brain registers the pain, the condemned is dead. Also, the death penalty may be effected through hanging.¹⁴⁰ This causes death by snapping the accused's neck around the second vertebrae, thereby closing the brain's ability to communicate with the rest of the body, in the process making the heart stop beating.¹⁴¹ In certain countries, they use the firing squad¹⁴², where there would be five men shooting the heart of the accused with high powered guns. The condemned's heart is instantly destroyed. In other areas, the death penalty is carried out through gas poisoning, causing unaccepted and unexpected pain. The gas inhibits respiration in every cell of the whole body, thereby shutting out the brain and causing death to the condemned. For all these forms of carrying out the death sentence, the abolitionists point to state cruelty towards the condemned.

2.2.9 Wrongful conviction and innocence and irrevocable mistakes

One of the arguments offered by the abolitionists is based on irrevocable mistakes. The abolitionists contend that any system of justice is bound to make mistakes as long as it relies on the proof provided by human beings.¹⁴³ They point to instances where people have been wrongly convicted, but later declared innocent as evidence to the justice system's shortcomings. The anti-abolitionists, however, argue that the fact that some people have been convicted and later found innocent after an appeal cannot be used as a ground for eliminating the death penalty.¹⁴⁴ Their assertion here centres on the fact that higher standards of proof are required for the death penalty, thus reduce the chances for mistakes.¹⁴⁵ The anti-abolitionists, therefore, contend that the wrongful conviction, innocence and irrevocable mistakes do not hold water.

¹³⁷E Fesser, Top pros and con should the death penalty be allowed, available at <http://deathpenalty.procon.org/view.resource.php?resourceID=002000> (accessed 13 February 2017).

¹³⁸ Amnesty International, available at <https://www.amnesty.org/en/what-we-do/death-penalty/> (accessed 3 May 2018).

¹³⁹ PR. Nugent ' Pulling the plug on the electric chair: The unconstitutionality of eletrocution' (1993) vol. 2 No 1.

¹⁴⁰ The death penalty, available at <http://www.clarkprosecutor.org/html/death/methods.htm> (accessed 3 May 2018).

¹⁴¹ Listverse (note 111 above).

¹⁴² The death penalty (note 140 above).

¹⁴³ Amnesty International, the death penalty, available at <https://www.amnesty.org/en/what-we-do/death-penalty/> (accessed 9 January 2017).

¹⁴⁴The death penalty-a balanced debate (note 131 above).

¹⁴⁵Michigan State University, Death Penalty Information Centre 2000, available at <http://deathpenaltyinfo.msu.edu> (accessed 28 November 2016).

To counter the above, the abolitionists argue that there have been so many miscarriages of justice in murder cases, and many people have been released from the death row after evidence has been raised proving their innocence. They claim that the introduction of the DNA tests has exonerated many innocent persons through its evidence, of which some of the convicts were facing the death penalty.¹⁴⁶ The last decade provided enough evidence on wrongful convictions from many countries around the world. These were Malaysia, China, Malawi, Pakistan, the Philippines, New Guinea and Trinidad and Tobago. One of the most famous cases where the convicted was exonerated after the DNA tests is Iwao Hakamada. The convicted had spent 47 years on China's death row. The DNA proved that the prosecutors fabricated the case against him.¹⁴⁷ It is against this backdrop that the late United States of America Supreme Court Justice Thurgood Marshall, in the case of *Furman v Georgia*¹⁴⁸ stated that:

No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony and human error remain too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some.¹⁴⁹

The above statement has been widely used by the abolitionists to further their argument that the state is not always right in its decisions of the death penalty. The primary argument being that the death penalty imposes an irreversible sentence. Once an execution has been made, nothing can be done to amend it in case of a mistake.

2.2.10 The interests of the public

Bedau¹⁵⁰ argues that public opinion has always played a role in the modern controversy about the death penalty to some extent. Lord Justice Denning explains that:

Punishment is the way in which society expresses its denunciation of wrongdoing; and, to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformatory or preventive and nothing else... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.¹⁵¹

The anti-abolitionists concur with the above argument, as they point out that a government with a democratic dispensation listens and does not ignore the strong and persisting public

¹⁴⁶ The Innocence Project, available at www.innocenceproject.org (accessed 18 November 2016).

¹⁴⁷ Death penalty and the victims, United Nations available at <http://www.ohchr.org/EN/newyork/Documents/Death-Penalty-and-the-Victims-WEB.PDF> (accessed 19 November 2016).

¹⁴⁸ *Furman v Georgia* 408 U S 238 1972.

¹⁴⁹ United States of America Supreme Court Justice Thurgood Marshall.

¹⁵⁰ H Bedau *What do Americans think of the death penalty? in the death penalty in America* (1967) 231.

¹⁵¹ Lord Justice Denning, former Master of the Rolls of the Court of Appeals in England made to the Royal Commission on Capital Punishment in 1950.

opinion on the retention of the death penalty.¹⁵² According to this line of thought, the death penalty is strongly favoured by the public and should therefore be retained for the sake of democracy. The anti- abolitionists also contend that the taking of one's life creates a disturbed balance of justice and democracy.¹⁵³ For instance, one anti-abolitionist Macy,¹⁵⁴ stated that, 'For justice to prevail, some killers just need to die.' Unless the balance is reinstated, it means the society will submit to a rule of violence. To restore that balance, therefore, a murderer's life must be taken away, thus justice and democracy would have prevailed. Furthermore, this line of argument stipulates that although the death penalty may not deter all the potential offenders, it is likely to deter some of the potential criminals who are likely to commit capital similar crimes.¹⁵⁵

Another argument was based on a South African case of *Makwanyane*¹⁵⁶ and the Attorney General, representing the state. This matter involved two convicts convicted of one count of attempted murder, four counts of murder and one count of robbery with aggravating circumstances. Both accused were sentenced to death on each of the murder counts. On the issue of public opinion, the Attorney General stated that,

What is cruel, inhuman and degrading depends to a large degree upon contemporary attitudes within society, and that the South African society does not regard the death sentence for extreme cases of murder as a cruel, inhuman or degrading form of punishment.¹⁵⁷

The Attorney General argued that punishment by death is an acceptable and necessary punishment which is not cruel, inhuman or degrading within the meaning of section 11 (2)¹⁵⁸ of the previous South African Constitution. He further stated that the South African society, then generally regarded the death punishment as an acceptable form of punishment, which is not cruel. He also explained that the limitation in section 11 (2) of the Interim South African Constitution was justified in terms of section 33, which was the then limitation clause and as such, the death penalty should be allowed for the public favoured it.

In response, the abolitionists responded by saying that a key responsibility of a democratic and caring government is to lead and that includes a duty to educate people not to kill, and to

¹⁵² The African Commission on Human and Peoples' Rights at its 50th Ordinary Session Resolution ACHPR/Res.79 (XXXVIII) 05 24 October -07 November 2011, 'Working Group on the Death Penalty in Africa'.

¹⁵³ The death penalty curriculum, available at <http://deathpenaltycurriculum.org/student/c/about/arguments/argument2a.htm> (accessed 2 march 2017).

¹⁵⁴ Former District Attorney of Oklahoma City in America.

¹⁵⁵ The African Commission on Human and Peoples' Rights at its 50th Ordinary Session Resolution (note 147 above).

¹⁵⁶ *Makwanyane* case (note 82 above).

¹⁵⁷ *Makwanyane* case (note 82 above).

¹⁵⁸ Act 200 of 1993,

advise itself also not to kill. It can do this through the legislation commanding absolute respect for human life, no matter how abject and miserable that life might be.¹⁵⁹

Furthermore, Chaskalson expressed his views concerning the public opinion in the case of *Makwanyane*,¹⁶⁰ where he based his views on the right not to be subjected to cruelty, inhuman and degrading punishment. He stated that,

The question before us, however, is not what most South Africans believe a proper sentence for murder should be. It is whether the Constitution¹⁸ allows the sentence.

Chaskalson asserted that the decision for the retention or the abolition of the death penalty should not be left to referendum as it might result in the majority prevailing over the minority.¹⁶¹ The Attorney General, on the other hand, contended that the issue of the death penalty rests with the Parliament and not the State. He observed that the Court has been vested with the power of judicial review and its duty is to protect minorities and those who cannot protect their rights. His observations were linked with the opinion of the Supreme Court of the USA.¹⁶² The Supreme Court opinion provides that there should be a clear distinction drawn between the majority's wishes and the role of the Court in protecting the values of the Constitution, especially when matters concerning life and death are at hand. Conclusively, the decision on the death penalty and the views of the public were rejected in the *Makwanyane*¹⁶³ case. It was stated in that case that public opinion would be rejected outright only when it does not accord the standards of civilisation. In this case, the court had the duty to determine what part of public opinion was relevant. Furthermore, it was concluded that the courts have the duty to interpret the Constitution and to uphold its provisions without fear or favour.

In *Furman v Georgia*¹⁶⁴ in the USA Supreme Court, it was argued that the Court cannot be diverted from the duty of acting as an independent arbiter of the Constitution by making choices on the basis that they would find favour with the public. It was, however, decided in both cases that the decision to retain or abolish the death penalty was vested in the courts and not on public opinion.

The abolitionists submit that the public is in favour of the death penalty because their opinions are based on emotions rather than rationale. For that reason, they declare that it is the duty of the criminal justice system serve the public safety and rehabilitate the condemned

¹⁵⁹ The African Commission on Human and Peoples' Rights at its 50th Ordinary Session Resolution (note 147 above).

¹⁶⁰ *Makwanyane* case (note 82 above).

¹⁶¹ *Makwanyane* case (note 82 above) 87.

¹⁶² Vidmar and Ellsworth *Public Opinion and the Death Penalty* (1975) 26.

¹⁶³ *Makwanyane* case (note 82 above).

¹⁶⁴ *Furman v Georgia* (note 148 above).

instead of revenge. They further submit that a caring democratic government's key responsibility is to lead, which includes a duty to educate the public not to kill it. For that reason, it is argued that public opinion should be shaped by leadership. A special role was envisaged in the case of *Makwanyane*¹⁶⁵ for determining which part of public opinion is relevant and the weight that must be attached when assessing the validity of a certain provision. In the *Makwanyane*¹⁶⁶ case, it was established that once such relevance and weight has been determined, that the Court has a duty of educating its people why such determination was considered.

2.2.11 Cost effectiveness

The anti- abolitionists argue that the death penalty costs the government less as opposed to life imprisonment without parole.¹⁶⁷ These are of the view that the expenses sustained by the government from imposing the death penalty are cheaper than the expenses obtained for life without parole. In support of this argument, they argue that a life sentence accumulates high expenses for food, the health of the prisoners and other costs for sustaining their lives. On the other hand, the abolitionists submit that the density and length of trials cost the government more money, which is paid by the tax payers. Wolfers,¹⁶⁸ (an abolitionist), believes that the death penalty is more expensive.¹⁶⁹ The state spends more money on verdicts and sentencing and as a result, the government can do away with the death penalty to save the tax payer's money.

2.2.12 A fair punishment for crimes committed against human rights

The anti-abolitionists¹⁷⁰ argue that the death penalty is a just punishment for crimes committed against the rights to life, freedom and safety of victims.¹⁷¹ They argue that everyone has the right to have all the human rights respected. They opine that crimes such as murder, rape and assault are committed by people who have no respect for other people's lives and property; hence it is only fair that justice prevails. The anti-abolitionists believe criminals should suffer the fate which they rightfully deserve, the imposition of the death penalty. The abolitionists on the other hand, believe that everyone has the right to live peacefully, free from any harm and, therefore, the death penalty is not just punishment. They argue that there are instances where people commit pre-meditated crimes unaware of their actions. The abolitionists also believe that the offender commits the crime of murder out of passion or extreme anger, which would have been triggered by a situation that made the

¹⁶⁵ *Makwanyane* case (note 82 above).

¹⁶⁶ *Makwanyane* case (note 82 above).

¹⁶⁷ Mahlhausen (note 109 above).

¹⁶⁸ Professor Wolfers an author of Stanford law review, available at <http://www.nytimes.com/2007/11/18/us/18deter.html?pagewanted=all> (accessed 14 February 2017).

¹⁶⁹ Professor Wolfers (note 168 above).

¹⁷⁰ Amnesty International, the death penalty (note 138 above).

¹⁷¹ Professor Wolfers (note 168 above).

condemned to act impulsively. As a result, they argue, the offender acted under mental illness, which clouded their judgment at the time of committing the crime.¹⁷²

2.2.13 An anti-poor, discriminatory and arbitrary platform

The anti-abolitionist agrees that there is no conclusive and truthful evidence about the contention that the death penalty is arbitrary and discriminatory.¹⁷³ They argue that there are many improvements on the death penalty and, therefore, it will not be justified to remove the whole penal justice system for the simple reason of being anti-poor and non-discriminatory. The system is better reformed instead.¹⁷⁴ The abolitionists, however, would have none of these. They press home, arguing that despite the improvements on the death penalty, it still remains anti-poor, discriminatory, based on race, sex and wealth or arbitrary.¹⁷⁵ Empirical research indicates that the USA implements the death penalty in a racially biased manner.¹⁷⁶

Statistical evidence from over 2000 murder cases in Georgia was provided in the case of *McCleskey v Kemp*¹⁷⁷ in the USA's Supreme Court. It was stated that 21% of cases which involved a black defendant and where there is a white victim resulted in the death penalty. On the other hand, only 8% of cases involving a white defendant and where there is a white victim resulted in the death penalty. The above statistics prove that the race of the victim or the perpetrator has an influence on the prosecutors to seek the death penalty. The statistics show that the chances are that 70%, the prosecutor would seek for the death penalty where the offender is black, and the victim is white, but 19% where the offender was white, and the victim was black.¹⁷⁸

The abolitionists claim that individuals who are poor mostly face the death punishment because of the lack of finances to obtain powerful defence in court. The abolitionists argue that every accused has the right to a lawyer as it is the most fundamental right to a person accused of a crime and, consequently the right to a legal representative becomes meaningless without a competent lawyer.¹⁷⁹ Stephen,¹⁸⁰ an abolitionist, contends that in many jurisdictions, the indigent offenders facing the death penalty have inadequate legal representation. In most cases, offenders are represented by court appointed lawyers who

¹⁷² Mahlhausen (note 109 above).

¹⁷³ Amnesty International, the death penalty (note 138 above).

¹⁷⁴ The death penalty a balanced debate (note 131 above).

¹⁷⁵ The death penalty a balanced debate (note 131 above).

¹⁷⁶ Amnesty International. 2016. Death Sentences and Executions 2015. London: Amnesty International, available at <https://www.amnesty.org/en/latest/research/2016/04/death-sentences-executions-2015> (accessed 13 November 2017).

¹⁷⁷ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹⁷⁸ CM Grosso et al, 'Race Discrimination and the Death Penalty: An Empirical and Legal Overview' in J R Acker & C. S. Lanier *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* 3rd ed (2014) 525-576.

¹⁷⁹ SB Bright 'Race, Poverty, the Death Penalty, and the Responsibility of the Legal Profession' (2002) Vol. 1: Iss. 1, *Seattle Journal for Social Justice* 6.

¹⁸⁰ Bright (note 179 above).

may lack the skill, resources and poor defence. Therefore, offenders convicted and sentenced, may be unable to challenge their convictions and sentences in post-conviction proceedings.

Moreover, the abolitionists argue that the death penalty is discriminatory based on sex in that there is a higher rate for both sentencing and the death row population for men than women. They argue that the number of women on death sentence is lesser than that of men on the death row. The essence of this argument is that if justice must prevail, it must be in both sexes.

The abolitionists further contend that the death penalty is arbitrary, and many cases have proven that a number of them amount to arbitrary deprivation of the right to life. A case in point is that of *Forum of Conscience v Sierra Leone*.¹⁸¹ The African Commission held that the execution of the 24 soldiers without affording them the right of appeal was a violation of Article 7 (1) (a) of the African Charter. As a result, their execution constituted an arbitrary deprivation of the right to life guaranteed by Article 4 of the African Charter.

The African Commission stated (in its 57th Ordinary Session) that the deprivation of the right to life caused by a violation of the procedural or substantive safeguards in the African Charter, for instance, based on the discriminatory grounds or practices, is arbitrary and consequently, unlawful.¹⁸²

2.2.14 No prohibition of the death penalty by International law

The anti-abolitionists argue that the international law or international human rights law does not prohibit the death penalty. Moreover, they contend that there is no regional instrument that totally outlaws the death penalty.

In response to the above, the abolitionists argue that the formulation of the provisions on the death penalty subject to the international and regional instruments suggests that there is a need for the abolition of the death penalty.¹⁸³

2.2.15 The morality of the death penalty

Nathanson, contends that the legal executions in death punishments are not murder,¹⁸⁴ thus not morally wrong. This argument is premised on the fact that since the executions are

¹⁸¹ *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000).

¹⁸² General Comment No. 3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) Adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia.

¹⁸³ Question on the death penalty, available at http://www.achpr.org/files/news/2012/04/d46/study_question_deathpenalty_africa_2012_eng.pdf (accessed 11 December 2017).

authorised by the state, it means that they are legal if they do not exceed the bounds of what is permissible. He adds that the burden of proof on the morality of the death penalty lies with the supporters of the death penalty.

In opposition to this, the abolitionists regard the death penalty as a punishment against all the religions. As a result, they regard it as immoral. One argument upon which the abolitionists base their argument is that the death penalty is an insult to the sanctity of human life and an infringement of the right to human dignity. They further argue that it is morally wrong to execute the prisoner for the sake that he or she killed. To them, murdering someone does not make them deserve the death penalty.¹⁸⁵ Consequently, the abolitionists regard the death penalty as a violation of the International Human rights law. It is, therefore, of paramount importance that this study expounds on the position of international human rights law and establishes whether the above debates could be reconciled or permitted within it.

2.2.16 The Constitutionality of the death penalty

The anti-abolitionists provide that the death penalty is a suitable form of punishment since it is constitutionalised in many Constitutions. In support of this notion, Millsap¹⁸⁶ posit that the system of applying the death penalty was designed and has been functioning in the USA for more than 200 years, with one dominant goal, to make sure that the innocent is protected.

In addition, the Federal Courts in the USA consider the death penalty with the assumption that it is not cruel and unusual, but constitutional. They consider it this way following the argument that the death penalty in America has existed since 1791, which demonstrates that the founding fathers of the constitution have approved it.

Considering the constitutionality of the death penalty suffices, it to note the contrasting opinions expressed by Justice Antonio Scalia (anti-abolitionist) and Stephen G Breyer (an abolitionist) on the topic. Basically, Justice Breyer calls for the abolition of the death penalty while Justice Scalia supports its retention. Justice Scalia contends that the constitution blesses the death penalty. He points out that the provision of the Constitution protects it from being challenged. A counter argument by Justice Breyer is to the effect that the death penalty violates the Constitution in that it is slow, rare, unreliable and arbitrary.¹⁸⁷

¹⁸⁴S Nathanson *An eye for an eye, immorality of punishing by death* (2001) 3.

¹⁸⁵The death penalty a balance debate (note 131 above).

¹⁸⁶ Samuel Millsap Jr, Former District Attorney, Bexar County, Texas.

¹⁸⁷The death penalty is unconstitutional, available at <https://www.nytimes.com/2015/07/07/opinion/is-the-death-penalty-unconstitutional.html> (accessed 4 November 2017).

2.2.17 African traditional beliefs

The anti-abolitionists contend that the death penalty is a valid form of punishment in that it was imposed for certain crimes in pre-colonial African societies. For instance, amongst Nigeria's Igbo people, the death penalty was considered as the only punishment for murder. In contrast, the anti-abolitionists argue that the death penalty is justified, given the traditional practices that took place both in pre- and colonial Africa that must be maintained as they are still functional even today. The imposition of the death penalty, therefore, must also be viewed as an imposition of these practices. Consequently, abolishing the death penalty would imply discarding such traditional practices.¹⁸⁸

The abolitionists, however, out rightly reject this argument, pointing out that the death penalty was not imposed in all pre-colonial African societies as there were some that never practiced it. It has been stated, for instance, that South Africa's Ama-Xhosa tribe never used the death penalty as they saw no reason to sacrifice yet another human being, when another has already been lost.¹⁸⁹ For this reason, the abolitionists reject the retention of the death penalty.

2.3 The application of the death penalty under International Human Rights Law

The international human rights law consists of treaties, customary international law, general principles, reports and other relevant sources.¹⁹⁰ The government's obligations to act in certain ways or to desist from certain conducts to safeguard the people's human rights are laid down under the international human rights law. This section examines the death penalty and its applicable instruments under both the United Nations Human Rights System and the African Human Rights one.

This section begins with the examination of the Universal Declaration on Human Rights (Universal Declaration). It then outlines the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).¹⁹¹ This instrument is monitored by the Committee on the Elimination of Racial Discrimination (CERD). The section then discusses the International Covenant on Economic, Social and Cultural Rights (ICESCR). This treaty is monitored by the Committee on Economic, Social and Cultural Rights (CESCR).¹⁹² Furthermore, this section examines the International Covenant on Civil and Political Rights

¹⁸⁸ Chenwi (note 51 above) 105.

¹⁸⁹ *Makwanyane* case (note 82 above) 377.

¹⁹⁰ The United Nations Human Rights, Office of the high commissioner available at <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx> (accessed 19 March 2017).

¹⁹¹ International Convention on the Elimination of All Forms of Racial Discrimination CERD Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965 entry into force 4 January 1969.

¹⁹² International Covenant on Economic, Social and Cultural Rights Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27.

(ICCPR).¹⁹³ This instrument is monitored by the Human Rights Committee (HRC). The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)¹⁹⁴ is also examined hereunder. It is monitored by the Committee on the Elimination of all forms of Discrimination Against Women (CEDAW). Also discussed here is the Convention Against Torture and other cruel, inhuman or degrading treatment or punishment (CAT).¹⁹⁵ It is monitored by the Committee Against Torture (CoAT). The Convention on the Rights of a Child (CRC)¹⁹⁶ is another instrument to be dissected in the light of the anti-abolitionists and abolitionists debates. This instrument is monitored by the Committee on the Rights of the Child (CoRC). In addition to the above, this section also examines the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR OPT-2).¹⁹⁷ It is monitored by the HRC.

It must be noted that the thrust of this section is to examine the international human rights law on the death penalty to explore whether the abolitionist and the anti- abolitionist debates may be permitted. Thus, the next section focuses on examining the international human rights instruments under the UN system, in seriatim.

2.3.1. Universal Declaration of Human Rights (UDHR)

The Universal Declaration is the oldest instrument enacted to protect several social, economic and cultural rights. Schabas¹⁹⁸ submits that a study of international instruments dealing with the abolition of the death penalty must begin with the Universal Declaration.¹⁹⁹ He further submits that the Universal Declaration is a touchstone for all the international instruments. It is the oldest of all the instruments. It was adopted in 1948 and it safeguards many human rights. The Universal Declaration does not make any comment about the death penalty,²⁰⁰ but it enshrines the protection of the basic international standards of the right to life in Article 3. It decrees the right to life and many other kinds of human rights for the first time, which arouses the world's attention to the right to life. Article 3 guarantees the right to life for everyone, that is, even the murderers are also entitled to the right to life. Considering the above, the anti-abolitionists' arguments are irrelevant since they advocate for the

¹⁹³International Covenant on Civil and Political Rights (note 42 above).

¹⁹⁴Convention on the Elimination of All Forms of Discrimination against Women Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979 entry into force 3 September 1981, in accordance with article 27(1).

¹⁹⁵Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1).

¹⁹⁶Convention on the rights of the child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 4.

¹⁹⁷Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (note 40 above).

¹⁹⁸ W Schabas *The abolition of the death penalty in International law* (2002) 14.

¹⁹⁹ Universal Declaration (note 71 above).

²⁰⁰Schabas (note 198 above).

execution of a murderer. However, what the abolitionists say can be allowed to stand in that they maintain that the right to life must be protected for everyone, in line with Article 3.

The death penalty is not only an infringement of the right to life, but also, an affront to human dignity.²⁰¹ The abolitionists contend that the death penalty is not in line with the right to freedom from cruel, inhuman and degrading treatment or punishment. In the case of *S v Makwanyane*,²⁰² it was held that the death penalty constitutes a violation of the right to human dignity. It is important, therefore, to examine the protection offered by the Universal Declaration, with regards to the right to human dignity. The Universal Declaration provides a valuable guidance for the understanding of the concept 'human dignity'. The human dignity principle is mentioned twice in the Universal Declaration preamble. It asserts that the recognition of the inherent dignity and all the absolute of everyone is the foundation of peace, justice and freedom in the world. It must be noted that the United Nations recognises the dignity and worth of human beings, and the equality between men and women.²⁰³

This shows that the concept 'human dignity' plays a pivotal role in the discourse of human rights. In terms of the classical and Kant's notion,²⁰⁴ the source of human dignity is the human worth that consists of the capacity to reason and the ability for self-sufficiency. Kant explains that these are the human beings' distinctive characteristics that make them complete persons, thus rendering them equally dignified.

The Universal Declaration's human dignity principle as enshrined in Article 1, states that,

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Every person, regardless of gender, ethnic origin, social status, political opinion, language, age, nationality or religion has a responsibility to treat all people in a humane way.

Article 2 stipulates that,

No person should lend support to any form of inhumane behaviour, but all people have a responsibility to strive for the dignity and the self-esteem of all others.

From the above, it should be noted that three ideas were constructed. First, the term "inherent" means being involved in the constitution or indispensable character of something, central, permanent, a characteristic of something.²⁰⁵ The idea derived from the above is that

²⁰¹World congress against the death penalty in Paris and the Vatican, available at www.deathpenaltyinfo.org/vatican (accessed 6 December 2016).

²⁰²*Makwanyane* case (note 82 above).

²⁰³Universal Declaration (note 71 above).

²⁰⁴ AR Monteiro *Ethics of human rights* (2014) 208.

²⁰⁵ R Andorno 'Human dignity and human rights as a common ground for a global bio ethics' (2009) Vol.1 *Journal of medicine and philosophy* 5.

human dignity is inseparable from human condition; therefore, it is not an accidental quality of human beings. The other idea is that all human beings are persons and should therefore be treated with due respect.

Second, the idea constructed in Article 1 is the consequence of the meaning of the term human being. The meaning derived from the term is that basic rights are equal for all, and for that reason, the distinction in the treatment of different categories of people is totally contrary to human dignity.

Third, the statement that emphasises the rights as derived from human dignity has an important practical consequence. The consequence is that those rights are inherent to every human being, and hence cannot be taken away from anyone. Considering the ideas constructed above, it may be stated that the right to human dignity prohibits practices such as torture, inhuman or degrading treatments, slavery, exploitative working conditions, and discrimination, among others.²⁰⁶

Looking at these, the abolitionists argue that the death penalty is an insult to the sanctity of human life, and an infringement of the right to human dignity, thus making it immoral. The anti-abolitionists, on the other hand, hold the view that the execution of a murderer is not immoral. This researcher, however, is of the opinion that the anti-abolitionists' view cannot be supported on the basis that it infringes on the right to human dignity as provided by the Universal Declaration.

A United Nations Human Rights Council (UNHRC) report (15th of May 2015), the USA was encouraged to end capital punishment,²⁰⁷ to respect the human dignity and the condemned. The report expressed concern over the death penalty, categorically stating that it is a major human rights issue of concern in the USA. It thus urged the country to either abolish it or impose a moratorium on executions with a view towards its abolition. Furthermore, the report recommended that the United States makes additional precautions to end racial discrimination in the death sentences. This report was relevant to this research as it was used as a tool to encourage Zimbabwe to impose a moratorium on death sentences. The Chapter is now analysing the position of the ICERD in relation to the above debates.

²⁰⁶Andorno (note 205 above).

²⁰⁷Report on the death penalty by the United Nations Human Rights Council in United States of America, under universal Declaration of human rights (2015). paras 176.198.

2.3.2 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

As stated above, the ICERD was enacted to commit the member states to the elimination of racial discrimination, and thus promote an understanding among all races. This instrument was adopted in 1965. It is monitored by the Committee on the Elimination of Racial Discrimination (CERD).

Article 4 of the above instrument provides grounding in which racial discrimination may be based. These grounds include the superiority of one race or group of persons of one colour over another. The instrument proclaims that any broadcasting of any ideas based on racial superiority constitutes discrimination. Article 5 eliminates all forms of racial discrimination. ICERD does not absolutely²⁰⁸ prohibit the imposition of the death penalty, but its requirements are only violated where the death penalty is applied in a discriminatory manner, based on race and ethnicity. The ICERD applies where the conduct engaged has a discriminatory effect or intent. It encourages each state party not to sponsor, defend or support any racial discrimination by anyone. It further encourages states to take appropriate measures in protecting individuals from racial discrimination. The death penalty, therefore, is not excused from this protection.

In a 2014 CERD report concerning the issue of racial discrimination in the USA,²⁰⁹ it was indicated that there is so much pronounced racial discrepancy in death penalty cases. This disparity is established in two ways. First, Blacks imprisoned for murdering white people are more likely to be punished with death than those convicted of murdering blacks. Second, black defendants are more likely to be punished with death regardless of the race of their victims. The CERD recommended that the USA should strive to see to it that such policies are repealed.

It must be noted that, there are other countries which have applied the death penalty over many years without any racial, skin, colour or origin discrimination for instance the country of Botswana. A murderess Marietta Bosch²¹⁰, a white woman was sentenced to death and duly executed in Botswana. In this case the accused was convicted of the murder by the High Court of Botswana in 1999 and was sentenced to death. However, the convicted was denied appeal in 2001.

²⁰⁸M Shama and S Morton, The death penalty, available at <http://academic.udayton.edu/race/06hrights/GeoRegions/NorthAmerica/USNGO2000/woat/hrights02b.htm> (accessed 7 March 2017).

²⁰⁹Follow up report to the United Nation Committee on the elimination of racial discrimination of the United States of America under Article 5 of the ICERD (2009) pg75.

²¹⁰ *S v Bosch* 2000 (1) BLR 180 HC.

Regarding the interpretation of the above instruments, the anti- abolitionists' argument is not acceptable in that it favours the retention of the death penalty regardless of whether it is discriminatory or not. The abolitionists' argument may, however, be reconciled within the ICERD in that they promote non- discrimination based on race on the death penalties. As such, this leaves no room for racial discrimination. Nonetheless, this study scrutinised the position of the ICCPR in the light of the death penalty debates.²¹¹

The foregoing implies that if the death penalty has to be applied, it should not be done in a discriminatory manner. For racism to be eliminated, it is submitted that the death penalty must be abolished as this will leave no ground for any discrimination based on race. Thus, the right to be not discriminated against will be protected.

2.3.3 International Covenant on Civil and Political Rights (ICCPR)

The ICCPR was adopted by the UN in 1966. It is recognised as the most vital treaty in the world as it has a universal coverage. Its main purpose is to safeguard the civil and political rights, which include the rights to life. The ICCPR provides, in Article 6 (1) that,

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

In ensuring non-arbitrary, the General Comment 36,²¹² states that there is a requirement for a high degree of certainty regarding guilt and such guilt must be proved beyond reasonable doubt. This means that no-one may be arbitrarily deprived of his or her life without the necessary proof.

Article 6 (1) protects against the arbitrary deprivation of the right to life. Moreover, the General Comment 36 provides that a high degree of certainty be required regarding the onus of proof on death sentences. To that end, it provides that capital punishment may only be charged in-terms of the guilt of the person based upon clear and convincing evidence, leaving no room for any alternative explanation of the facts. To avoid the arbitrary killing of murderous criminals, it is also required that the threshold be higher than that of proof beyond reasonable doubt.

The anti-abolitionists submit several reasons in support of their argument. These include deterrence, rehabilitation among others, of which almost all lead to the loss of the criminal's life, contrary to the above article's spirit and the General Comment. The anti- abolitionists'

²¹¹ International Covenant on Civil and Political Rights (note 42 above).

²¹² UN Human Rights Committee General Comment No 36- Article 6: Right to life written submission from penal reform international.

argument cannot, however, be permitted to stand as it can be deemed to be in violation of the right to life as protected by the covenant. Further, the ICCPR provides, in Article 2 that,

In countries which have not abolished the death penalty, the sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.

Article 2 stipulates the conditions to be followed by states that have the death penalty. That is, the application of the death penalty is limited to serious crimes only and must be in accordance with the law in place at the time such crime was committed. According to this Article, the application of the death penalty should be in line with the provisions of the ICCPR and be carried out by a competent Court. It is of paramount importance to note that the ICCPR is one of the universal instruments enacted to protect civil and political rights.²¹³

In terms of the ICCPR, the death penalty cannot be applied where other rights are breached. For example, the abolitionists reveal that prisoners awaiting their execution are kept under harsh conditions, breaching their right not to be subjected to torture, inhuman or degrading treatment. These rights are all protected by the ICCPR. In addition, the abolitionists concern about the methods used for the execution, which they deem unacceptable under international law.

The anti-abolitionists contend that the death penalty is a just punishment for crimes committed against human rights and, therefore, its application is not cruel. This contention contradicts Article 2 of the ICCPR in that the imposition of the death penalty violates many human rights, which are protected by the ICCPR. As a result, the anti-abolitionists views cannot be reconciled with the ICCPR. Conversely, the debate presented by the abolitionists, can be considered under this instrument in that they argue that the death penalty is not justified for murder crimes, in line with the provisions of the international law.

To this end, Article 4 of the ICCPR states that,

Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

The above provision stipulates that criminals who have been sentenced to death have the right to seek pardon or commutation. Pardon²¹⁴ is an action of forgiving someone for a mistake, and commutation²¹⁵ refers to reducing a judicial sentence. Pardoning criminals

²¹³K M Smith *International Human Rights* (2010) 110.

²¹⁴C Soanes & S Hawler *Compact Oxford English Dictionary of current English* (2013) 738.

²¹⁵Soanes (note 214 above) 196.

means letting them go free, back into the society and commutation means reducing the crime to a lesser one.

The anti-abolitionists argue that murderers deserve execution as punishment and raise reasons such as retribution and incapacitation. They argue, therefore, that the death penalty is the best punishment for murder crimes. In retribution, the criminal must mete the crime committed, so that justice may be restored. This argument cannot, however, be allowed to stand as it disqualifies pardoning and commutation as encouraged by Article 4. The anti-abolitionists, it seems, do not tolerate a situation where the wrongdoer fails to mete his or her criminal act or have his or her crime reduced to a lesser crime.

The abolitionists' position, however, is the preferable one if one takes into cognisance the international law. They argue that the death penalty must be abolished or be turned into life imprisonment. Their contention is in accordance with the above provisions of the international law.

Also, Article 6 of the ICCPR dictates that,

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

Article 6 (6) of the Covenant explicitly encourages countries that have not yet abolished the death penalty to do so, as there is nothing that can prevent them from taking that decision. The reason behind such controversy regarding the death penalty is whether it should be abolished or retained. The abolitionists argue that the death penalty must be abolished, while on the other hand, the anti-abolitionists call for its retention. The anti-abolitionists' debates cannot be permitted in terms of the above provision, in that they prevent or delay the abolition of the death penalty. On the other hand, the abolitionists' views may be allowed to prevail in that they support its abolition.

One of the arguments presented by the abolitionist is that the death penalty is discriminatory, anti- poor and has an arbitrary platform. It is important to examine the ICCPR in relation to discrimination. First, Article 2 (1) provides the grounds in which discrimination may be based, that,

Each state party undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, the ICCPR provides a cornerstone for protection against discrimination in Article 26 by stating that,

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The above provisions protect against discrimination of any kind. The grounds of prohibition in Article 26 are similar to those stated in the Universal Declaration. In Article 2 of both the ICCPR and the ICESCR, the non-discrimination clause prohibits discrimination in the enjoyment of rights. According to the UHRC's General Comment 18,²¹⁶ Article 26 features where there is a state action, omission or a provision with a discriminatory impact on the enjoyment of the rights which are not set forth in the ICCPR.

In terms of this provision, state parties are obliged to launch judicial remedies in the case of discrimination in the public or private domain. In *Broeks v the Netherlands*,²¹⁷ a case which concerned a widow who contested the discontinued unemployment payments of her late husband, the widow raised Article 26 of the ICCPR, which guarantees equality before the law and equal protection of the law without discrimination. It was held in the case that the ICCPR entails that any rights established by the legislation must be delivered without discrimination, even if there is no legal obligation on the state to provide such rights or benefits in the first place.

Article 10 (1) of the ICCPR stipulates that 'persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' In accordance with the General Comment 21,²¹⁸ Article 10 (1) applies to anyone deprived of liberty under the laws and authority. The persons include those held by the state in prison, hospitals and correctional institutions. Article 10 (1) imposes a positive obligation on state parties towards persons deprived of their liberty. The states are obliged to ban activities such as torture, cruel, inhuman or degrading treatment or punishment which is contained in Article 7 of the Covenant. However, the respect and dignity of such persons must be guaranteed under the same condition as those of persons who are free. Therefore, all people must be treated with respect and dignity for it is a universally applicable rule.

It has been stated that prisoners under the death row wait in prison under very hard conditions, subjecting them to torture, inhuman or degrading treatments. Bearing in mind the views of the anti-abolitionists that the death penalty is an ultimate warning and that it is not

²¹⁶Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

²¹⁷*Broeks v the Netherlands* no. 1 2/1984.

²¹⁸ ICCPR General Comment 21 (Forty-fourth session, 1992): Article 10 Humane Treatment of persons Deprived of Liberty, A? 47/40 (1992) 195 at para 1-13.

discriminatory, it is obvious that such an argument contradicts Article 10. Such an argument cannot be permitted in-terms of Article 10 (1), which seeks to protect the prisoners so that they have the same conditions as those who are free. The retention of the death penalty as favoured by the anti-abolitionist will be an infringement of the prisoners' rights. On the contrary, the argument of the abolitionists can be reconciled with Article 10 (1) of the Covenant in that it supports the abolition of the death penalty and that the prisoner must be treated with dignity.

In 2012, the UNHRC, which monitors the implementation of the ICCPR, made Concluding Observations regarding Zimbabwe's compliance with the ICCPR and suggested that the country should review its laws. This was meant to reduce the number of offences that are punishable by death, in accordance with Article 6 of the ICCPR. The Council was also concerned with the severe conditions that resulted in several deaths in Zimbabwe's prisons. The UNHRC recommended that the Zimbabwe government should investigate the issue of severe prison conditions to safeguard the prisoners' rights to safety and human dignity, among other rights.

In another report, the UNHRC stated that section 15 of the Zimbabwean Constitution was not in compliance with Articles 6 and 7 of the ICCPR. The provision seemed to deny death row inmates opportunities to improve their situation when they experienced harsh treatment.²¹⁹ In 2014, the UNHRC reported that Zimbabwe has restricted the use of the death penalty. For instance, Zimbabwe's new Constitution adopted in 2013 provides for the death penalty only for murder committed in aggravating circumstances and prohibits its imposition on women or on men who were under 21 or over 70 years at the time when the crime was committed. This clearly is a contravention of the provisions of international law which prohibit discrimination based on sex and gender.

2.3.4 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The Covenant was adopted by the United Nations in 1966. It was enacted to guarantee the protection of economic, social and cultural rights. It is of paramount importance to note that the ICESCR does not specifically have provisions on the death penalty, but its provisions offer support to the protection of the rights of the murder criminals facing the death penalty. For instance, the ICESCR's²²⁰ non-discrimination clause prohibits discrimination in the enjoyment of rights. Article 2 (1) of ICESCR asserts that states are required to guarantee formal and substantive equality, meaning that they can take positive action, and may be

²¹⁹Corlonell Law School, the death penalty database. <http://www.deathpenaltyworldwide.org/country-search-post.cfm?100-0chk=on&101-0chk=on> (accessed 10 March 2017).

²²⁰International Covenant on Economic Social and Cultural Rights (note 192 above).

required to do so to prevent discrimination. Article 2 (2) of the ICESCR prohibits direct and indirect discrimination. It provides that,

To guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 outlaws discrimination in the satisfaction of rights. By virtue of Article 3, state parties must ensure that there is equality between men and women to the enjoyment of all economic, social and cultural rights set in the Covenant. Article 2 of the ICESCR is devoted to protecting everyone against being discriminated against and emphasises on equality. Therefore, the application of the death penalty to men only is an infringement to the right of not being subjected to any discrimination.

The abolitionists contend that the death penalty is anti-poor, discriminatory based on race, sex and wealth or arbitrary.²²¹ On the other hand, the anti-abolitionists hold the view that the death penalty is not discriminatory, but silent on the other grounds mentioned by the abolitionist. The abolitionists' point of view is preferable to the researcher in that it supports equality in the criminal justice system for justice to prevail. Thus, the anti-abolitionists' argument cannot be accepted as it is silent on the issue of equality between men and women, regarding the death penalty.

In a report concerning Angola,²²² the CESCR expressed concern about the lack of a comprehensive anti-discriminatory legislation there. It then recommended that the country takes positive steps to implement the complete anti-discrimination legislation. It further stated that such steps should cover all prohibited grounds of discrimination as spelt out in Article 2 of the ICESCR. This report was important to this discussion in that it informs other states that when implementing any international legislation into their local legislation, they should consider all the grounds laid in the instrument.

2.3.5 Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of all forms of Discrimination Against Women has been described as an international bill for women's rights.²²³ This international treaty was adopted by the UN in 1979. Article 1 of the Convention on the Elimination of Discrimination Against

²²¹The death penalty a balanced debate (note 131 above).

²²² 4th and 5th periodic report of the Republic of Angola Concluding observations under Article 2 of the International Covenant on Economic, Social and Cultural Rights (2016).

²²³ An International Bill of Rights for Women? - Why the United States Refuses to Ratify the Convention on the Elimination of All Forms of Discrimination Against Women, available on https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875830 (accessed on 13 November 2017).

Woman sets grounds in which discrimination may be conducted. These grounds are as follows,

For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made based on sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

It is noteworthy that the grounds stated in Article 1 are free standing as they apply to rights and freedoms in any other field. In terms of General Comment 18, the language stated in the above provision refers to both direct and indirect discrimination. Article 2 (f) of the CEDAW further provides that,

To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.

The CEDAW further calls on all the state parties to take positive measures in modifying or abolishing all laws that seem to be discriminatory to women. In addition, Article 2 (g) provides that all state parties must repeal penal provisions that are found to be discriminatory.

Despite the protection offered by CEDAW on women, there are still countries which still subject women to the death penalty, for instance in the USA²²⁴. It has been stated that in the United States, between 1973 and 2011, 2.1% of death sentences were imposed on female offenders.²²⁵ This shows that the rights protected by CEDAW may still not be regarded by other states.

The anti-abolitionists support any legislation which advocates for the death penalty. However, this support seems to be contrary to Article 2 (f) of CEDAW, which provides that discriminatory laws must be abolished or repealed. The anti-abolitionists' view is inconsistent with the CEDAW in that it does not prohibit any discrimination against women. On the other hand, the abolitionists' position is preferable since it is consistent with the provisions of the Covenant.

The CoEDAW, a committee mandated with monitoring CEDAW,²²⁶ (2013) stated that under the international humanitarian law, women are entitled to the general protections that apply to both women and men. These protections include the protection from the death penalty for

²²⁴ Cornel Law School (note 219 above).

²²⁵ Cornel Law School (note 219 above).

²²⁶ UN General Recommendation No 30 Committee on women in conflict prevention, conflict and post-conflict situation: 2013 Elimination of Discrimination against Women.

pregnant women, and mothers of dependents or young children. The committee recommended that states parties should give due attention to complementary safeguards for women and girls stemming from international humanitarian, refugee and criminal law, in implementing obligations under the CEDAW. This suggests that the CoEDAW is committed in protecting women and girls against the infringement of their rights.

2.3.6 Convention Against Torture (CAT)

This instrument was adopted in 1984 and has been enacted regarding Article 5 of the Universal Declaration and article 7 of the ICCPR, which stipulates that no one may be subjected to torture.

The CAT aims at preventing torture and other acts of cruelty, inhuman, or degrading treatment or punishment in the world. The death penalty has been said to predictably cause cruelty, owing to the delay in carrying it out.²²⁷ Different reasons for the delays have been stated and these differ from country to country. Delays have been caused relatively due to the sentenced prisoner availing himself to the appeal procedures.²²⁸ Examples that show the death penalty as constituting torture and cruelty include a prisoner in Uta, USA, who was executed after spending 18 years on the death row since he was aged 19 at the time of the sentence.²²⁹ Also, in Arkansas, USA, a prisoner's death sentence was commuted to life imprisonment, a tortured for a period of 19 years.²³⁰ It has been stated that generally, in the USA, it takes an average of 10 years to execute a death row inmate. As a result, delays on death row, for various reasons, have become the norm rather than the exception.

In the USA's case of *Ex parte Medley*,²³¹ Justice Miller stated that,

When a prisoner sentenced to death by a court is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it. . . as to the precise time when his execution shall take place.

There are standards which have been provided by the CAT that are meant to prevent torture and other ill-treatments. These include warranties of survivor assistance and legal redress for those who have been faced with torture or other forms of inhuman treatment or punishment.

²²⁷ D Pannick *Judicial review of the death penalty* (1982) 162; in the case of *Riley & Others v Attorney General of Jamaica & Another* [1982] 3 All ER 469 (PC), the Privy Council held at 473 that 'period of anguish and suffering is an inevitable consequence of sentence of death'.

²²⁸ In the *Catholic Commission* case the Supreme Court of Zimbabwe noted at 334 that the state has nothing to gain by delaying execution.

²²⁹ P Hudson 'Does the death row phenomenon violate a prisoner's rights under international law?' (2000) Vol.11 *European Journal of International Law* 833.

²³⁰ *AI United States of America: Developments on the death penalty during 1994* 17. AI Index: AMR 51/01/95.

²³¹ *Ex parte Medley* 134 US 160 (1890).

The definition of torture has been provided in Article 1 of CAT,²³² in which it has been referred to as,

Any act committed by a public official or other person acting in an official capacity or at the instigation of or with the consent of such a person – by which severe physical or mental pain or suffering, is intentionally inflicted on a person for a specific purpose, such as the extortion of information or confession, punishment, intimidation or discrimination.

Human rights law guarantees the right of all people deprived of their liberty to be treated with humanity and with respect for their inherent dignity. General Comment 2²³³ addresses three parts of Article 2. First, it decrees that state parties are obliged to take action that will protect the prohibition against torture, through legislation, administrative, judicial or other actions that can prevent it. Second, it requires state parties to take effective measures in preventing torture in their territories or jurisdictions. Third, it provides that Article 2 is a wide range in that state parties are obliged to eliminate anything that may impede the eradication of torture and ill treatment. As a result, state parties should take measures to prevent such obstruction. The same Article provides for absolute prohibition against torture and states that the prohibition is absolute and non - derogable.

State parties have an obligation to prevent, prohibit, and redress torture and ill-treatment in all contexts of the custody. These include prisons, hospitals, schools and institutions. The, acts and omissions of the officials, agents, private contractors and those acting on behalf of the state are attributed to the state as international responsibility.

The abolitionists contend that the application of the death penalty is cruel and constitutes torture to the criminal. They base their contention on the lengthy periods spent on the death row awaiting execution. The abolitionists further claim that the forms of punishment which include hanging, among others, are very harsh on the condemned. On the contrary, the anti-abolitionists argue that the death row phenomenon is suitable for the murder crime and such cannot be used as an excuse for its abolition. With regards to the above arguments, the anti-abolitionist debates cannot be reconciled in terms of CAT which encourages prevention, prohibition of torture and ill-treatment in all contexts. The abolitionists' debate is preferred by this researcher as it argues for the prevention of the death penalty and torture to murder criminals, as provided by the CAT.

²³²Convention Against Torture (note 195 above).

²³³Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007).

2.3.7 Convention on the Rights of the Child (CRC)

It was adopted in 1989 by the UN. It was enacted to safeguard the special needs of a child, which includes appropriate legal protection. Article 37 (a) of the CRC prohibits the imposition of the death penalty for crimes committed by persons below the age of 18.²³⁴ The Article provides that:

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

The provision further stipulates that no-one is allowed to punish children in a way that is harmful and cruel. Moreover, the provision states that children who break the law must not be cruelly treated. It is worth noting that in Article 1 of this instrument, a child has been defined as a person under the age of 18.

It is of paramount importance to note again that both the anti- abolitionists and the abolitionists do not submit any arguments about children on the issue of the death penalty. It may be implied that both the abolitionists and the anti-abolitionists understand the rights of children in as far as the death penalty is concerned.

In its periodic report,²³⁵ the CRC encouraged state parties to provide relevant information on the measures taken to protect children. Furthermore, the report recommends that measures should be taken to ensure that children who are under arrest, detention or imprisonment, should be under such for a short time and this should be the last resort. The report further recommends that the state parties should find alternative sanctions based on the restorative approach other than the death penalty and life imprisonment. This shows the extent in which the rights of children are protected at the international level.

2.3.8 The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (ICCPR OPT-2)

Internationally, this instrument is the only universal treaty aimed at the abolition of the death penalty. It was adopted in 1989. The ICCPR OPT-2 is the most important instrument which aims at the total abolition of the death penalty. In its preamble, it provides that, "The abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights".

²³⁴S Detrick *A commentary on the United Nations Convention on the rights of the Child* (1999) 130.

²³⁵Report of the Committee on the Rights of Children on the Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child (2015).

The anti-abolitionists argue that the death penalty is the best response to murder and an effective and justified form of punishment. This argument is contrary to the aim of the protocol of enhancing human dignity and developing the human rights as contained in Article 1 of the ICCPR OPT-2, which states that,

No one within the jurisdiction of a State Party to the present Protocol shall be executed. Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.

In view of the death penalty debates as discussed above, the anti -abolitionists contend that the death penalty must be retained as a form of punishment. This contention cannot be reconciled with the above provision in that the said provision aims at the total abolition of the death penalty. It is meant to encourage all countries that practise the death penalty to take the necessary measures to abolish the punishment within their jurisdictions.

It is worth noting that the protocol aims at the total abolition of the death penalty. But, it allows state parties to retain the death penalty in times of war, provided they made reservation to that effect at the time of ratification or acceding to the ICCPR OPT-2. On this note, the anti-abolitionists argue that in wartime, the death penalty is necessary for maintaining soldiers' discipline at a time when there is great tension and strain.

Between 2013 and 2014, the UNHRC submitted a report in which it stated that many states have made proposals in their constitutional reform processes to abolish or restrict the use of the death penalty. A case in point is the 2013 Zimbabwe Constitution, which now applies the death penalty only for murder committed in aggravating circumstances. The report further gives an example of Ghana, where the Constitutional Review Implementation Committee submitted a draft bill which seeks to replace the death penalty with life imprisonment.²³⁶

As noted above, the international instruments under the UN system have provided significant protection to murderers likely to face the death penalty. The following section discusses the death sentences in the context of the applicable instruments under the African Human Rights system and provides an insight into the status of regional and international human rights law on the death penalty.

²³⁶Report of Human Rights Committee in Ghana, on the Constitution Review from *a political to a developmental constitution*, executive summary (2014) paras 69.

2.4 Death penalty and the applicable instruments under the African Human Rights System

The entrenchment of human rights instruments is not only restricted to the international level, but to regional human rights instruments too. This section scrutinises the applicable African human rights instruments.

The African Charter on Human and Peoples' Rights (ACHPR/African Charter)²³⁷ is an African Human Rights instrument that was enacted with the intention of promoting and protecting human rights and basic freedoms in the continent. It was adopted in 1998 and is monitored by the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights (African Commission). This section discusses the death penalty with reference to the African Charter on the Rights and Welfare of the Child (ACRWC).²³⁸ The Charter is monitored by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and was adopted in 1999. Noteworthy is that it prohibits the imposition of the death penalty on persons under the age of 18.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Rights Protocol)²³⁹ was also examined. The Women's Rights Protocol was adopted in 2003 and is monitored by the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court). It prohibits the use of the death penalty on pregnant women. Finally, the section outlines the Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty (ACHPR-OP).²⁴⁰ The ACHPR-OP was adopted in 2005 and is monitored by the African Commission. It was enacted for strengthening the protection of the right to life in Africa. The ACHPR-OP was also meant to supplement and strengthen the provisions of the African Charter. The Chapter is now analysing in detail, the death penalty and the above mentioned applicable instruments under the African Human Rights System, in *seriatim*.

²³⁷African [Banjul] Charter on Human and Peoples' Rights (note 43 above).

²³⁸African Charter on the Rights and Welfare of the Child (note 44 above).

²³⁹*The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, also known as the Maputo Protocol, was adopted by the African Union on July 11, 2003 and entered into force on November 25, 2005.* (Women's Rights Protocol).

²⁴⁰The draft Protocol was introduced during the first Conference on the death penalty in Africa organised by the African Commission and Benin in Cotonou in July 2014; it was supported by many representatives of AU Member States, by Members of Parliament, National Human Rights Institutions and civil society organisations. The ACHPR officially adopted the draft Protocol at its 56th ordinary session in April 2015 and submitted it to the AU for adoption.

2.4.1 African Charter on Human and Peoples' Rights (ACHPR/African Charter)

The African Charter was enacted with the intention of promoting and protecting human rights and basic freedoms on the African continent. This instrument was adopted by Zimbabwe in 1981.²⁴¹

The use of dignity and the right to life are not only limited to the international human rights texts sphere, the semantic has become entrenched in regional human rights instruments. Human dignity has become central to the preambles in regional instruments including the African Charter.

The African Charter states, in its preamble, that it is conscious of the duty to achieve the dignity of the people struggling for their dignity.²⁴² Article 4 of the Charter,²⁴³ provides that,

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

General Comment 3 in paragraph 5,²⁴⁴ on the African Charter provides that the right to life has been stated universally as the most binding always. States have been given the responsibility to protect, implement, protect, promote and fulfil the right to life. This protection allows for the actions caused by the state and third parties. A state may be held responsible for failing to protect the right to life. According to this General Comment, states are encouraged to eliminate any discriminatory laws and practices, which may hinder individuals from enjoying the right to life. Furthermore, State Parties have a role to play, especially in making sure that individuals enjoy all the human rights collectively. These may be the realisation of the economic, social and cultural rights, which will contribute to securing the full and dignified right to life.

One of the reasons given by the anti-abolitionists in support of the death penalty is that it is in the best interests of the public. This view is contrary to the above provision in that it transgresses on the protected rights by the African Charter. As a result, the anti-abolitionist debate cannot be permitted under the African Charter. The abolitionists have submitted reasons against the death penalty, proving how inhuman and degrading the death penalty is, and for that reason, their debates may be permitted.

Article 2 of the African Charter reads as follows,

²⁴¹OAU/AU Treaties, Convection, protocol and Charter, available at https://au.int/en/treaties?field_treaty_ratifiedby_tid%5B%5D=65 (accessed 3 May 2018).

²⁴²African Charter on Human and Peoples' Rights (note 43 above).

²⁴³African Charter on Human and Peoples' Rights (note 43 above) preamble.

²⁴⁴General Comment No. 3 On the African Charter on Human and Peoples' Rights: The Right to Life (Article 4)

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without the distinction of any kind, such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The prohibited grounds of discrimination as stated in the African Charter are the same as those stated in the ICCPR. The only replacement made is for the word 'property', where the African Charter employs 'fortune'. However, similar to the ICCPR and ICESCR, the list of the prohibited grounds is not exhaustive, but illustrative. Article 2 is supplemented by Article 3, which provides the general requirements that every individual shall be equal before the law and entitled to the equal protection of the law. In fact, Article 3 expressly states that, every individual shall be equal before the law and shall be entitled to equal protection of the law". In terms of the above provisions, it is very clear that the protection of human dignity and the enjoyment of rights have been extended to the regional level. In that regard, the anti-abolitionists' argument is deemed inconsistent with the provisions of the African Charter to the extent that it supports the retention of the death penalty, which has been adjudged to be discriminatory at times. The abolitionists' argument is to be preferred as it is in line with the said regional human rights provisions in the African Charter.

In 2011, the African Commission established a working group on the death penalty,²⁴⁵ with a view to monitor the situation on the African continent. The working group²⁴⁶ compiled a report concerning the arbitrary killings in Sudan for a number of conducts that do not meet the threshold of 'most serious crimes'. In that regard, the African Commission advised Sudan to immediately impose moratorium on executions and further recommended that it reduces the number of crimes punishable by death.

The African Charter safeguards the right to life and protects against it being arbitrarily deprived. It is worth noting that under the African Charter, the anti-abolitionist debate cannot be permitted since it is set against the Charter. A Protocol to the African Charter enacted to totally abolish the death penalty, specifically provides the right to life, hence is the foundation of other human rights and, as such, the abolition of the death penalty is important for the effective protection of all the other human rights.

²⁴⁵ 32nd and 33rd activity report of the African Commission on Human and People's rights under article 54 of the African Charter (2013) paras 44.

²⁴⁶ 58th ordinary session of the African Commission on Human and Peoples' rights. Banjul, The Gambia, Joint Statement Delivered to the African Commission on the Death Penalty and Extrajudicial, Summary, or Arbitrary Killings in *Sudan 4 – 20 April 2016* available at <http://www.acjps.org/joint-statement-delivered-to-african-commission-on-protest-killings-and-death-penalty-in-sudan/> (accessed 13 March 2017).

2.4.2 The African Charter on the Rights and welfare of the Child (ACRWC)

The ACRWC was enacted to safeguard the rights of children. This instrument was adopted by Zimbabwe in 1990.²⁴⁷ Article 2 of the Charter defines a child as a human being below the age of 18. Article 5 states that every child has the right to live and declares that a death penalty may not be imposed on a child. To that end, the Charter calls for the protection of the children's lives by the law.

Article 30 (e) of the ACRWC forbids state parties from applying the death penalty for expectant mothers and "mothers of infants and young children." This Article protects both the children and mother from being punished by death. The anti-abolitionists and abolitionists debates cannot be compared at this instance, as both are silent on the issue of children with regards to the death penalty.

In its 2016 report concerning Eritrea, the ACERWC,²⁴⁸ recommended that Eritrea provides laws which protect children from the death penalty. The Committee further recommended that the country should align its definition of the 'child' with the definition provided by the International instruments which it ratified. This alignment is of great importance in that failure to do that would expose children to the death penalty.

2.4.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Rights Protocol)

The Women's Rights Protocol was adopted by Zimbabwe in 2003.²⁴⁹ Article 4 (1) of the Women's Rights Protocol Charter stipulates that all women are entitled to respect of their life, integrity and security of their person. It prohibits all forms of exploitation, cruel, inhuman or degrading punishment. Furthermore, Article 4 (2) (j) provides that state parties shall take appropriate and effective measures to ensure that in those countries which still retain the death penalty, not to carry out death sentences on woman either pregnant or nursing. The above instrument protects women against punishment through death.

The abolitionists argue that the death penalty is an infringement on the rights to life and human dignity and that it is discriminatory based on sex. It should be noted that in other countries, women are still subjected to capital punishment. For instance, in the United States of America, 2.1% of death punishments handed down between 1973 and 2011 were carried out on female offenders.²⁵⁰ The abolitionists suggest that the death penalty should be

²⁴⁷ OAU treaties (note 241 above).

²⁴⁸ 28th Session and 12th Pre-Session of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) 21st October – 1st November 2016, Banjul, The Gambia.

²⁴⁹ OAU treaties (note 241 above).

²⁵⁰ Cornell Law School, Cornell Centre on the death penalty worldwide (note 219).

abolished while the anti-abolitionists contend that it is a fair punishment. However, looking at the two viewpoints, the anti-abolitionist's position cannot be considered in that it disregards the objects of the Women's Rights Protocol and offends the above provision which states that women should not be exposed to degrading punishment.

Moreover, the debates by the anti-abolitionists cannot be permitted in that the application of the death penalty implies gender in balance in the justice system, which only exposes men to it. On the other hand, the debates by the abolitionists could be allowed to stand, since they promote the abolition of the death penalty. As a result, men will not be discriminated in any way.

State parties have been urged to take positive measures to make sure that women are not exposed to inhuman treatments. According to a report by the African Commission, a body tasked with the monitoring and enforcement of the above instrument, women experience harsh treatment in prison. The African Commission observes that it is usual to see women being imprisoned in one facility with man. It, therefore, recommends that state parties should implement the instruments in which they ratify to protect women from harsh treatment.²⁵¹ This is laudable as it signifies that the African Commission is committed to protecting the human rights of women by urging state parties to implement the instrument as to fully guarantee these rights.

2.4.4 The protocol to the African Charter on human and People's rights on the Abolition of the death penalty (ACHPR -OP)

Article 1 of the ACHPR -OP²⁵² provides that:

The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

From a political point of view, the ACHPR -OP was enacted to reaffirm that the right to life is vital and, therefore, it is necessary to abolish the death penalty. The ACHPR -OP binds upon all state parties and calls upon the member states that ratified it to apply a moratorium on the death penalty executions. The abolitionists argue that the death penalty is a cruel punishment, whereas anti-abolitionists reject this notion. However, Article 1 of the ACHPR -OP seems to concur with the abolitionists' arguments, hence it seeks to abolish it.

An African Commission report presented on its 14th World Day Against the Death Penalty, directs attention to terrorism related crimes. The African Commission, as the monitoring body

²⁵¹32nd and 33rd activity report of the African Commission on Human and People's rights under article 54 of the African Charter (note 245 above).

²⁵²The protocol to the African Charter on the abolition of the death penalty (note 41 above)

of the ACHPR –OP, has through its Working Group on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa followed the trends towards the abolition of the death penalty in Africa and has made a call on all the African Union (AU) member states which have not ratified the ICCPR -OPT-2 and the ACHPR -OP to do so. It is apt to note that ACHPR-OP and the ICCPR –OPT 2 have not yet been ratified by Zimbabwe. Therefore, there is need for the instruments to be ratified.

2.5 The case for Zimbabwe to ratify the existing international protocols on the death penalty

This section determines whether there is any feature that may oblige the state of Zimbabwe to sign the ICCPR -OPT 2 and the ACHPR-OP in as far as the death penalty is concerned.

Zimbabwe has a duty under both international human rights and regional human rights laws to protect, respect, promote and fulfil these human rights without any discrimination. The human rights include the right to life, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, equality, non- discrimination and the right to a fair trial. By signing the regional and international treaties, Zimbabwe has set itself under the obligations of these treaties in which it has signed. As a result, the application of the death penalty in Zimbabwe violates the above rights.

The death row phenomenon in Zimbabwe, together with the bad living conditions, poor sanitation in prisons, the lack of proper food and agony, among other conditions, constitute a violation of the right not to be exposed to torture and the right not to be treated in a cruel, inhuman and degrading manner. Zimbabwe is obliged to sign the above instruments to totally protect the prisoners from being tortured and treated in an inhuman and cruel manner. This would fulfil the duty of protecting and respecting the right to a fair trial.

Furthermore, as established above, the retention of the death penalty in the Zimbabwe's New Constitution is inconsistent with its obligation both internationally and regionally of protecting and promoting the human rights. Zimbabwe, therefore, is obliged to sign the above protocols to be consistent with the international and regional obligations. This would ensure the duty of respecting the right to life for murder crimes.

It has been established that the unreasonable delay in the application of the death penalty and the failure to allow prisoners sufficient time and resources to prepare for their trial, infringes the right to a fair trial. As a result, Zimbabwe is obligated to sign the above protocols to meet the entire requirements in terms of the international instruments. This would accomplish the duty to promote the fair trial of all offenders.

Additionally, the impositions of the death penalty only on males constitute a violation of the right to equality and discrimination between men and women. Zimbabwean laws should be applied equally, regardless of gender. As a result, Zimbabwe may be obliged to totally abolish the death penalty to protect both genders. Zimbabwe may also be urged to ratify the protocols, which would ensure that the human rights are observed.

2.6 Conclusion

The anti-abolitionists contend that the death penalty must be retained to restore justice. They claim that the death penalty is the best way of punishment for reasons, which include rehabilitation and retribution, among other reasons. On the contrary, the abolitionists argue against the retention of the death penalty. They contend that the application of the death penalty is an infringement of the protected fundamental rights, especially against a background of the possibility of a wrongful execution, among others. Instruments under the UN system have been examined in the light of the anti-abolitionist and abolitionist debates to determine if the debates can be reconciled with the instruments. The UN instruments examined include the UDHR, ICERD, ICESCR, ICCPR, CEDAW, CAT, CRC, and ICCPR OPT-2. The section further discussed the relevant and applicable instruments under the African human rights system, which includes the African Charter, ACRWC, the protocol to woman's rights and the ACHPR -OP. The above-referred instruments seek to protect the human rights in general and some safeguards the rights that are infringed by the imposition of the death penalty. The instruments prevent the state officials from abusing their power by infringing these protected rights. Several reports from the respective monitoring bodies and committees of these treaties have affirmed the global trend towards the abolition of the death penalty. It may be concluded that the debates offered by the anti- abolitionist cannot be permitted under the international human rights instruments. The anti- abolitionists have mentioned many reasons for supporting the death penalty's retention, including that the death penalty is not cruel, it is the best punishment for crimes against humans, and it costs less than life imprisonment, among others. These arguments are not tenable under the international law as shown above. Such arguments are incompatible with the protection of the human rights; thus, the above provisions provide for the total abolition of the death penalty and its effects. It is against this background that the next Chapter establishes the trend on the death penalty and the human rights implications of section 48 (2) (d) of the 2013 Zimbabwe Constitution. The Chapter examines the practice of capital punishment in post 2013 Zimbabwe. Furthermore, it examines the general situation regarding capital punishment in Zimbabwe. Additionally, the rights which are violated due to the application of the death penalty were examined in seriatim. The rights include the right to life, human dignity, equality, freedom from torture and fair trial. The Chapter proceeded to examine the specific features

that may oblige the country to ratify the death penalty, protecting instruments. The death penalty protecting instruments include ICCPR -OPT 2 and the ACHPR-OP. It noted that the death penalty is an infringement of the right to life, equality, and freedom from torture, fair trial and the human dignity. Furthermore, the Chapter noted that features which include the death row phenomenon, among others, oblige Zimbabwe to sign the ICCPR -OPT 2 and the ACHPR-OP to fully protect the rights violated. In the last part of this Chapter, the study provided the remedies available for those convicted of murder in Zimbabwe.

CHAPTER THREE: THE RECOGNITION OF THE DEATH PENALTY IN ZIMBABWE AS A VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW

3.1 Introduction

The previous chapter analysed the abolitionists and the anti-abolitionists debate on the death penalty. It further examined the debates within the context of international human rights law. It established that the abolitionists' debate can be reconciled with the international human rights law in that it seeks to protect the human rights. The anti-abolitionists debate cannot, however, be supported under international human rights law in that it promotes the violation of human rights. The previous Chapter answered the research question on whether the abolitionists or anti-abolitionists' debates can be reconciled under international human rights law.

The chapter focuses on the recognition of the death penalty in Zimbabwe as a violation of international human rights law, by establishing the international human rights treaties' status in Zimbabwe. That is, how Zimbabwe has responded to the issue of death sentences, and how those sentenced to death can benefit from the international human rights law. Furthermore, the chapter discusses the death penalty in Zimbabwe in the context of the violation of international human rights law. It examines its implications on human rights in Zimbabwe. These rights include the right to life, human dignity, equality, and freedom from torture, and the right to a fair trial. The study focuses on these specific rights because they are the most basic of all the human rights. The recognition of these rights promotes the respect and protection of other human rights. The other reason for focusing on these specific rights is that they are key human rights, which are directly threatened by the application of the death penalty in Zimbabwe. In achieving this, the study will examine the practice of capital punishment in the post 2013 Zimbabwe. On this section the study analyse section 48 (2) (d) of the Zimbabwean Constitution which safeguard the death penalty. The study goes on to examine the rights that are infringed by the application of section 48 (2) (d) and the implications thereof.

3.2 The status of international human rights treaties in Zimbabwe

Zimbabwe follows a dualistic approach in determining the relationship between international law and its domestic one. In terms of this approach, there is no direct application of the international law into the domestic law upon a ratification of a treaty. Accordingly, the international law must be translated into a national legislation before it can be applied by the national courts. This means that the international bodies of law will only become part of

Zimbabwe's national law if they have been expressly adopted as such by way of legislative acts. This is provided in section 327 (2)²⁵³ of the constitution, which states that,

Any international convention acceded to shall be subject to approval by Parliament and shall not form part of the law of Zimbabwe unless it has been incorporated into the law by Parliament.

In short, this means that Zimbabwe cannot be bound by any international human rights law, unless that law has been legislated by Parliament into Zimbabwe's local statutes. Consequently, this approach makes Zimbabwe dualistic regarding the international human rights law. In the case of *Kachingwe and Others v Minister of Home Affairs and Commissioner of Police*, the final appeal judgment,²⁵⁴ in the Supreme Court of Zimbabwe, counsel for the applicants reinforced the dualism approach in the domestication of the international laws in Zimbabwe. The matter concerned a complaint from three applicants regarding the cells in which they were held. The applicants claimed that they had ill-conditions and therefore constituted inhuman and degrading treatment. The Counsel for the applicants submitted that Zimbabwe signed the ICCPR and for that reason, she is bound by the provisions of these treaties which are part of the national law of Zimbabwe. The counsel relied on the case of *S v Petane*,²⁵⁵ in the Supreme Court of South Africa, where it was ruled that features of customary international laws which are directly operating in the national sphere are those which are universally recognised or have received the assent of the state. The applicants were successful in their claim.

Zimbabwe is a party to both international and regional instruments that seek to either limit the use of the death penalty or to outline the conditions in which it can be applied. However, it must be noted that Zimbabwe is not yet a party to the OPT-2 ICCPR and the protocol to the African Charter on the death penalty, which aims at the total abolition of this sentence. Zimbabwe assented to the ICCPR on the 13th of May 1991. In 1989, an Optional Protocol was adopted to outlaw the death penalty completely. To this day, Zimbabwe has not yet signed this protocol.

That being so the death penalty is applied in Zimbabwe. On the 20th of February 1986 Zimbabwe signed the African Charter. Zimbabwe also assented to the African Charter on the 30th of May 1986. A Protocol to the African Charter on the death penalty was adopted in 2015 and is monitored by the African Commission. It was enacted for strengthening the protection of the right to life in Africa. This protocol is meant for the total abolition of the death penalty in

²⁵³ Constitution of Zimbabwe Amendment (note 38 above).

²⁵⁴ *Kachingwe and ors v Minister of Home Affairs and Commissioner of Police*, Final appeal judgment, No SC 145/04; ILDC 722 (ZW 2005), 18 July 2005.

²⁵⁵ *S v Petane* 1988 (3) SA.

Africa. Zimbabwe is, however, not yet a party to this protocol. The fact that Zimbabwe is not a party to this protocol makes the total abolition of the death penalty in that country more problematic, and perhaps, unrealistic.

Zimbabwe is a state party to the African Charter on the Rights and Welfare of the Child that aims at protecting the rights of children. The implication of the dualistic approach is that it limits the application of international instruments into domestic laws. Furthermore, it implies that there is no direct application of a treaty into the domestic legal system once it has been ratified.

Despite the foregoing, following a dualist approach is not reason enough for Zimbabwe not to comply with the international human rights law's rules and principles. It has to be taken into cognisance that there are certain rights, which are non-derogable that retain the status of *jus cogens*.²⁵⁶ These rights include the right to life, protection from torture, cruel and inhuman treatment. The above rights do not require an Act of parliament for them to be adopted into Zimbabwe's legislation. By virtue of being a member state of the international and regional instruments, Zimbabwe sets its self under obligations under those instruments to safeguard and protect human rights. This is more so as the customary international law also forms part of the law of Zimbabwe. This has been provided in section 326 (1) of the Constitution of Zimbabwe, which states that,

Customary international law is part of the law of Zimbabwe, unless it is inconsistent with the Constitution or an act of Parliament.

Furthermore, in section 326 (2) of the same constitution, it is provided that,

When interpreting legislation, every court and tribunal must adopt any reasonable interpretation of the legislation that is consistent with customary international law applicable in Zimbabwe, in preference to an alternative interpretation that is inconsistent with that law.

It was proved that customary international law is part of Zimbabwe's law in the case of *Barker McComarc (Pvt) Ltd v. The Government of Kenya*,²⁵⁷ in the Supreme Court of Zimbabwe, where Waddington submitted that, "There is no doubt that customary international law is part of the law of this country".

It is pertinent to note that the Statute of the International Court of Justice defines the customary international law in Article 38 as evidence of general practice of law that has been

²⁵⁶ Adjami ME *African Courts, International Law, and Comparative Case Law: Chimera or Emerging Human Rights Jurisprudence* (2002)103.

²⁵⁷ *Barker McComarc (Pvt) Ltd v. Government of Kenya* 1983 (4) SA 817 (ZS).

accepted as law.²⁵⁸ In the case of *Military and Paramilitary Activities In and Against Nicaragua, Nicaragua vs United States*,²⁵⁹ the use of international customary law was debated. In this case, the military of the United States of America attacked with force the government of Nicaragua with the aim of overthrowing it. The International Court of Justice ruled that the government of America violated its customary international law obligation not to use force against another State by directly attacking Nicaragua in 1983 and 1984. However, this prohibition on using force has been stated in both Article 2 (4) of the UN Charter and in customary international law. Since America has a multilateral treaty reservation, the ICJ could not only rely on the UN Charter, it was bound to base its findings on the use of force from customary and general principles of international law. Consequently, it is contended that in so far as the right to life, equality, freedom from torture, human dignity and the right to fair trial form part of the customary international law, Zimbabwe's retention of the death penalty, and arguably its application is incompatible with the customary international law.

Despite the foregoing, the case law in Zimbabwe on the death penalty indicates that the courts show no respect for the position of customary international law on death penalty. In the case of the *Government of the Republic of Zimbabwe v Fick and Others*,²⁶⁰ which concerned farmers whose farms were confiscated without compensation, the parties aggrieved did not have a forum to take up their case and as a result, their case was taken to a Tribunal for adjudication. Zimbabwe refused to pay the cost, reasoning that the Parliament has not approved the treaty concerning the adjudication of the Tribunal. Conclusively, Zimbabwe stated that the orders of the Tribunal cannot be enforced or registered in South Africa on Zimbabwe.

Several recent decisions of the Zimbabwe Supreme Court have made use of a wide-range of international and comparative resources to interpret the provisions of the Zimbabwean Constitution,²⁶¹ but none specifically cites the Universal Declaration, which is the source of customary international law. This has been proved in cases such as the *Catholic Commission for Justice and Peace in Zimbabwe*,²⁶² *S v Ncube*,²⁶³ and the *S v A Juvenile*.²⁶⁴ This basically means that Zimbabwe is not bound by any international instrument, except if that law is legislated by Parliament into Zimbabwe's local statutes. As a result, a signature to any treaty or convention will not be binding enough to such treaty or convention. This is the

²⁵⁸ Statute of the International Court of Justice

²⁵⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, 1984 ICJ REP. 392 June 27, 1986.

²⁶⁰ *Government of the Republic of Zimbabwe v Fick and Others* (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013).

²⁶¹ 2013 Constitution of Zimbabwe (note 38 above).

²⁶² *Catholic Commission* case (note 228 above).

²⁶³ *S v Ncube* 1987 Zimb. L. Rep. 246, [1988] L.R.C. (Const.) 442.

²⁶⁴ *S v A Juvenile* 1990 (4) SA 151 (ZS).

predicament affecting Zimbabwe now. This predicament has given the government the liberty to refuse to be bound by any international law, protocol, conventions or treaties, which do not form part of the Zimbabwean law. As a result, this dilemma has caused so much confusion and difficulty for the lawyers who try to argue their cases from an international law perspective, treaties, protocols and conventions. This situation has made it so easy for the judiciary to dismiss such cases.

Thus, the foregoing shows that those courts rarely take into consideration the position of international customary law in its consideration of the cases and application of section 48 (2) (d) of the Constitution of Zimbabwe.

3.3 The practice of capital punishment in post 2013 Zimbabwe

Despite the call for the moratorium, Zimbabwe still retains the death penalty and has entrenched it in its 2013 Constitution, Section 48 (2) (d), which reads,

A law may permit the death penalty to be imposed on a person convicted on murder committed in aggravating circumstances, and – (d)... the penalty must not be imposed or carried out on a woman.

This provision allows the imposition of the death penalty in Zimbabwe. It is interesting to note that the same constitution, in section 48 (1) also safeguards the right to life. Section 48 (1) provides that the death penalty must be applied if the crime of murder has been committed in aggravating circumstances. A limitation that has been set on murder cases in Zimbabwe is, therefore, ‘aggravating circumstances’.

Aggravating circumstances may be defined as circumstances, which increase the degree of liability or culpability for a criminal act. It also refers to a circumstance relating to a criminal offence, which the courts consider when imposing punishment.²⁶⁵ Nonetheless, the problem created here is that there is no legislation in Zimbabwe that defines aggravated circumstances and the conditions in which it must be imposed. This shortcoming was noted by Justice Hungwe of the High Court of Zimbabwe in the case of *S v Mutsinze*.²⁶⁶ Justice Hungwe observes that the establishment of aggravating circumstances requires an enactment of an Act of Parliament, which will set out conditions constituting aggravating circumstances. The introduction of aggravated circumstances in section 48 (2) (d) must be interpreted to mean that which has been envisaged in an Act of Parliament.

This absence of definition of aggravating circumstance can be problematic in that the court cannot execute the death penalty in accordance with the new Constitution. However,

²⁶⁵ Black & Garner (note 90 above).

²⁶⁶ *S v Mutsinze* (Unreported case).

because of this omission the accused must benefit from the absence of that Act of Parliament.

It is pertinent to note that the Zimbabwe Constitution is not the only domestic instrument providing the legal framework for the imposition of the death penalty. The death penalty is also well-established in Zimbabwe's domestic legislation. The Criminal Law (Codification and Reform) Act provides in section 20 that 'anyone guilty of treason is liable to be sentenced to death or to life imprisonment'. Furthermore, it states in section 23 that anyone guilty of insurgency, banditry, sabotage or terrorism is also liable to the death sentence if the crime has resulted in the death of a person, even if the death was not intended. Moreover, section 47 provides that, 'anyone guilty of murder must be sentenced to death unless he or she was under the age of 18 when the crime was committed, or the court finds that there are extenuating circumstances'. Additionally, section 47 (3) states that, 'anyone convicted of attempted murder, or of incitement or conspiracy to commit murder, may be sentenced to death.'

Another instrument which has provisions for the death penalty is the Genocide Act,²⁶⁷ which states in section 4 (1) that anyone who commits an act of

Additionally, the Criminal Procedure and Evidence Act have provisions for the death penalty, in section 339 (1), which states that,

- (1) The form of sentence to be pronounced upon a person who is convicted of an offence punishable with death and sentenced to death shall be that he be returned to custody and that the sentence of death shall be executed according to law.
- (2) Where the sentence of death is carried out, the person sentenced shall be hanged by the neck until he is dead.

Zimbabwe has not carried out the death penalty for a period of over 10 years.²⁶⁸ This information puts it on the list of states that have a *de facto* moratorium on executions. The fact remains that Zimbabwe still did not formally abolish the death penalty. As such, the *de facto* moratorium does not excuse the condemned prisoners from the horrors of awaiting execution on death row. Recently, there were rumours about Zimbabwe struggles to get a hangman to carry out the death sentence. In early 2016, the *Times Live*,²⁶⁹ reported that there has been no one willing to take up the post. However, a report by a Zimbabwean newspaper stated that a hangman was found in May 2016.²⁷⁰ A development in terms of the death penalty was made in December 2016 by the former President,²⁷¹ Robert Gabriel

²⁶⁷ Genocide Act of Zimbabwe, Act 9/2000, 2000.

²⁶⁸ 'And the Zimbabwean coalition against the death penalty' *The Zimbabwean the voice for the voiceless* 7 October 2016.

²⁶⁹ 'Zimbabwe struggles to find person to fill hangman post' *Times live* (note 29 above).

²⁷⁰ 'Zimbabwe finally finds candidate for 'Controversial' Job nobody wants' *I Harare* 5 May 2016.

²⁷¹ G Phiri, 'Mugabe commutes 10 death row inmates' sentences' *Dailynews* 5 December.

Mugabe, where he commuted the sentence of 10 death row inmates from the death penalty to life imprisonment.

Against this background, it is imperative to examine the human rights implications of the application of the death penalty in Zimbabwe. It is worth noting that the Constitution of Zimbabwe provides a limitation clause in which other rights are limited and others are absolute. Section 86 (3) provides that,

No one may limit the following rights enshrined in this Chapter, and no person may violate them-

- (a) The right to life except to the extent provided in section 48
- (b) The right to human dignity
- (c) The right not to be tortured and subjected to cruel or inhuman and degrading punishment or treatment.
- (e) The right to fair trial.

Noteworthy is that the rights provided in section 86 (3) are not subject to any limitation in terms of any law, even in a state of emergency, as provided in section 87 of the Constitution. Section 48 of the Constitution safeguards the right to life and the extent of this right's limitation are issues under study, as mentioned above. The extent of the limitation conflicts with the absolute terms offered in sections 86 and 87 above. Section 86 of the Constitution provides that no law may limit the right to life except to the extent provided in section 48. Section 48 provides that the extent to which the right to life may be limited, is when a person is convicted of murder committed in aggravating circumstances. The conflict arises where section 86 (3) provides the right to life as an absolute right, and yet section 48 of the same Constitution disqualifies the absoluteness of the right to life. It does this by allowing the death penalty to be applied to the condition of a murder committed under aggravated circumstances.

In terms of section 48 (2) of the 2013 Constitution, only men are subjected to the death penalty while women are exempted. As a result, this creates gender in-equality among men and women which is a violation of the right to equality. Moreover, anyone under the age of 18 is also exempted from the death penalty. Under the current law, aggravated murder is the only offence that attracts the death penalty. It is very important to examine how institutions and organisations have dealt with the death penalty in Zimbabwe. These include the legislature, the judiciary, the executive, opposition parties and the public.

The legislature in Zimbabwe has declared that their hands are tied concerning the abolition of the death penalty. It has been reported that the scrapping of the death penalty rests with

the executive and political leaders and not with the Parliament.²⁷² The Members of Parliament (MPs) have declared that Zimbabwean laws give more power to the executive,²⁷³ and political leaders and not the Parliament. The MPs for the opposition Movement for Democratic Change (MDC), Jessie Majome and the ruling party, Zimbabwe African National Union Patriotic Front (ZANU PF)'s Fortune Chasi concurred that for the death penalty to be scrapped, there is a need for the blessing of the executive.²⁷⁴ This means that the Zimbabwean Parliament would only react to what the executive brings before it.

*The Herald*²⁷⁵ has reported that the High Court of Zimbabwe cannot impose the death penalty on murderers until the legislature enacts the law which spells out the circumstances in which these may be hanged. This came after the Mutsinze²⁷⁶ case cited earlier wherein Justice Hungwe was of the view that the Lancaster House Constitution made specific provisions for the death penalty, but the new order leaves that decision to the legislature.

This ruling exempted Jonathan Mutsinze from the death penalty for killing a security guard and a policeman during an armed robbery. At the present moment, the judiciary is waiting for an Act of Parliament, which would define 'aggravated circumstances' as required in section 48 (2) of the Zimbabwean Constitution. Section 48 (2) requires that for the death penalty to be imposed, the murder crime must have been committed in aggravating circumstances. It must be noted that despite the pause in imposing the death penalty, awaiting the Act of parliament, there are still many prisoners waiting to be executed. Moreover, this pause does not mean the death penalty has been abolished in any way. Amnesty International has reported that in Southern Africa, only Zimbabwe and Malawi are the countries that handed down death sentences in 2016.²⁷⁷

The executive is responsible for enforcing the law and has been established in terms of section 88 of the Constitution. Section 88 (2) stipulates that the executive authority is vested in the President who has to act in accordance to the Constitution. The President of Zimbabwe, then Vice President, Emmerson Dambudzo Mnangagwa, has openly declared that he is among the minority in Zimbabwe who do not favour the death penalty. He has also revealed that the government was still in the process of making a paper for public debate on the abolition of the death penalty. It must be noted that during the Geneva Conference,

²⁷²The New Zimbabwe, The abolition of the death penalty, Mps says their hands are tied available at <http://www.newzimbabwe.com/news-31672-Death+penalty+MPs+say+their+hands+tied/news.aspx>(accessed 10 March 2017).

²⁷³The New Zimbabwe (note 272 above).

²⁷⁴The New Zimbabwe (note 272 above).

²⁷⁵ D Nemukuyu, the Herald High court rules out capital punishment, available at <http://www.herald.co.zw/high-court-rules-out-capital-punishment/> (accessed 12 April 2017).

²⁷⁶ S v Mutsinze (note 266 above).

²⁷⁷ Amnesty international Zimbabwe: Abolish Death Penalty, Zimbabwe Urged , available at <http://allafrica.com/stories/201704120394.html> (accessed 21 April 2017).

where the then vice President was giving a periodic report on human rights, it was recommended that Zimbabwe should abolish the death penalty both in law and in the paper.²⁷⁸ At that meeting, the recommendation to abolish the death penalty was mentioned seven times. However, the then Vice President stated that it was noted. President Mnangagwa, however, explained that the only problem arising from all noted recommendations was that these related to the issues in which Zimbabwe was not in a position to support.²⁷⁹

This effectively meant that the government of Zimbabwe was not ready to support the abolishment of the death penalty. It is questioned then whether the death penalty will ever be abolished since the power lies with the political leaders and the executive.

Opposition parties have responded to the issue of the death penalty in Zimbabwe. There are many opposition parties that are against the death penalty that call for its abolition. The People's Democratic Party (PDP), for example, has made a call towards the abolition of the death penalty. It argues that the death penalty is in contravention of the Constitution, which guarantees the right to life.

Generally, most people in Zimbabwe seem to be in favour of the death penalty. It has been stated that during Zimbabwe's constitution making, the issue of the death penalty became a public issue. That is where it was established that the majority of the Zimbabweans favour it.²⁸⁰ Zimbabwe's death penalty saga has been reported by *The Herald*. The paper,²⁸¹ states that out of the 97 death row inmates, were successfully exempted from the death penalty and had their sentences commuted to life imprisonment. This was done through a Presidential pardon. Before assuming office, President Mnangagwa revealed that despite the exemption for the 10 death row inmates, the applications for the hangman's job were still open. It is worth noting that Zimbabwe does not have an official moratorium on the death penalty since 2004, and this means that executions may start at any time.

The Chapter now examines the key human rights that are threatened by the application of the death penalty. These rights are the right to life, human dignity, equality, freedom from torture and the right to a fair trial.

²⁷⁸L Gumbo, 10 Death row inmates *The Chronicle* 4 November 2016.

²⁷⁹ Bulawayo 24 news available at <http://bulawayo24.com/index-id-news-sc-national-byo-106422.html> (accessed 7 April 2017).

²⁸⁰ A Mawonde, 10 death row inmates escape hang man's noose available at <http://www.herald.co.zw/10-death-row-inmates-escape-hangmans-noose/> (accessed 7 April 2017).

²⁸¹ A Mawonde 10 death row inmates escape hang man's noose (note 280 above).

3.4 The Right to Life

As observed above, the death penalty is a denial of many fundamental rights. It violates a fundamental principle under the human rights law, that states must recognise the right to life. The right to life has been referred to as ‘the supreme right from which no derogation is permitted even in time of public emergency’.²⁸² This has also been confirmed in General Comment 14 (23) (c) where the HRC observes that the right to life as articulated in Article 6 of the ICCPR is a supreme right from which no derogation may be allowed even in times of emergency.²⁸³

The right to life is a yardstick in which other rights may be exercised, meaning that other rights are breached due to its violation.²⁸⁴ The right to life has been described as meaning that nobody, including the government, may try to end one’s life and that it has to be protected if it is at risk.²⁸⁵ The right to life is regarded as the ultimate right,²⁸⁶ in that it is a prerequisite for the enjoyment of other human rights.²⁸⁷ In the case of *R v Home Secretary, Ex parte Bugdaycay*,²⁸⁸ at the England House of Lords Court, the right to life was described as the most fundamental of all the rights. This proves that the right to life has immeasurable value and requires to be protected at all times. Without the right to life, other rights have no significance since they cannot be practised.²⁸⁹ General Comment 3 of the African Charter states that,

The right to life should not be interpreted narrowly. To secure a dignified life for all, the right to life requires the realisation of all human rights as recognised in the Charter, including civil, political, economic, social and cultural rights and the people’s rights, especially the right to peace.²⁹⁰

Thus, other rights are realised through the recognition of the right to life. Consequently, the application of the death penalty in Zimbabwe implies that all other human rights will have a void meaning. Furthermore, section 48 (2) (d) indicates an infringement of the right to life as stated in section 48 (1) of its Constitution, which proclaims that everyone has the right to life. Section 48 (2) (d) further implies the unwillingness on the part of the state to recognise and protect that right.

²⁸² RKM Smith *International human rights* 2010 210.

²⁸³ ICCPR General Comment No. 14: Article 6 (Right to Life) Nuclear Weapons and the Right to Life Adopted at the Twenty-third Session of the Human Rights Committee, on 9 November 1984.

²⁸⁴ Smith (note 282 above).

²⁸⁵ British Institute of Human Rights (BIHR): *the Equality and Diversity Forum (EDF) Report*, available at <http://www.equalityhumanrights.com/your-rights/human-rights/what-are-human-rights/human-rights-act/right-life> (accessed 14 April 2016).

²⁸⁶ Novak M *UN Covenant on Civil and Political Rights: CCPR commentary* 2003 121.

²⁸⁷ Chenwi (note 51 above).

²⁸⁸ *R v Home Secretary, Ex parte Bugdaycay* (1986) UKHL 3; (1987) AC 514 at 531G.

²⁸⁹ Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994).

²⁹⁰ General Comment No 3 on the African Charter and Human and People’s Rights: The right to life Article 4, available at <http://www.achpr.org> (accessed 07 October 2017).

In the case of *Per Lord Bridge in R v Home Secretary, Ex parte Bugdaycay*,²⁹¹ three applicants gave untrue reasons for entering the United Kingdom so that they secure admission. As such, they were treated as refugees. The challenge was that upon being returned to their original countries, they were at risk of being executed. *In casu*, the right to life was described as the most fundamental of all the human rights and must be protected if the individual's life is at risk of being executed.²⁹² Accordingly, the right to life is of great value as stated in the case of *Kindler v Canada* at the Supreme Court of Canada,

The value of life is immeasurable for any human being and the right to life enshrined in Article 6 of the Covenant is the supreme human right. It is an obligation of State parties to the Covenant to protect the lives of all human beings on their territory and under their jurisdiction. If issues arise in respect of the protection of the right to life, priority must not be accorded to the domestic laws of other countries or to (bilateral) treaty articles. Discretion of any nature permitted under an extradition treaty cannot apply, as there is no room for it under Covenant obligations. It is worth repeating that no derogation from a State's obligations under Article 6, paragraph 1, is permitted.

The imposition of the death penalty, therefore, transgresses the value of the right to life, which is afforded to everyone equally. Human life has infinite worth and deserves to be respected and protected. This follows the fact that even the prisoner's lives are also valuable, and prisoners must be treated with respect and value of their life for a fair trial. For that reason, section 48 (2) (d) implies a disregard of the value of the right to life and the failure to protect such value.

According to Pinghua,²⁹³ as a fundamental human right, the right to life has three aspects,

The right to guarantee safety, which prohibit individuals or organisations from depriving life illegally and thereby, allowing people to enjoy their right to live undisturbed. Secondly, right to eliminate hindrances that would provide ways of eliminating illegal violation and danger to life. Last, the right to change the life-threatening environment, which is meant to eliminate danger before it occurs.

According to Schabas,²⁹⁴ there are two contending approaches to the interpretation of the right to life, narrow and broad views. The narrow view is restricted to the protection offered by the right to life in matters involved in the Universal Declaration and ICCPR for capital punishment, abortion, disappearances, non-judicial executions and other forms of intentional or careless life-taking by the State. The broader view of the right to life attempts to introduce an economic and social content. In terms of this view, the right to life embraces a right to

²⁹¹ *R v Home Secretary, Ex parte Bugdaycay* (note 288 above).

²⁹² *R v Home Secretary, Ex parte Bugdaycay* (note 288 above).

²⁹³ S Pinghua *Protection of the right to life by international human rights law* (2008) 1.

²⁹⁴ Schabas (note 198 above).

food, to medical care and to a healthy environment. Conversely, both schools consider the death penalty as the core issue of the right to life.²⁹⁵

Moreover, the right to life has been described as a modern concept that goes beyond the traditional view. As an imperative norm of international law, it inspires and influences other rights.²⁹⁶ Another implication brought by section 48 (2) (d) is that it violates other rights, since the right to life is the supreme right out of all the rights, hence constitutes the irreducible core of human rights.²⁹⁷

The right to life does not only include the protection against arbitrary deprivation of life, but also imposes a duty on states to pursue policies designed to ensure that individuals have access to survival within those states. If a state fails to provide such access, the residual duty is placed upon the international community to provide an appropriate assistance.²⁹⁸ The right to life as developed by the UN entails the protection against the use of weapons of mass destruction, for example, the use of nuclear weapons.²⁹⁹ The right to life is related to the right to peace, safety, health and development. These rights take their cue from the right to life. The protection of the right to life is related and affected by the implementation of the human rights standards that threaten the right to life.³⁰⁰

However, an examination of the international and regional standards on the right to life shows that it is supported in both the international and regional instruments. According to the African Charter, the right to life has been referred to as 'respect for life',³⁰¹ while the ICCPR calls for the right to be protected by the law. The Universal Declaration stipulates, in Article 3, that 'everyone has the right to life, liberty and security of a person'. Article 6 of the ICCPR protects the right to life by prohibiting any arbitrary deprivation of the right. The African Charter provides, in Article 4, that 'Every human being shall be entitled to respect for his life and the integrity of his/her person'. It may be acknowledged that in general, the international instruments guarantee everyone the right to life. The application of the section 48 (2) (d) implies a serious violation against the protection offered by the international and regional instruments.

It is the duty of the state parties to protect their citizens from such deprivation. States are, therefore, obliged to take positive and reasonable steps in the protection of the right to life within their jurisdiction. States are further required to enact laws that seek to protect people

²⁹⁵ Schabas (note 198 above)

²⁹⁶ BG Ramcharan *The right to life in international law: international studies in human rights* 1985 6.

²⁹⁷ Schabas (note 198 above) 8.

²⁹⁸ Ramcharan (note 296 above) 6.

²⁹⁹ Ramcharan (note 296 above)

³⁰⁰ Ramcharan (note 296 above) 6.

³⁰¹ CK Boyle et al *The right to life in international law* 1985 3.

from losing their lives. In the case of *Kaya v Turkey*,³⁰² the European Court of Human Rights held that the obligation to protect the right to life secures everyone within the states the jurisdiction and the rights safeguarded in the ICCPR. The European Court of Human Rights found that the effective investigation must be conducted in cases of murder. This must be done for securing the effective application of domestic laws to protect the right to life. On the duty to protect, the ICCPR provides the obligations upon state parties in terms of the right to life. It declares that state parties may not arbitrarily deprive anyone's life and should take positive measures to improve people's living standards.³⁰³ The ACPHR sets a duty upon state parties to protect and ensure that the respect of the rights and freedoms contained in the Charter are well understood.

In the case of *Forum of Conscience v Sierra Leone*,³⁰⁴ the African Commission protected the right to life. It was alleged *in casu* that 24 soldiers were tried and condemned to death by a Court Martial for their alleged roles in the coup, which overthrew the elected government of President Ahmed Tejan Kabah. It was further alleged that the trial was a violation of the country of Sierra Leone's obligation under the African Charter. It was also held that the trial amounted to an arbitrary deprivation of the right to life as envisaged in Article 4 of the African Charter. The African Commission held that indeed, the government of Sierra Leone breached the right to life for the soldiers due to its failure to follow due process, and such conduct amounted to the arbitrary deprivation of the right to life.

The right to life was challenged by the African Commission in the matter concerning *Interights et al (on behalf O/ Bosch) v Botswana*.³⁰⁵ The matter was brought before the African Commission against the decision made by the Court of Appeal of Botswana. In this case, the accused was convicted of murder and sentenced to death. The accused alleged that the application of the death penalty for her was a violation of Articles 1, 4, 5 & 7 (1) of the African Charter. Although the African Commission found that the government of Botswana was not in violation of the above rights, the state parties still practising the death penalty as a form of punishment were encouraged to envisage a Moratorium on the Death Penalty.

Section 48 (2) (d) implies a breach of the duty stated in the African Charter and the ICCPR. It is worth noting that Zimbabwe assented to the ICCPR,³⁰⁶ and signed the African Charter.³⁰⁷ When assessed in the light of the above, section 48 (2) (d) implies a serious infraction of the

³⁰² *Kaya v Turkey*, Merits, App No 22535/93, ECHR 2000-III, [2000] ECHR 129, (1999) 28 EHRR 1, IHRL 2861 (ECHR 2000), 28th March 2000, European Court of Human Rights.

³⁰³ L Liantai *Comparative Studies of International Bill of Human Rights and Constitution of China* 2006 112.

³⁰⁴ *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000)

³⁰⁵ *Interights and Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003)

³⁰⁶ Zimbabwe assented to the ICCPR 13 May 1991.

³⁰⁷ Zimbabwe signed the African Charter 20 February 1986

rights, including the rights to food, health, and healthy environment. As earlier indicated, Zimbabwe's prisoners on the death row experience harsh conditions, where they are abused and have no access to adequate food and a healthy environment, leading to the spread of diseases owing to the crowded environment.³⁰⁸ This is a serious violation of the prisoners' rights, which include the right to a healthy environment. Smith,³⁰⁹ submits that in-terms of health care, the state has a duty to facilitate the right to life and provide health care. This right has been safeguarded in terms of Article 25 of the Universal Declaration.

The application of the death penalty implies an infringement on the right to life as safeguarded in the Zimbabwean Constitution, Section 48 (1). From the examination of the right to life, it can be conclusively stated that the provision allowing the death penalty is incompatible with the domestic, regional and international human rights law on the right to life.

3.5 The Right to Equality and Non- discrimination

Another human right to be examined in the light of section 48 (2) of the Constitution of Zimbabwe is the right to equality and non- discrimination. The right to equality is protected under the international human rights law.³¹⁰ It entails that all persons must be treated equally before the law, without any discrimination. The principle entailed in these rights, warranties that those in equal circumstances are dealt with equally, both in law and in practice.³¹¹

The HRC has emphasised that the principle of equality requires that state parties must take affirmative action, for the reason of eradicating conditions related to discrimination. Non-discrimination offers the foundation for the enjoyment of human rights.³¹² The right to non-discrimination and equality has been established in the UN Charter, which contains an effective protection of the human rights. One of its aims is to provide friendship among nations, which is based on the respect for the human rights and fundamental freedom for all without any distinction based on race, sex, language or religion. The UN elaborated on the UN Charter's equal right prescription. Article 1 provides that everyone is born free and equal in dignity and rights. Article 2 emphasises on the enjoyment of the rights without any distinction based on race, colour, and sex, among others. Article 7 stipulates that everyone is equal before the law and has the equal protection of the law.

³⁰⁸ Amnesty International Zimbabwe, Prison and Detention: 2011 Centre conditions U.S.Dep. of state Human Rights Report, (note 35 above).

³⁰⁹ Smith (note 262 above).

³¹⁰ Ramcharan (note 296 above)

³¹¹ Ramcharan (note 296 above)

³¹² L. Weiwei, Equality and non-discrimination under international human rights law, available at <http://www.humanrights.uio.no/forskning/publ/publikasjonslite.html> (accessed 22 November 2016).

As observed above, the basic and general principle, which relates to the protection of human rights, is constituted from non-discrimination, equality before the law and equal protection of the law. In the *South West Africa* case,³¹³ the ICJ provided that,

The principle of equality before the law does not mean... absolute equality, namely the equal treatment of men without regard to individual, concrete circumstances, but it means... relative equality, namely the principle to treat equally what are equal and unequally what are unequal... To treat unequal matters differently according to their inequality is not only permitted but required.³¹⁴

As intimated previously in Chapter 2, the abolitionists state that the death penalty is discriminatory, especially to the poor because they do not have access to proper legal representation. Such discrimination is unfair. Section 48 (2) (d), therefore, implies a disrespect of the right to equality. The right to equality has been guaranteed in section 56 of the Zimbabwean Constitution, which provides that everyone has the right to equality and equal protection of the law. It must be noted, therefore, that owing to the development brought by the Constitution, women are no longer punishable by the death penalty. This contradicts equality in that it is unfair to men. If equality must prevail, it means that both men and women must be subjected to the death penalty as a form of punishment. If the death penalty must be abolished, it must be abolished for both sexes.

According to Fredman,³¹⁵ the right to equality and non-discrimination has two broad conceptual approaches evident in equality and non-discrimination provisions in both domestic and international laws. These are formal or judicial and substantive equality. Formal or 'juridical' equality refers to the idea that individuals in similar situations should be treated alike. The author also emphasises on equal treatment based on the appearance of similarity, without looking at the broader background within which such treatment occurs.³¹⁶ Substantive equality means that persons in different situations should be treated differently. It embraces two distinct ideas, which are equality of the results and equality of opportunity.

However, on a gendered perspective, section 48 (2) (d) of the Constitution of Zimbabwe implies an inequality in the justice system. It should be noted that Zimbabwe's Constitution is founded on the respect for the principle of gender equality. Its section 17 (1) provides that the state must take measures through the legislation in making sure that both genders are equally represented. Surprisingly, section 48 (2) (d) of the Constitution seems to have

³¹³ *South West Africa (Ethiopia v. South Africa)* CJ rep. (1966), 4.

³¹⁴ *South West Africa Cases, [1966] I.C.J. 217 (second phase)*.

³¹⁵ S Fredman *Discrimination* 2011 18.

³¹⁶ Fredman (note 315 above).

retained the death penalty for males and abolished it for females.³¹⁷ To this end, section 48 (2) (d) is inconsistent with the notion of gender equality and substantive equality.

The infringement of the principle of non-discrimination arises where equal cases are treated in a different manner, for instance, where there is no reasonable justification for the difference in treatment and where there is no proportionality between the aim sought and the means employed. This principle has been stated in the case of *Jacobs v Belgium*.³¹⁸ In this case, Mr Jacobs claimed to be a victim of the violation of Articles 2, 3 & 14 (1), (25) & (26) of the ICCPR. The applicant alleged that there were violations of the rule of law.

The application of section 48 (2) (d) in the Zimbabwean Constitution implies a disrespect of the rights not to be discriminated against and equality. Moreover, it implies the failure of the State to uphold its duty in terms of section 44 of the Constitution. This provision states that the state and everyone have a duty to respect, protect, promote and fulfil the rights in the Constitution.

The International human rights instruments, which address equality issues at the universal level include the UDHR, ICCPR and the ICESCR.³¹⁹ Additionally, at the regional level, the African Charter dealt with the provision of discrimination in the case of the *African Institute for Human Rights and Development v. Republic of Guinea Communication*.³²⁰ In this case, the President of the Republic of Guinea said an inflammatory speech, which led to human rights violations suffered by Sierra Leone refugees. The African Commission ruled that the remarks constituted impermissible discrimination on the grounds of nationality and had led to numerous violations of the African Charter, including the failure to ensure its application, discriminatory, cruel and inhuman treatment, arbitrary detention, and arbitrary execution, deprivation of the right to a fair trial, mass expulsions and deprivation of property.

In the matter between *Dino Noca vs Democratic Republic of the Congo*,³²¹ (DRC), a complaint was brought before the African Commission. The DRC was found to be in violation of Article 3. *In casu*, the Complainant alleged that the Respondent State had violated his rights protected by the African Charter. In the case of *Lubuto v Zambia*,³²² a sentence of death was imposed for aggravated robbery. The applicant had applied for an appeal, which was immediately dismissed by the Zambian Supreme Court. The applicant consequently brought the case before the HRC. The argument before the committee was that the trial

³¹⁷ E Durojaye *A gendered analysis of section 48 (2) (d) of the Zimbabwean Constitution of 2013* (2016) 1.

³¹⁸ *Jacobs v Belgium* UN Doc CCPR/C/81/D/943/2000 (2004).

³¹⁹ D Silverstone *Non- discrimination in International law* 2011 25.

³²⁰ *African Institute for Human Rights and Development v. Republic of Guinea Communication* 249/2002.

³²¹ Communication 286 /2004 – *Dino Noca vs Democratic Republic of the Congo*

³²² *Lubuto v. Zambia*, Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995).

against him was unfair and the death penalty imposed on him was disproportionate as no-one was wounded during the robbery. The HRC relied on article 5 (4) of ICCPR-OPT2 and was of the view that the issue before it disclosed the violation of Article 6 (2) & 14 of the ICCPR. The committee found that Mr. Lubuto was entitled to an appropriate and effective remedy, which entails a commutation of the sentence. As a result, a duty was imposed on the state of Zambia to ensure that no similar violations may occur. In the case concerning *S v Makwanyane*,³²³ Ackermann noted that the death penalty application is inherently arbitrary. Since the death penalty has been said to be arbitrary and accordingly unequal, it is a violation of the right not to be discriminated against. However, the implication brought by section 48 (2) (d) is the violation of both the constitutional and international guarantee of the equal protection of the law.³²⁴

Considering the above, it can be argued that section 48 (2) (d) of Zimbabwe's Constitution similarly violates the right to equality and non-discrimination as provided in Article 3 of the African Charter. Article 3 of the African Charter provides that,

Every individual shall be equal before the law. Every individual shall be entitled to equal protection of the law.

3.6 The Right to Freedom from Torture, or Cruel, Inhuman or Degrading Treatment or Punishment

The right to freedom from torture, or cruel, or inhuman or degrading treatment or punishment is another right to be examined in the light of section 48 (2). This right is important because its violation contributes to the death penalty. The most painful time for a prisoner awaiting execution happens upon the failure to protect the right to freedom from torture, or cruel, inhuman or degrading treatment or punishment.

The right not to be subjected to cruelty and torture has found expression in Article 5 of the Universal Declaration, which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Furthermore, Article 16 of CAT prevents state parties from conducting any acts of cruel, inhuman or degrading punishments. Additionally, the ICCPR also prohibits the same conduct in terms of Article 7. Article 10 of the ICCPR states that, "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." Regionally, Article 5 of the African Charter similarly prevents the inhuman and degrading punishments.

³²³*Makwanyane* case (note 82 above).

³²⁴HA Bedau, The case against the death penalty (note 150 above).

Torture has been described as a deliberate ill-treatment of human beings, which leads to very serious suffering. Article 1 (1) of CAT,³²⁵ defines torture in a broad way. It is defined as,

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

It must be noted that torture may sometimes be distinguished from other forms of maltreatment by the ruthlessness of the suffering endured.³²⁶ In the case of torture, intent must be established. From the definition offered by CAT, the term torture has three requirements. First, there must be a degree of pain on the act. Second, the perpetrator must be the state authorities, and third, there must be an intention to obtain some information, to inflict pain and cause intimidation.³²⁷ Torture does not only need the infliction of harm, but also an intentional physical and mental harm.

In a case concerning *Selmouni v France*,³²⁸ Selmouni was both a national of the Netherlands and Morocco. He was sentenced to thirteen years in prison for drug trafficking offences. Selmouni complained of being subjected to ill-treatments during the time when he was being held in custody. In this matter, the European Court of Human Rights (ECHR) held a decision concerning Article 3 of CAT that the treatment of the complainant constitutes torture.³²⁹ Furthermore (in this case), the definition of torture was expanded by stating that subjecting detainees to physical force diminished human dignity and is a violation of Article 3 of CAT. As a result, the ill-treatment of Selmouni constituted torture.³³⁰

In *Kaya v Turkey*,³³¹ Kaya, a medical practitioner who treated Kurdish activists injured during clashes with the Turkish security forces, was harassed several times before he was finally killed. Investigations suggested that there was state involvement in his death. In this matter, the court was left to decide on whether there was a violation of Article 3 of CAT. The Court

³²⁵Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (note 191 above).

³²⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (note 191 above)

³²⁷ LA Wendland *Handbook on state obligations under the UN Convention against Torture* 2002 29.

³²⁸*Selmouni and Netherlands (intervening) v France*, Admissibility, merits and just satisfaction, App no 25803/94, Case No 100/1995/606/694, ECHR 1999-V, [1999] ECHR 66, (2000) 29 EHRR 403, 7 BHRC 1, IHRL 3247 (ECHR 1999), 28th July 1999, European Court of Human Rights [ECtHR, Grand Chamber].

³²⁹Human rights education project, available at www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-hrc/the-right-to-freedom-from-torture-or-inhuman-or-degrading-treatment-Or-punishment/what-is-torture-and-illtreatment. (accessed 12 November 2017).

³³⁰Human rights education project (note 329 above).

³³¹ The Kaya case (note 302 above).

found that indeed, Article 3 was violated. The European Court of Human Rights relied mostly on CAT and stated that there are special elements that make torture to be distinguishable from other types of ill-treatments. These elements are that there should be a deliberate and purposive nature of acts that comprise or exceed the level of suffering required of inhuman treatment.

A distinction has been drawn by human rights law between torture and cruel, inhuman or degrading treatment or punishment. It is stated that where an action does not meet the defined definition of torture, it may be considered cruel, inhuman, or a degrading treatment or punishment.³³² This depends on the form, strictness and purpose of the conduct. Also, there is need to assess the intensity and the duration of the pain of a circumstance of an individual. In the matter of *Abdel Hadi, Ali Radi & Others v the Republic of Sudan*,³³³ which appeared before the African Commission, the complainants alleged that they were subjected to torture and ill-treatment in the state agents' hands. The complainants claim to have been subjected to beatings, whippings, deprivation of food, death threats and many other forms of ill-treatment. The complainants alleged that all the ill-treatments constituted torture and cruel, inhuman or degrading treatment or punishment, a violation of Article 5 of the African Charter. The African Commission was called upon to determine whether the actions of the Respondent State constituted the violation of Articles 1, 5, 6, & 7 of the African Charter as alleged. Article 5 of the African Charter provides that,

Every individual shall have the right to the respect of the dignity inherent in the 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 treatment or punishment shall be prohibited.

The African Commission found that the Republic of Sudan had violated the Articles as alleged by the complainants.³³⁴

In the South African Constitutional Court, in a case of *S v Makwanyane*,³³⁵ it was stated that the application of the death penalty constitutes an infringement of the right to life and the right not to be treated in a cruel, inhuman, degrading treatment or punishment. According to Smith,³³⁶ inhuman treatment may be defined as relating to an attack on an individual or the condition in which they are held. It may also include the immediate threat of torture. Furthermore, it is argued that the death penalty is more similar to torture in the fact that it

³³² The Kaya case (note 302 above).

³³³ African Commission on Human and People's Rights Communication 368/09 – *Abdel Hadi, Ali Radi & Others v Republic of Sudan*.

³³⁴ *Abdel Hadi, Ali Radi & Others v Republic of Sudan* (note 312 above).

³³⁵ *Makwanyane* case (note 82 above).

³³⁶ Smith (note 262 above).

constitutes a mental and physical effect on the condemned who is already under the control of the government.³³⁷

It is important to note that the death penalty is not included in the definition provided above.³³⁸ However, the death row phenomenon and the methods of the death penalty constitute torture. The HRC, which adopts its views from Article 5 (4) of the ICCPR -OPT 2, in the case of *Chita Ng v Canada*,³³⁹ stated that, 'The execution by gas asphyxiation constitutes torture due to the length of time this method takes to kill a person and the availability of other less cruel methods to achieve the same objective.'³⁴⁰

In the case concerning *Francis v Jamaica*,³⁴¹ the HRC held that the delay in that instance did not constitute violation of Article 7 of the ICCPR, which prohibits torture. The HRC stated that there are compelling circumstances, which will have to be considered in turn. The compelling circumstances in this case were that the prisoner had spent many years on the death row. The years exceeded 12 years, which led to him developing signs of mental instability.³⁴² A case decided in the Supreme Court of Zimbabwe on the issue of prisoners spending many years on the death row is that of *Dhlamini and Others v Carter NO and Others*.³⁴³

This was one of the earliest cases reported on the death row phenomenon in Zimbabwe. *In casu*, the appellants sought to interdict the first respondent from carrying out the death penalty. They argued, among other issues, that the delay between the imposition of their sentences and their confirmation was so excessive to an extent of constituting inhuman or degrading punishment, which was in violation of section 60 (1) of the Constitution of the then Rhodesia. However, the contention was not admitted on the reason that once a lawful sentence has been meted out, it can never be declared unlawful, bearing on the fact that it constitutes inhuman or degrading punishment.³⁴⁴

The death penalty has been said to be predictable, causing cruelty by the delay in carrying it out.³⁴⁵ Many different reasons for the delays have been stated and these differ from country to country. In many cases, the delay has been due to the sentenced prisoner availing himself

³³⁷ E Prokosch *The death penalty v human rights in death penalty: Beyond abolition of Europe* 2004 23-25.

³³⁸ M Machaya, 'The death penalty in Zimbabwe: A human right perspective' Masters Thesis (2014) University of western cape, Master 10.

³³⁹ *Chitit Ng v. Canada*, Comm. No. 469/1991, 49th Session, U.N. Doc. CCPR/C/49/D/469/1991 at 16.4 (Nov. 5, 1993).

³⁴⁰ *Chitit Ng v. Canada* (note 339 above).

³⁴¹ *Francis v. Jamaica*, Communication No. 606/1994, U.N. Doc. CCPR/C/54/D/606/1994 (1995).

³⁴² *Francis v Jamaica* case (note 341 above).

³⁴³ *Dhlamini and Others v Carter NO and Others* (1) 1968 RLR 136.

³⁴⁴ Zimbabwe Constitution order (note 25 above).

³⁴⁵ Pannick (note 227 above).

to appeal procedures.³⁴⁶ It has been stated that generally, it takes an average of 10 years in the USA to execute a death row inmate. As a result, delays on death row, for various reasons, have become a norm rather than immunity.

In a United States case of *Ex parte Medley*,³⁴⁷ Justice Miller stated as follows in relation to sentenced prisoners,

When a prisoner sentenced to death by a court is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected to during that time is the uncertainty during the whole of it . . . as to the precise time when his execution shall take place.

As a result, such delays keep the prisoner under fear that he or she might lose life at any time. Another case in the USA Supreme Court was that of *Re Kemmler*,³⁴⁸ where Justice Miller observed that, even though the death penalty might not be cruel *per se*, it becomes cruel when it involves a lingering death, which is beyond the mere extinction of life. Moreover, reference to the suffering that a prisoner may be subjected to on the death row has been highlighted by the Supreme Court of India in *Ediga Anamma v State of Andhra Pradesh*,³⁴⁹ where Justice Krishna Iyer noted that,

The excruciation of a long pendency of the death sentence, with the prisoner languishing in near solitary confinement, suffering all the time, may make the death sentence unconstitutionally cruel and agonising.

In another case decided by the Supreme Court of India,³⁵⁰ Chandrachud observed that,

The prolonged anguish of alternating hope and despair, the agony of uncertainty, the consequences of such suffering on the mental, emotional and physical integrity and health of the individual can render the decision to execute the sentence of death an inhuman or degrading punishment in the circumstances of a given case.

From these cases, cruelty and torture may be established by the prolonged anguish in waiting in the death row. Zimbabwe's delay in effecting death sentences has resulted in the increased number of death row inmates who are kept under harsh prison conditions.³⁵¹ The harsh conditions include abuse habits, torture and assaults by the guards. Moreover, there is insufficient food, water, electricity, clothes, and daily necessities, leading to the prisoners' malnourishment. Additionally, prisons have poor health conditions and are often over-

³⁴⁶In the *Catholic Commission* case the Supreme Court of Zimbabwe noted at 334 that the state has nothing to gain by delaying execution.

³⁴⁷*Ex parte Medley* 134 US 160 (1890).

³⁴⁸*Re Kemmler* 136 US 436 (1890).

³⁴⁹*Ediga Anamma v State of Andhra Pradesh* [1974] 3 SCR 329.

³⁵⁰*Sher Singh & Others v State of Punjab* [1983] 2 SCR 583.

³⁵¹ '15 death row inmates hire Biti's for constitutional court fight' (note 36 above).

crowded, which sometimes leads to the spread of diseases such as tuberculosis, measles and diarrhoea.³⁵²

The imposition of the death penalty in section 48 (2) (d), therefore, implies an impairment of the right not to be subject to torture, cruel and degrading punishment. Yet, this right is protected by section 53 of the Zimbabwe Constitution, which stipulates that no one may be subjected to any torture either physically or psychologically. This right has been listed in section 86 of the country's constitution as an absolute right, meaning that it cannot be limited no matter what circumstance may arise.

3.7 The Right to Human Dignity

Wolbert,³⁵³ defines human dignity in a fundamental sense as something that is given, which cannot be lost and that must be respected. He further describes human dignity as an end in itself and for that reason, it cannot be acted against. The recent interpretations have described human dignity to some commitment, namely to care for the humane existence of fellow human beings. In this sense, the dignity of another may be violated upon the failure to care for him/her.

The idea of human dignity has been stated by Annermarie,³⁵⁴ as being innate in the sense that it cannot be acquired by any special faculties or performances, indivisible, since all human beings own this quality in its totality, unbalanced, cannot be lost, derivable,³⁵⁵ inviolable in the sense that anyone questioning will be denied his or her own humanity.

The role of human dignity has been well captured in a South African case of *Dawood v Minister of Home Affairs*,³⁵⁶ that human dignity enlightens constitutional decision and interpretation at a range of levels. It is a value that notifies the interpretation of all other rights. The court stated that such interpretation is for the rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. The court further added that human dignity is not only a fundamental value, but also a justifiable and enforceable right that must be respected and protected.

Respect for another has been described as treating another person like a human being, with the right to live as a human being. As a result, all human beings have a responsibility to treat

³⁵²Amnesty international Zimbabwe, Prison and Detention: 2011 Centre conditions U.S.Dep. of State Human Rights (note 35 above).

³⁵³ W Wolbert 'Human dignity, human rights and torture' (2007) Vol. 95 *International Journal of bible, religion and theology in Southern Africa* 166.

³⁵⁴ P Annemarie Introductory lecture to a conference of Protestant theologians (1999)19-30.

³⁵⁵ Annermarie (note 354 above).

³⁵⁶*Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*2000 (8) BCLR 837 (CC).

every other human being in a dignified and humane manner. Human dignity has, therefore, been stated as a universal human duty, a universal human responsibility. It has been stated that recognising the right to dignity is an acknowledgement of the intrinsic worth of human beings.³⁵⁷

The right to human dignity has been incorporated in the regional and international instruments. At international level, the right to human dignity is in both general and specific human rights charters. The subsequent use of dignity in regional and international human rights instruments has been inspired and derived from the use of dignity in the UDHR.³⁵⁸ The core international covenants including the ICCPR, ICESCR and the ICERD, have included the dignity language in their preambles and has confirmed that dignity would continue to play a significant role in human rights texts.

The right to human dignity enjoys legal protection under Article 10 of the ICCPR. This Article applies to anyone who has been deprived of his or her liberty under the laws and authority of the state. It stipulates that, 'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.' Additionally, the right to human dignity is also protected under Article 5 of the ACHPR, which has specific provisions that relate to human dignity. It provides that,

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

In the case of *Kindler v Canada*,³⁵⁹ it was submitted that the death penalty and the conditions on the death row constitute the cruel and inhuman treatment or punishment. The application of the death penalty imposes a limitation on the essential content of the fundamental rights to life and human dignity and thereby eliminating them irretrievably. Also, in the case of the *Catholic Commission of Justice and Peace in Zimbabwe v Attorney-General (Zimbabwe) and Others*,³⁶⁰ the Zimbabwean Supreme Court deliberated on the continued validity of the death penalties of four men who had been held on the death row in terrible and horrible conditions for a long period. In this case, the issue of the right to human dignity was considered. In coming to its decision, the Court relied mostly on international case law. For instance, the Court referred to the decision made in the European Court of Human Rights in the

³⁵⁷ Currie I & De Waal J *The Bill of Rights handbook* (2008) 273.

³⁵⁸ C McCrudden 'Human dignity and judicial interpretation of human rights' (2008) VOL.19 *European journal of international law* 667.

³⁵⁹ *Kindler v Canada (Minister of Justice)* [1991] 2 SCR 779.

³⁶⁰ *Catholic Commission case* (note 228 above).

Soering case.³⁶¹ The European Court had ruled in the *Soering* case that the delay in the accused 's execution and the long suffering from the death row syndrome constituted inhuman and degrading treatment, which was forbidden by the European Convention. Following the same precedent, the Supreme Court of Zimbabwe interpreted the protection on inhuman or degrading punishment or treatment offered in the Constitution of Zimbabwe in a similar way and set aside the death sentences, which were being challenged.

In *Interights & Ditshwanelo v The Republic of Botswana*,³⁶² the complainant brought a case where the victim was accused of murdering his girlfriend and his son and was convicted and sentenced to 15 years imprisonment and death by hanging for murder. The complainants alleged that the Respondent State (Botswana) had violated Articles 1, 4 & 5 of the African Charter. The African Commission held that the Respondent State had indeed violated Articles 1 and 5 of the African Charter.

The circumstance that led to the African Commission holding that Botswana was in violation of the above-mentioned articles was the fact that, Botswana as the Respondent State failed to respond to the African Commission's request for its submissions on the merits of the Communication. The Respondent State failed to submit on merits within the stipulated time, despite several reminders by the African Commission.

In the case of *S v Makwanyane*, O' Regan noted the relationship between the right to life and human dignity. On the question whether the death penalty is a violation of both rights, it was stated that,

The purpose of the death penalty is to kill convicted criminals. Its very purpose lies in the deprivation of existence. Its inevitable result is a denial of human life. It is hard to see how this methodical and deliberate destruction of life by the government can be anything other than a breach of the right to life. The implementation of the death penalty is also a denial of the individual's right to dignity.³⁶³

As stated above, section 48 (2) (d) implies a serious violation of the right to human dignity. This right has been secured in section 51 of the Zimbabwe Constitution, which provides that everyone has the right to human dignity, which requires protection and respect. The imposition of the death penalty in the Zimbabwe has, therefore, set the country against its obligation to protect and respect its citizens. Zimbabwe is founded on the principle and values of the supremacy of the constitution, respect of the fundamental rights and of the inherent dignity of everyone, among others. The application of the death penalty informs of a

³⁶¹ *Soering v United Kingdom* (1989) 11 EHRR 439.

³⁶² Communication 319/06 - *Interights & Ditshwanelo v. The Republic of Botswana*

³⁶³ *Makwanyane* case (note 82 above).

failure by the State to uphold the constitutional values as stated in section 3 of its constitution.

Furthermore, the retention of the death penalty in Zimbabwe's Constitution implies a violation of the international state obligation vested upon the country of Zimbabwe if regard is to be given to the international instruments as discussed above. Zimbabwe has an international duty to protect and uphold human rights. In addition, section 48 (2) (d) of the Zimbabwe Constitution provides for the death penalty, thus violating the well-known African principle of Ubuntu, the worthiness or humaneness of a person. This principle was stated in the *Makwanyane* case, where the court stated that the death penalty is against the value of Ubuntu (*hunhu* in Shona). The principle of Ubuntu forbids the death penalty and declares it undignified.³⁶⁴ As Metz states, the death penalty violates the right to human dignity in that it does not give a second chance to the condemned. Ubuntu upholds that for punishment to be justified, it must have a likelihood of bringing people together or result of making peoples' lives better.

The application of section 48 (2) (d) implies a breach of the right to human dignity under international human rights law. This has been demonstrated by the process in which the executions are conducted. Schabas states that public executions are incompatible with the right to human dignity.³⁶⁵ These forms of death penalty punishment are explained in the second Chapter. These processes violate the condemned's right to human dignity, which has been safeguarded in the African Charter and the ICCPR. Moreover, as stated above, the application of section 48 (2) (d) implies a limitation on the essential content of the fundamental human right to life.

The protection of the right to human dignity on the issue of the death penalty has been raised in relation to the death row phenomenon. The issue of the death penalty in relation to the protection of the right to human dignity is often raised with specific reference to the death row phenomenon. This refers to harmful conditions experienced by the prisoners on the death row. The conditions include longer duration under detention, uncertain moments of execution and the failure to contact the outside world. This leads to physical and mental deterioration. Because of the above, it leaves the prisoner looking a living dead.³⁶⁶ It has also been contended that such conditions and treatments diminish the condemned's right of self-

³⁶⁴ T Metz 'Human dignity, capital punishment and an African moral theory toward the new philosophy of human rights, (2010) vol 1, iss 1 *Journal of human of rights*.

³⁶⁵ Schabas (note 198 above) 337.

³⁶⁶ Schabas (note 198 above) 337.

worth.³⁶⁷ Based on the foregoing, the death row phenomenon infringes the right to human dignity as protected under Article 10 of the ICCPR and Article 5 of the African Charter.

In the Zimbabwean case of the *Catholic Commission for Peace and Justice in Zimbabwe v Attorney-General and Others*,³⁶⁸ it was held that it is unconstitutional to keep the death row criminal for a period of over five years under inhuman and degrading conditions. It was stated that it will seem as if the offenders are serving a sentence of imprisonment, yet they are serving for a death sentence. Therefore, section 48 (2) (d) of the Zimbabwean Constitution implies a violation of the protection offered by the ICCPR in Article 10 and the African Charter in Article 5.

3.8 The Right to a Fair Trial

The right to a fair trial is another right that is affected by the application of the death penalty in Zimbabwe. Amnesty International has stated that this right is one of the cornerstones of a democratic society, which is based on the rule of law.³⁶⁹ The rule of law entails that no one must be above the law. The right to a fair trial is aimed at protecting individuals facing criminal charges of unlawful and arbitrary abuse of their human rights and freedom.³⁷⁰ This right ensures an equal protection of individuals by the law throughout the whole criminal process. This protection starts from investigation, to detention until the final judgment of the case.³⁷¹ Furthermore, the right to fair trial relates to the right to equality before the law and the courts, as explained above. It further entails being tried fairly by a competent court which is independent and impartial established by law for public hearing.³⁷² This right further include the right not to be forced to incriminate oneself and the rights to find the right and competent defence for the trial.

The right to a fair trial has found protection in the Universal Declaration Article 10, which guarantees the right to everyone, when the courts are resolving a criminal charge against an individual. It guarantees a fair public hearing by an independent and impartial tribunal. In terms of Article 11 (1), everyone charged with a penal offence is guaranteed the right to be presumed innocent until proven guilty. This must be done in accordance with a law in a public trial. Similarly, the ICCPR stipulates in Article 6 (2) certain safeguards or procedural requirements in relation to the death penalty, one of which is that the death sentence can only be carried out pursuant to the final judgment held by a competent court. Article 6 provides that the protection for a fair trial has to be against the arbitrary deprivation of one 's

³⁶⁷Human Rights Advocates 'Death row phenomenon violates human rights', available at: <http://www.humanrightsadvocates.org> accessed (22 November 2016).

³⁶⁸ *Catholic Commission* case (note 228 above).

³⁶⁹ Amnesty International *Fair Trial Manual* 2014 18.

³⁷⁰ Chenwi (note 51 above).

³⁷¹ Penal Reform International *Death penalty information Pack* (2011) 20.

³⁷² Amnesty International (note 35 above).

life and that the death penalty cannot be imposed upon the breach of the Covenant. The HRC has interpreted that in all the death penalty cases, if the procedures stated in the ICCPR are followed, then the death punishment may be held, but if there is a breach the death penalty may not be imposed.³⁷³

In other words, the death penalty can only be applied under controlled circumstances, or else it would entail a violation of the above-mentioned rights. Therefore, it is required that all the requirements are met. Additionally, Article 14 of the ICCPR provides a full range of the rights and standards that must be followed in criminal cases.

Regionally, the right to a fair trial has been protected in terms of Article 7 of the African Charter. In the case of the *African Commission Forum of Conscience v. Sierra Leone*,³⁷⁴ the complainant was the Forum of Conscience, acting on behalf of 24 soldiers who were executed in Sierra Leone. The complainant alleged that the 24 soldiers were tried and sentenced to death for their unproven role in the coup that removed the elected government of Tijan Kabah. The Forum of Conscience further alleged that the trial was unfair under the African Charter, on the reason that the court did not allow the right of appeal against the sentence imposed to a higher tribunal and was therefore in breach of Article 7 (1) of the African Charter. The complainant argued that the trial constituted an arbitrary deprivation of the right to life, which is contrary to Article 4 of the African Charter.

The African Commission held that the authorities of the Republic of Sierra Leone failed to respond to the request for additional arguments on the admissibility and the merits of the case. The defence to this was that the regulations of the military did not allow for the right of appeal. In turn, the African Commission found that the rules of the military offended the African Charter and the government of Sierra Leone was in violation of Article 7 (1) (a) of the said African Charter.

In the case of *Judge vs Canada*,³⁷⁵ under the ICCPR- OPT 2, the complainant had been detained for a period of ten years, which constituted mental suffering amounting to cruel, inhuman and degrading treatment or punishment. The condemned had been waiting for the finalisation of the death penalty, which was pending. The complainant's argument was based on the fact that he suffered from the death row phenomenon during his detention while in Canada. He further argued that he was denied the right to appeal by deporting him to America where he was under death penalty before he could exercise the right to appeal. He

³⁷³ Human Rights Committee, General Comment 6 (note 289 above).

³⁷⁴ *African Commission Forum of Conscience v. Sierra Leone* Communication No. 223/98.

³⁷⁵ *Judge v. Canada* Communication No. 829/1998.

further stated that the proposal to move him to the USA from Canada was a violation of the right to life under Article 6 of the ICCPR.

The HRC, under the ICCPR- OPT 2, held that since Canada had abolished the death penalty, such deportation did not constitute a violation of the right to life or the right not to be treated in a cruel and degrading manner as stated from its previous jurisprudence in *Kindler v. Canada*.³⁷⁶ On the issue of being denied the right to appeal, the HRC stated that the decision to deport the accused without affording him the right to appeal was a violation of Article 6 & 2 (3) of the ICCPR.

The above case, therefore, proves that section 48 (2) (d) of the Zimbabwe Constitution implies a serious violation of the right to a fair trial, right not to be subjected to torture and cruel and degrading treatment or punishment. A plethora of reports on the conditions of the Zimbabwe prisons reveals that the conditions are harsh and life threatening.³⁷⁷

In a case of *S v Mashayamombe*,³⁷⁸ the accused was sentenced to death. He faced a series of charges which include rape, escaping from lawful custody and murder. The accused complained that the manner in which the charges against him were instituted contravened his rights as enshrined in section 69 (1) of the Constitution of Zimbabwe. Section 69 (1) provides for a fair trial. The accused argued that a single transaction underpins all the above charges. He argued that the preference by the court to start charging him from the least serious charge to the more serious one prejudiced him. It was held that the facts alleged by the accused did not reveal any form of contravention of sections 56 (1) and 69 (1) or any other provision of the Constitution of Zimbabwe.

In the case of *S v Nkomo*,³⁷⁹ brought before the Zimbabwe Supreme Court, the accused complained that his rights to a fair trial were infringed due to the delay in bringing him before trial within a reasonable time. As noted above, the prisoners on the death row wait for many years before they are tried. This is a violation of the right to a fair trial. The retention and application of section 48 (2) (d), therefore, implies an infringement of section 69 of the Zimbabwe Constitution. Moreover, section 48 (2) (d) infringes the protected right to a fair trial as stated in the international instruments.

3.9 Conclusion

Chapter three focused on the recognition of the death penalty in Zimbabwe as a violation of international human rights law. It noted that Zimbabwe follows a dualistic approach in

³⁷⁶*Kindler v. Canada*, Communication No. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993).

³⁷⁷Cornel law school, the death penalty data base; Zimbabwe, (note 219 above).

³⁷⁸*S v Mashayamombe* (HH 596-15 CRB 112/15) [2015] ZWHHC 596 (02 July 2015).

³⁷⁹*S v Nkomo and Another* (89/03) ((89/03)) [2006] ZWSC 52 (05 December 2006).

domesticating international law. This approach implies that for the international law to be applied in Zimbabwe, it must first be legislated into the local statutes by the Zimbabwean Parliament. Because of this dualistic approach, Zimbabwe is not bound by any international human rights law if that law is not part of the local status. The Chapter noted that Zimbabwe is a party to the ICCPR and the African Charter. For that reason, Zimbabwe is obliged to protect the rights as safeguarded therein. Since the Universal Declaration is an International Customary law by default, Zimbabwe also becomes part of it and is thus obliged to protect the right in it. It noted that the African Commission established a Protocol to the African Charter aimed at the total abolition of the death penalty in Africa. The states that still retain the death penalty, like Zimbabwe, are encouraged to sign the Protocol to safeguard the right of the murderous criminals. Section 48 (2) (d) provides for the death penalty. As indicated above, there are many human rights implications here. That is, the death penalty is a total denial of many fundamental rights and it violates one accepted fundamental principle under the human rights law. The application of the death penalty implies an infringement of the right to life as provided by section 48 (1) of the constitution of Zimbabwe. Moreover, it transgresses the right to human dignity as secured in section 51 of the constitution. Again, it violates section 53 of the Zimbabwe Constitution. It further infringes section 69 (1), which provides for a fair trial. Section 48 (2) (d) is also incompatible with section 17 (1) of the Constitution of Zimbabwe, which provides that the state must take measures through legislation to make sure that both genders are equally represented. Above all, the application of section 48 (2) (d) implies a serious violation against the protection offered by the international and regional instruments. Section 48 (2) (d) implies a breach of the duty as stated in the African Charter and the ICCPR to which Zimbabwe is a party. From these rights, it can be concluded that the provision that allows the death penalty is incompatible with the domestic, regional and international human rights law. The next Chapter scrutinises international, regional and domestic opportunities to address the application of section 48 (2) (d) in Zimbabwe.

CHAPTER FOUR: OPPORTUNITIES IN THE UN HUMAN RIGHTS SYSTEM, AFRICAN HUMAN RIGHTS SYSTEM AND THE DOMESTIC MECHANISMS TO ADDRESS THE APPLICATION OF THE DEATH PENALTY IN ZIMBABWE

4.1 Introduction

The previous Chapter focused on establishing the status of the international human rights law treaties in Zimbabwe, the practice of the death penalty in post 2013 Zimbabwe and examining the death penalty in relation to the key rights guaranteed under international human rights instrument. It examined how the rights, which include life, equality, human dignity, fair trial and freedom from torture are affected by the application of the death penalty. It noted that the application of section 48 (2) (d) of the Zimbabwean Constitution is a violation of the above-mentioned rights, which are protected by the same Constitution and the international instruments. Moreover, in examining the status of international human rights treaties in Zimbabwe, the Chapter revealed that the state of Zimbabwe is a party to the ICCPR and the African Charter, and these instruments guarantee the human rights. Additionally, the chapter noted that in post 2013, Zimbabwe follows a dualistic approach in domesticating international laws. Nonetheless it concluded that dualism is not an excuse for violating human rights. Consequently, the previous chapter tackled two research questions on the compatibility of section 48 (2) (d) on the international obligations of the state of Zimbabwe and on the implication of the death penalty in Zimbabwe. It was found that generally, section 48 (2) is incompatible with the international and regional human rights laws.

This Chapter focuses on the United Nations Human Rights System (UNHRS), African human Rights Systems (AHRs) and domestic opportunities to address the application of the death penalty in Zimbabwe. The chapter focuses on how persons sentenced to death can benefit from international, regional human rights systems and domestic opportunities. In view of the trend, the argument is made that the possibilities exist within the UNHRS, African Human Rights System and the domestic mechanisms that persons sentenced to death can explore to invalidate or prevent the implementation of the death penalty. This is discussed below.

4.2 Opportunities in the United Nations Human Rights System to address the application of the death penalty in Zimbabwe

The term human rights system has been defined as a system which involves the establishment of human rights laws, courts, investigative bodies and organisations at national, regional and international levels for the sake of promoting and protecting human rights.³⁸⁰

³⁸⁰ Human rights systems, available at <https://definitions.uslegal.com/h/human-rights-systems> (accessed 13 November 2017).

The main tasks by the UN system of human rights are development of international human rights, monitoring and protection of existing human rights.³⁸¹ The UN has mechanisms that ensure whether states are complying with the developed rights. The mechanisms fall under the following bodies: United Nations Office of the High Commissioner for Human Rights (UNOHCHR), United Nations Human Rights Council (UNHRC), Special Procedures of the Human Rights Council, Human Rights Treaty Bodies and the complaint procedure.³⁸² The study examines these bodies in seriatim, and establishing how they may be used in addressing the death penalty issue in Zimbabwe

4.2.1 United Nations Office of the High Commissioner for Human Rights (UNOHCHR)

The OHCHR is the main office or body of the UN and is concerned with protecting and promoting the enjoyment of human rights of everyone.³⁸³ This is the main office of the UN that deals with human rights and ensures that the human rights standards are applied in all the UN activities. This office promotes human rights through working with governments, civil society and other international organisations. The OHCHR have functions of setting a standard, monitoring and ensuring the implementation of the human rights rules.

The office of the UNOHCHR has engaged in many activities that seek to deal with the death penalty in different regions. For instance, a report ³⁸⁴from the United Nations has stated that the regional office of the UNOHCHR for South-East Asia has engaged with stakeholders in advocating for the abolition of the death penalty in countries of that region. ³⁸⁵In 2013 the Regional Office of the UNOHCHR collaborated with the Ministry of Justice in Thailand and arranged an Expert Seminar on “Moving Away from the Death Penalty in South-East Asia” in Bangkok. Through these collaborations participants laid down grounds for dealing with the death penalty in South East Asia.

However, in addressing the death penalty situation in Zimbabwe, the OHCHR may partner with the civil society in Zimbabwe and stakeholders by collaborating on forums, projects and promotional campaigns that are aimed at dealing with the death penalty. This engagement will help the country of Zimbabwe to move away from the death penalty both in law and in practice.

³⁸¹ The UN Human rights system available at <https://www.humanrights.dk/about-us/the-un-human-rights-system> (accessed 5 May 2018).

³⁸² The UN Human rights system (note 381 above).

³⁸³ A brief guide to the United Nations Human Rights System available at <https://www.hri.global/files/2011> (accessed 5 May 2018).

³⁸⁴ OHCHR Regional Office for South-East Asia, “International Experts Welcome Efforts Toward the Abolition of Death Penalty in South East Asia, available at http://bangkok.ohchr.org/files/PRESS%20RELEASE_Death%20Penalty%20Seminar.pdf (accessed 5 May 2018).

³⁸⁵ OHCHR Regional Office for South-East Asia (note 384 above).

4.2.2 United Nations Human Rights Council (UNHRC)

The highest intergovernmental body within the United Nations is the UNHRC which monitors human rights situations.³⁸⁶ As the highest intergovernmental body, the UNHRC has several control mechanisms that are free from the individual core treaties. These mechanisms include the Universal Periodic Review (UPR),³⁸⁷ special procedures,³⁸⁸ and the complaint procedure.³⁸⁹ The UPR is a procedure carried out every four years in which all the UN members' standards and observances of human rights are examined. Below is an example of an extract of the 27th session of the UNHRC UPR for Zimbabwe, Ghana and Sierra Leone.

In many States, a constitutional reform process provided an opportunity for discussions on the death penalty and led to proposals to abolish or restrict the use of the death penalty. For example, in Zimbabwe, a new Constitution was adopted in 2013. It provides for the death penalty only for murder committed in aggravating circumstances and prohibits its imposition on women or on men who were under 21 or over 70 years at the time of the commission of the crime. In Ghana, the Constitutional Review Implementation Committee submitted a draft bill for the amendment of the 1992 Constitution, in which it recommended replacing the death penalty with life imprisonment. Sierra Leone indicated that the current review of its Constitution would present an opportunity for the examination of the question of the death penalty.³⁹⁰

If a country is not complying with the human rights, the UNHRC makes recommendations for the country to make amends. This mechanism will help in addressing the death penalty in Zimbabwe in that, the UNHRC may give recommendations for the total abolishing of the death penalty. This mechanism will be of great help to the country of Zimbabwe since the council also serves as a round-table for governments and civil society groups to raise concerns about human rights violations in particular states and thematic areas of concern.³⁹¹

4.2.3 Special Procedures of the Human Rights Council

The other mechanism is the Special Procedures,³⁹² which is an umbrella term for the independent experts and working groups which operate in certain countries, addressing on special themes. The UNHRC appoints special *rappoteurs*' or independent and establish working groups which investigate human rights abuses. These consist of experts in the field who include academics, legal scholars and practicing lawyers.³⁹³ These experts annually submits reports to the UNHRC and they make recommendations for specific countries.

³⁸⁶ A brief guide to the United Nations Human Rights System (note 382 above).

³⁸⁷ The UN Human rights system (note 381 above).

³⁸⁸ The UN Human rights system (note 381 above).

³⁸⁹ The UN Human rights system (note 381 above).

³⁹⁰ 27th session of the HRC reports available at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/Pages/ListReports.aspx> (accessed 5 May 2018).

³⁹¹ United Nations Human rights Mechanisms available at <https://www.escri-net.org/resources/united-nations-human-rights-system-treaties-mechanisms-and-documents> (accessed 5 May 2018).

³⁹² The UN Human rights system (381 above).

³⁹³ A brief guide to the United Nations Human Rights System (note 38 above).

In a report³⁹⁴ made by UNHRC on 26th of January 2018 a group of UN human rights experts called for the country of Egypt to stop all the pending executions after allegations were made about unfair trials. On this issue the UN experts encouraged the country of Egypt to consider a moratorium on the death penalty with the view to abolish it. The UNHRC in this instance may send these experts to the country of Zimbabwe to investigate for instance the situations in Zimbabwe prisons where the prisoners on the death row are kept thus helping to address the death penalty issue in Zimbabwe especially on the conditions of the cells. However, recommendations and guide line may be made or given to the country of Zimbabwe.

4.2.4 The Human Rights Treaty Bodies

Every UN human rights treaty have independent human right treaty body or committees which is made up of 10 to 23 experts in the field who are established to ensure the implementation and observance of the core international treaty. A committee is usually named after the treaty it monitors. For instance, the Human Rights Committee (HRC) which is a treaty body that monitors the implementation of the ICCPR.³⁹⁵ Moreover, the Committee on the Elimination of Racial Discrimination (CoERD) monitors the implementation of the Convention on the Elimination of Racial Discrimination (CERD).³⁹⁶ Furthermore, the Committee on the Elimination of Discrimination Against Women (CoEDAW) which monitors the implementation of the Convention on the Elimination of Discrimination Against Women (CEDAW).³⁹⁷ Additionally, there is the Committee Against Torture (CoAT) which monitors the implementation of the Convention Against Torture (CAT).³⁹⁸ All these committees are there to protect everyone from the violation of their rights. The following are a few of the works done by the committees.

In a press report in 2015,³⁹⁹ the CoAT condemned the USA about the executions and prolonged delayed that they constituted to torture. The report stated that the practice of the death penalty in the USA is a contravention of International instruments specifically the CAT. The CoAT recommended that the USA should stop executions with the view to abolish the death penalty. Therefore, such recommendations may be used to address the death penalty in Zimbabwe.

³⁹⁴ Egypt must halt executions, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22613> (accessed 5 May 2018).

³⁹⁵ Monitoring the core international human rights treaties available at <http://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx> (accessed 6 May 2018).

³⁹⁶ Monitoring the core international human rights treaties (395 above).

³⁹⁷ Monitoring the core international human rights treaties (395 above).

³⁹⁸ Monitoring the core international human rights treaties (395 above).

³⁹⁹ UN calls death penalty 'torture' available at <http://www.Deathpenalty.org/blog/un-call-death-penalty-torture/> (accessed 6 May 2018).

In the case of *Dexter Johnson v Republic of Ghana*⁴⁰⁰ the HRC helped the accused who was sentenced to death in the Republic of Ghana. The HRC helped Mr Johnson in his appeal against his sentence and conviction in the Supreme Court of Ghana. However, after his appeal was dismissed, the HRC submitted a communication to the UNHRC on behalf of Mr Johnson arguing that the imposition of mandatory death penalty in Ghana was a violation of the ICCPR. Furthermore, the HRC submitted a clemency petition on behalf of Mr Johnson to the president of the Republic of Ghana. However, due to the efforts of the HRC Mr Johnson's execution was suspended since the HRC was his matter was under consideration.⁴⁰¹

To address the death penalty issue in Zimbabwe the HRC may consider identifying prisoners under the sentence of death who are able to submit their complaints to the committee. These prisoners must have exhausted all the domestic remedies in Zimbabwe.

It is of great importance to note that, the treaty monitoring committees ensure that governments submit reports to the committees showing how they have implemented the requirements of the treaty.⁴⁰²

4.2.5 The complaint procedure⁴⁰³

Moreover, there is the complaint procedure⁴⁰⁴ mechanism which aims at addressing attested gross violation of human rights. It is apt to note that non-governmental organisations work hand in hand with this group in that they submit shadow reports on whether the country is complying with the terms of the treaty or not.⁴⁰⁵ Through the complaint procedure individuals, groups, NGOs which claim to be victims of human rights violations or having direct knowledge of such violations may be addressed after submitting their communications. This mechanism may help in addressing the death penalty issue in Zimbabwe in that individuals, groups and NGOs may lodge a complaint about the violation of human rights through the application of the death penalty. However, the study goes on to explore opportunities in the African human rights system.

⁴⁰⁰ *Dexter Johnson v the Republic of Ghana* (Crim. Appeal J3/3/2010).

⁴⁰¹ UN Human Rights Committee available at www.deathpenaltyproject.org/where-we-operate/international/un-human-rights-committee/ (accessed 6 May 2018).

⁴⁰² A brief guide to the United Nations Human Rights System (note 382 above).

⁴⁰³ The UN Human rights system (note 381 above).

⁴⁰⁴ The UN Human rights system (note 381 above).

⁴⁰⁵ A brief guide to the United Nation Human Rights System (note 382 above)

4.3 Opportunities in the African Human Rights System to address the application of the death penalty in Zimbabwe

Ingange,⁴⁰⁶ defines the term 'African human rights system as the regional system of norms and institutions established to enforce human and peoples' rights in Africa. Anyangwe,⁴⁰⁷ expressed the importance of the regional human rights system as follows,

Regional systems are critical to contemporary human rights development. They play an important complementary role in reinforcing international standards and machinery. They provide how human rights concerns can be addressed within the social, historical and political context of the region. Moreover, when it comes to human rights implementation, the universal human rights system relies heavily on regional human rights agreements.

Thus, the regional human rights systems are useful for the sake of upholding human rights in the continent. The African system has been said to be the youngest of the three judicial or quasi-judicial regional human rights systems and was formed under the support of the AU. The African human rights system consists of a number of treaties,⁴⁰⁸ the African Charter,⁴⁰⁹ the Convention on Specific Aspects of the Refugee Problem in Africa,⁴¹⁰ the African Charter on the Rights and Welfare of the Child,⁴¹¹ the Protocol on the Establishment of an African Court on Human and Peoples' Rights,⁴¹² and the Protocol to the African Charter on the Rights of Women in Africa.⁴¹³

To address the problems raised by the provisions in national law, such as found in section 48 (2) (d) of the Zimbabwe Constitution, the African human rights system adopted a protocol to the African Charter. The Protocol to this Charter aims at the abolition of the death penalty, both in law and in practice within the African states. This was done after the realisation of the need for matching with changing conditions. Furthermore, the AU established the African Court on which it intended to complement the African Commission. Potentials exist within the African Court and the Commission to address the retention and application of the death penalty in Zimbabwe.

⁴⁰⁶ JD Ingange *The African Human Rights System: Challenges and prospects* (2010) 16.

⁴⁰⁷ C Anyangwe *Obligations of States to the African Charter on Human and Peoples' Rights* (1998) 10.

⁴⁰⁸ C Heyns *The African Regional Human Rights System: The African Charter on Human and Peoples' Rights* (2004) 108.

⁴⁰⁹ African Charter (note 43 above).

⁴¹⁰ The final draft of the OAU Convention was adopted by the AHSG at its Sixth Ordinary Session in Addis Ababa in September 1969. It came into force on 26 November 1974, upon the deposit of instruments of ratification by one-third of the member states of the OAU.

⁴¹¹ African Charter on the Rights and Welfare of the Child (note 44 above).

⁴¹² Protocol to the African Charter on Human and Peoples' rights on the establishment of an African Court on Human and Peoples' Rights OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997), Adopted in 1998, and came into force on 25 January 2004.

⁴¹³ Protocol on the African Charter on the Rights of Women in Africa (note 45 above).

4.3.1 Opportunities in the African Court on Human and Peoples' Rights

The African Court was established by virtue of Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. The Protocol was adopted in Burkina Faso, on the 9th of June 1998. It was entered into force on the 25th January 2004. This Court was established in order to complement the protective mandate of the African Commission. State Parties to the Protocol are bound by the decisions of the African Court. The court is made up of 11 judges who are elected by the AU Assembly. The judges are elected from a list of candidates nominated by AU member states. It is important to note that the jurisdiction of the African Court applies only to states that have ratified the Court's Protocol.

The African Court has jurisdiction over disputes, which concern the interpretation and the application of the African Charter, the Court's Protocol and other human rights treaties ratified by the state concerned. Furthermore, the African Court renders advisory opinion on matters within its jurisdiction. Moreover, the African Court promotes amicable settlement on cases pending before it. The court also interpreted its own judgment.

It is apt to note that Zimbabwe signed the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights in June 1998. However, the country has not ratified and accepted the jurisdiction of the Court for any dispute that may concern the country.⁴¹⁴ Consequently, any party cannot directly approach the Court as required in terms of Article 34 (6) of the Protocol, except through referral by the African Commission. The African Court can be helpful in Zimbabwe's death penalty dilemma, in that the death penalty convicts may approach the Court through lodging a complaint to the African Commission. The African Commission may, in terms of Article 5 (1) of the Protocol, refer the case at any stage of the proceeding to the Court. This must comply with Rule 118 of the Commission's Rules of Procedure.⁴¹⁵ The African Court will give a final decision, which may bind Zimbabwe to observe the murderers' human rights.

As stated above the African Court hears matters that have been referred to it by the African Commission. Under certain circumstances, a complainant may be directly brought to the African Commission against any State that has accepted the Court's jurisdiction. The *African Commission on Human and Peoples' Rights v Libya* is one of the cases on the death penalty that was handed down by the African Court. This matter concerned the trial of the son

⁴¹⁴ Ratification Table: Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, available at <http://www.achpr.org/instruments/court-establishment/ratification/> (accessed on 17 February 2018).

⁴¹⁵ Rules of procedure of the African Commission on Human and People's, available at [rights://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf](https://www.achpr.org/files/instruments/rules-of-procedure-2010/rules_of_procedure_2010_en.pdf) (accessed on 18 November 2018).

Gaddafi's son over crimes he allegedly committed while his father was Libya's President. The crimes included murder, and he was sentenced to death in Libya in his absence. The victim faced a pending trial, which carried with it the threat of the death penalty. This followed a period of arbitrary detention and interrogations which were carried out in the absence of a legal representative. In this case, it was alleged that Libya contravened articles 6 and 7 of the African Charter. The African Court found that indeed, Libya violated the stated articles of the African Charter. The country was, therefore, ordered to protect the rights of Gadhafi as stated in the African Charter. The African Court may be used to interpret some of the death penalty cases of this manner in Zimbabwe, and thereby bringing justice to the accused.

4.3.2 The opportunities in the African Commission on Human and Peoples' Rights

The African Commission promotes and protects human rights in the member states of the AU, which have ratified the African Charter. Article 45 of the African Charter contains the mandates of the African Commission which are as follows,

The functions of the Commission shall be:

1. To promote the human and peoples' rights and in particular: to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with the human and peoples' rights and, should the case arise, give its views or make recommendations to Governments.
2. To formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislation.
3. Cooperate with other African and international institutions concerned with the promotion and protection of human and peoples' rights.
2. Ensure the protection of human and peoples' rights under conditions laid down by the present Charter.
3. Interpret all the provisions of the present Charter at the request of a State Party, an institution of the OAU or an African Organisation recognised by the OAU.
4. Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.⁴¹⁶

As stated above, the African Commission is tasked with four basic functions, which include the promotion and protection of human and peoples' rights, the interpretation of the African Charter provisions and the performance of any other duties, which might be assigned to it by the AU Assembly.

4.3.2.1 Opportunities in the promotional mandate of the African Commission

Article 45 (1) provides for the promotional mandate. To address the death penalty situation in Zimbabwe, the African Commission is obliged to promote human and peoples' rights in Zimbabwe by distributing documents that promotes the abolition of the death penalty there. In addition, the African Commission must pursue strategies that include the following, having a continued engagement with Zimbabwe on the need for the abolition of the death penalty.

⁴¹⁶ African Charter (note 43 above) Article 45.

These commitments must be done through the African Commission's resolutions, the examination of Zimbabwe's state reports, promotional activities, special mechanisms and communication procedures.

The African Commission must undertake to raise the awareness in Zimbabwe on activities intended to elicit the continued support of the death penalty. Furthermore, in addressing the issue of the death penalty in Zimbabwe, the African Commission must adopt human rights education programmes. These programmes must include the adoption of a media strategy, which will create public awareness of the necessity to abolish the death penalty. These strategies must include pressurising decision makers, the establishment of national human rights coalitions, petitions for the abolition of the death penalty and campaigns.

As stated above, politics play a major role in the death penalty. The African Commission must urge the state of Zimbabwe to display stronger political determination towards the abolition of the death penalty. The strategies to be developed to enhance public awareness shall include, *inter alia*, advocacy.

In addition, the African Commission must bring on board different constituencies as part of the debates concerning the death penalty issues in Zimbabwe. These must include the following, parliamentarians, Judges, Lawyers, National Human Rights Institutions, Civil Society Organisations, Religious Leaders, Regional Economic Communities, traditional leaders, NGOs, Student Unions, Trade Unions, Professional Associations, media, Academic Institutions, and other stakeholders. Parliamentarians must be brought on board in that they are the lawmakers. For that reason, they will know whether there is a need for the amendment of the legislation. Judges are the interpreters of the law, for that reason, they hold before them different cases, of which their input would help in the debate. As representatives of the accused, the participation of the lawyers in the debate would help enhance their legal skills, especially when handling death penalty matters. All these other constituencies should be involved in the debate because they come from different spheres and for that reason, this would help in that they would have different views and experiences regarding the death penalty.

In addition, attending to the death penalty issue in Zimbabwe, the African Commission must encourage the country (as a member of the AU) to ratify the human rights instruments that prohibit the death penalty, especially the ICCPR-OPT 2 on the abolition of the death penalty, and the ACHPR-OP on the abolition of the death penalty in Africa, aimed at the total abolition of this sentence. This would encourage Zimbabwe to harmonise its legislation accordingly.

Furthermore, the African Commission must address Zimbabwe's death penalty issues by advising the country to impose a moratorium on sentencing to death and encourage the state to commute all the death sentences to life imprisonment. Additionally, the African Commission must encourage Zimbabwe to refrain from resuming the executions once it has imposed a moratorium on the death sentence. By so doing, this would encourage the country to do away with the death penalty. Additionally, the African Commission must organise seminars and circulate more information on the implication of the death penalty in Zimbabwe, as this would inspire the Zimbabwe national human rights institutions to follow its ways. Additionally, as part of its promotional mandate, the African Commission must articulate principles and rules in which Zimbabwe can base its legislation when enacting its laws. In a way of promoting human and people rights, the African Commission developed other mechanisms such as the working groups and special reporters.

In terms of the African Charter, it is necessary that states submit reports to the African Commission. This is a mechanism which ensures that there is an implementation of the rights in the African Charter. This reporting is considered as a dialogue in which the African Commission and the state concerned exchange their views. The African Commission publishes the report prior to the session to give the civil society an opportunity to comment on the state's report.

It is important to note that state reporting is also part of the promotional mandate of the commission in terms of Article 62 of the African Charter. This measure helps in identifying challenges that hinder the realisation of the rights in the African Charter. The state reporting mechanism requires that, a state submits an initial and a periodic report. The initial report is submitted after a state has ratified or accented to the Charter, while a periodic report is submitted every two years after the previous one. This process can be useful in addressing the death penalty situation in Zimbabwe, in that it would monitor the human rights violation.

4.3.2.2 The opportunities in the protective mandate of the African Commission

The protective mandate of the African Commission has been specified in Article 45 (2) of the African Charter. The African Commission is mandated to ensure that the human and people's rights are protected under the conditions laid down by the African Charter. Two basic areas of the protective mandate have been identified by the African Commission. These comprise of the examination of the complaints or communications, which has been further divided into State and other communications. In terms of the African Charter, two main categories of communications have been identified, namely the communications from

member states in terms of Articles 47 - 54 and other communications in terms of Articles 55 - 59.

Under Article 47 of the African Charter, any member state that has good reasons to believe that Zimbabwe is violating other rights by its application of section 48 (2) (d) may communicate to Zimbabwe and to the African Commission or AU Chairperson about such violation. This would help Zimbabwe to uphold its obligation on both the international and regional levels, thereby protecting its citizens against the violation of their rights.

4.3.2.3 Domestic opportunities available for convicts sentenced to the death penalty

There are many remedies which are available to convicts sentenced to death. Prisoners sentenced to death have a remedy of appealing directly to a higher court. This transpires shortly after the trial. The highest criminal court reviews the defendant's sentence and establishes whether the relief can be granted or not. At this stage, the decision of the Judge may be challenged. The Appeal may be declined or may be reviewed and be upheld. Any decision made at the highest court will be the final decision.⁴¹⁷

Also, the convicted may rely on post -conviction proceedings.⁴¹⁸ For this remedy, the convicted has an option of challenging the Constitutionality of the judgment by referring to the series of petitions made to the state concerning the death penalty. The petition comes after the conviction becomes final. The earliest case reported on the death penalty was the case of *s v Maxwell Bowa*,⁴¹⁹ in the High Court of Zimbabwe. The accused was convicted of intentionally killing a suspected poacher and subsequently sentenced to death by hanging but escaped the hangman's noose due to the massive signing of a petition against his death. At this stage, the convicted may challenge the ineffectiveness of the counsel who was handling his or her matter. The convicted may state that the legal representative handling his or her matter was not qualified enough if the representative was state given. Moreover, the misconduct of the prosecutor may be challenged too.

Additionally, the convicted may rely on the clemency of the executive.⁴²⁰ If the convicted was denied judicial relief, he or she may apply for mercy through the executive branch. The executive reviews the defendant's sentence. A death sentence may be reduced to life sentence. In some circumstances, the convicted may be pardoned from the death sentence by the decision made by the executive.

⁴¹⁷Remedies for the death penalty, available at <https://capitalpunishmentincontext.org/issues/remedies> (accessed 12 December 2017).

⁴¹⁸ Remedies for the death penalty (note 397 above).

⁴¹⁹ *S v Bowa* case no CRB (HC) 140/13.1

⁴²⁰ Remedies for the death penalty (note 397).

4.6 Conclusion

The Chapter focused on the UNHRS, African human Rights Systems and domestic opportunities which may help in addressing the death penalty issue in Zimbabwe. In the international level the study noted that there are many opportunities that may be used in addressing the death penalty which include approaching the HRC, OHCHR, independent experts to lodge a complaint and the complaint procedure. Furthermore, it noted in the regional level that the African Commission, as part of its promotional mandate, must raise the awareness in Zimbabwe of the implications of the application of the death penalty there. It found out that the convicts may rely on appeals and the presidential clemency, among others. The next Chapter focuses on the conclusions and the recommendations. The Chapter concludes this study. It also provides the recommendations in the context of Zimbabwe moving forward with its death penalty.

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

The preceding Chapter focused on the United Nations Human Rights System (UNHRS), African human Rights Systems (AHRs) and domestic opportunities to address the application of the death penalty in Zimbabwe. The chapter noted that persons sentenced to death can benefit from international, regional human rights systems and domestic opportunities. In the process the Chapter answered on the question seeking mechanisms that the death penalty convicts can rely on to invalidate or prevent the implementation of the death penalty. Finally, this Chapter provides conclusions and recommendations for future considerations.

In the first Chapter, the study traced the historical background of the death penalty in Zimbabwe and its post-colonial applications. It established that Zimbabwe inherited the use of the death penalty from its colonisers. Moreover, it noted that when Zimbabwe became independent in 1980 the death penalty still formed part of the Lancaster House Constitution of 1979. However even after being amended and being re-enacted the death penalty is still part of the Zimbabwean Constitution and laws.

In Chapter Two, the study examined the international human rights instruments in the light of the abolitionist and anti- abolitionist debates. It established that there are many rights that are violated due to the application of the death penalty as provided in section 48 (2) (d) of the Zimbabwe Constitution. It further outlined those violated rights. These include the right to life, the right to human dignity, the right not to be treated in a cruel, inhuman and degrading manner, the right to equality and non- discrimination and the right to a fair trial. In the same vein, the debates by the abolitionist and the anti- abolitionist were examined. The Chapter noted that the anti-abolitionists favour the abolition of the death penalty, both in practice and in law. On the other hand, the abolitionists argue that the death penalty is a violation of international and regional human rights law and call on states that have not yet abolished the death penalty to end its practice. The anti-abolitionists contend that the death penalty is not a violation of the human rights, but it is an appropriate punishment for murderers. They argue that justice can only be restored where the death penalty has been applied. Investigating whether the death penalty debates offered by both the anti-abolitionist and the abolitionist can be reconciled with international human rights law, the study found out that only those by the anti-abolitionist cannot be reconciled with international laws. In conclusion to this, it may be stated that any debate that is against international human rights law cannot be allowed.

It is against this background that the study progressed to its main purpose in Chapter three. That is, to determine the human rights implications of the application of the death penalty in Zimbabwe. The study examined the human rights implications of the application of the death penalty in Zimbabwe. The right to life, human dignity, equality, freedom from torture and fair trial were examined. The death row, coupled with bad living conditions in Zimbabwe's prisons, constitutes a violation of the right not to be treated in an inhuman and degrading manner. The unreasonable delay in imposing the death penalty and the inadequate time to prepare for trials violates the right to a fair trial and equality. The study found out that the implication of the application of section 48 (2) (d) of the Zimbabwe Constitution is that it amounts to a violation of human rights that are being protected under both the international and regional instruments. It was noted that the application of the death penalty in Zimbabwe is a violation of the Constitution of Zimbabwe, which protects the fundamental rights of individuals. It was also established that the implication of the death penalty is that, it is an infringement of the state of Zimbabwe on its failure to uphold its obligation in which it sets itself by signing certain international instruments. In conclusion, the application of the death penalty is a violation of national, regional and international human rights. Thus, by establishing the above, the research question on what the human rights implications of the application of the death penalty, was answered.

Chapter Three scrutinised the status of the human rights treaties in Zimbabwe. The study established that Zimbabwe is a party to the ICCPR and the African Charter. The country follows a dualistic approach on the domestication of the international treaties. With the dualistic approach, there is no direct application of international laws into the domestic laws of Zimbabwe upon ratification of a treaty. Section 327 (2) of the Zimbabwean Constitution states that international laws must be first legislated by the Parliament into local laws for them to be recognised in Zimbabwe. This means that Zimbabwe cannot be bound by any international laws unless they are first legislated into the local laws by its Parliament. Furthermore, it was established that Zimbabwe is part of the international customary law, which include the UDHR. This means that the country is bound by the obligations imposed by the UDHR. The same Chapter dissected Zimbabwe's both regional and international obligations in as far as the death penalty is concerned. The study established that Zimbabwe has an obligation to protect, promote and fulfil the human rights under the international human rights law. Also, this obligation has been set in terms of the instruments in which it signed to.

The study answered the research question on whether section 48 (2) (d) of the Zimbabwe Constitution is compatible with the country's obligations under the international law. The study established that the death penalty section in Zimbabwe's Constitution is incompatible

with the state's obligations under the international law. As stated above, Zimbabwe has an international obligation to protect human rights.

The same chapter answered the research question on the human rights implication of the application of the death penalty in Zimbabwe. It established that the death penalty is a serious violation of the rights which include the right to life, equality, freedom from torture, human dignity and the right to a fair trial.

Chapter four of the study focused on the United Nations Human Rights System (UNHRS), African human Rights Systems (AHRs) and domestic opportunities to address the application of the death penalty in Zimbabwe. The study noted that there are mechanisms that persons sentenced to death can explore to invalidate or prevent the implementation of the death penalty. Under the UNHRS, the mechanisms fall under these bodies: United Nations Office of the High Commissioner for Human Rights (UNOHCHR), United Nations Human Rights Council (UNHRC), Special Procedures of the Human Rights Council, the Human Rights Treaty Bodies and the complaint procedure. In addressing the death penalty issue on the UNHRS affected persons in Zimbabwe may rely on the OHCHR the main office or body of the UN concerned with protecting and promoting the enjoyment of human rights of everyone. Moreover, there is the HRC which is highest intergovernmental body within the UN. This body monitors human rights situations. Again there is the Special Procedures of the Human Rights Council which is made up of experts and working groups operating in certain countries, addressing on special themes related to the abuse of human rights. Furthermore, there are committees which are established to ensure the implementation and observance of the core international treaties. Moreover, there is the complaint procedure mechanism which aims at addressing attested gross violation of human rights. All these are the international mechanisms that can be used to address the death penalty issue by lodging complaints to the bodies.

The chapter also provided the opportunities that can be utilised at regional level to address the death penalty issue in Zimbabwe. It was stated that the African Human Rights System adopted a protocol to the African Charter, which aims at the total abolition of the death penalty. This would help address the death penalty issue in Zimbabwe, if the country agrees to be bound by the protocols. Another potential is through the African Court, where matters concerning the death penalty may be referred to this Court for a final decision. It was established that another potential lay with the African Commission, through the practice of its promotional and protective mandates. In the International system the study found out that a grievous party may lodge a complaint to the HRC about the violation of human rights, there it noted that the death penalty issue in Zimbabwe may be addressed through such mechanism.

In the domestic sphere the convicted may rely on appeals, post-conviction proceedings among other mechanisms. This Chapter answered the research question on, what are the opportunities in the African human rights system, UNHRS and domestic system which address the application of the death penalty in Zimbabwe. The following section provides the specific recommendations to Zimbabwe.

5.2 Specific Recommendations

Based on the above findings, it is recommended that Zimbabwe immediately amend its domestic legislation, which provides for the death penalty. These legislations include the Zimbabwe Criminal Law (Codification and Reform Act), Criminal Procedure and the Evidence Act and Genocide Act. These laws must be amended by removing clauses that favour the death penalty.

The death penalty, therefore, must be abolished both in law and in practice in the national legislation for all crimes. This must be done, for Zimbabwe is a member state of the ICCPR and the African Charter. This will ensure the protection and promotion of human rights, both on paper and in practice. The Constitution of Zimbabwe must be amended in section 48 (2) (d), where the death penalty is substituted with life imprisonment. To that end, all prisoners who were sentenced to death must have their sentences commuted to life imprisonment. Additionally, the Constitution must be amended to empower the Courts to refer to international law. This amendment should be implemented, especially on international human rights treaties to which Zimbabwe is a party.

The study also recommends that Zimbabwe promotes gender balance in its criminal and justice system. This must be done through the exclusion of all categories of people from capital punishment. Thus, the study recommends that the death penalty must be abolished for both male and female offenders in Zimbabwe.

The study further recommends that the Justice Ministry creates a watchdog committee that will make certain that human rights are not violated, for example, the treatment of prisoners on death row. The creation of a watchdog committee will ensure that prisoners on death row are treated with dignity. In this regard, the study recommends that the human rights activists and non- governmental organisations be allowed to tour Zimbabwe's prisons where there are death row prisoners to ascertain whether the prisoners are treated with dignity or not. Also, the government should provide quality legal representation, well trained on human rights laws at both international and regional levels.

The study also recommends that Zimbabwe emulates countries that have abolished the death penalty both in law and in practice. These countries include the Republic of South Africa, where the Constitutional Court abolished the death penalty in the *Makwanyane* case.

Another country that Zimbabwe must emulate is Namibia. Article 6 of the Namibian Constitution (Act No. 8 of 2014) states that, 'the right to life shall be respected and protected'. It clearly asserts that 'no Court or Tribunal shall have the power to impose a death sentence to any person'. This clearly shows that the country of Namibia shall not have any executions.

Above all, the government of Zimbabwe is urged to ratify without any reservation, the ICCPR-OPT -2, aiming at the abolition of the death penalty. This is a necessary step towards the abolition of the death penalty here. As discussed above, the government of Zimbabwe is obliged to sign the above instruments in line with the global trend on the abolition of the death penalty. Finally, the study recommends that Zimbabwe ratifies the ACHPR-OP, which aims at the total abolition of the death penalty in Africa. By signing these instruments, the government of Zimbabwe would have achieved its goal of protecting both the international and regional human rights of the murderers facing the death penalty.

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