

**IN THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS**  
**REQUEST FOR ADVISORY OPINION NO. \_\_\_\_\_ OF 2024**

**AMICUS CURIAE**

**BY**

**THE ADVOCATES FOR HUMAN RIGHTS (TAHR)**

**AND**

**THE WORLD COALITION AGAINST THE DEATH PENALTY**

**IN THE MATTER OF A REQUEST FOR AN ADVISORY OPINION ON THE  
COMPATIBILITY OF THE DEATH PENALTY WITH THE AFRICAN  
CHARTER ON HUMAN AND PEOPLES' RIGHTS AND OTHER HUMAN  
RIGHTS INSTRUMENTS APPLICABLE IN AFRICA**

**(Made under Article 4 of the Protocol to the African Charter on Human  
and Peoples' Rights on the Establishment of the African Court on  
Human and Peoples' Rights and Rule 68 of the Rules of the African  
Court on Human and Peoples' Rights)**

**[++] FEBRUARY 2025**

## I. STATEMENT OF INTEREST OF THE AMICUS

1. The *amici curiae* are non-governmental organizations committed to the impartial promotion and protection of international human rights standards and the rule of law and, in particular, to the abolition of the scourge on human life and dignity that is represented by capital punishment. As advocates for these foundational rights, we have both an interest in the outcome of this Advisory Opinion and specialized expertise in the questions of law before the African Court on Human and Peoples' Rights (the "**Court**"). We respectfully submit this brief on the question of whether the death penalty is *per se* an arbitrary deprivation of life, in violation of Article 4 of the African Charter on Human and Peoples' Rights (the "**African Charter**") and other international legal instruments. Specifically, the *amici* seek to bring our experience and expertise to bear on the myth that the death penalty deters the commission of serious crimes. We respectfully submit that there is a dearth of credible evidence that the death penalty achieves any measurable success in crime prevention<sup>1</sup> and provide evidence that other measures, which do not impinge on the right to life, provide equal or greater deterrent effects.<sup>2</sup> The *amici* urge this Court to take the final step in an overwhelming trend away from imposing the death penalty across the African Continent<sup>3</sup> and rule that the death penalty violates the right to life, and that provisions of law persisting in some Member States of the African Union that permit the use of capital punishment must be struck down.<sup>4</sup>

2. The *amici* are as follows: The Advocates for Human Rights and the World Coalition against the Death Penalty.<sup>5</sup>

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<sup>1</sup> See, *infra*, § IV.E (1).

<sup>2</sup> See, *infra*, § IV. E (2).

<sup>3</sup> See, *infra*, ¶¶ 10, 22.

<sup>4</sup> See, *infra*, § V.

<sup>5</sup> Please see Annex 1 for additional information about the *amici*.

## II. SUMMARY OF ARGUMENT

3. Article 4 of the Charter provides unique protections for the right to life, and unlike other similar international legal instruments,<sup>6</sup> contains no explicit exception for the death penalty. Nevertheless, retentionist States continue to impose the death penalty based on the false assumption that it deters serious crimes. This assumption is unsubstantiated by credible evidence. Outdated studies which purport to support the premise that the death penalty curbs crime are methodologically unsound. A comparative analysis of abolitionist and retentionist jurisdictions demonstrates that there is no credibly measurable difference in the occurrence of violent crime. Some jurisdictions have seen a reduction in crime following the abolition of capital punishment.

4. Capital punishment is proven to have a disproportionate impact on economically vulnerable and marginalized communities and cannot provide a broad deterrent to crime where it is applied in such a manner. Separate from its discriminatory application, it is established in modern international human rights jurisprudence that the death penalty violates numerous other human rights—in particular, the prohibitions against torture and cruel, inhuman, or degrading treatment.

5. The overwhelming global consensus among scholars of capital punishment is that alternative policies that increase the certainty rather than the severity of punishment are equally or more effective than the death penalty at achieving the same objective of crime reduction. For example, policies which enhance law enforcement capabilities to investigate criminal conduct and apprehend and prosecute perpetrators have a greater deterrent effect on crime. Such alternative policies do not impinge on the right to life.

6. For these and other reasons addressed in the principal Request for an Advisory Opinion of the Court, international human rights jurisprudence has held that the death penalty must be abolished. The *amici* respectfully submit that the African

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<sup>6</sup> See, e.g., International Covenant on Civil and Political Rights (“**ICCPR**”), Art. 6(2) (expressly permitting the death penalty subject to a number of restrictions).

Court should arrive at the same conclusion. Such a finding accords with the position of the African Commission on Human and Peoples' Rights ("**African Commission**") and with the trend among the majority of African States which have abolished the death penalty in law or in practice.

7. In this submission, the *amici* explain that the death penalty *per se* entails an arbitrary deprivation of life, in violation of Article 4 of the African Charter, because the weight of the evidence shows that the death penalty is not necessary to achieve the stated purpose of reducing crime is disproportionate to the benefits it seeks to capture.

### **III. RELEVANT LAWS**

8. This section compiles the relevant Laws for the questions addressed in this brief. **Subsection A** discusses the status of the death penalty in African States. Further, **Subsection B** lists the relevant provisions in the African Charter on Human and Peoples' Rights that are addressed in this brief. **Subsection C** enumerates international law standards germane to the analysis of the death penalty.

#### **A. National Laws**

9. Six African States have retained legal provisions for the imposition of capital punishment and have carried out executions within the past ten years: Botswana, Egypt, Nigeria, Somalia, South Sudan, and Sudan.<sup>7</sup>

10. Twenty-five African States observe a moratorium on capital punishment, either expressly or in practice (such that executions have not been carried out within the past ten years): Algeria, Burkina Faso, Cameroon, Comoros, Democratic Republic of the Congo, Eritrea, Eswatini, Ethiopia, Equatorial Guinea, Gambia, Ghana, Kenya, Lesotho, Liberia, Libya, Malawi, Mali, Mauritania, Morocco, Niger, Tanzania, Tunisia, Uganda, Western Sahara, and Zimbabwe.<sup>8</sup> Of these countries, Burkina Faso,

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<sup>7</sup> See Cornell Center on the Death Penalty Worldwide *available at* <https://deathpenaltyworldwide.org/>.

<sup>8</sup> See Cornell Center on the Death Penalty Worldwide *available at* <https://deathpenaltyworldwide.org/>.

Equatorial Guinea, and Ghana have abolished the death penalty for ordinary crimes, but capital punishment remains available in law for certain military offenses, extraordinary crimes in times of war, or for high treason.<sup>9</sup>

11. A list of the abolitionist *de facto*, abolitionist *de jure*, and retentionist African States has been produced as Annex A of the Request for an Advisory Opinion.

### ***B. African Charter on Human and Peoples' Rights (1984)***

12. The Organisation of African Unity unanimously approved the African Charter on Human and Peoples' Rights (as known as the Banjul Charter) in June 1981, and the African Charter subsequently entered into effect on 21 October 1986 (*i.e.*, "African Human Rights Day"). The African Charter states in relevant part:

Art. 1. The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.

Art. 4. Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

Art. 26. States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

Art. 27(2). The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.

### ***C. International Law***<sup>10</sup>

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<sup>9</sup> See Parliamentarians for Global Action, *Burkina Faso and the Death Penalty*, <https://www.pgaction.org/ilhr/adp/bfa.html> (last visited 22 October 2024); Amnesty International, *Equatorial Guinea*, <https://www.amnesty.org/en/location/africa/west-and-central-africa/equatorial-guinea/> (last visited 22 October 2024); Parliamentarians for Global Action, *Ghana and the Death Penalty*, <https://www.pgaction.org/ilhr/adp/gha.html> (last visited 22 October 2024).

<sup>10</sup> The provisions of international human rights treaties are relevant not only because African States are signatories thereto, but also because Article 60 of the African Charter provides that, in interpreting the Charter, guidance should be sought from international law on human and

13. The International Covenant on Civil and Political Rights (“**ICCPR**” or the “**Covenant**”), was adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966 and entered into force on March 23, 1976. The Covenant states in part:

Art. 6. (1). 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.

(2). In countries which have not abolished the death penalty, 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.

(3). When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

(4). 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.

(5). Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

(6). 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.

14. The Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty was adopted by General Assembly Resolution 44/128 of December 15, 1989, and entered into force on July 11, 1991. The Protocol states in part:

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peoples’ rights (Charter, Art. 60). The Court should consider these analogous provisions as they offer context for the interpretation of Article 4 of the African Charter and express the intention that abolition of the death penalty should be the ultimate goal under international law on human and peoples’ rights.

## Article 1

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

## IV. ARGUMENT

15. This section explains why the death penalty is incompatible with the right to life and other rights protected under the African Charter. It debunks the unfounded belief that the death penalty deters crime—a notion that has never been proven and is used by proponents to justify capital punishment.

16. **Subsection A** outlines the fundamental role of the right to life under the African Charter. **Subsection B** reviews the African Court of Human and Peoples' Rights' jurisprudence on the death penalty. **Subsection C** details the criteria the Court should use to assess the compatibility of the death penalty with the right to life, requiring the death penalty to serve a legitimate public interest, be absolutely necessary, and be proportionate to its benefits.

17. **Subsection D** explains that lawmakers seek to justify the death penalty as serving the public interest of crime deterrence. **Subsection E** provides evidence that the death penalty is unnecessary for deterring crime, showing no concrete deterrent effect compared to less severe punishments. Finally, **Subsection F** highlights the disproportionate impact of the death penalty on other protected human rights and vulnerable groups, rendering it incompatible with the right to life under the African Charter.

### ***A. Article 4 of the African Charter Is the Fulcrum of all other Rights***

18. Article 4 of the African Charter codifies the right to life and the inviolability of human beings:

Article 4. "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

19. The African Court on Human and Peoples' Rights held in *African Commission on Human and Peoples' Rights v. Kenya* that "[t]he right to life is the cornerstone on which the realisation of all other rights and freedoms depend. The deprivation of someone's life amounts to eliminating the very holder of these rights and freedoms."<sup>11</sup> The Court further distinguished the African Charter from other international human rights instruments as inextricably linking the right to life and "the inviolable nature and integrity of the human being."<sup>12</sup> The African Commission on Human and Peoples' Rights similarly explained in its General Comment 3 to Article 4 of the African Charter that the right to life is "a foundational right" without which "other rights cannot be implemented."<sup>13</sup> This right is the "fulcrum of all other rights" and, accordingly, is "non-derogable."<sup>14</sup> The obligation to protect this right is therefore an affirmative one on all Member States,<sup>15</sup> which "should not be interpreted narrowly."<sup>16</sup>

***B. The Court Has Yet to Contemplate the Arbitrariness of the Death Penalty Per Se***

20. Unlike other international human rights instruments,<sup>17</sup> the right to life under the African Charter contains no express exception for the death penalty. Justification for the death penalty in African States hinges on the limiting clause in

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<sup>11</sup> *African Commission on Human and Peoples' Rights v Kenya* (merits) (2017) 2 AfCLR 9, ¶ 152. See also *Mugesera v Rwanda* (judgment) (2020) 4 AfCLR 834, ¶ 102.

<sup>12</sup> *Ibid.* See also *Ajavon v Benin* (judgment) (2020) 4 AfCLR 133, ¶¶ 163, 166 (this article, read together with Article 5, relates to "the integrity of human beings" and enshrines "the protection of the principle of life").

<sup>13</sup> General Comment No. 3, African Charter on Human and Peoples' Rights, The Right To Life (Article 4), Preamble.

<sup>14</sup> *Ibid.*, ¶ 1.

<sup>15</sup> General Comment No. 3, African Charter on Human and Peoples' Rights, The Right To Life (Article 4), ¶ 2. See also *ibid.*, ¶ 7 ("States have a responsibility under the Charter to develop and implement a legal and practical framework to respect, protect, promote and fulfil the right to life... States are responsible for violations of this right by all their organs (executive, legislative and judicial), and other public or governmental authorities, at all levels (national, regional or local).").

<sup>16</sup> General Comment No. 3, African Charter on Human and Peoples' Rights, The Right To Life (Article 4), ¶ 6.

<sup>17</sup> See, e.g., International Covenant on Civil and Political Rights ("ICCPR"), Art. 6(2) (expressly permitting the death penalty subject to a number of restrictions).



Article 4: “[n]o one may be arbitrarily deprived of this right,”<sup>18</sup> which implies that a non-arbitrary deprivation of life is permissible.

21. The African Court has not contemplated whether the death penalty *per se* arbitrarily deprives a person of the right to life.<sup>19</sup> It came close in *Rajabu and others v. Tanzania*, where the Court held that laws that stipulate the death penalty as the mandatory sentence for people convicted of certain crimes violate the arbitrariness clause in Article 4.<sup>20</sup> In so finding, the Court noted that the only basis for permitting the death penalty is “implied[]” in the Article’s limiting clause and, in its view, “such strongly worded provision for the right to life outweighs the limitation clause.”<sup>21</sup> From this decision it may be construed that deprivation of life by the State—by way of the death penalty, for example—must meet a high bar to be permissible under Article 4.

22. The Court stopped short of ruling that the death penalty *per se* was arbitrary under Article 4 because the applicants in *Rajabu and others v. Tanzania* had circumscribed their application to the compulsory imposition of the death penalty. In a Separate Opinion, Honorable Justice Tchikaya criticized the majority for not *sua*

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<sup>18</sup> African Charter on Human and Peoples’ Rights, Art. 4 (emphasis added).

<sup>19</sup> The Court has noted that in an early line of cases before the African Commission, the Commission articulated a standard for determining whether the death penalty has been arbitrarily imposed by the State. *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, ¶¶ 99-104, citing, *inter alia*, *Interights and others (on behalf of Bosch) v Botswana*, Communication 240/2001 (2004) ¶¶ 42-48; *International Pen and others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), ¶¶ 1-10, 103; *Forum of Conscience v Sierra Leone*, Communication 223/98 (2000) 293 (ACHPR 2000), ¶ 20. Notably, the Commission has more recently determined that “[i]nternational law requires those States that have not yet abolished the death penalty to take steps toward its abolition.” See General Comment No. 3, African Charter on Human and Peoples’ Rights, The Right To Life (Article 4), ¶ 22.

<sup>20</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, ¶ 109 (holding that the mandatory imposition of the death penalty is inherently arbitrary as it would “deprive[] [the Court] of the discretion, which must inhere in every independent tribunal to consider both the facts and the applicability of the law, especially how proportionality should apply between the facts and the penalty to be imposed.”). The African Court affirmed this decision in *Juma v Tanzania* (judgment) (2021) 5 AfCLR 431, ¶¶ 123-131, and in *Lazaro v. Tanzania* (judgment) (2023) AfCHPR 35 (7 November 2023), ¶¶ 83-84.

<sup>21</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, ¶ 112 (emphasis added).

*sponte* addressing the death penalty more broadly,<sup>22</sup> noting that jurisprudence under international human rights law had evolved toward an international prohibition against the death sentence *per se*.<sup>23</sup> He further highlighted that the majority of African States have now abolished the death penalty or observe a moratorium on its use.<sup>24</sup>

23. Justice Tchikaya opined that the majority ruling revealed the “emptiness of the distinction between the death penalty and the so-called compulsory sentence.”<sup>25</sup> He explained that the same considerations that render the mandatory death penalty “arbitrary” plague the death penalty more broadly.<sup>26</sup> Specifically, he noted that the death penalty “fundamentally and manifestly” violates the right to life; it violates other human rights; it imposes a “superfluous punishment” where an individual is already given a life sentence of imprisonment; it is unnecessary because “[i]t is observed...that

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<sup>22</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, Separate Opinion of Hon. Justice Tchikaya, ¶ 25.

<sup>23</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, Separate Opinion of Hon. Justice Tchikaya, ¶ 9 (the death penalty “is not compatible with the requirements of international human rights law.”). See also *Rutechura v Tanzania* (judgment) (2021) 5 AfCLR 7, Separate Opinion of Hon. Justice Tchikaya, ¶ 1 (“International human rights law, through its most advanced jurisprudence, has already derived from the prohibition of torture, cruel, inhuman or degrading treatment or punishment[,] the international prohibition of the death sentence. The question of the legal basis for this prohibition no longer arises.”).

Hon. Justice Tchikaya further emphasized that the international prohibition against the death sentence has been long underway, since the adoption of the ICCPR, which restricted the application of the death penalty. ICCPR, Arts. 6(2), 6(4), 6(5). Moreover, the more recent adoption of the Second Protocol to the ICCPR requires each State Party to “take all necessary measures to abolish the death penalty within its jurisdiction” (UNGA Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty, Resolution 44/128 of 15 December 1989). The Justice also referred to the European system’s prohibition on the death penalty (Art. 1, Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, Vilnius, 3 May 2002).

<sup>24</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, Separate Opinion of Hon. Justice Tchikaya, ¶¶ 17-20 (explaining that the movement away from the death penalty under international law is reflected by the same trend in Africa, in which “nearly forty countries are abolitionist in law or in practice.”).

<sup>25</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, Separate Opinion of Hon. Justice Tchikaya, § I.

<sup>26</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, Separate Opinion of Hon. Justice Tchikaya, ¶¶ 10-11 (“what is condemned in the death penalty [generally] is found *mutatis mutandis* in the mandatory death penalty” and “the death penalty...constitutes an arbitrary deprivation of life”).

most lifers... do not reoffend”; and the premise that the death penalty will deter potential criminals is undercut “by the fact that most crimes [for which the death sentence is imposed] are crimes of passion or spontaneous acts.”<sup>27</sup>

24. In another case considering the compulsory death sentence, *Lazaro v. Tanzania*, Justice Ntsebeza issued a similar Dissenting Opinion, opining that “capital punishment, in and of itself, is a violation of Article 5 [of the African Charter<sup>28</sup>] inasmuch as it is a cruel, inhumane, degrading and torturous punishment.”<sup>29</sup> On this basis, Justice Ntsebeza concluded that the Court “should have gone a step further” to pronounce that the death penalty “should be struck from the domestic legislations as a punishment,”<sup>30</sup> and that any conclusion by the Court that upholds the death penalty is “unconscionable.”<sup>31</sup> Accordingly, Justice Ntsebeza has dissented in numerous recent cases before the Court which involved the death penalty, explaining that the death penalty inherently violates the African Charter as “it is an inherently cruel, degrading, and inhuman treatment or punishment”; “[i]t is irreversible and has a potential for error”; “[i]t has no demonstrable deterrent effect”; and “[i]ts discriminatory application undermines the fundamental principles of human dignity, justice, and equality.”<sup>32</sup>

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<sup>27</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, Separate Opinion of Hon. Justice Tchikaya, ¶ 20; *Rutechura v Tanzania* (judgment) (2021) 5 AfCLR 7, Separate Opinion of Hon. Justice Tchikaya, ¶ 47.

<sup>28</sup> African Charter, Art. 5 (“Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”).

<sup>29</sup> *Lazaro v. Tanzania* (judgment) (2023) AfCHPR 35 (7 November 2023), Dissenting Opinion of Hon. Justice Ntsebeza, ¶ 4.

<sup>30</sup> *Id.*, ¶ 5.

<sup>31</sup> *Id.*, ¶ 8.

<sup>32</sup> *Crospery Gabriel and Another v. Tanzania* (judgment) (2024), Application No. 050/2016 (13 February 2024), Dissenting Opinion of Hon. Justice Ntsebeza. See also similar dissenting opinions in *Mulokozi Anatory v. Tanzania* (judgment on merits and reparations) (2023), Application No. 057/2016 (5 September 2023), Dissenting Opinion of Hon. Justice Ntsebeza; *Chrissant John v. Tanzania* (judgment) (2023), Application No. 049/2016 (7 November 2023), Dissenting Opinion of Hon. Justice Ntsebeza; *Kachukura Nshekanabo Kakobeka v. Tanzania* (judgment) (2023), Application No. 029/2016 (4 December 2023), Dissenting Opinion of Hon. Justice Ntsebeza.

25. While the Court may not as yet have had occasion to contemplate whether the death sentence is arbitrary *per se*, these arguments are all relevant to the Court's consideration of the instant Request for an Advisory Opinion.

***C. The Death Penalty Should Be Considered "Arbitrary" Because it is Unnecessary to Achieve the Legitimate State Purpose of Deterrence and Disproportionate to the Benefits it Seeks to Capture through Deterrence***

26. The African Charter does not define what is meant by the "arbitrary" deprivation of the right to life. However, the African Commission explains that "arbitrariness" in this context must be interpreted with reference to considerations of "appropriateness, justice, predictability, reasonableness, necessity and proportionality."<sup>33</sup> The Court in *Onyachi and Njoka v. Tanzania* similarly held that "the notion of arbitrariness" in the context of restrictions on the right to physical liberty is to be assessed based on considerations of justice, necessity, and proportionality.<sup>34</sup>

27. The Court regularly assesses whether the African Charter permits a deprivation or restriction of a protected right by reference to these same principles of necessity and proportionality.<sup>35</sup> Specifically, for the restriction of a protected right to

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It is notable that on 6 July 2023, the Committee on Constitutional, Legal and Parliamentary Affairs of Ghana issued a report in the Third Session of the Eighth Parliament of the Fourth Republic of Ghana on the Armed Forces (Amendment) Bill, 2022, recommending the abolition of the death penalty in military tribunals in Ghana. The Committee was advised by the Hon. Justice Dennis Dominic Adjei (then-Justice of the Court of Appeal). The Committee's recommendation highlighted similar points identified in Justice Ntsebeza's aforementioned Dissenting Opinions, including, *inter alia*, that the death penalty violates human rights recognizing the value and dignity of persons, the irreversibility of the death sentence and the fallibility of the justice system, and that the death penalty "eliminates the possibility of reform and denies individuals the opportunity to reintegrate into society." Report of the Committee on Constitutional, Legal and Parliamentary Affairs on the Armed Forces (Amendment) Bill, 2022, Third Session of the Eighth Parliament of the Fourth Republic of Ghana (6 July 2023).

<sup>33</sup> General Comment No. 3, African Charter on Human and Peoples' Rights, The Right To Life (Article 4), ¶ 12.

<sup>34</sup> *Onyachi and Njoka v Tanzania* (merits) (2017) 2 AfCLR 65, ¶ 130 (the restriction of a protected right is determined based on whether it is "just, necessary, proportionate and equitable in opposition to unjust, absurd and arbitrary." (internal quotations omitted) (emphasis added)).

<sup>35</sup> See, e.g., *TLS and Others v Tanzania* (merits) (2013) 1 AfCLR 34, ¶ 106.1 ("Jurisprudence regarding the restrictions on the exercise of rights has developed the principle that, the restrictions must be necessary in a democratic society; they must be reasonably proportionate

pass muster, it must (1) serve a “legitimate aim”<sup>36</sup> that is “based on legitimate public interest”;<sup>37</sup> (2) be “absolutely necessary” to achieve the set objective;<sup>38</sup> and (3) be “proportionate...to the benefits to be gained.”<sup>39</sup>

28. The Court has yet to apply this framework to determine whether the death penalty violates Article 4. Nevertheless, as explained in paragraph 19 above, the Court has roundly determined that the right to life is a foundational right “on which the realisation of all other rights and freedoms depend.”<sup>40</sup> Accordingly, restrictions of this right cannot reasonably be subjected to a less exacting standard than is applied to other, less foundational rights.

29. While lawmakers have historically justified capital punishment as serving the legitimate State objective of crime deterrence, the death penalty is neither necessary nor proportionate to achieve this goal. It offers no unique, or indeed, any proven benefits in the prevention or reduction of crime. The Honorable Justice Ntsebeza highlighted this tension in his Dissenting Opinion in *Lazaro v. Tanzania*. He noted that despite the global abolitionist trend, “the death penalty is still employed in

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to the legitimate aim pursued.”). These elements to assess proportionality are applied across different international human rights frameworks and jurisprudence including the American Convention on Human Rights. See Inter-American Court of Human Rights, *Kimel v. Argentina*, Judgment (Merits, Reparations, and Costs) (2 May 2008), ¶ 58; Inter-American Court of Human Rights, *Romero Feris v. Argentina*, Judgment (Merits, Reparations and Costs) (15 October 2019), ¶ 92. For the European Convention on Human Rights, see *Romanenko et al. v. Russia*, European Court of Human Rights, No. 11751/03 (8 October 2009), ¶ 37.

<sup>36</sup> *TLS and Others v Tanzania* (merits) (2013) 1 AfCLR 34, ¶ 106.1.

<sup>37</sup> *Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, ¶ 133.

<sup>38</sup> *TLS and Others v Tanzania* (merits) (2013) 1 AfCLR 34, ¶ 106.1; *Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, ¶ 133 and § B.i.c (in the context of the restriction of freedom of expression); *Ajavon v Benin* (merits) (2019) 3 AfCLR 130, ¶ 171 (in the context of a limitation on the right to be represented by a lawyer).

<sup>39</sup> *Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, ¶ 133, citing *Media Rights Agenda, Constitutional Rights Project v Nigeria*, Communication 105/93, 128/ 94, 130/94, 152/96, ¶ 69 (emphasis added). See also *ibid.*, ¶¶ 151-152 (“sanctions should never be so severe as to interfere with the exercise of the right [itself]”); *TLS and Others v Tanzania* (merits) (2013) 1 AfCLR 34, ¶ 106.1 (restrictions must be “reasonably proportionate”); *Onyachi and Njoka v Tanzania* (merits) (2017) 2 AfCLR 65, ¶ 137 (restrictions of a right must not render the right itself illusory).

<sup>40</sup> *African Commission on Human and Peoples’ Rights v Kenya* (merits) (2017) 2 AfCLR 9, ¶ 152. See also *Mugesera v Rwanda* (judgment) (2020) 4 AfCLR 834, ¶ 102.

a small number of countries, largely because of the myth...that it deters crime.”<sup>41</sup> Justice Ntsebeza further explained that the deterrence claim “has been repeatedly discredited, and there is no evidence that the death penalty is any more effective in reducing crime than life imprisonment without the possibility of parole.”<sup>42</sup>

30. Indeed, studies which purport to show that capital punishment has a deterrent effect on serious crime are methodologically unsound. An analysis of abolitionist jurisdictions demonstrates that many experience a reduction in crime after abolishing the death penalty. Moreover, alternative policies which do not impinge on the right to life have been shown to have equal or greater impact on crime deterrence than capital punishment. Accordingly, the death penalty is inherently arbitrary and violates Article 4 of the African Charter.

#### ***D. The Death Penalty Does Not Serve the Interest of Deterrence***

31. The Court’s framework for assessing whether restrictions of a right are permissible under the African Charter requires that the restriction of a protected right must be provided by law and “must serve a legitimate aim”<sup>43</sup> and be “based on legitimate public interest.”<sup>44</sup> In this respect, the Court has affirmed the African Commission’s recommendation that the “only legitimate reasons for limitations to the rights and freedoms of the African Charter” are found in Article 27(2) of the African Charter.<sup>45</sup> Article 27(2) of the African Charter provides for the exercise of rights and

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<sup>41</sup> *Lazaro v. Tanzania* (judgment) (2023) AfCHPR 35 (7 November 2023), Dissenting Opinion of Hon. Justice Ntsebeza, ¶ 21 (emphasis added). In Justice Ntsebeza’s Dissenting Opinion in *Mulokozi Anatory v. Tanzania*, he further described the deterrence theory as a “manifest misconception...for which there is no shred of evidence,” noting that the same premise was used in South Africa’s Apartheid regime as justification for mass public executions. *Mulokozi Anatory v. Tanzania* (judgment on merits and reparations) (2023), Application No. 057/2016 (5 Sept. 2023), Dissenting Opinion of Hon. Justice Ntsebeza, ¶ 11.

<sup>42</sup> *Lazaro v. Tanzania* (judgment) (2023) AfCHPR 35 (7 November 2023), Dissenting Opinion of Hon. Justice Ntsebeza, ¶ 26.

<sup>43</sup> *TLS and Others v Tanzania* (merits) (2013) 1 AfCLR 34, ¶ 106.1.

<sup>44</sup> *Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, ¶ 133.

<sup>45</sup> *TLS and Others v Tanzania* (merits) (2013) 1 AfCLR 34, ¶¶ 106.1, 107.1, citing *Media Rights Agenda and others v Nigeria*, Communications 105/93, 128/ 94, 130/94, 152/96 and *Gareth Anver Prince v South Africa*, Communication No 255/2002 Eighteenth Activity Report (July 2004–December 2004).

freedoms “with due regard to the rights of others, collective security, morality, and common interest.”<sup>46</sup> In line with the objective of enhancing collective security, every State has a legitimate interest in protecting those within its jurisdiction from crime and to adopt policies to that effect, including through different forms of punishment for the commission of a crime.

32. Proponents of the death penalty commonly invoke the so-called “deterrence theory”—which posits that potential offenders will abstain from committing crimes subject to capital punishment out of fear of execution.<sup>47</sup> Indeed, in adopting and imposing the death penalty, States have consistently invoked the deterrence theory as one of the main justifications for their choice.<sup>48</sup> For example, Singapore has described the death penalty as a “key element” of its efforts to address drugs and murder, and has asserted success in its approach, maintaining that “the death penalty has deterred major drug syndicates from establishing themselves in Singapore.”<sup>49</sup> Similar examples of such assertions abound.<sup>50</sup>

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<sup>46</sup> African Charter on Human and Peoples’ Rights, Art. 27(2). The Court has explained that restrictions may also serve a legitimate purpose where they serve “the protection of national security, public order, public health or public morality.” *Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, ¶¶ 134-135.

<sup>47</sup> See, e.g., UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), p. 7; Jeffrey Fagan, ‘Deterrence and the death penalty in international perspective’ in Ivan Šimonović (ed), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations Publications 2015), p. 85 relying on R. Hood & C. Hoyle (eds), *The Death Penalty in Worldwide Perspective* (OUP 2014); Amnesty International, *Not making us safer—Crime, public safety and the death penalty*, ACT Doc. ACT 51/002/2013 (10 October 2013), p. 18.

<sup>48</sup> UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), p. 4.

<sup>49</sup> Amnesty International, *Cooperate or die—Singapore’s flawed reforms to the mandatory death penalty*, ACT Doc. ACT 50/7158/2017 (11 October 2017), p. 13. As discussed below, a study comparing the death penalty practices of Singapore and Hong Kong and their effect on crime rates is in direct tension with Singapore’s rationale.

<sup>50</sup> See, e.g., C. Eboh, “Nigeria’s Senate proposes death penalty for drug trafficking”, *Reuters* (9 May 2024), available at <https://www.reuters.com/world/africa/nigerias-senate-proposes-death-penalty-drug-trafficking-2024-05-09/> (“Nigeria’s Senate on Thursday proposed significantly toughening penalties for drug trafficking, making the death penalty the new maximum sentence through a law amendment. [...] Supporters argued the threat of execution would serve as a stronger deterrent to drug traffickers than life imprisonment.”); John J. Donohue and Justin Wolfers, “The Death Penalty: No Evidence for Deterrence,” *The*

33. Even if the death penalty may arguably serve a legitimate objective, *i.e.*, deterring crime, it can only be justified pursuant to this objective if it is proven to be an effective tool to accomplish it and if it does so in proportion to the benefits sought. Put differently, the deterrence theory as the rationale for the death penalty is sound only if it is proven that the death penalty in fact deters or reduces crime. To date, no such confirmation has been achieved.

### ***E. The Death Penalty Is Not “Absolutely Necessary” to Deter Crime***

34. The second prong of the Court’s framework to assess restrictions of protected rights requires that the limitation of a protected right must be “absolutely necessary” to achieve the set objective.<sup>51</sup> Moreover, as the Court ruled in its 2020 Advisory Opinion, “[w]here policy alternatives that do not infringe on individuals’ rights and freedoms exist, policies that infringe on fundamental human rights... are unnecessary and should be avoided.”<sup>52</sup> Accordingly, for the death penalty to satisfy this requirement, it must be proven that its imposition is necessary to achieve the objective of crime deterrence and that alternative, less restrictive, policies that may serve the same purpose are unavailable.

35. The misguided notion that an inverse relationship exists between the use of the death penalty and crime rates is longstanding,<sup>53</sup> and studies claiming to prove

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Economists’ Voice (April 2004), p. 1 as quoted in Roger Hood & Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (OUP 2008), pp. 318-319 (noting that, in a presidential debate in 2000, George W. Bush argued in favor of the death penalty on the basis that “it saves other people’s lives.”); L. Domingo-Cabarrubias & S. Kowal, ‘The Use of the Death Penalty to “Protect” Women’ in M. Sato and S. Babcock (eds), *Silently Silenced: State-Sanctioned Killing of Women* (2023) Eleos Justice, Monash University and Cornell Center on the Death Penalty Worldwide, p. 54 (reporting that, in 2022, an Egyptian court proposed that the execution of the killer be aired live to “achieve the goal of deterrence.”).

<sup>51</sup> *TLS and Others v Tanzania* (merits) (2013) 1 AfCLR 34, ¶ 106.1; *Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, ¶ 133 and § B.i.c (in the context of the restriction of freedom of expression); *Ajavon v Benin* (merits) (2019) 3 AfCLR 130, ¶ 171 (in the context of a limitation on the right to be represented by a lawyer).

<sup>52</sup> *Pan African Lawyers Union (PALU) (Advisory Opinion)* (2020) 4 AfCLR 805, ¶ 101. See also *Rashidi v Tanzania* (merits and reparations) (2019) 3 AfCLR 13, ¶¶ 91-99 (in the context of the right to physical integrity under Article 4 and right to dignity under Article 5 of the African Charter).

<sup>53</sup> See, *e.g.*, Separate Opinion of Hon. Justice Tchikaya in *Rutechura v Tanzania* (judgment) (2021) 5 AfCLR 7, ¶ 4 (“This is precisely the Roman position, which held that the death penalty



this once-commonly-held belief through scientific evidence have flooded academia throughout the 20<sup>th</sup> and 21<sup>st</sup> century.<sup>54</sup> As early as the 18<sup>th</sup> century, however, opposing scholars have argued that the death penalty does not “make societies safer”<sup>55</sup> and, since then, a wealth of corresponding research and literature has substantiated this argument.<sup>56</sup> Indeed, from modern studies’ extensive examination of the purported deterrent effect of capital punishment, an inescapable truth has emerged: the death penalty cannot be credibly proven to deter crime. Moreover, alternative, less restrictive, policies are equally or more effective at crime prevention. Accordingly, the death penalty fails this prong of the Court’s arbitrariness standard.

(1) Studies Claiming to Prove that the Death Penalty Deters Crime are Unreliable

36. Studies claiming to prove and quantify the deterrence purportedly achieved by the death penalty (“**Deterrence Studies**”) suffer from various deficiencies mapped out across scores of counter studies, rendering their conclusions unreliable. These deficiencies largely relate to the fact that there is no consensus on the

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would protect society, because it would be an exemplary punishment and would serve as deterrence to criminals. This position, although widely held, has not been sociologically proven.”).

<sup>54</sup> See, e.g., Jeffrey Fagan, ‘Death and Deterrence: Redux Science, Law and Casual Reasoning on Capital Punishment’ (2005) 06-125 Columbia Law School Public Law & Legal Theory Working Paper Group pp. 255-259 (describing the various “wave[s]” of studies); M. Radelet & T. Lacoock, “Do Executions Lower Homicide Rates: The Views of Leading Criminologists,” 99 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (2009), pp. 490-492 (outlining the evolution of the field of study relating to the death penalty as a deterrent in the 20<sup>th</sup> century); Daniel S. Nagin & John V. Pepper (eds), *Deterrence and the Death Penalty*, National Research Council, (The National Academies Press 2012), p. 10 (describing a number of studies in the 21<sup>st</sup> century which “concluded that deterrent effects are large and robust.”).

<sup>55</sup> See, e.g., UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 36. In 1764, Cesare Beccaria published *On Crimes and Punishments*; a treatise condemning torture and death penalty that has since become seminal in the field of legal and penal reform.

<sup>56</sup> See, e.g., Daniel S. Nagin & John V. Pepper (eds), *Deterrence and the Death Penalty*, National Research Council, (The National Academies Press 2012), pp. 10-11 (summarizing the conclusions of studies that have “vigorously challenged” claims that the death penalty achieves a deterrent effect).

appropriate statistical methodology with which to test the deterrence theory,<sup>57</sup> and manifest themselves in three important respects that were aptly summarized by the National Research Council's report in 2012 ("**2012 NRC Report**").<sup>58</sup>

37. *First*, Deterrence Studies fail to identify and account for the forms of punishment other than the death penalty that are available under the relevant legal framework.<sup>59</sup> To achieve reliable results, researchers must sufficiently explain and particularize the different components of the legal regimes under study including, *inter alia*, the crimes that are punishable by the death penalty, the appeals and pardon processes available, other forms of punishment that may be used to sanction the crime, and the frequency with which the relevant authorities use the death penalty as their chosen form of punishment.<sup>60</sup> These methodological requirements are notable because none of the Deterrence Studies that the 2012 NRC Report reviewed took "into account the non-capital component of the sanction regime," thereby failing to properly isolate the deterrence caused by the death penalty as opposed to deterrence caused by available non-capital punishments.<sup>61</sup>

38. *Second*, the reliance on or use of "incomplete or implausible models of potential murderers' perceptions of and responses to the capital punishment"<sup>62</sup>

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<sup>57</sup> World Coalition Against the Death Penalty, "Debunking the Deterrence Theory" (May 2024), p. 2.

<sup>58</sup> See Daniel S. Nagin & John V. Pepper (eds), *Deterrence and the Death Penalty*, National Research Council, (The National Academies Press 2012). The 2012 NRC Report reviewed approximately 50 years' worth of research on the purported deterrence effect of the death penalty and has since been widely recognized as blue-ribbon authority in this field of study.

<sup>59</sup> *Ibid.*, pp. 3-4.

<sup>60</sup> *Ibid.*, pp. 32-33; see also, D. Nagin, "Deterrence in the Twenty-First Century," 42(1) CRIME AND JUSTICE (August 2013), pp. 66-67 ("A second theoretical and empirical gap concerns the concept of a sanction regime and its two dimensions—the legal authority for different types of sanctions and the way that authority is administered. [...] Theories of deterrence that conceive of sanctions in the singular do not provide the conceptual basis for considering the differential deterrent effect of different types of sanction options. The empirical companion to this theoretical expansion involves assembling the data required to measure sanction regimes.").

<sup>61</sup> D. Nagin, "Deterrence in the Twenty-First Century," 42(1) CRIME AND JUSTICE (August 2013), p. 25.

<sup>62</sup> Daniel S. Nagin & John V. Pepper (eds), *Deterrence and the Death Penalty*, National Research Council, (The National Academies Press 2012), pp. 3-4.

renders Deterrence Studies' conclusions implausible. Because these studies purport to establish a causal relationship between capital punishment and a reduction in crime, their interpretation of how potential offenders (i) perceive the risk of the death penalty and (ii) act pursuant to that perception lies at the core of their analysis.<sup>63</sup> The deterrence theory posits that a person contemplating a crime considers as a tolerable risk a long prison sentence or other form of punishment, but not the death penalty.<sup>64</sup> These postulations about how potential offenders perceive and respond to risk rest on shaky foundations.

39. Some studies simply remain silent on how, if at all, they have accounted for perpetrator perception.<sup>65</sup> Other researchers assume “subjective probabilities of arrest, conviction, and execution” but do not rely on concrete data in support thereof.<sup>66</sup>

40. The latter group inherently assumes that potential offenders weigh risks and consequences, despite the absence of any “empirical foundation” for that assumption;<sup>67</sup> a particularly problematic approach for three reasons. First, it ignores

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<sup>63</sup> Daniel S. Nagin & John V. Pepper (eds), *Deterrence and the Death Penalty*, National Research Council, (The National Academies Press 2012), pp. 34-35; see also, Jeffrey Fagan, ‘Deterrence and the death penalty in international perspective’ in Ivan Šimonović (ed), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations Publications 2015), p. 96 (“The logic of deterrence rests on the principle that persons people (sic) committing these crimes have motivations that influence their consideration of the possibility of death as a consequence of their act. There is strong and consistent social science evidence that persons contemplating murder tend to heavily undervalue the risks of punishment. They regard punishment as a distant possibility, and not one to be taken seriously. In some instances, the rewards and gratification from murder outweigh any risks of death, or even the certainty of death itself.”); Carolyn Hole & Lucrezie Rizzelli, ‘Living With a Death Sentence in Kenya: Prisoners Experience of Crime, Punishment and Death Row,’ (2022) THE DEATH PENALTY PROJECT, p. 40 (“[D]eterrence research is clear that the necessary preconditions of decision-making by potential offenders are that: They are knowledgeable about the law and its implications; They are rational in allowing their knowledge and understanding to influence their behaviour; They will avoid offending if they think it is likely they will be caught and convicted, and if they think the punishment outweighs the rewards”).

<sup>64</sup> Amnesty International, “*Does the death penalty deter crime? Getting the Facts Straight*” (1 June 2008).

<sup>65</sup> Daniel S. Nagin & John V. Pepper (eds), *Deterrence and the Death Penalty*, National Research Council, (The National Academies Press 2012), p. 106.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* See also, Jeffrey Fagan, ‘Death and Deterrence: Redux Science, Law and Casual Reasoning on Capital Punishment’ (2005) 06-125 Columbia Law School Public Law & Legal Theory Working Paper Group, p. 272 (“Research both with offenders and general population

the role that other available forms of punishment such as life in prison play in the offender's decision-making process.<sup>68</sup> Second, it assumes that, in making a rational decision—an untenable assumption unto itself—potential offenders have accurate knowledge of the possible implications of their specific actions. Yet this secondary assumption is also unfounded.<sup>69</sup> A study in Kenya showed just how misguided it is to assume that potential offenders have knowledge about the law and, even when they do, that they use that knowledge to reach a decision on whether to commit a crime. According to that study's findings, "95% of those convicted of robbery and 86% of those convicted of murder" did not know that the crimes they were committing were punishable by death.<sup>70</sup> In stark contrast, "[o]nly 1% thought they might get the death penalty" and 56% indicated that they were "not at all" concerned about being sentenced to death.<sup>71</sup> The study thus rightfully concluded that, "being oblivious to the risk of such a harsh punishment means that most could not have been deterred by the

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samples suggests that (subjectively) perceived risk weighs heavily on the decisions of would-be offenders to engage in or avoid crime. But only a small minority of the new deterrence studies include measures of risk of detection, especially as constructed through effective and efficient policing." (emphasis added).

<sup>68</sup> Jeffrey Fagan, 'Death and Deterrence: Redux Science, Law and Casual Reasoning on Capital Punishment' (2005) 06-125 Columbia Law School Public Law & Legal Theory Working Paper Group, pp. 269-272; see also, J. Donohue & J. Wolfers, "Uses and Abuses of Empirical Evidence in the Death Penalty Debate," 58(3) STANFORD LAW REVIEW (December 2005), p. 821 ("[A] 'get tough on crime' attitude might lead to longer jail sentences, increased use of life without parole, harsher prison conditions, as well as increased use of the death penalty. It might be that criminals are responding to these other changes in deterrence, and given that the existing estimates contain no (or inadequate) controls for these factors, they may be driving the correlation between homicides and executions. There are good reasons to be concerned by this possibility, as very few criminals are potentially affected by the death penalty, while many inmates are likely to be affected by these broader changes in deterrence policies.") (emphasis added).

<sup>69</sup> See, e.g., Jeffrey Fagan, 'Deterrence and the death penalty in international perspective' in Ivan Šimonović (ed), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations Publications 2015), pp. 97-98.

<sup>70</sup> Carolyn Hole & Lucrezie Rizzelli, 'Living With a Death Sentence in Kenya: Prisoners Experience of Crime, Punishment and Death Row,' (2022) THE DEATH PENALTY PROJECT, p. 41.

<sup>71</sup> *Ibid.*, pp. 41, 44.

death penalty,”<sup>72</sup> and those that had been sentenced to death “had not anticipated that this was a risk when deciding to commit the offence.”<sup>73</sup>

41. Finally, the assumption that potential offenders weigh risks and consequences ignores the circumstances in which a crime subject to punishment by death is committed; circumstances that do not always lend themselves in terms of the amount of time or mental clarity available to an offender carrying out an informed and objective analysis. As one author fittingly noted, “it is unlikely that perpetrators of homicide experiencing emotional distress or those under the influence of drugs first carefully weigh the potential costs of their offenses, let alone the differential impact that capital punishment may carry throughout a lengthy prison sentence.”<sup>74</sup>

42. Indeed, Deterrence Studies fail to explain, let alone prove, how the death penalty can dissuade crimes of passion or other crimes without premeditation. The only logical answer is that Deterrence Studies do not adequately address this point because, ultimately, the death penalty cannot deter such crimes.<sup>75</sup>

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<sup>72</sup> *Ibid.*, p. 41.

<sup>73</sup> *Ibid.*, p. 46.

<sup>74</sup> S. Oliphant, “Estimating the effect of death penalty moratoriums on homicide rates using the synthetic control method” 21(4) *CRIMINOLOGY & PUBLIC POLICY* (November 2022), p. 917 citing T. Kovandicz, L. Vieratis & D. Boots, “Does the death penalty save lives? New evidence from state panel data, 1977 to 2006,” 8(4) *CRIMINOLOGY & PUBLIC POLICY* (November 2009), pp. 803–843; see also, Jeffrey Fagan, ‘Death and Deterrence: Redux Science, Law and Casual Reasoning on Capital Punishment’ (2005) 06-125 Columbia Law School Public Law & Legal Theory Working Paper Group, p. 292 (noting that “[t]he rationality test [which] asks whether offenders, assuming they possess knowledge of the risks of detection and punishment, will apply their understanding to the decision to engage in homicide at the moment when they are making the choice” is one of three “conceptual hurdle[s]” facing Deterrence Studies “to attain empirical validity and conceptual legitimacy.”).

<sup>75</sup> See, e.g., World Coalition Against the Death Penalty, “Debunking the Deterrence Theory” (May 2024), p. 2 *relying* on Oliver Roeder, Lauren-Brooke Eisen, & Julia Bowling, ‘What Caused The Crime Decline?’, (2014) Brennan Center for Justice, pp. 43-45 (“[I]t is debatable whether an individual even engages in such objective calculations before committing a crime. Much psychological and sociological research suggests that many criminal acts are crimes of passion or committed in a heated moment based only on immediate circumstances, and thus potential offenders may not consider or weigh longer term possibilities of punishment and capture, including the possibility of capital punishment.”) (emphasis added).

43. *Third*, Deterrence Studies are unreliable due to their prevailing “use [of] strong and unverifiable assumptions to identify the effects of capital punishment”<sup>76</sup> and general absence of sufficient and adequate data. This basic threshold for any scientific study is a significant hurdle for Deterrence Studies because they do not deal with experimental data; after all, conducting an experiment to test the efficacy of the death penalty would be heinous. Instead, Deterrence Studies must work with existing data that are often insufficient due to the infrequency with which executions are carried out<sup>77</sup> or unreliable due to the motives behind the publication of the data.<sup>78</sup> For example, the 2012 NRC Report noted that murder rates across various states in the United States of America include murders that are not punishable by the death penalty, and the requisite data on alternative punishments (as discussed above) simply does not exist.<sup>79</sup>

44. These significant “gaps” directly undermine the integrity of researchers’ findings and “may result in serious bias in estimates of deterrent effects.”<sup>80</sup> Thus, the 2012 NRC Report concludes that “the failings of the capital punishment literature are [...] rooted in manifest deficiencies related to the research data and methods and the

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<sup>76</sup> Daniel S. Nagin & John V. Pepper (eds), *Deterrence and the Death Penalty*, National Research Council, (The National Academies Press 2012), p. 4.

<sup>77</sup> See, e.g., Franklin Zimring, Jeffrey Fagan & David Johnson, ‘Executions, Deterrence and Homicide: A Tale of Two Cities’ (2009) 09-206 Columbia Law School Public Law & Legal Theory Working Paper Group, pp. 1, 25.

<sup>78</sup> See, e.g., Amnesty International, *Death Sentences and Executions 2023 (2024)*, p. 7 (“Secrecy and control of information on the death penalty continued to be an indicator of the determination of governments of some executing countries to use this punishment as a tool to instil (sic) fear and display the power of state institutions. Death penalty figures remained classified as state secrets in China and Viet Nam. Even though reporting on death sentences and executions was tightly restricted in these two countries as well as North Korea, the authorities sparingly lifted the veil of secrecy on certain cases as a reminder that crime, or departures from established rules, would be harshly punished.”).

<sup>79</sup> Daniel S. Nagin & John V. Pepper (eds), *Deterrence and the Death Penalty*, National Research Council, (The National Academies Press 2012), p. 36.

<sup>80</sup> *Ibid.* See e.g., Jeffrey Fagan, ‘Death and Deterrence: Redux Science, Law and Casual Reasoning on Capital Punishment’ (2005) 06-125 Columbia Law School Public Law & Legal Theory Working Paper Group, p. 268 (An illustrative example identified in another report noted that Deterrence Studies focusing on the U.S. were “captives of the structure of the data” and, more specifically, the effect that one jurisdiction (Texas) had on the rest to the point that, without the data from Texas, “the relationship between execution and homicide disappears.”).

researchers' interpretations of results."<sup>81</sup> Similarly, another survey undertook to collate and understand the views of leading criminologists, ultimately concluding that "the vast majority of the world's top criminologists believe that the empirical research has revealed the deterrence hypothesis for a myth."<sup>82</sup>

45. Against this backdrop, research shows that it is the certainty of apprehension and being punished generally, rather than the severity of the punishment, that is more effective at curbing crime.<sup>83</sup> In any event, to the extent that credence is given to research on the deterrence theory, the Court should note that studies have shown there the opposite to be true, that is, that there is no causal relationship between capital punishment and lower crime rates. For example, a study in Japan considered whether the death penalty prevented future crime in a 20-year period and concluded that while it "deterred neither homicide nor robbery-homicide," punitive law reform, *i.e.*, ensuring that crime did not go unpunished generally (just not by the death penalty), was able to curb crime rates.<sup>84</sup>

46. Plainly, "there is no evidence that the death penalty in fact deters [...] crime more than other methods of punishment" such that it could be considered

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<sup>81</sup> Daniel S. Nagin & John V. Pepper (eds), *Deterrence and the Death Penalty*, National Research Council, (The National Academies Press 2012), p. 101.

<sup>82</sup> M. Radelet & T. Lacoock, "Do Executions Lower Homicide Rates: The Views of Leading Criminologists," 99 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY (2009), p. 504; *see also ibid.*, pp. 501-503.

<sup>83</sup> D. Nagin, "Deterrence in the Twenty-First Century," 42(1) CRIME AND JUSTICE (August 2013); *see also ibid.*, p. 66; UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 32; Jeffery Fagan, 'Deterrence and the death penalty in international perspective' in Ivan Šimonović (ed), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations Publications 2015), p. 96 *relying on* R. Hjalmarsson, "Does Capital Punishment have a 'Local' Deterrent Effect on Homicides?" 11(2) AMERICAN LAW AND ECONOMICS REVIEW (2009), pp. 310-334.

<sup>84</sup> David T. Johnson, "Does the Death Penalty Deter Homicide in Japan?" in Asian Law Center Briefing Paper (2017), p. 16; *see also* Carolyn Hole & Roger Hood, 'Deterrence and public opinion' in Ivan Šimonović (ed), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations Publications 2015), pp. 73-74 *relying on* Home Office Statistical Bulletin, "Table 1.02: Offences initially recorded as homicide by outcome, 1999/00 to 2009/10", in *Homicide, Firearm Offences and Intimate Violence 2009-10*, p. 28.

necessary to accomplish deterrence objectives.<sup>85</sup> This conclusion stems not only from studies and academic literature, but also factual findings, as is discussed below.

(2) Comparative Reviews Confirm that the Death Penalty is not “Absolutely Necessary” to Deter Crime

47. Beyond the methodological flaws undermining the reliability of Deterrence Studies’ conclusions, scores of collected data show that, in practice, the absence of the death penalty does not result in higher crime rates. Indeed, two comparative approaches confirm that the death penalty cannot be considered “absolutely necessary” to a State’s crime prevention objectives, regardless of what Deterrence Studies purport to show. The first approach consists of comparing crime rates in a single jurisdiction during two distinct periods, that is, before and after the death penalty is abolished or limited. If the death penalty were an effective tool for crime deterrence (*quod non*), an increase in crime would naturally follow abolition. Instead, the opposite has been observed in Albania, Azerbaijan, Bulgaria, Canada, Estonia, Kyrgyzstan, Latvia, Poland, Serbia, South Africa, and Ukraine.<sup>86</sup> In Canada, for example, murder rates had “peak[ed]” in 1975 with a rate of 3.09 for every 100,000 of its population.<sup>87</sup> The death penalty was abolished the next year and, by 1980, Canada reported a murder rate of 2.41.<sup>88</sup> Others, like Mongolia, saw “no increase in

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<sup>86</sup> See World Coalition Against the Death Penalty, “Debunking the Deterrence Theory” (May 2024), pp. 4-5; Amnesty International, *Not making us safer—Crime, public safety and the death penalty*, ACT Doc. ACT 51/002/2013 (10 October 2013), p. 20, citing Roger Hood, “The question of the death penalty and the new contributions of the criminal sciences to the matter: a report to the United Nations Committee on Crime Prevention and Control”, UN Doc. E/AC.57/1988/CRP.7 (1988).

<sup>87</sup> Amnesty International, *Not making us safer—Crime, public safety and the death penalty*, ACT Doc. ACT 51/002/2013 (10 October 2013), p. 20, citing Roger Hood, “The question of the death penalty and the new contributions of the criminal sciences to the matter: a report to the United Nations Committee on Crime Prevention and Control”, UN Doc. E/AC.57/1988/CRP.7 (1988).

<sup>88</sup> *Ibid.*



violent crime after the abolition of the death penalty,<sup>89</sup> while Taiwan enjoyed a drop in homicide rates during a period of reduced executions.<sup>90</sup>

48. The second approach consists of comparing a jurisdiction that retains the death penalty to another that does not. Here, too, the data show that the death penalty has not made the former safer. One often-cited study compared Singapore, a jurisdiction known for its zealous application of death penalty for both homicide and drug-related offenses, to the nearby city of Hong Kong where the death penalty has been abolished since 1993.<sup>91</sup> During the relevant period, “Singapore conducted two of the most dramatic natural experiments in execution on record: a huge increase, followed by an extraordinary decline” in its use of the death penalty, while Hong Kong adhered to its no death penalty policy.<sup>92</sup> Despite the seemingly ideal conditions to test the efficacy of the death penalty and changes in its application as a crime deterrent, the study showed that there was no “visible impact on homicide rates in these two cities” or on drug-related offenses.<sup>93</sup> Indeed, the study described as “critical” its conclusion that, despite their opposing death penalty policies and practices, “Hong Kong is just as safe a city from criminal homicide as is Singapore.”<sup>94</sup> This result, in turn, magnified the assertions by Deterrence Studies “to a patently silly status.”<sup>95</sup> The Singapore versus Hong Kong study is not an outlier either. Similar conclusions can be drawn from the comparative experience of different states in the United States of

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<sup>89</sup> UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 13.

<sup>90</sup> Jeffrey Fagan, ‘Deterrence and the death penalty in international perspective’ in Ivan Šimonović (ed), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations Publications 2015), p. 89.

<sup>91</sup> See Franklin Zimring, Jeffrey Fagan & David Johnson, ‘Executions, Deterrence and Homicide: A Tale of Two Cities’ (2009) 09-206 Columbia Law School Public Law & Legal Theory Working Paper Group, pp. 2-3.

<sup>92</sup> *Ibid.*, p. 4.

<sup>93</sup> *Ibid.*, pp. 4, 27-28. Indeed, one specific conclusion reached by the study was that “Singapore [was] a slightly safer city in an era of 5 executions per year than it was with 60.”

<sup>94</sup> Franklin Zimring, Jeffrey Fagan & David Johnson, ‘Executions, Deterrence and Homicide: A Tale of Two Cities’ (2009) 09-206 Columbia Law School Public Law & Legal Theory Working Paper Group, p. 28.

<sup>95</sup> *Ibid.*, p. 31.

America<sup>96</sup> and of jurisdictions in the Greater Caribbean area,<sup>97</sup> as well as Africa. With respect to the latter, for example, one report shows that “crime rates actually declined following the abolition of the death penalty” in South Africa.<sup>98</sup> The country’s murder rate, specifically, fell by an average of 4% per year.<sup>99</sup> Indeed, a study conducted by the African Commission in 2011 noted that a comparison between countries that retain the death penalty and those that have abolished fails to establish a causal link between capital punishment and the rate of serious crimes.<sup>100</sup>

49. In sum, empirical data from numerous jurisdictions bearing diverse geographical locations, socio-economic characteristics, cultural traits, political environments, and legal frameworks confirm that the death penalty has not been “absolutely necessary” to prevent crime. Thus, even if the next wave of Deterrence Studies were able to overcome the multiple methodological barriers precluding them

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<sup>96</sup> According to the Death Penalty Information Center, murder rates in states with the death penalty were higher than the murder rates in states without the death penalty every year from 1993 until 2019. See Death Penalty Information Center, “Murder Rate of Death Penalty States Compared to Non-Death Penalty States” available at <https://deathpenaltyinfo.org/facts-and-research/murder-rates/murder-rate-of-death-penalty-states-compared-to-non-death-penalty-states>. Similarly, in a recent study by the Death Penalty Project, between 1987 and 2019, states that have no death penalty had the lowest murder rates in the United States compared to states that did not repeal the death penalty over that period. Further States that repealed the death penalty at some point during the study period saw no increase in murder rates: “[t]he murder rate in the transitional states started higher and then fell over time, eventually mirroring the trends in the death penalty states, even after the transitional states had ended capital punishment.” See R. Dunham, (14 November 2024) *DP3 Study: After 1,600 Executions, the Public and Police are Safer in States with No Death Penalty*, available at <https://dppolicy.substack.com/p/dp3-study-after-1600-executions-the>

<sup>97</sup> According to the World Coalition Against the Death Penalty, “[i]n the Greater Caribbean, the highest homicide rates belong to retentionist countries, apart from Honduras, [while] the lowest homicide rates are in abolitionist countries, except for the retentionist Antigua and Barbuda.” See World Coalition Against the Death Penalty, “Debunking the Deterrence Theory” (May 2024), p. 5.

<sup>98</sup> See Kafumu Kalyala, Maya Linstrum-Newman & Nathalie Greenfield, ‘The Death Penalty in Zambia: A Country on the Verge of Abolition’ (2022) Southern African Institute for Policy and Research Discussion Paper 7, p. 6, citing Anna Kreigler and Mark Shaw, “Analysis: Why South Africa’s murder rates today are not higher than ever”, *Africa Check* (22 July 2016).

<sup>99</sup> *Ibid.*

<sup>100</sup> See Working Group on the Death Penalty in Africa, ‘Study on the question of the death penalty in Africa’, (2011) African Commission on Human and Peoples’ Rights, available at [https://archives.au.int/bitstream/handle/123456789/2069/Study%20on%20the%20Question%20of%20the%20Death%20Penalty\\_E.pdf?sequence=1](https://archives.au.int/bitstream/handle/123456789/2069/Study%20on%20the%20Question%20of%20the%20Death%20Penalty_E.pdf?sequence=1), p. 39.

from obtaining credible results to date, the fact would remain that, in practice, the death penalty has failed to offer a unique or additional deterrence effect, thereby robbing it of its chief purported justification. As one authority succinctly put it, “[w]hether the offense is murder, a drug-related crime or terrorism, the scientific evidence for deterrence is unreliable, inconclusive and, in many instances, simply wrong.”<sup>101</sup>

(3) The Death Penalty is Not More Effective in Achieving Deterrence than Less Restrictive Measures Like Imprisonment

50. To establish whether a measure meets the element of necessity, the Court must examine the existing alternatives for achieving the legitimate purpose and determine the greater or lesser degree of harmfulness of those alternatives.<sup>102</sup> The judgment of necessity is thus eminently comparative: when faced with two equally suitable means to achieve or promote a legitimate objective, it must be determined which of them affects less intensely, or not at all, the achievement of other legitimate objectives.<sup>103</sup>

51. The issue of the necessity of the death penalty *vis a vis* any other crime reduction strategy is deeply impacted by the myth of capital punishment’s deterrent effect. In no uncertain terms, the Secretary General of the United Nations reiterated recently that “there is no conclusive evidence to support the proposition that the death penalty deters crime more effectively than any other punishment.”<sup>104</sup> The Secretary

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<sup>101</sup> Jeffrey Fagan, ‘Deterrence and the death penalty in international perspective’ in Ivan Šimonović (ed), *Moving Away from the Death Penalty: Arguments, Trends and Perspectives* (United Nations Publications 2015), p. 86.

<sup>102</sup> Inter-American Court of Human Rights, *Kimel v. Argentina*, Judgment (Merits, Reparations, and Costs) (2 May 2008), ¶ 74.

<sup>103</sup> Inter-American Court of Human Rights, *Pavez Pavez v. Chile*, Judgment (Merits, Reparations, and Costs) (4 February 2022), ¶ 69; Inter-American Court of Human Rights, *Advisory Opinion OC-24/17: Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples: State Obligations Concerning Change of Name, Gender Identity, and Rights Derived From a Relationship Between Same-Sex Couples* (24 November 2017), ¶ 81; Inter-American Court of Human Rights, *Flor Freire v. Ecuador*, Judgment (Preliminary objection, merits, reparations and costs) (31 August 2016), ¶126.

<sup>104</sup> UN Human Rights Council, *Report of the Secretary General on the Question of Death Penalty*, UN Doc. A/HRC/51/7 (25 July 2022), ¶ 72; see also UN General Assembly, *Moratorium on the use of the death penalty, Report of the Secretary-General*, UN Doc. A/73/260 (27 July 2018), ¶ 60.

General's report echoed the United Nations High Commissioner for Human Rights' position on the matter.<sup>105</sup> This absence of evidence demonstrates that the death penalty is unnecessary in light of other crime reduction measures. Any measures which violate the right to life when alternatives exist, are inherently unnecessary, thus arbitrary.

52. Even compared to life imprisonment, arguably the next most severe penalty, there is no evidence that the death penalty deters crime more effectively, despite its greater severity. There is wide support amongst the international community on this point.<sup>106</sup>

53. While the death penalty lacks comparative efficacy in general,<sup>107</sup> findings show that for serious crimes often invoked as justification for capital punishment, the death penalty's deterrent effect, if any, is not greater than that of imprisonment. The death penalty has not been proven to deter crimes like murder, terrorism, or drug related offenses to any greater extent than any other measure or penalty.

54. There is no evidence that the death penalty has any marginal value in preventing murder compared to life imprisonment.<sup>108</sup> Based on studies conducted in several countries, prominent criminologist Carolyn Hoyle<sup>109</sup> found no evidence

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<sup>105</sup> UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 4 (“In her opening remarks, the High Commissioner for Human Rights began by emphasizing the fundamental nature of the issue to be considered by the panel. She underlined that there was no evidence that the death penalty deterred crime more effectively than any other punishment.”).

<sup>106</sup> *Ibid.*, ¶ 32.

<sup>107</sup> UN Human Rights Council, *Report of the Secretary General on the Question of Death Penalty*, UN Doc. A/HRC/51/7 (25 July 2022), ¶ 72 (“The Secretary-General [...] recalls that there is no conclusive evidence to support the proposition that the death penalty deters crime more effectively than any other punishment.”) (emphasis added).

<sup>108</sup> M. Radelet & T. Lacock, “Do Executions Lower Homicide Rates: The Views of Leading Criminologists,” 99 *JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY* (2009), footnote 14 (“Furthermore, the proper question for public policy is the death penalty's marginal deterrent effect—that is, whether it deters homicides over and above the deterrent effect of life imprisonment without parole.”).

<sup>109</sup> Professor Carolyn Hoyle has been at the University of Oxford Centre for Criminology since 1991 and was Centre Director from 2012 - 2017. She is Director of the Death Penalty Research Unit, based in the Centre. She is currently working on a range of research studies with the team at the Death Penalty Research Unit and The Death Penalty Project including

suggesting that the death penalty deterred individuals from committing murder to a greater extent than the threat of life imprisonment.<sup>110</sup> A survey of the Criminology Society of America, one of the largest associations of experts in the field, found that “few of America's top criminologists believe the threat or use of the death penalty can reduce homicide rates any more than long-term imprisonment.”<sup>111</sup> In fact, fewer than 10% of the polled experts believed that there was any stronger effect from death penalty when compared to long-term imprisonment.<sup>112</sup> This survey shows practically a “consensus among criminologists is that the death penalty does not add any significant deterrent effect above that of long-term imprisonment.”<sup>113</sup>

55. Similarly, the death penalty has not been an effective response to combating terrorism.<sup>114</sup> Many people engaging in terrorist acts are prepared to give up their lives to commit the offense, and therefore any unique deterrent effect from the death penalty is unlikely.<sup>115</sup> Recently, UN Human Rights experts “noted the lack of persuasive evidence that the death penalty could contribute more than any other

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research on deterrence and the death penalty for drugs in Indonesia, a project 'mapping' death row for drug offences in Southeast Asia, and research on abolitionist de facto states in Africa and the Caribbean. Her work with The Death Penalty Project in Kenya, Zimbabwe and Taiwan continues. See University of Oxford, “Carolyn Hoyle”, *available at* <https://www.law.ox.ac.uk/people/carolyn-hoyle>.

<sup>110</sup> UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 19 (“Ms. Hoyle referred to studies that had been conducted in Australia, Canada, Singapore, South Africa and the United States of America, as well as in Hong Kong, China, and in European countries, which had all concluded that there was no evidence to suggest that the death penalty deterred individuals from committing murder to a greater extent than the threat of life imprisonment.”).

<sup>111</sup> M. Radelet & T. Lacock, “Do Executions Lower Homicide Rates: The Views of Leading Criminologists,” 99 *JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY* (2009), p. 503.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 11.

<sup>115</sup> *Ibid.*, ¶ 46. (“Terrorism was not likely to be deterred by the death penalty, as perpetrators were in any event often ready to die for their causes.”).

punishment to eradicating terrorism.”<sup>116</sup> The death penalty can even be more likely to be counterproductive by making martyrs of convicted terrorists.<sup>117</sup>

56. The death penalty is not effective to prevent drug-related crimes either.<sup>118</sup> According to the Secretary General of the United Nations, resort to the “death penalty for drug offences is disproportionate to the aim of deterring drug-related crime, as there is no evidence that the death penalty in fact deters drug-related or other crime more than other methods of punishment.”<sup>119</sup>

57. As described above, the death penalty cannot prove to be necessary for crime prevention purposes even when compared to the next most severe penalty. Moreover, evidence shows that even less restrictive measures than the threat of long terms of imprisonment are more effective in achieving crime reduction. The certainty of punishment, rather than its severity, is what effectively deters people from committing a crime.<sup>120</sup> Certainty of punishment becomes the true deterrent when an

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<sup>116</sup> OHCHR, 46th session of the Human Rights Council Biennial high-level panel discussion on the question of the death penalty Theme: Human rights violations related to the use of the death penalty, in particular with respect to whether the use of the death penalty has a deterrent effect on crime rate, *Statement by United Nations High Commissioner for Human Rights, Michelle Bachelet* (23 February 2021).

<sup>117</sup> UN Human Rights Council, *Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, UN Doc. A/HRC/42/28 (28 August 2019), ¶ 11 (“The Council of Europe further noted that applying the death penalty in cases of terrorism could be counterproductive, creating focal points whose memory could be used to rally others to commit further acts of terrorism.”); see also UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 46 (“Life imprisonment prevented the risk of terrorists attaining martyr status.”).

<sup>118</sup> UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 35.

<sup>119</sup> UN Human Rights Council, *Capital Punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty*, UN Doc. A/HRC/42/28, (28 August 2019), ¶ 10. See also UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 35 (“Some delegates referred to the findings in the 2019 report of the Secretary-General that there was no evidence that the death penalty deterred drug-related crime more than other methods of punishment or that it affected crime reduction”).

<sup>120</sup> OHCHR, 46th session of the Human Rights Council Biennial high-level panel discussion on the question of the death penalty Theme: Human rights violations related to the use of the death penalty, in particular with respect to whether the use of the death penalty has a deterrent effect on crime rate, *Statement by United Nations High Commissioner for Human Rights,*

offender can be apprehended, effectively prosecuted, and convicted, even more so if authorities carry out the process with efficiency and celerity.<sup>121</sup>

58. Therefore, measures geared towards improving the rule of law are effective means to deter crime<sup>122</sup> which do not impinge on the right to life recognized by the African Charter. Adoption of this approach is already within Member States' international human rights obligations.<sup>123</sup> Further, Member States could approach a complex phenomenon such as criminality holistically with measures aimed towards "reducing socioeconomic inequalities, investing in education and training of youth and embracing diversity,"<sup>124</sup> which ultimately can reduce crime and further other international human rights commitments.<sup>125</sup>

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*Michelle Bachelet* (23 February 2021) ("Studies have shown that it is the certainty of punishment, not its severity, that deters criminals."); UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 4, 13 ("When discussing punishment, it was not the severity, but the certainty of the punishment that mattered more.").

<sup>121</sup> World Coalition Against the Death Penalty, "Debunking the Deterrence Theory" (May 2024), p. 7.

<sup>122</sup> UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 41 ("Delegates asserted that the best deterrent was the rule of law.").

<sup>123</sup> The African Commission has held that the protection of the right to life imposes upon States an affirmative obligation to establish a system of domestic laws as well as "a law enforcement system with the necessary equipment and training, and a competent, independent and impartial judiciary and legal profession based on the rule of law" and the creation of "[e]ffective systems and legal processes of police investigation (including capacity to collect and analyze forensic evidence) and accountability (including independent oversight mechanisms)." See OHCHR, General Comment 3: The Nature of States Parties' Obligations (14 December 1990), ¶ 10, 16.

<sup>124</sup> *Ibid.*, ¶ 26. ("Delegates believed that reducing socioeconomic inequalities, investing in education and training of youth and embracing diversity could go far towards crime reduction and building safer societies")

<sup>125</sup> Under Article 1 and 26 of the African Charter, States are required to adopt legislative or other measures to give effect to the rights codified therein. See African Charter, Art. 1 ("The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them"); see also African Charter, Art. 26 ("States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.").

***F. The Death Penalty Is Not A “Proportionate” Way to Achieve the Interest of Crime Deterrence***

59. The third prong of the Court’s framework for assessing restrictions of protected rights requires that any such limitation must be strictly proportionate to the benefits it purports to serve. This principle demands that the impact, nature, and extent of the limitation be weighed against the legitimate state interest. In this context, the death penalty fails to meet the proportionality requirement because it does not provide a demonstrable benefit, such as effective crime reduction. As the Court in *Konaté v. Burkina Faso* emphasized, restrictive measures must not only be appropriate to achieve their protective function but also must be the least disturbing means available:

[R]estrictive measures must comply with the principle of proportionality; they must be appropriate to achieve their protective function, they must be the least disturbing means among those that might help achieve the desired result and they must be proportionate to the interest to be protected [...].<sup>126</sup>

The death penalty, however, does not satisfy this criterion, as its purported deterrent effect remains unproven, and less severe alternatives are available.

60. The Court in *TLS and others v. Tanzania* also adopted the European Court of Human Rights’ holding in *Lonroth v. Sweden Applications No 7151/75, 7152/75* that any restriction on a protected right must strike a “fair balance... between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”<sup>127</sup> The death penalty, by its irreversible nature and its disproportionate impact on members of vulnerable groups, disrupts this balance. It fails to proportionately serve the intended goals of crime prevention or reduction, especially when its application is often arbitrary and

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<sup>126</sup> *Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, ¶ 153, citing Human Rights Committee, *General Observation No. 34, Article 19: Freedom of Opinion and Freedom of Expression*, UN Doc. CCPR/C/GC/34 (29 July 2011), ¶ 33. The Court in *Konaté v Burkina Faso* made explicit that criminal sanctions which are “disproportionate, or excessive... are incompatible with the Charter and other relevant human rights instruments.” *Konaté v Burkina Faso* (merits) (2014) 1 AfCLR 314, ¶ 166.

<sup>127</sup> *TLS and Others v Tanzania* (merits) (2013) 1 AfCLR 34, ¶¶ 106.4, 107.1.



influenced by factors unrelated to the gravity of the crime, such as gender bias and the offender's socioeconomic status.

61. The Court also applied this requirement of proportionality in *Rajabu and others v. Tanzania*, discussed in paragraphs 21 and 22 above, concerning the mandatory imposition of the death penalty. In that ruling, which stopped short of finding that the death penalty *per se* violates Article 4's arbitrariness requirement, the Court found that the mandatory imposition of the death penalty would rob the Court of discretion to consider the facts and applicability of the law, "especially how proportionality should apply between the facts and the penalty to be imposed."<sup>128</sup>

62. Moreover, in assessing the proportionality requirement, the Court should assess the extent to which the restriction impinges on other protected rights, such as the prohibition against torture, and cruel, inhuman, and degrading treatment.

63. As discussed below, the death penalty's disproportionate impact on members of vulnerable groups, the lack of evidence supporting its deterrent effect, and its inherent inhumane and degrading nature, reveal that the death penalty does not satisfy the required balancing test, rendering it arbitrary and disproportionate *per se*.

#### (1) The Death Penalty Has a Disproportionate Impact

64. In his Dissenting Opinion in *Lazaro v. Tanzania*, Justice Ntsebeza cautioned that the death penalty "is often applied disproportionately to marginalized groups" and that "[s]uch disparities undermine the principles of fairness and equal protection under the law."<sup>129</sup> As noted by the U.N. High Commissioner for Human Rights, the death penalty "disproportionately affect[s] the poor and economically vulnerable, those belonging to religious or ethnic minorities, lesbian, gay, bisexual, transgender and intersex communities, persons with disabilities, foreign nationals,

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<sup>128</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, ¶ 109. See also *Juma v Tanzania* (judgment) (2021) 5 AfCLR 431, ¶¶ 126-131.

<sup>129</sup> *Lazaro v. Tanzania* (judgment) (2023) AfCHPR 35 (7 November 2023), Dissenting Opinion of Hon. Justice Ntsebeza, ¶ 28.

indigenous peoples and marginalized members of society,”<sup>130</sup> rendering its application arbitrary and discriminatory. This biased application further undermines any argument for the death penalty’s supposed deterrent effect, as it targets those least able to defend themselves rather than being applied uniformly across all segments of society. The lack of fairness and consistency in its application further undermines the death penalty’s purported deterrent effect.

65. The death penalty disproportionately affects people who are poor<sup>131</sup> and constitutes a “class-based form of discrimination in most countries, thus making it the equivalent of an arbitrary killing.”<sup>132</sup> People living in poverty are disproportionately targeted for arrest, incarceration, and the death penalty.<sup>133</sup> People who are poor and accused of serious crimes often lack the resources to hire skilled lawyers, leaving them unable to mount an adequate defense.<sup>134</sup> Many countries fail to provide these people with well-qualified legal advocates.<sup>135</sup> When a person does not have a well-qualified lawyer to challenge the government’s case and undertake an investigation to present evidence of mitigating factors, the person will be more likely to face a death sentence.

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<sup>130</sup> UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 5. See also Amnesty International, *Advocacy Toolkit, Abolition of the Death Penalty in Africa* (2019), available at <https://www.amnesty.org/en/wp-content/uploads/2021/05/ACT5011622019ENGLISH.pdf>, p. 18.

<sup>131</sup> OHCHR, *Death penalty disproportionately affects the poor, U.N. rights experts warn* (6 October 2017), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22208&LangID=e>.

<sup>132</sup> *Ibid.*

<sup>133</sup> See e.g., Carolyn Hole & Lucrezie Rizzelli, ‘Living With a Death Sentence in Kenya: Prisoners Experience of Crime, Punishment and Death Row,’ (2022) THE DEATH PENALTY PROJECT, pp. 26, 27 and 30 (The majority were poorly educated: more than one in 10 had never been in formal education; their average wage was below the Kenyan minimum wage and more than 1/3 were in debt; 89% of prisoners were responsible for supporting dependents).

<sup>134</sup> *Ibid.*

<sup>135</sup> World Coalition Against the Death Penalty, *Death Penalty and Poverty, Detailed Factsheet: 15th World Day Against the Death Penalty* (10 October 2017), available at [https://worldcoalition.org/wp-content/uploads/2020/09/EN\\_WD2017\\_FactSheet-1.pdf](https://worldcoalition.org/wp-content/uploads/2020/09/EN_WD2017_FactSheet-1.pdf), p. 7 (“One of the most intractable problems in death penalty administration in Nigeria is the severe lack of competent and adequately compensated counsel for indigent defendants and death row inmates seeking appeals.”).

People from disadvantaged economic backgrounds do not have the means to pay experts or to obtain an in-depth investigation of facts and evidence.<sup>136</sup> Moreover, when bail is available for pre-trial release, their inability to pay bail means they remain in pre-trial detention. Pre-trial detention severely hampers their ability to access quality representation and to mount an effective legal defense.<sup>137</sup> Additionally, defendants from disadvantaged socioeconomic backgrounds are particularly vulnerable in corrupt systems where bribes and connections outweigh justice.<sup>138</sup>

66. Gender bias disproportionately affects women at multiple stages in capital proceedings, from investigation to sentencing. During investigations, law enforcement officers often exhibit biases that disadvantage women.<sup>139</sup> In many countries that still enforce the death penalty, women are underrepresented in legal decision-making roles, and as a result the criminal legal system often fails to consider their unique circumstances.<sup>140</sup> During sentencing, judges often show leniency towards women who conform to traditional gender roles, such as caregivers, while those who

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<sup>136</sup> *Ibid.* (“In Nigeria, if suspects are unable to pay for fuel the police will not travel to see witnesses in order to assess the accused’s alibi.”).

<sup>137</sup> Robin M. Maher, “Poverty and Death Penalty”, *Penal Reform International* (10 October 2017), available at <https://www.penalreform.org/blog/poverty-death-penalty/>.

<sup>138</sup> See e.g. *Forum of Conscience v Sierra Leone*, Communication 223/98 (2000) 293 (ACHPR 2000), ¶ 19 (“The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life.”); *International Pen and others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), ¶¶ 1-10, 103; World Coalition Against the Death Penalty, *Death Penalty and Poverty, Detailed Factsheet: 15th World Day Against the Death Penalty* (10 October 2017), available at [https://worldcoalition.org/wp-content/uploads/2020/09/EN\\_WD2017\\_FactSheet-1.pdf](https://worldcoalition.org/wp-content/uploads/2020/09/EN_WD2017_FactSheet-1.pdf), p. 8

<sup>139</sup> See e.g. The Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (September 2018), available at <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>, pp. 6-8.

<sup>140</sup> U.N Human Rights Council, *Joint written statement submitted by Advocates for Human Rights, International Federation of ACAT (Action by Christians for the Abolition of Torture), International Harm Reduction Association (IHRA), Ensemble contre la peine de mort, non-governmental organizations in special consultative status*, UN Doc. A/HRC/47/NGO (May 2021), available at <https://www.fiacat.org/attachments/article/2975/HRC47%20-%20Joint%20written%20statement%20on%20women%20sentenced%20to%20death.pdf>, p. 2.

deviate from these roles, such as those labeled as adulterers, face harsher punishments.<sup>141</sup>

67. Studies conducted by the Cornell Center on the Death Penalty Worldwide (“**CCDPW**”) have “revealed a number of cases of women whose capital trials were permeated with candidly sexist language.”<sup>142</sup> For instance, in India, a court denied leniency to a woman accused of killing her husband with her lover for being “the kind of woman” who brings shame and represents a threat to society, referring to her extramarital affair. Similarly, in Pakistan, a court denied bail to a woman in a drug smuggling case, stating that if she had cared for her infant, she wouldn’t have engaged in such actions harmful to society and youth.<sup>143</sup> Such gender biases influence judicial decisions, often leading to harsher judgments against women based on perceived moral failings.

68. According to the CCDPW, “[o]ne of the most striking instances of gender bias at sentencing affects female defendants who are survivors of domestic abuse.”<sup>144</sup> Data show that most women on death row have been sentenced for murder, often involving the killing of close family members in situations of gender-based violence.<sup>145</sup> These cases frequently share common factors, such as prolonged abuse, lack of external support, and economic dependence. Many of these women are victims of early and forced marriage.<sup>146</sup> However, as noted by the Office of the UN High Commissioner for Human Rights, it is “extremely rare” for sentencing courts to

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<sup>141</sup> The Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (September 2018), available at <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>, p. 6.

<sup>142</sup> *Ibid.*, p. 7.

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*, p. 8. In jurisdictions like Tanzania, where the death penalty is mandatory, courts only consider gender-based violence if the defendant can assert a claim of self-defense.

<sup>145</sup> *Ibid.*, p. 11. For instance, women have been sentenced to death for killing their abusers in Uganda, Morocco, Malawi, Nigeria, and Yemen.

<sup>146</sup> *Ibid.*, p. 4.

consider domestic violence as a mitigating factor.<sup>147</sup> For instance, in Sudan, 19-year-old Noura Hussein was sentenced to death for killing her husband, who had raped her. Noura was forced into marriage at the age of 15 but managed to escape for three years. In 2017, however, her father forced her to return to her husband. After Noura refused to have sex, her husband raped her. When he attempted to rape her again the next day, she defended herself by stabbing and killing him. Despite the circumstances of self-defense, a court sentenced her to death for murder.<sup>148</sup>

69. Women also face capital punishment for other offenses, including terrorism and witchcraft. For instance, in 2018, Houthi rebels in Yemen sentenced 22-year-old Asmaa al-Omeissy to death on terrorism-related charges after rebels detained her, tortured her, and accused her of collaborating with foreign powers and engaging in illicit sexual relations. Her trial lacked essential due process guarantees, resulting in her death sentence, while authorities released her father and two companions accused of similar offenses.<sup>149</sup> Additionally, women have historically been, and continue to be, persecuted and executed for alleged witchcraft. This persecution persists in some regions, where women are still accused of causing misfortunes like death, illness, and droughts through witchcraft, leading to their torture and execution.<sup>150</sup>

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<sup>147</sup> U.N Human Rights Council, *Joint written statement submitted by Advocates for Human Rights, International Federation of ACAT (Action by Christians for the Abolition of Torture), International Harm Reduction Association (IHRA), Ensemble contre la peine de mort, non-governmental organizations in special consultative status*, UN Doc. A/HRC/47/NGO (May 2021), available at <https://www.fiacat.org/attachments/article/2975/HRC47%20%20Joint%20written%20statement%20on%20women%20sentenced%20to%20death.pdf>, p. 2.

<sup>148</sup> The Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (September 2018), available at <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>, p. 4.

<sup>149</sup> *Ibid.*, p. 14.

<sup>150</sup> See John Alan Cohan, "The problem of witchcraft violence in Africa" (Suffolk University Law Review, Vol. 44, No. 4) (2011), available at [http://go.galegroup.com/ps/i.do?p=AONE&u=nysl\\_sc\\_cornl&id=GALE|A286720008&v=2.1&it=r&sid=summon](http://go.galegroup.com/ps/i.do?p=AONE&u=nysl_sc_cornl&id=GALE|A286720008&v=2.1&it=r&sid=summon); Bob Chaundy, "The burning times", *BBC News Magazine* (30 October 2009), available at [http://news.bbc.co.uk/2/hi/uk\\_news/magazine/8334055.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/8334055.stm); UN Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary*

70. Many women in conflict with the law, and the vast majority of women on death row, are from poor and marginalized communities. Many of these women lack the education to understand legal proceedings fully and lack the financial resources to hire competent legal representation. As noted by CCDPW, “most women on death row come from backgrounds of severe socio-economic deprivation and many are illiterate, which has a devastating impact on their ability to participate in their own defense and to obtain effective legal representation,”<sup>151</sup> leaving them more vulnerable to discrimination, coercion, and exploitation.<sup>152</sup> The United Nations has documented reports of women who are illiterate and poor signing confessions which they neither wrote nor understood.<sup>153</sup> This economic disadvantage also prevents them from offering financial restitution, which, in some legal systems, could reduce their sentences.<sup>154</sup>

71. The death penalty disproportionately impacts the LGBTQ+ community. Four countries—Nigeria (in 12 northern states),<sup>155</sup> Mauritania,<sup>156</sup> Somalia (under

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*executions, Philip Alston, UN Doc. A/HRC/11/2 (27 May 2009), available at <https://www.rightdocs.org/doc/a-hrc-11-2/>.*

<sup>151</sup> See The Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (September 2018), available at <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>, p. 3.

<sup>152</sup> *Ibid.*, p. 18.

<sup>153</sup> See U.N. Office on Drugs and Crime, *Handbook on Women and Imprisonment* (March 2014), available at [https://www.unodc.org/documents/justice-and-prison-reform/women\\_and\\_imprisonment\\_-\\_2nd\\_edition.pdf](https://www.unodc.org/documents/justice-and-prison-reform/women_and_imprisonment_-_2nd_edition.pdf).

<sup>154</sup> The Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (September 2018), available at <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>, p. 8.

<sup>155</sup> “Tell Me Where I Can Be Safe”, *Human Rights Watch* (20 October 2016), available at <https://www.hrw.org/report/2016/10/20/tell-me-where-i-can-be-safe/impact-nigerias-same-sex-marriage-prohibition-act>.

<sup>156</sup> “Mauritania: Prison terms for Men Celebrating Birthday”, *Human Rights Watch* (7 February 2020), available at <https://www.hrw.org/news/2020/02/07/mauritania-prison-terms-men-celebrating-birthday>. See also, ECPM (Together Against the Death Penalty), “Love is not a crime”, available at <https://www.ecpm.org/en/campaigns/love-is-not-a-crime/> (“Despite a moratorium on executions since 1987, Article 308 of the Penal Code states that “any Muslim of full age who commits an indecent or unnatural act with a person of the same sex shall be liable to death by public stoning.”).

Sharia law<sup>157</sup>), and Uganda<sup>158</sup>—authorize the death penalty for consensual sexual relations between people of the same sex. Notably, in June 2022, a Sharia court in Bauchi, Nigeria, sentenced three men to death by stoning for engaging in same-sex sexual acts. This judgment raised significant concerns among LGBTIQ+ rights organizations, who feared it might set a precedent for similar harsh rulings in other regions governed by Islamic law. In March 2022, authorities in Kaduna, Nigeria, arbitrarily arrested and detained 42 individuals based solely on their perceived sexual orientation. This situation underscores the precarious and dangerous conditions faced by LGBTQ+ communities in jurisdictions that retain such draconian laws.<sup>159</sup>

72. The death penalty disproportionately affects religious minorities. For instance, religious dissent in the form of blasphemy or apostasy is a capital offense in Egypt, Libya, and Sudan.<sup>160</sup>

73. In sum, as explained in Section E, the lack of a proven deterrent effect not only undermines the argument that the death penalty serves a legitimate state interest, but also exacerbates the disproportionate impact on members of economically vulnerable and marginalized groups. This impact reflects an arbitrary

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<sup>157</sup> See ECPM (Together Against the Death Penalty), “Love is not a crime”, *available at* <https://www.ecpm.org/en/campaigns/love-is-not-a-crime/> (“Sharia law is applied in southern Somalia, in the areas controlled by Al-Shabaab, and in Somaliland. Same-sex relations are punishable by death or flogging”); Human Dignity Trust, *Somalia Country Profile* (2024), *available at* <https://www.humandignitytrust.org/country-profile/somalia/>.

<sup>158</sup> See ECPM (Together Against the Death Penalty), “Love is not a crime”, *available at* <https://www.ecpm.org/en/campaigns/love-is-not-a-crime/> (“People convicted of ‘aggravated homosexuality’ may now be punished with a death sentence. Although same-sex relationships were already illegal in the country, the new law, which passed with the support of 341 out of 389 members of parliament, includes harsher punishments for ‘promoting’ homosexuality and engaging in same-sex relations. Under the 2023 Act, the charge of ‘aggravated homosexuality’ is punishable by death and includes spreading HIV through same-sex relations, rape, and statutory rape, as well as for those deemed ‘serial offenders.’”); “Exclusive: First Ugandan charged with ‘aggravated homosexuality’ punishable by death,” *Reuters* (28 August 2023), *available at* <https://www.reuters.com/world/africa/first-ugandan-charged-with-aggravated-homosexuality-punishable-by-death-2023-08-28/>.

<sup>159</sup> See e.g. Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (University of Pretoria, 2007) (Library of Congress, Publication No. 2020717669), p. 48 (In February 2001, a court in Northern Somalia sentenced to death two women who had a lesbian relationship for “exercising unnatural behaviour.”).

<sup>160</sup> *Ibid.*, p. 49.

application of capital punishment, where certain populations are more likely to face the death penalty due to systemic biases rather than the severity of their crimes.

(2) The Death Penalty Impinges on other Human Rights

74. The death penalty violates several fundamental human rights enshrined in the African Charter, including the right to dignity, the prohibitions against torture, and cruel, inhuman, or degrading treatment, and the right to a fair trial.<sup>161</sup>

75. These violations highlight the inherent arbitrariness of capital punishment. When the death penalty infringes on multiple protected rights, it further disrupts the balance required by the principle of proportionality. The significant encroachment on these rights, coupled with the lack of demonstrable benefits such as deterrence, underscores that the death penalty is disproportionate and unjustifiable as a measure of punishment.

76. The death penalty is inherently degrading and inhumane. Article 5 of the African Charter upholds the right to dignity and prohibits “all forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.” The death penalty, especially through certain methods of execution<sup>162</sup> and the inherent psychological torment experienced by people on death row anticipating their own execution, is inherently cruel, degrading, and inhumane, thus violating Article 5.<sup>163</sup> Human dignity is further affronted by the

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<sup>161</sup> OHCHR, *Death penalty incompatible with right to life* (31 January 2024), available at <https://www.ohchr.org/en/stories/2024/01/death-penalty-incompatible-right-life> (“The infliction of the death penalty is profoundly difficult to reconcile with human dignity, the fundamental right to life, and the right to live free from torture or cruel, inhuman or degrading treatment or punishment”).

<sup>162</sup> Notably, Justice Ntsebeza commented in his Dissenting Opinion in *Lazaro v. Tanzania* that “no termination of life, in whatever form, whether by electrocution, or by lethal injection, hanging, gas chamber asphyxiation, decapitation—none at all—, escapes being an affront to the dignity right protected by Article 5. Every killing of a human being, by another individual, —or even by the State, is, conceptually, undignified.” *Lazaro v. Tanzania* (judgment) (2023) AfCHPR 35 (7 November 2023), Dissenting Opinion of Hon. Justice Ntsebeza, ¶ 8.

<sup>163</sup> See also, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), Article 5; ICCPR, Article 7.



death penalty insofar as it denies the individual “the opportunity for potential rehabilitation or redemption.”<sup>164</sup>

77. The death penalty, particularly when it involves protracted confinement of the person sentenced to death, strips the individual of their humanity, amounting to torture.<sup>165</sup> The prolonged wait for execution, often accompanied by uncertainty regarding whether the sentence will be carried out, results in significant psychological distress. Several socio-psychological studies have documented the reactions of prisoners who endure prolonged uncertainty about their fate, comparing those reactions to the experiences of terminally ill patients.<sup>166</sup> Furthermore, detention conditions for people under sentence of death can intensify the cruelty of awaiting execution, such as confinement to a cell for up to twenty-two hours a day, limited visitation rights, and, in many cases, no access to vocational or educational opportunities, religious services, recreational activities, or treatment programs.<sup>167</sup>

78. Execution methods such as hanging, shooting, and stoning, are inherently brutal and inhumane.<sup>168</sup> No method of execution ensures that the person being executed experiences no physical pain.<sup>169</sup> Certain methods can lead to prolonged and agonizing deaths, as evidenced by documented cases of botched hangings in countries like Tanzania and Uganda.<sup>170</sup> Stoning, a particularly cruel

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<sup>164</sup> *Lazaro v. Tanzania* (judgment) (2023) AfCHPR 35 (7 November 2023), Dissenting Opinion of Hon. Justice Ntsebeza, ¶ 10.

<sup>165</sup> Roger Hood and Carolyn Hoyle, 'The Death Penalty in Reality: The Process of Execution and the Death Row Experience', *The Death Penalty: A Worldwide Perspective* (22 March 2012).

<sup>166</sup> *Ibid.*, p. 175. See also Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (University of Pretoria, 2007) (Library of Congress, Publication No. 2020717669), pp. 113, 115, and 138.

<sup>167</sup> See Lilian Chenwi, *Towards the Abolition of the Death Penalty in Africa: A Human Rights Perspective* (University of Pretoria, 2007) (Library of Congress, Publication No. 2020717669), p. 113.

<sup>168</sup> *Ibid.*, p. 115, note. 83.

<sup>169</sup> Roger Hood and Carolyn Hoyle, 'The Death Penalty in Reality: The Process of Execution and the Death Row Experience', *The Death Penalty: A Worldwide Perspective* (22 March 2012), p. 156.

<sup>170</sup> *Ibid.*, p. 157.

method referenced in Sharia law, is not only inhumane but also inherently discriminatory, disproportionately targeting women. Under some interpretations of Shariah law, if a person manages to free themselves during a stoning, they are pardoned. The stones used must be of a size that neither prolongs death nor causes it too quickly. During stoning, men are buried up to their waists, while women are buried deeper to prevent their breasts from being struck. While a few men have managed to escape, it is almost impossible for women to do so. The vast majority of adultery cases and stoning sentences disproportionately target women, highlighting the unequal application of the law.<sup>171</sup> The death penalty impinges on the right to due process and a fair trial, which is protected under Article 7 of the African Charter. The risk of arbitrary or biased application of the death penalty, lack of due process guarantees, corruption, inadequate legal representation, or lack of resources, increases the likelihood of an arbitrary deprivation of life. As consistently noted by the African Court, “[t]he right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right *without due process amounts to arbitrary deprivation of life*.”<sup>172</sup> Undoubtedly, a wrongful conviction or sentence rendered without due process cannot produce any deterrent effect, let alone, one that is grounded on a legitimate State interest. As Justice Ntsebeza has commented, “Execution is the ultimate, irrevocable punishment: the risk of executing an innocent person can never be eliminated.”<sup>173</sup>

79. The use of the death penalty raises significant concerns about arbitrary deprivation of life when fair trial and due process standards are not met.<sup>174</sup> For

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<sup>171</sup> The Cornell Center on the Death Penalty Worldwide, *Judged for More Than Her Crime: A Global Overview of Women Facing the Death Penalty* (September 2018), available at <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>, p. 13. See also ¶¶ 64 and 65 *supra*.

<sup>172</sup> See e.g. *Forum of Conscience v Sierra Leone*, Communication 223/98 (2000) 293 (ACHPR 2000), ¶ 20; *International Pen and others (on behalf of Saro-Wiwa) v Nigeria*, Communications 137/94, 139/94, 154/96, 161/97 (2000) AHRLR 212 (ACHPR 1998), ¶¶ 1-10, 103.

<sup>173</sup> *Lazaro v. Tanzania* (judgment) (2023) AfCHPR 35 (7 November 2023), Dissenting Opinion of Hon. Justice Ntsebeza, ¶ 25.

<sup>174</sup> Justice Ntsebeza has noted that in “many cases,” people are “executed after being convicted in grossly unfair trials, on the basis of torture-tainted evidence and with inadequate

instance, as reported by Philip Alston, the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, the Nigerian police routinely use torture to obtain confessions, which often serve as the primary evidence in capital cases.<sup>175</sup> Similarly, Manfred Nowak, the UN Special Rapporteur on Torture, noted that suspects in Nigeria are frequently subjected to severe abuse, including beatings, shootings, and being suspended from ceilings, to force confessions.<sup>176</sup>

80. The right to legal representation in death penalty cases is also frequently violated. In some cases, defendants in capital trials have no legal representation, or the representation was so inadequate that it failed to provide a meaningful defense to defend from the death penalty. Reports from Libya,<sup>177</sup> Sudan,<sup>178</sup> and Yemen<sup>179</sup> highlight instances where defendants condemned to the death penalty were denied legal counsel, held incommunicado, or faced trials behind closed doors. In some cases, such as in Botswana, the right to legal counsel was recognized as a constitutional right, but there have been instances where convicts were executed without their lawyers' knowledge.<sup>180</sup>

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legal representation." *Lazaro v. Tanzania* (judgment) (2023) AfCHPR 35 (7 November 2023), Dissenting Opinion of Hon. Justice Ntsebeza, ¶ 27.

<sup>175</sup> See UN Commission on Human Rights, *Civil and Political Rights, Including the Question of Disappearances and Summary Executions*, UN Doc. E/CN.4/2006/53Add.4 (7 January 2006), ¶ 28.

<sup>176</sup> See Roger Hood and Carolyn Hoyle, 'The Death Penalty in Reality: The Process of Execution and the Death Row Experience', *The Death Penalty: A Worldwide Perspective* (22 March 2012), p. 251.

<sup>177</sup> See UN Commission on Human Rights, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahanhir, submitted pursuant to Commission Resolution 2002/36*, UN Doc. E/CN.4/2003/3/Add.1, (12 February 2003), ¶¶ 338, 474 and 475;

<sup>178</sup> *Ibid.*, ¶¶ 474 and 475.

<sup>179</sup> UN Commission on Human Rights, *Report of the Special Rapporteur, Ms. Asma Jahanhir, submitted pursuant to Commission Resolution 1999/35*, UN Doc. E/CN.4/2000/3/Add.1 (2 February 2000), ¶¶ 489 and 490.

<sup>180</sup> See e.g. *Interights & Ditshwanelo v. Botswana*, Communication 319/06 (2015) (ACHPR 2015); Bojosi, K. N., *A Commentary on Recent Constitutional Challenges: A Botswana Perspective*, British Institute of International and Comparative Law (2004) available at: [https://www.biicl.org/files/2191\\_bojosi\\_recent\\_constitutional\\_challenges.pdf](https://www.biicl.org/files/2191_bojosi_recent_constitutional_challenges.pdf), p. 4.

81. Moreover, suspects are deprived of their right to a trial before a competent, independent, and impartial court. In Algeria, the Democratic Republic of the Congo, Egypt, Sierra Leone, Somalia, and Uganda for example—trials that resulted in the death penalty were held before military tribunals,<sup>181</sup> under proceedings falling “far short of international fair trial standards.”<sup>182</sup> In northern Nigeria, Islamic courts are entitled to impose the death penalty under a summary jurisdiction, despite often being untrained in law.<sup>183</sup> Likewise, in Somalia, clan courts with no legal training have sentenced people to death.<sup>184</sup>

82. The right to appeal is another critical aspect often neglected in death penalty cases. While most countries mandate automatic appeals in capital cases, in some countries, the right to appeal is severely restricted or nonexistent. For example, there is no right of appeal from Revolutionary Courts in Libya. In Egypt, no appeals are permitted against sentences from the Emergency Supreme State Security Courts.<sup>185</sup> In Chad, there is no appeal process in cases of premeditated murder.<sup>186</sup>

83. Additionally, as discussed in greater detail in paragraphs 64 through 72 above, the death penalty disproportionately impacts members of marginalized and vulnerable groups, such as people living in poverty and members of minority groups, exacerbating its arbitrary application and violating the principle of equal protection under the law, provided in Article 3 of the African Charter.

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<sup>181</sup> Roger Hood and Carolyn Hoyle, 'The Death Penalty in Reality: The Process of Execution and the Death Row Experience', *The Death Penalty: A Worldwide Perspective* (22 March 2012), p. 248.

<sup>182</sup> Human Rights Watch, *The Court's of "Absolute Power": Fair Trial Violations by Somalia's Military Court* (21 May 2014), available at <https://www.hrw.org/report/2014/05/22/courts-absolute-power/fair-trial-violations-somalias-military-court>

<sup>183</sup> Amnesty International, *BAOBAB for Women's Human Rights and Amnesty International Joint statement on the implementation of new Sharia-based penal codes in northern Nigeria*, AI Index AFR 44/008/2002.

<sup>184</sup> Roger Hood and Carolyn Hoyle, 'The Death Penalty in Reality: The Process of Execution and the Death Row Experience', *The Death Penalty: A Worldwide Perspective* (22 March 2012), p. 248.

<sup>185</sup> *Ibid.*, p. 251.

<sup>186</sup> *Ibid.*, p. 251.

84. In conclusion, the death penalty not only violates the right to life but also breaches other fundamental human rights, including the rights to dignity, a fair trial, and non-discrimination, further underscoring its arbitrariness. Arbitrary deprivation of life cannot produce any impact on a purported legitimate deterrence interest.

(3) The Availability of Less Restrictive Measures to Pursue Crime Prevention Compared to the Death Penalty's Harmful Effects Makes it Grossly Disproportional.

85. As discussed above,<sup>187</sup> punishment and policies that do not entail infringement of the right to life are equally or more effective crime prevention strategies. In fact, the best crime deterrents are policies strengthening the rule of law to promote the certainty of punishment, regardless of its severity, with efficiency and celerity.<sup>188</sup>

86. Therefore, under the requisite strict proportionality analysis, there is no justification for imposing the death penalty as a crime reduction measure because less restrictive alternatives exist. The death penalty completely deprives individuals of their right to life,<sup>189</sup> while alternatives like imprisonment and reforms aimed at improving the justice system do not violate the rights protected by Article 4 of the African Charter.

87. The evident disproportion between the death penalty's restrictions on the right to life and any alternatives is exacerbated by its violations of other protected rights and discrimination against members of vulnerable groups. Intrinsic characteristics of the death penalty constitute grave violations of other human rights. As discussed in paragraph 77, execution methods can rise to the level of torture in violation of Article 5 of the African Charter. In capital cases, structural problems within criminal legal systems, such as corruption, bias, and the absence of due process compound any infringement of the right to a fair trial protected by Article 7 of the African Charter.

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<sup>187</sup> See Section IV.D (3) *supra*.

<sup>188</sup> UN Human Rights Council, *Report of the OHCHR on the High-level panel discussion on the question of the death penalty*, UN Doc. A/HRC/48/38 (3 August 2021), ¶ 18.

<sup>189</sup> See African Commission on Human and Peoples' Rights v Kenya (merits) (2017) 2 AfCLR 9, ¶ 152.

88. As previously discussed, the death penalty also disproportionately impacts members of vulnerable groups.<sup>190</sup> Its biased application undermines claims of deterrence, as it primarily targets people who are least able to defend themselves. The death penalty disproportionately affects individuals living in poverty, who lack resources to secure expert testimony, conduct thorough investigations, and finance an effective legal defense, and those individuals are often particularly vulnerable when they interact with corrupt legal systems. Additionally, the death penalty disproportionately impacts the LGBTQ+ community by criminalizing non-conforming behavior, including consensual same-sex conduct between adults. Religious minorities can also experience such disproportionate effects in jurisdictions where apostasy and blasphemy can lead to execution.

89. These factors demonstrate that any alleged crime reduction effects of the death penalty are vastly outweighed by violations of the right to life and other protected rights, rendering the right to life illusory.<sup>191</sup> In cases of unfair trials and wrongful convictions, its irreversible nature makes it a deeply flawed practice, rendering the right to life a fiction.<sup>192</sup> For people who are poor, members of minority

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<sup>190</sup> See Section IV.E (1) *supra*.

<sup>191</sup> International Human Rights Instruments “must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory” see *Magyar Helsinki Bizottság v. Hungary*, European Court of Human Rights, Grand Chamber, No. 18030/11 (8 November 2016), ¶ 121 and 125; *Soering v. the United Kingdom*, European Court of Human Rights, No. 14038/88 (7 July 1989), ¶ 87 (“the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective”); *Case of Artico v. Italy*, European Court of Human Rights No. 6694/74 (13 May 1980), ¶ 33 (“The Court recalls that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective”).

<sup>192</sup> States and its agents have the obligation to comply with their legal duties in a manner that human rights international obligations do not become totally or partially illusory through domestic judicial or administrative decisions see Inter-American Court of Human Rights, *Maidanik et al. v. Uruguay*, Judgment (Merits and Reparations) (15 November 2021), ¶ 251; Inter-American Court of Human Rights, *Gelman v. Uruguay*, Monitoring Compliance with Judgment (20 March 2013), ¶ 66 (“to ensure that effects of the provisions of the Convention are not impaired by the application of standards contrary to their object and purpose, so that their judicial or administrative decisions do not render total or partial compliance with international obligations illusory.”).

groups, and people who are unjustly convicted, the threat the death penalty reduces the right to life to empty rhetoric.

## V. CONCLUSION

90. As explained above, the death penalty is *per se* an arbitrary deprivation of life, in violation of Article 4 of the African Charter. It violates African Charter's the strong protections for the inviolability of human beings, underlying a foundational human right from which all other human rights necessarily flow. The African Commission's declaration that "[i]nternational law requires those States that have not yet abolished the death penalty to take steps toward its abolition"<sup>193</sup> and the growing consensus among African States on the abolition of the death penalty underscore the necessity that this Court issue the requested ruling.

91. Moreover, the policy justifications for the death penalty collapse under the weight of modern understanding. As discussed above, the death penalty cannot be credibly proven to prevent crime. Moreover, the relevant data confirm what the Honorable Justice Tchikaya noted in his Separate Opinion in *Rajabu v. Tanzania*, that the death penalty "constitutes a superfluous punishment," as individuals who are sentenced to life imprisonment are unable to reoffend if not released, and unlikely to do so if they are.<sup>194</sup> Research also supports Justice Tchikaya's position in his Separate Opinion in *Rutechura v. Tanzania* that the death sentence cannot meaningfully deter the crimes for which it is most commonly imposed: violent crimes which are most frequently spontaneous acts or crimes of passion.<sup>195</sup> Measures to reform law enforcement systems to improve the quality of crime investigations and to enhance

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<sup>193</sup> See General Comment No. 3, African Charter on Human and Peoples' Rights, The Right To Life (Article 4), ¶ 22. This is legally significant as the African Court was established in part to "complement and reinforce the functions of the African Commission on Human and Peoples' Rights." Protocol to the African Charter on Human and Peoples' Rights (1998), Preamble. See also *ibid.*, Art. 2 ("The Court shall ... complement the protective mandate of the African Commission...conferred upon it by the African Charter.").

<sup>194</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, Separate Opinion of Hon. Justice Tchikaya, ¶ 21.

<sup>195</sup> *Rutechura v Tanzania* (judgment) (2021) 5 AfCLR 7, Separate Opinion of Hon. Justice Tchikaya, ¶ 47.

the apprehension and prosecution of offenders have equal or greater crime-prevention effects than the death penalty. Capital punishment is arbitrary, as it is neither absolutely necessary for the policy aims it purports to advance nor is it proportional, insofar as its implementation entails numerous other human rights violations.

92. Accordingly, the Court should not, as Honorable Justice Tchikaya reasoned in his Separate Opinion in *Rajabu and others v Tanzania*, “allow [] islands of tolerance to persist.”<sup>196</sup> Rather, the *amici* respectfully request the Court to blot out this enduring moral stain from the mantle of the African Charter which extends its protections across the African Continent.

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<sup>196</sup> *Rajabu and others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, Separate Opinion of Hon. Justice Tchikaya, ¶ 29.