



fidh



Triggers for abolition of the death penalty in Africa: A Southern African perspective

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Cover photo: Two Somalis, convicted of the murder of a Somali nurse working with a Turkish medical aid unit, are tied to large wooden stakes as they wait to be executed by a firing squad on July 15, 2014 in Mogadishu.
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Foreword

The process to abolish the death penalty is a unique path in every country. Culture, politics, social dynamics and movements are all triggers that can lead to the abolition of death penalty. Whether the abolition arrives through international pressure and influences or through grass rooted initiatives, there is a common understanding that we are moving towards a global abolition of the death penalty given recent statistics and realities of the past years.

Africa is experiencing a trend of abolition of the death penalty with more than 80% of African countries that have abolished the death penalty in law or in practice while State authorities, judges, scholars, civil society all together mobilized around this issue. The abolition of the death penalty in Africa became an irreversible priority of the African Commission for Human and People's Rights since at least 1999 when it adopted the Resolution ACHPR/Res.42(XXVI)9, calling upon African Union Member States to observe a Moratorium on the Death Penalty.

Since 2007, the Working Group on Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa, that I chair, and multiple actors and partners have undertaken different activities and actions such as organizing conferences, addressing letters of appeal to States to abolish the death penalty in Africa. The actions of the Working Group on Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa, led as well to the adoption by the African Commission of Human and People's Rights of a draft Protocol on the abolition of the death penalty in Africa. A study was also conducted in 2011 on the issue of the death penalty in Africa suggesting that it is important for civil society organizations to realize further studies and organize activities to continue sensitizing around the subject.

This study conducted by the International Federation for Human Rights (FIDH) and its Botswana member organization, DITSHWANELO, on the triggers for the abolition of death penalty in Africa certainly follows these recommendations. It is a powerful tool that will frame and support the work of human rights defenders, activists, lawyers, parliamentarians, policy-makers and international human rights bodies, as well as of the Working Group on Death Penalty on the abolition of the death penalty in Africa.

The Southern African States perspective of death penalty explored by the study, is a microcosm that helps to understand the different dynamics across the continent between retentionists, abolitionists and States that apply a Moratorium. It comes on due time when two main obstacles are taking a certain importance on the question. First, the current rise of extremism and terrorism across the continent that is threatening the march towards a general abolition. A surge of execution has been observed in countries like Nigeria, Somalia, Chad, the latter having re-established death penalty only 6 months after abolition. Secondly, the absence of accurate data on public opinion support towards death penalty makes it easy for governments to present public opinion as a strong rationale to maintain it. In fact in the majority of retentionist States the most cited reason to retain death penalty is that the public opinion is in favour of it.

The study emphasizes the courage of political leaders, influential personalities, government and head of States who, despite security threats and numerous challenges, are leading their country on the right path of abolition. It can also be observed that the work of human rights treaty bodies have lead in certain cases to important changes.

Those who have experienced generalized violence, civil war and other form of sufferings, have

realized that capital punishment is cruel, unnecessary, irreversible and illogical. Similarly, the majority of countries that have abolished death penalty have done so, after political transitions, peace and reconciliation processes and constitutional reforms. South Africa is a good example of a country where abolition was a direct result of the end of apartheid. The same happened in Angola and Namibia where the death penalty that was used as a tool of political oppression during the civil war became central during peace negotiations.

Public opinion is not static on the continent. It can be observed through the advancing role of judges who use discretion and consider extenuating circumstances in their sentences. Equally, it is expressed through national parliaments on the continent who are progressively aware of their responsibility of undertaking key changes including adopting laws and legal amendments in favour of the abolition of the death penalty. This is complemented by the growing voice of civil society organizations, women and youth associations, victims and relatives who are contributing to legal reforms in their countries.

I am grateful to the work done all across the continent by various to achieve the abolition of death penalty in Africa. I would like to give a special thank to the International Federation for Human Rights (FIDH), the International Federation of Action by Christians for the Abolition of Torture (FIACAT), the World Coalition Against Death Penalty (WCADP) and DITSHWANELO – The Botswana Centre for Human Rights for their valuable contribution to this goal.

I am particularly supportive of this initiative and other researches, analysis and reflections that intend to not only present the state of discussion on the death penalty but also suggest some concrete steps to follow towards abolition, especially to those who are still doubtful on the overall engagement of African people to put an end to unnecessary sufferings such as the death penalty.

Commissioner Kayitesi Zainabo Sylvie

**Chairperson of the Working Group on Death Penalty
and Extrajudicial, Summary or Arbitrary Killings in Africa**

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the left.

Scope and purpose of the study

The purpose of this study is to identify the triggers leading to the abolition of the death penalty in Southern Africa, so that abolitionists in the region and wider continent can use these examples to help shape their action and advocacy. For the purposes of this research, we have defined Southern Africa as including Angola, Botswana, Lesotho, Madagascar, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. However, we refer to examples from elsewhere in Africa and beyond where relevant.

The study is intended for activists, lawyers, parliamentarians, policy-makers and others advocating for abolition of the death penalty in their countries. It is not meant to be an exhaustive guide. The abolitionist movement in Africa has a long history and is ever-changing. The purpose is to share examples and provide throughout the text, concrete recommendations on how to achieve abolition of the death penalty all over the region and beyond.

This study should be viewed within the context of the 2011 'Study on the question of the death penalty in Africa' produced by the Working Group of the African Commission on Human and People's Rights on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa.¹

Background

The process that leads to abolition of the death penalty is unique in each country. Deeply linked to culture, politics, law and circumstance, there is no 'one size fits all' model. Some countries abolished the death penalty after political change or crises, such as an independence struggle or civil war, others abolished it after it became legal and politically incompatible with the Constitution. In some countries, the movement started on a grass-roots level, based on strong public support, whilst in others, it was the result of international pressure or an influential public figure. With over half of the countries in the world having abolished the death penalty, and almost three quarters of all countries not having executed for at least a decade, it is clear that we are steadily moving towards global abolition. Now, more than ever, there is a need to work together and support abolitionists in countries which still retain the death penalty.

In Africa, more than 80% of countries have abolished the death penalty, with only 10 countries executing within the past decade.² Compared to the rest of the world, it has one of the lowest execution rates per capita. Southern Africa, in particular, is moving in the right direction of abolition. The only country that still regularly executes is Botswana, which has put to death 8 people over the past decade.³ The region has come a long way – the last two decades have seen a steady drop in the number of executions and death sentences. It has also seen Malawi abolish the mandatory death penalty, Zambia and Zimbabwe stop executing, and Madagascar abolish the death penalty outright. With still a way to go, there is an ever-increasing need to share resources and work together in an effort to achieve abolition in ways that fit the countries in the region.

1. *Study on the question of the death penalty in Africa* (2011), Working Group on the Death Penalty in Africa, African Commission on Human and Peoples' Rights. Accessed via http://www.achpr.org/files/news/2012/04/d46/study_question_deathpenalty_africa_2012_eng.pdf on 11 March 2017.

2. These countries are Botswana, Chad, Egypt, Equatorial Guinea, The Gambia, Libya, Nigeria, Somalia, South Sudan and Sudan. See: Death Penalty Worldwide Database, <http://www.deathpenaltyworldwide.org/search.cfm>.

3. *Botswana*, Death Penalty Worldwide Database. Accessed via <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Botswana> on 17 April 2017.

This report is divided into three parts. Part I presents a brief data analysis of the current state of the death penalty in Africa, including the number of executions and death sentences, the crimes eligible for the death penalty and the different methods of execution. Part II then identifies the mechanisms which can lead to abolition of the death penalty, such as by legislative or constitutional reform. Finally, part III contains a comparative analysis of how States have abolished the death penalty, what triggered reform in those States and which actors played a central role. Also included are recommendations based on this analysis, presenting advocacy strategies and best practice examples in an effort to aid abolitionists in Africa.

This work would not have been possible without the generous assistance from Anita Nyanjong (Lawyer at International Commission of Jurists, Kenya), Andrew Novak (Assistant Professor at George Mason University, United States), Ariane Adams (Africa Caseworker at Reprieve, United Kingdom), Cousin Zilala (Director of Amnesty International Zimbabwe), Delphine Lourtau (Executive Director of the Centre on the Death Penalty at Cornell University, United States), Harriet McCulloch (Deputy Director at Reprieve, United Kingdom) Holly Sarkissian (Senior Development Officer at Parliamentarians for Global Action, United States), Jean-Claude Katende (President of ASADHO – African Association for the Defence of Human Rights, Democratic Republic of Congo), Lucy Peace Nantume (Lawyer at Foundation for Human Rights Initiative, Uganda), Mandy Mudarikwa (Lawyer at Legal Resource Centre, South Africa), Marion Chahuneau (Programme Officer at Parliamentarians for Global Action, The Netherlands), Martin Mavengjina (Kenya Human Rights Commission), Moses Owori (Senior Lecturer in Law, University of Lesotho), Omer Kalameu (Human Rights Advisor at the Office of the High Commissioner for Human Rights, Madagascar), Sharon Pia Hickey (Research and Advocacy Director of the Centre on the Death Penalty at Cornell University, United States), Thomas Probert (Senior Researcher at the Institute for International and Comparative Law in Africa, South Africa) and Tlatsetso Palime (Human Rights Officer, DITSHWANELO – The Botswana Centre for Human Rights). DITSHWANELO and FIDH thank them all for their valuable insights and contributions.

DITSHWANELO and FIDH also thank the authors of this publication, Zorah Blok and Ciarán Suter. Zorah Blok previously worked on a death penalty resentencing project in Malawi and Ciarán Suter at Reprieve, an international human rights organisation specialising in the death penalty. Together they have over a decade of experience working on the death penalty and human rights.

Part I: Introduction

The death penalty in Africa in figures

When its new Criminal Code came into force on 1 July 2017, Mongolia became the 105th country in the world to legally abolish the death penalty.⁴ Adding the 37⁵ countries which still legally retain the death penalty, but have not executed over the past 10 years, almost three quarters of the world have now stopped executing.⁶

This trend is even stronger in Africa, where more than 80% of countries have abolished the death penalty, with only 10 of the 55 Member States of the African Union executing within the past decade.⁷ Of that group, Libya, Somalia, South Sudan and Sudan are currently witnessing civil war, with executions being used to repress political opposition, greatly complicating any abolition efforts. The rise of extremist groups like Boko Haram and Al Shabaab has further seen a surge in executions in countries such as Nigeria, Somalia and Chad, and even led the latter to reinstate the death penalty in July 2015 just six months after abolishing it.⁸

According to Amnesty International, at least 1,032 people were put to death worldwide in 2016.⁹ The vast majority of these executions took place in just three countries: Iran, Pakistan and Saudi Arabia.¹⁰ In the whole of Africa, at least 64 people were executed in Botswana, Egypt, Nigeria, Somalia, South Sudan and Sudan.¹¹ Of those, the only execution taking place in Southern Africa was that of Patrick Gabaakanye in Botswana on 25 May 2016.¹²

Compared to previous years, worldwide, the number of people put to death in 2016 has dropped while the number of death sentences has risen. In 2016, 3,117 people received a death sentence globally, with 1,424 – almost half – occurring in Africa.¹³ The majority of death sentences in Africa occurred in Nigeria (527), Egypt (237) and Cameroon (160).¹⁴ In Southern Africa, Zambia recorded 101 death sentences – the 10th highest number globally.¹⁵

In order to work towards abolition of the death penalty across the continent, the Working Group on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa, which is a special mechanism of the African Commission on Human and Peoples' Rights (ACHPR), has been working on a Draft Protocol to the African Charter on Human and Peoples' Rights that would commit States

4. *Mongolia: death penalty confined to history as new Criminal Code comes into effect* (July 2017), Amnesty International. Accessed via <https://www.amnesty.org/download/Documents/ACT5066462017ENGLISH.pdf> on 16 July 2017.

5. This number also includes the 7 countries which have abolished the death penalty for ordinary crimes, but maintain it for military crimes: Brazil, Chile, El Salvador, Guinea, Israel, Kazakhstan and Peru. See: *Death Sentences and Executions in 2016* (2017), Amnesty International, p. 42. Accessed via <https://www.amnesty.org/download/Documents/ACT5057402017ENGLISH.PDF> on 13 April 2017.

6. *Ibid.*

7. These countries are Botswana, Chad, Egypt, Equatorial Guinea, The Gambia, Libya, Nigeria, Somalia, South Sudan and Sudan. See: *Death Penalty Worldwide Database*, <http://www.deathpenaltyworldwide.org/search.cfm>.

8. "Chad reintroduces death penalty for acts of terror" (2015), *BBC*. Accessed via <http://www.bbc.com/news/world-africa-33732176> on 29 March 2017

9. *Death Sentences and Executions in 2016*, Amnesty International.

10. *Ibid.*, p. 4.

11. *Ibid.*, p. 24b.

12. *Statement by the Spokesperson on the execution of Patrick Gabaakanye in Botswana*, European Union External Action (25 May 2016). Accessed via https://eeas.europa.eu/headquarters/headquarters-homepage/5077/statement-spokesperson-execution-patrick-gabaakanye-botswana_en on 14 April 2017.

13. *Death Sentences and Executions in 2016*, Amnesty International, p. 7.

14. *Ibid.*, p. 5.

15. *Ibid.*, p. 36.

to abolition. The protocol is currently being reviewed internally by the African Union before adoption, and is hoped to become a strong impetus to African States to abolish the death penalty.

Crimes eligible for the death penalty

Worldwide, most death sentences are issued for murder and other crimes that involve intentional killing, or for armed robbery, drug-related offences, terrorism or blasphemy.¹⁶ In Southern Africa, the majority of – if not all – death sentences issued in 2016 were for murder or armed robbery. Regionally, other crimes that are technically eligible for the death penalty range from rape, treason, mutiny and espionage, although the death penalty is rarely issued in these cases.

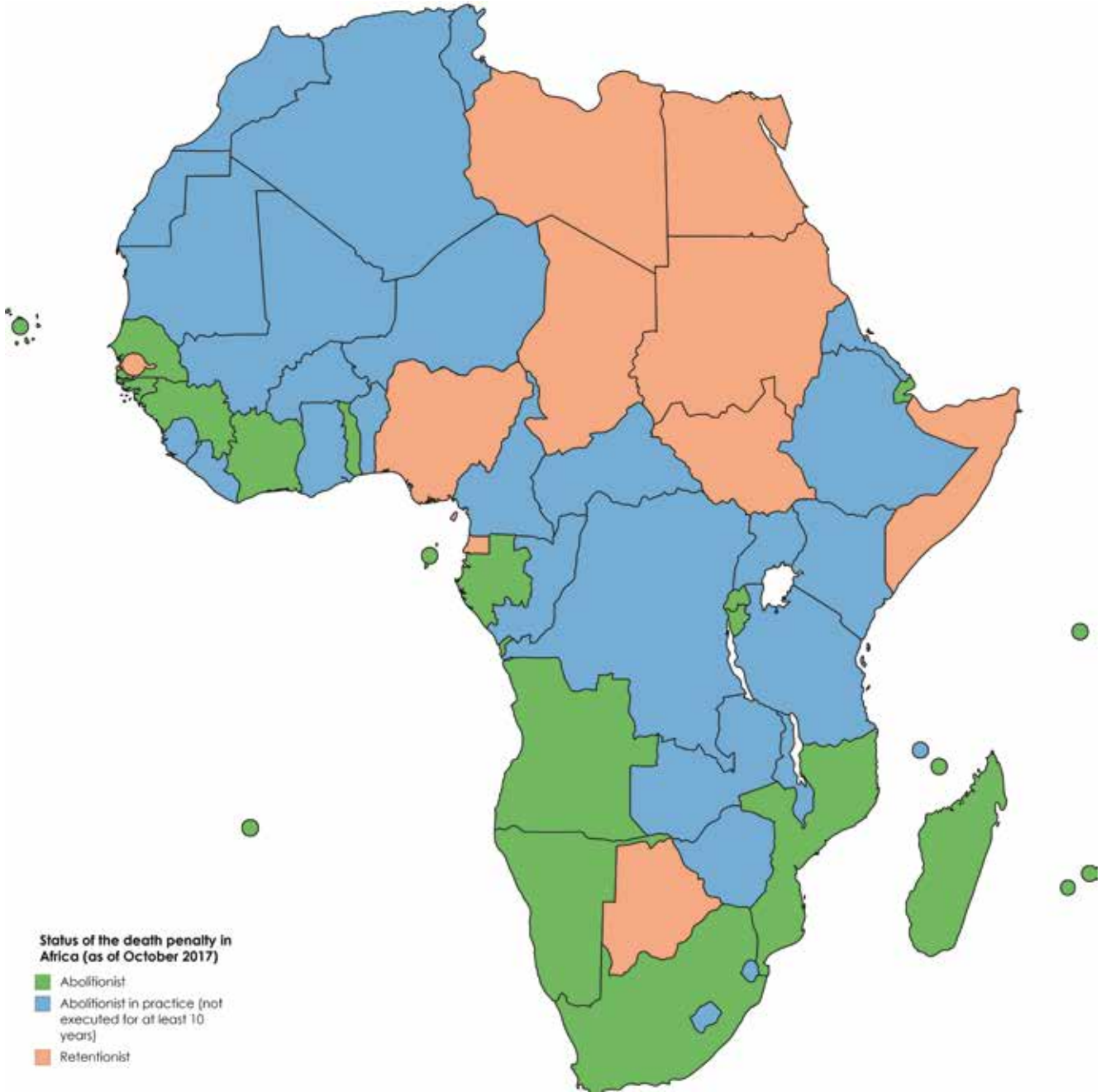
Methods of execution

With the exception of Somalia, which uses shooting as its mode of execution, all people put to death in Africa in 2016 were hanged.¹⁷ Although a percentage of countries in the continent allow other methods, such as stoning (Mauritania, Nigeria and Sudan), these forms of execution are rarely used, or are only reserved for certain crimes or types of offenders.¹⁸

16. *Ibid.*, p. 8.

17. *Study on the question of the death penalty in Africa* (2011), Working Group on the Death Penalty in Africa, African Commission on Human and Peoples' Rights, p. 16; *Death Sentences and Executions in 2016*, Amnesty International, p. 5.

18. *Methods of execution*, Death Penalty Worldwide. Accessed via <http://www.deathpenaltyworldwide.org/methods-of-execution.cfm> on 17 April 2017.



Mandatory death penalty

The mandatory death penalty requires an automatic death penalty for certain crimes. Unlike a discretionary sentencing scheme, where the court has the discretion to take into account the facts of the offence or characteristics of the offender, under a mandatory death penalty scheme the court is obliged to sentence the offender to death regardless of the circumstances or the personality of the convicted. The mandatory death penalty was introduced in Africa under British colonial rule and although it has since then steadily retreated, it still remains in certain parts of the continent. Equatorial Guinea, Kenya, Libya, Mauritania, Niger, Nigeria, Sudan, Tanzania and Zambia maintain it for certain offences, and in Burkina Faso, Chad, Ethiopia, Ghana, Kenya, Somalia and South Sudan it can be authorised under certain circumstances.¹⁹

Zambia has a mandatory death penalty for aggravated armed robbery, even if it does not result in death.²⁰ Following the principle of joint criminal enterprise, participating in a robbery where at least one person uses a firearm is punishable by death for all participants.²¹

Tanzania maintains the mandatory death penalty for murder.²² Human rights groups have filed litigation challenging the constitutionality of the sentence, which is still pending.²³

Although in **Kenya**, the mandatory death penalty for murder was successfully challenged in the Court of Appeal in 2010, the issue is currently pending before the Supreme Court, and this penalty remains for armed robbery and robbery committed by multiple offenders.²⁴ This means that if someone is convicted for committing robbery together with someone else or with the use of a weapon, even if no one is hurt, they will be sentenced to death.²⁵ There is currently a legal challenge pending before the Supreme Court on whether this is compatible with the Constitution.²⁶

Malawi struck down the mandatory death penalty for murder in 2007 on the basis that it violated the right to life and amounted to inhuman punishment, as it did not provide the individuals concerned with an opportunity to present mitigating factors.²⁷ As a result, all 168 prisoners who had previously received the mandatory death penalty were ordered back to court to receive a new sentence in which the court was able to consider mitigating and aggravating factors. As of July 2017, of all 148 sentence rehearings concluded, no death sentences have been confirmed.

The mandatory death penalty for murder was also abolished in **Uganda** in 2009, when the Supreme Court found that the lack of discretion in sentencing violates equal protection, because it indiscriminately treats all crimes and offenders as equally grave or culpable. It also does not offer the possibility of presenting mitigating factors.²⁸ In addition to striking down the mandatory death penalty, the court concluded that death row prisoners who had spent more than 20 years on death

19. *Mandatory death penalty*, Death Penalty Worldwide. Accessed via <http://www.deathpenaltyworldwide.org/mandatory-death-penalty.cfm> on 17 April 2017.

20. Zambia Penal Code Act, sec. 294(2).

21. *Ibid.*

22. Penal Code of Tanzania, arts. 196-197, 200.

23. *Where we work: Tanzania*, Death Penalty Project. Accessed via <http://www.deathpenaltyproject.org/where-we-operate/africa/tanzania/> on 17 April 2017.

24. *Mutiso v. Republic*, Criminal Appeal No. 17 of 2008.

25. Kenya Penal Code, secs. 296(2), 297(2).

26. See *Joseph Njuguna Mwaura & 2 Others vs. Republic*, Criminal Appeal No. 5 of 2008, Court of Appeal at Nairobi, Oct. 18, 2013.

27. *Kafantayeni and others v. The Attorney General of Malawi* (Constitutional Case No. 12 of 2005). Accessed via <http://www.globalhealthrights.org/wp-content/uploads/2014/09/Kafantayeni-v.-Attorney-General.pdf> on 17 April 2017.

28. *Attorney General v. Susan Kigula & 417 Others*, p. 45, Constitutional Appeal No. 03 of 2006, Supreme Court of Uganda, Jan. 21, 2009.

row should be released, those who had spent more than 3 years on death row should have their sentence commuted to life, and all remaining prisoners should be brought back to the High Court to be re-sentenced.²⁹

In addition, **Botswana** and **Lesotho** have adopted legislation that imposes a mandatory death sentence unless extenuating circumstances are presented.³⁰ Different to a discretionary death penalty, where the court has the opportunity to impose the death penalty based on aggravating factors, the burden of proof here is on the defence to present extenuating circumstances, or mitigating factors, to lower the sentence. Although one could argue this comes close to a mandatory death penalty, in reality the courts in these jurisdictions display some level of discretion, often citing extenuating circumstances of their own accord when reaching a sentence.

29. *Ibid.*

30. *Mandatory death penalty*, Death Penalty Worldwide.

Part II: Mechanisms for abolition of the death penalty in Southern Africa

Legislative amendment

Legislative amendment has been one of the main tools through which the death penalty has been abolished in Africa. One recent example is **Madagascar**, which abolished the death penalty when the National Assembly adopted a bill to amend the Penal Code on 10 December 2014.³¹ Madagascar had not carried out any executions since it became independent in 1960.³² The bill to abolish the death penalty was put forward by the President of the National Assembly, Jean Max Rakotomamonjy, and was the result of strong international pressure and political lobbying in the period of political instability following the coup d'État in 2009.³³

Other countries in Africa which have achieved abolition through legislative amendment are **Burundi** (2008), **Côte d'Ivoire** (2000), **Djibouti** (1995), **Gabon** (2010), **Guinea-Bissau** (1993), **Rwanda** (2007), **Senegal** (2004) and **Togo** (2009).

Constitutional reform

Constitutional reform has been one of the other key mechanisms through which the death penalty has been abolished in Africa. It has frequently followed a process of political transition, often marked by violent conflict and typically goes hand in hand with a greater emphasis on the protection of the right to life and other basic human rights. One example is **Namibia**, which abolished the death penalty when it became independent and adopted its Constitution in 1990.³⁴

Other countries in Africa which have achieved abolition through constitutional reform are the **Republic of Congo** (2015), **Mauritius** (1995), **Seychelles** (1993), **São Tomé and Príncipe** (1990), **Namibia** (1990), **Mozambique** (1990) and **Angola** (1971).

Constitutional challenge

In **South Africa**, abolition of the death penalty was achieved through a constitutional challenge. Until the end of apartheid, the country was one of the most prolific executioners in the world.³⁵ The new political landscape that emerged after apartheid allowed for a legal moratorium on the death penalty in 1992, followed by the adoption of a new Constitution in 1993 which included strong references to the right to life, dignity and equality.³⁶ In a landmark judgment passed by the South African Constitutional Court in 1995 it was declared that the death penalty was incompatible with the new Constitution, as a result of which the punishment was abolished completely.³⁷

31. *Death sentences and executions 2014*, Amnesty International, p. 54. Accessed via https://www.amnestyusa.org/pdfs/DeathSentencesAndExecutions2014_EN.pdf on 17 April 2017.

32. *Madagascar*, Death Penalty Worldwide Database. Accessed via <https://www.deathpenaltyworldwide.org/country-search-archive.cfm?country=Madagascar> on 18 April 2017.

33. *Pathways to abolition of the death penalty*, Death Penalty Worldwide (2016), p. 23. Accessed via <https://www.deathpenaltyworldwide.org/pdf/Pathways%20to%20Abolition%20Death%20Penalty%20Worldwide%202016-06%20FINAL.pdf> on 18 April 2017.

34. *Death penalty news*, Amnesty International (February 1991). Accessed via <https://www.amnesty.org/download/Documents/200000/act530011991en.pdf> on 18 April 2017.

35. R. Turrell, *White mercy: a study of the death penalty in South Africa* (2004).

36. L. Chenwi, *Towards the abolition of the death penalty in Africa: a human rights perspective* (2005), p. 199-200.

37. *S. v. Makwanyane and Another* (1995) ZACC 3.

Ratification of international treaties

Depending on the legal system, in some jurisdictions ratifying a treaty makes it directly applicable and supreme over domestic law. **Benin**, for example, abolished the death penalty after a 20-year moratorium by ratifying the Second Optional Protocol to the International Covenant on Civil and Political Rights in July 2012, which prohibits the use of the death penalty.³⁸

“Justice is not served when those who are officers of the court or the administration of justice do not follow strictly, the procedures laid down for dealing with people, especially those who run the risk of losing their lives.”

Archbishop Makhulu

38. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 4.

Part III: Triggers for abolition of the death penalty

In this section, we will explore the different triggers that have led to abolition of the death penalty. We will look at Southern Africa in particular, and also reference examples from the wider continent and beyond where relevant. Included are examples of factors that have contributed towards the abolition of the death penalty, as well as strategies employed by abolitionists in countries which still retain the death penalty. This is not an exhaustive list; instead it seeks to provide illustrative examples to help guide abolition strategies.

Political transition

The overwhelming majority of countries which have abolished the death penalty in Southern Africa, and indeed beyond, have done so following years or sometimes decades of political transition. Peace and reconciliation processes following civil war and constitutional reform following independence have proven to be opportune moments to consider abolition of the death penalty, especially as part of an effort to move away from bloodshed after long periods of violence.

In **South Africa**, abolition was a direct result of the end of apartheid. Once one of the most prolific executioners in the world, the country stopped executing in 1989 and issued a legal moratorium in 1992.³⁹ A report by the South African Law Commission in 1991 described the punishment as 'highly controversial' and advised the issue to be reviewed by the Constitutional Court. Decades of racial segregation and violence resulted in the inclusion of strong references to the right to life, dignity, equality, and the right to freedom from inhuman, degrading or cruel treatment or punishment in the interim Constitution that accompanied the first non-racial general elections in 1994.⁴⁰ Special mention was made of the concept of *ubuntu*, literally meaning 'humanity' in Nguni Bantu, which refers to a person's status as a human being, entitled to respect, dignity, value and acceptance from his or her community.⁴¹ As displayed by the Truth and Reconciliation Commission set up to deal with the atrocities committed under apartheid, there was a strong desire towards reconciliation rather than retribution.⁴² The interim Constitution would pave the way for a legal challenge in which it was successfully argued that the death penalty was incompatible with the new Constitution, thereby abolishing it.⁴³

Namibia abolished the death penalty when it became independent from South Africa. Due to the arbitrary and repressive use of the death penalty during the apartheid colonial period, it was one of the major issues debated by the Constituent Assembly when drawing up the 1990 independence Constitution.⁴⁴ When speaking during a UN General Assembly debate on capital punishment in 1994, Namibia's representative stated that "*the historical perspective and the social cultural and political reality of Namibia prior to independence had played a major role in shaping its Constitution*" and that "*capital punishment was therefore clearly and expressly banned.*"⁴⁵ Indeed, the language used in the Constitution leaves no question as to Namibia's views on the death penalty: "*[n]o law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.*"⁴⁶

39. L. Chenwi, *Towards the abolition of the death penalty in Africa*, p. 149.

40. *Ibid.*, p. 69; J. Hatchard and S. Coldham, "Commonwealth Africa", in P. Hodgkinson and A. Rutherford, *Capital Punishment: Global Issues and Prospects* (1996), p. 161-162.

41. L. Chenwi, *Towards the abolition of the death penalty in Africa*, p. 140.

42. "South Africa's Supreme Court abolishes death penalty", *The New York Times* (1995). Accessed via <http://www.nytimes.com/1995/06/07/world/south-africa-s-supreme-court-abolishes-death-penalty.html> on 19 April 2017.

43. *S. v. Makwanyane and Another* (1995) ZACC 3.

44. J. Hatchard and S. Coldham, "Commonwealth Africa", p. 161.

45. UN Doc. A/C.3/49/SR.43, para. 68.

46. Constitution of the Republic of Namibia (1990), article 6.

Mozambique and **Angola** did not have the death penalty under Portuguese colonial rule, although both introduced it following independence in the 1970s before abolishing it again two decades later. Mozambique and Angola both witnessed civil war after independence: in Mozambique there was fighting between the Mozambique Liberation Front (FRELIMO) government and the Mozambique National Resistance (RENAMO), and Angola saw a Cold War proxy war play out between the Peoples' Movement for the Liberation of Angola (MPLA) and the National Union for the Total Independence of Angola (UNITA).⁴⁷ Since the death penalty was used as a tool of political oppression it became central to peace negotiations. In Angola, the Peoples' Assembly approved a law introducing a multi-party system and subsequently introduced provisions guaranteeing the inviolability of the right to life in 1991.⁴⁸ In Mozambique, the 1990 draft constitution initially did not include abolition, but the drafting committee incorporated it after receiving input from the drafters of the Namibian Constitution.⁴⁹

In **Madagascar**, abolition was a result of the political and economic crisis that followed the coup d'État by Antananarivo mayor Andry Rajoelina in 2009. Although Madagascar did not carry out any executions after gaining independence from France in 1960, it regularly handed down death sentences – particularly in the south to deter violent cattle crime.⁵⁰ The coup was widely condemned by the international community and led to a sharp decrease in foreign aid, leaving the country in economic turmoil.⁵¹ Rajoelina's government subsequently indicated a greater willingness to discuss abolition, perhaps in part to appease the international community, and also because of a growing sense that after years of crisis there was an increased need for the inclusion of human rights in the country's future.⁵² Abolition was eventually achieved in January 2015, in part due to broad support by civil society organisations and parliamentarians – with the President of the National Assembly himself introducing the abolition bill.

International and regional human rights instruments and bodies

The abolition of the death penalty in Africa has coincided with the affirmation of the rule of law and the promotion and respect for fundamental human rights. Many of these rights can be found in international and regional human rights instruments that either prohibit the use of the death penalty or restrict its use and seek its abolition. These instruments often have a corresponding body that monitors the implementation of the provisions by State Parties, such as the Human Rights Committee monitoring the implementation of the International Covenant on Civil and Political Rights. Please see page 12 and 13 for a breakdown of these treaties and standards.

One example of a country where international human rights instruments played a role in abolition of the death penalty is **Madagascar**, which in 2010 for the first time co-sponsored a UN General Assembly Resolution on a global moratorium on the use of the death penalty. Two years later, Madagascar signed the Second Optional Protocol to the ICCPR, committing it to refraining from carrying out executions and to abolish the death penalty within a reasonable period. Several months later, in December 2012, Madagascar again co-sponsored and voted in favour of the UN General Assembly's death penalty moratorium resolution.⁵³

47. *Angola general conflict information*, Uppsala conflict data program. Accessed via <http://ucdp.uu.se/#conflict/327> on 20 April 2017.

48. *Angola: human rights guarantees in the revised constitution* (1991), Amnesty International. Accessed via <https://www.amnesty.org/download/Documents/200000/afr120041991en.pdf> on 20 April 2017.

49. A. Novak, *The death penalty in Africa: foundations and future prospects* (2014), p. 35.

50. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 22.

51. *Madagascar: measuring the impact of the political crisis* (2013), The World Bank. Accessed via <http://www.worldbank.org/en/news/feature/2013/06/05/madagascar-measuring-the-impact-of-the-political-crisis> on 20 April 2017.

52. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 22.

53. *Ibid.*, p. 22-23.

In 2007, **Benin** co-sponsored a UN General Assembly Resolution on a global moratorium on the use of the death penalty. It would continue to do so from 2008 to 2014. In 2011, Benin introduced a law authorising the ratification of the Second Optional Protocol to the ICCPR. The ratification of the Protocol in 2012 resulted in the abolition of the death penalty in Benin as ratified treaties are directly applicable in its domestic legal system and take precedent over inconsistent national law. A two-decade long moratorium on executions, as well as the election of a new president open to arguments for abolition, contributed to the creation of fertile ground for this process.⁵⁴

Other countries in which international human rights provisions have demonstrated their relevancy in the process of the abolition of the death penalty include **Guinea**, which abolished the death penalty for ordinary crimes in 2016 following a series of reforms of the penal code to ensure greater compliance with international human rights law⁵⁵; the **Republic of Congo**, which co-sponsored UN General Assembly moratorium resolutions between 2008 and 2014 and reacted favourably to UPR recommendations in 2009 and 2013 that it abolish the death penalty⁵⁶; and **South Africa**, where the Constitutional Court examined international human rights provisions during its consideration of whether the death penalty violates the right to life and freedom from cruel and inhuman punishment.⁵⁷ In **Ghana**, a complaint filed on behalf of a death row prisoner led the United Nations Human Rights Committee to conclude that the mandatory death penalty for murder violated the right to life, and that Ghana had to commute his sentence to life.⁵⁸

Recommendations: The motivation for countries to accede to international and regional human rights treaties is complex and inextricably linked to their history, socio-political situation and economic stability. It is important to establish the areas which will gain the most traction while working towards abolition. Identify to which international and regional human rights treaties a country is party to establish a country's commitments and obligations. This information can be used for domestic advocacy with key stakeholders such as members of the executive, judiciary and legislative branches to ensure that a country's domestic policy and laws are in line with its international commitments.

In this regard, a country's international commitments need to be matched by corresponding action on the ground. In 2005, interim President Gyude Bryant endorsed **Liberia's** accession to the International Covenant on Civil and Political Rights Second Optional Protocol. However, a subsequent bill was introduced that contained a provision for the death penalty in extreme cases of rape.⁵⁹ According to legal analysis by the Justice Minister the protocol has no effect until it is ratified by the legislature.⁶⁰

A review of a country's international commitments will also identify potential gaps in membership of key human rights treaties. This in turn provides an opportunity to advocate domestically for participation in instruments which either prohibit or narrow the application of the death penalty. Consider submitting complaints to the monitoring body of international and regional human rights instruments regarding the death penalty in the country. There are however countries where international instruments are not legally binding until they have been made into (domesticated) national law.

54. *Ibid.*, p. 4.

55. *Abolition of the death penalty in Guinea*, World Coalition Against the Death Penalty (2016). Accessed via <http://www.worldcoalition.org/Abolition-of-the-death-penalty-in-Guinea.html> on 24 April 2017.

56. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 11.

57. *S. v. Makwanyane and Another* (1995) ZACC 3.

58. UN Doc. CCPR/C/110/D/2177/2012. Accessed via http://ccprcentre.org/doc/2014/04/177_2012-Ghana-E.pdf on 25 April 2017.

59. T. Curry, *Cutting the Hangman's Noose: African Initiatives to Abolish the Death Penalty*. Accessed via <https://www.wcl.american.edu/hrbrief/13/3curry.pdf> on 24 April 2017.

60. *Liberia*, Death Penalty Worldwide Database. Accessed via <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Liberia> on 20 April 2017.

To contribute to the strengthening of the regional normative framework on the abolition of the death penalty, States may also consider participating and supporting regional advocacy efforts towards adoption, by the African Union, of the Protocol to the African Charter on the abolition of the death penalty in Africa. This could be initiated through sensitization and advocacy initiative within their country.

Examples of relevant international and regional treaties

The International Covenant on Civil and Political Rights

The ICCPR restricts the use of the death penalty to the most serious crimes and sets abolition as the ultimate goal. It establishes that the death penalty shall not be imposed on pregnant women or for crimes committed before the age of 18. It also states that the use of the death penalty may violate the right to life if it breaches other rights under the ICCPR, including the right to fair trial and the prohibition on torture.

Parties: All African countries, with the exception of South Sudan⁶¹

Treaty body: Human Rights Committee⁶²

Second Optional Protocol to the International Covenant on Civil and Political Rights

The protocol requires parties not to carry out executions and to “*take all necessary measures to abolish the death penalty within its jurisdiction*” with no delay. It does not provide a mechanism for withdrawal, which makes it an important guarantee against the reinstatement of the death penalty.

Parties: Guinea-Bissau, Liberia, Togo, Benin, Gabon, Rwanda, Djibouti, Namibia, South Africa and Mozambique have ratified, whilst Angola and Madagascar have only signed⁶³

Treaty body: Human Rights Committee⁶⁴

African Charter on Human and Peoples’ Rights

The charter does not prohibit the use of the death penalty, but it does prohibit arbitrarily depriving someone of the right to life as well as torture, cruel, inhuman or degrading punishment and treatment.

Parties: All African countries⁶⁵

Treaty body: African Commission on Human and Peoples’ Rights⁶⁶

61. *Status of ratification*, United Nations Office of the High Commissioner for Human Rights. Accessed via <http://indicators.ohchr.org/> on 27 April 2017.

62. *Human Rights Committee*, United Nations Office of the High Commissioner for Human Rights. Accessed via <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> on 25 April 2017.

63. *Ibid.*

64. *Human Rights Committee*, United Nations Office of the High Commissioner for Human Rights. Accessed via <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> on 25 April 2017.

65. *Ratification table: African Charter on Human and Peoples’ Rights*, African Commission on Human and Peoples’ Rights. Accessed via <http://www.achpr.org/instruments/achpr/ratification/> on 25 April 2017.

66. *African Commission on Human and Peoples’ Rights*. Accessed via <http://www.achpr.org/> on 25 April 2017.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The protocol calls on State Parties *"not to carry out death sentences on pregnant or nursing women"*.

Parties: 36 African countries, including all Southern African countries except Botswana⁶⁷

Treaty body: African Commission on Human and Peoples' Rights⁶⁸

African Charter on the Rights and Welfare of the Child

The charter establishes that *"the death sentence shall not be pronounced for crimes committed by children"* and that no child who is imprisoned should be tortured or otherwise mistreated.

It specifies that the term 'child' *"means every human being below the age of 18 years"*.

Parties: 41 African countries, including all Southern African countries except Zambia and Swaziland, which have both signed but not ratified⁶⁹

Treaty body: African Committee of Experts on the Rights and Welfare of the Child⁷⁰

Examples of relevant international and regional standards

Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty

The safeguards provide that no one under the age of 18 at the time of the crime shall be put to death; that death sentences should not be carried out on pregnant women, *"new mothers, or on persons who have become insane"*; and that anyone sentenced to death has the right to appeal and to petition for pardon or commutation of the sentence.

UN General Assembly Resolutions on a Moratorium on the Use of the Death Penalty

Every two years UN member States vote on a UN General Assembly resolution on a moratorium on the use of the death penalty, which calls on States to establish a moratorium on executions *"with a view to abolishing the death penalty"*. The last vote took place in December 2016 and is discussed in more detail below.

African Commission on Human and Peoples' Rights Resolution 42 (1999)

The resolution calls on State Parties to *"a) limit the imposition of the death penalty only to the most serious crimes; b) consider establishing a moratorium on executions;"* and *"reflect on the possibility of abolishing the death penalty"*.

African Commission on Human and Peoples' Rights Resolution 136 (2008)

This resolution calls on State Parties to observe a moratorium on executions *"with a view to abolishing the death penalty"* and to ratify Second Optional Protocol to the ICCPR.

African Commission on Human and Peoples' Rights General Comment n°3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) (2015)

This general comment offers interpretation and application of the right to life under Article 4 of the African Charter, which includes provisions on the abolition of the death penalty.

67. Ratification table: *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, African Commission on Human and Peoples' Rights. Accessed via <http://www.achpr.org/instruments/women-protocol/ratification/> on 25 April 2017.

68. *African Commission on Human and Peoples' Rights*. Accessed via <http://www.achpr.org/> on 25 April 2017.

69. Ratification table: *African Charter on the Rights and Welfare of the Child*, African Commission on Human and Peoples' Rights. Accessed via <http://www.achpr.org/instruments/child/ratification/> on 25 April 2017.

70. *African Committee of Experts on the Rights and Welfare of the Child*. Accessed via <http://www.acerwc.org/> on 25 April 2017.

Draft Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa

In the conclusion of its 2011 study on the question of the death penalty in Africa, the Working Group of the African Commission on Human and Peoples' Rights on Death Penalty and Extra-Judicial, Summary or Arbitrary Killings in Africa, which is a mechanism of the African Commission on Human and Peoples' Rights, recommended "to the African Union and to State Parties the adoption of a Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa under any circumstances [to] fill the gap in the African Charter [...] with stronger emphasis on restorative rather than on retributive justice". The draft protocol was adopted by the African Commission on Human and Peoples' Rights in 2015 and is currently being reviewed internally by the African Union before adoption. Once established, the protocol becomes binding on those States that ratify it.⁷¹

Prison conditions and lack of resources to carry out executions

Human rights violations as part of the application of the death penalty have been factors in its abolition and reduction in use in Southern Africa. In addition to the trauma of living under a death sentence, many death row prisoners endure severe living conditions, often for years or even decades. Prolonged confinement under such circumstances subjects death row prisoners to treatment that violates their human dignity, and amounts to cruel, inhuman and degrading treatment or punishment.⁷² When coming to a decision in the case challenging the constitutionality of the death penalty in **South Africa**, the court specifically referenced the suffering and cruelty of time spent on death row, as well as the situation of the 300-400 prisoners who had been on death row for up to six years since the start of the moratorium.⁷³ It also made reference to the general risk of arbitrariness in handing down the death penalty, particularly in South Africa, where certain provinces which used to be independent states, such as Ciskei, had abolished the death penalty prior to becoming part of South Africa again. This meant that a person who was brought to trial for murder in the province that was formerly Ciskei could not be sentenced to death, whereas someone who was brought to trial in the neighbouring province could.⁷⁴

In a Supreme Court case in **Zimbabwe**, the court commuted to life the sentences of three death row prisoners on the basis that they had spent more than four years on death row before receiving their execution warrant.⁷⁵ Similarly, On July 13, 2016, the Constitutional Court of Zimbabwe found that life imprisonment without the possibility of parole was unconstitutional as it violated the rights to equal protection and human dignity and the prohibition on cruel and degrading punishment.⁷⁶

In **Kenya**, the President commuted the sentences of 4,000 death row prisoners to life on the basis that it would alleviate the "undue mental anguish and suffering, psychological trauma and anxiety" that resulted from an "extended stay" on death row.⁷⁷

71. *The protocol to the African Charter on Human and Peoples' Rights on the abolition of the death penalty*, DITSHWANELO, FIACAT, FIDH and the WCADP. Accessed via <http://www.fiacat.org/IMG/pdf/leaflet-uk-simple.pdf> on 15 April 2017.

72. L. Chenwi, *Towards the abolition of the death penalty in Africa*, p. 250-251.

73. *S. v. Makwanyane and Another* (1995) ZACC 3.

74. *Ibid.*

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

76. CCZ 08-16 - *Obediah Makoni vs Commissioner of Prisons & Anor.doc*, Harare, January 27 & July 13, 2016.

77. "Kenya's Death Row Inmates Get Life Instead", *Time* (2009). Accessed via <http://content.time.com/time/world/article/0,8599,1914708,00.html> on 25 April 2017.

In **Lesotho**, budgetary, resource and personnel constraints have contributed to a *de facto* moratorium on the death penalty. The country cannot meet the required standards of forensic investigation including, for example, DNA testing, which is often critical in death penalty cases, to ensure it is fully complying with fair trial provisions.⁷⁸

Similarly, one of the things that is often cited by countries to explain the existence of a *de facto* moratorium is the lack of resources to carry out executions. **Zimbabwe, Malawi** and **Swaziland** have all stated at some point that they were unable to execute because they did not have a hangman.⁷⁹ In **Bangladesh** prisons have even resorted to offering convicts reduced sentences if they carry out executions of their fellow inmates.⁸⁰

In the **United States**, where the majority of executions are carried out by lethal injection, many retentionist states struggle to obtain the drugs necessary for execution. Over the past years, all the pharmaceutical companies that produce these drugs have issued restrictions preventing the sale to US prisons, making it very difficult for states to acquire them.⁸¹ This has led to a scramble to find drugs via other states or through unknown means, as well as the use of untested new drug cocktails resulting in botched executions.⁸² In April 2017, the state of Arkansas attempted to execute 8 prisoners in 10 days – the highest rate in the US in 40 years – in an effort to use their supply of lethal injection drugs before they expired at the end of the month.⁸³ Among widespread condemnation by human rights groups, this prompted lawsuits from the pharmaceutical companies that had produced these drugs, as well as concerns by prison officials that the high rate of executions would put undue psychological pressure on their staff.⁸⁴

Recommendations: There is often opportunity to challenge and scrutinise the process that surrounds the death penalty. Strategic litigation or media coverage regarding appalling prison conditions, inhumane treatment of prisoners – including length of time spent on death row –, as well as methods of execution can be helpful additions to the debate on the death penalty. It is worth engaging with those who have intimate knowledge of the execution process: (previous) executioners, prison officers, death row prisoners and prison wardens and chaplains, for example, to share their experiences and concerns. There is, for example, substantial proof that those involved in the execution process suffer from psychological issues due to their work, to the point of inducing depression, post-traumatic stress disorder and suicide attempts.⁸⁵ In **Botswana** and **Uganda**, prison officers have spoken out about the emotional toll it takes having to participate in the execution process with prisoners they have worked alongside for years.⁸⁶

78. M. O. A. Owori, *The Death Penalty In Lesotho: The Law And Practice*, The British Institute of International and Comparative Law (BIICL). Accessed via https://www.biicl.org/files/2197_country_report_Lesotho_owori.pdf on 25 April 2017.

79. "Wanted: hangman for Zimbabwe prison" (2010), *The Guardian*. Accessed via <https://www.theguardian.com/world/2010/apr/13/hangman-zimbabwe-chikurubi-prison> on 20 April 2017; "Africa: hangman wanted, no experience required" (1998), *BBC News*. Accessed via <http://news.bbc.co.uk/2/hi/africa/191310.stm> on 20 April 2017.

80. "The tale of the accidental hangman" (2011), *Mail & Guardian*. Accessed via <https://mg.co.za/article/2011-06-29-the-tale-of-accidental-hangman> on 20 April 2017.

81. "Pfizer blocks the use of its drugs in executions" (2016), *The New York Times*. Accessed via https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html?_r=0 on 21 April 2017.

82. *United States of America*, Death Penalty Worldwide Database. Accessed via <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=united+states+of+america> on 21 April 2017.

83. "Arkansas rushes to execute 8 men in the space of 10 days" (2017), *The New York Times*. Accessed via <https://www.nytimes.com/2017/03/03/us/arkansas-death-penalty-drug.html> on 21 April 2017.

84. *Letter from former corrections officials and administrators to Governor Hutchinson* (2017). Accessed via <http://www.constitutionproject.org/wp-content/uploads/2017/03/Letter-to-Governor-Hutchinson-from-Former-Corrections-Officials.pdf> on 21 April 2017.

85. See amongst others: "The Role of Moral Disengagement in the Execution Process", in *Law and Human Behaviour*, 29/4 (2005); and D. Cabana, *Death at midnight: the confessions of an executioner* (1998); *Study on the question of the death penalty in Africa* (2011), Working Group on the Death Penalty in Africa, African Commission on Human and Peoples' Rights, p. 36.

86. "Botswana has its own hangmen – Minister" (2009), *The Sunday Standard*. Accessed via <http://www.sundaystandard.info/botswana-has-its-own-hangmen-minister> on 25 April 2017; *Situation of the death penalty in Uganda* (2015), Presentation by the Commissioner of Prisons at the parliamentary round table on the abolition of the death penalty. Accessed via <http://www.pgaction.org/pdf/2015-10-07-Obura.pdf> on 26 April 2017.

International engagement

In **Madagascar**, the United Nations, European Union and third States played an important role in coordinating the movement towards abolition. This was partly due to efforts by a newly elected Malagasy government to ensure its legal framework reflected international human rights standards. The government also wanted to demonstrate its democratic legitimacy.

United Nations officials regularly attended meetings with parliamentary and government officials to plan awareness and sensitisation campaigns in the country and develop the abolition process.

In **Burundi**, abolition of the death penalty occurred as part of a post-conflict peace building process, culminating in the enactment of a new Penal code.⁸⁷ This was strongly supported by the United Nations. Indeed, abolition of the death penalty was a key UN requirement during its collaboration with Burundi to create a war crimes tribunal and a truth and reconciliation commission. Further, international organisations were able to support national awareness raising and sensitisation campaigns regarding the death penalty by the Burundi government and civil society organisations, bar associations, parliamentarians and religious groups.⁸⁸

Other examples in which international engagement has played a significant role in the movement towards abolition include **Rwanda**, in which the establishment of the International Criminal Tribunal for Rwanda (ICTR) – that did not provide for the death penalty – largely influenced its later abolition. Also in the **Republic of Congo**, international engagement played an important part in abolition of the death penalty being included in the constitutional reform process. In **Central African Republic**, the Special Criminal Court, established in 2015 to investigate serious human rights and humanitarian law violations committed in the country since January 2003, and to prosecute those responsible, does not retain the death penalty as an applicable sentence. The non applicability of the death penalty by the Special Criminal Court may contribute to the general debate around abolition in Central African Republic. In March 2017, the National Assembly decided to reform the military justice code and to exclude the death penalty as an applicable sentence by military tribunals.

Another way in which international engagement can play an important role in the debate on the death penalty is through bilateral conversations regarding extradition treaties. One example is the relationship between **South Africa and Botswana**, which is frequently tested because South Africa refuses to extradite people facing the death penalty to Botswana, on the basis that it violates their right to life.⁸⁹ South Africa and Botswana have recently resumed talks to amend their extradition treaty and there are indications that it would include a written assurance from Botswana that extradited individuals would not face the death penalty.⁹⁰

Recommendations: Within the international community, various actors – States, international or regional organisations, including the ACHPR, civil society groups, and international experts, amongst others – are experienced in working towards the abolition of the death penalty. It can be helpful for States to identify relevant actors who might be able to support domestic advocacy

87. *Death Penalty Policy in Countries in Transition* (2013), United Nations University. Accessed via https://collections.unu.edu/eserv/UNU:2899/u3112_Policy_Brief_13_09_Web.pdf on 20 April 2017.

88. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 5-7.

89. O. Jonas, *Human Rights, extradition and the death penalty: reflections on the stand-off between Botswana and South Africa* (2013). Accessed via <http://www.conectas.org/en/actions/sur-journal/issue/18/1000443-human-rights-extradition-and-the-death-penalty-reflections-on-the-stand-off-between-botswana-and-south-africa> on 16 July 2017.

90. K. Ontobetse, "S/Africa forces Botswana to backtrack on death penalty for extradited criminals" (2016), *The Sunday Standard*. Accessed via <http://www.sundaystandard.info/safrica-forces-botswana-backtrack-death-penalty-extradited-criminals> on 16 July 2017.

strategies based on criteria specific to their country and the status of the death penalty. Which countries does their country have specific ties to? For example, for abolition advocacy in **Lesotho** or **Swaziland** it might be helpful to engage with South African abolitionists, given the shared history between the countries. Ask what engagement should look like – should it be in public or behind closed doors? Then identify what are their campaign needs – experience, regional or international contacts, financial resources, or something else, and try to work with their international allies to achieve it. Further, it is worth engaging with abolitionist countries in the region to ensure that extradition treaties include provisions preventing individuals from being extradited if they are at risk of being sentenced to death.

Constitutional and penal reform

In **Zimbabwe**, the adoption of a new Constitution was a key requirement of a power-sharing deal between ZANU-PF President Robert Mugabe and Movement for Democratic Change (MDC) leader Morgan Tsvangirai, following a disputed election in 2008. The adoption of a new Constitution in 2013 provided an opportunity for civil society organisations and other concerned individuals to make submissions to the Constitution drafting committee to develop new and revised provisions, such as on the right to life.⁹¹ As a result, whilst the death penalty is still permitted, its scope has been drastically reduced. In addition to removing the mandatory death penalty, the new Constitution exempts women from the death penalty, as well as men under 21 when the offence was committed, or over 70 years old at sentencing.⁹² Other crimes previously eligible for the death penalty, such as treason and mutiny, were also removed. This in part reflects the involvement of the opposition in the Constitution drafting committee as the death penalty had previously been used as a weapon to target political opponents.⁹³

In the **Republic of Congo**, abolition of the death penalty occurred as part of a package of constitutional amendments that were approved by referendum in October 2015. The primary purpose of amending the Constitution was to reform the presidential age and term limits, therefore allowing the incumbent president to seek re-election. As a result, the issue of the death penalty received little focus during the referendum campaign.⁹⁴ However, an ongoing process of reform of the penal code, along with various other factors such as a 33-year moratorium on executions and an effective civil society campaign, eventually led to abolition being included.⁹⁵

Recommendations: In some instances, reform of a country's Constitution or penal code can reflect a move towards constitutional modernisation, democratisation and good governance. This makes them an excellent opportunity to advocate for the inclusion or expansion of right to life and other human rights provisions that render the death penalty obsolete or reduce its scope and application. Key bodies to engage with are the Ministry of Justice, Attorney General, national law commission, relevant executive and parliamentary committees and national human rights commission, amongst others.

91. *Benchmark report on death penalty within selected SALAN Member States (Malawi, South Africa, Zimbabwe and Botswana)* (2015), DITSHWANELO – The Botswana Centre for Human Rights. Accessed via <http://www.ditshwanelo.org/bw/FINAL%20Benchmark%20Report%20December%20%202015.docx> on 26 April 2017.

92. Constitution of Zimbabwe (2013), article 48.

93. "Controversy builds over death penalty in Zimbabwe, Africa" (2014), *VO Zimbabwe*. Accessed via <http://www.voazimbabwe.com/a/zimbabwe-death-penalty-zimbabwe/1957410.html> on 26 April 2017.

94. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 11-12.

95. *Ibid.*; *Congo's presidential election strengthens the controversial new constitution that abolished capital punishment* (2016), World Coalition Against the Death Penalty. Accessed via <http://www.worldcoalition.org/Congos-Presidential-Election-Strengthens-the-Controversial-New-Constitution-that-Abolished-Capital-Punishment.html> on 24 April 2017.

An alternative strategy to utilise the Constitution as a basis for abolition is to initiate litigation examining the compatibility of the death penalty with a country's Constitution. For example, in the **Democratic Republic of the Congo**, human rights groups have filed a legal challenge with the Constitutional Court, arguing that the death penalty is incompatible with the Constitution. This is part of a dual strategy that also includes lobbying efforts at the National Assembly to legislate for abolition.

The need to make sure that there is sufficient political and public support for abolition of the death penalty at the time of constitutional or penal reform is highlighted in the **Comoros**. There, the modernisation of the country's criminal laws and a positive response to UPR recommendations led to the new draft criminal code to include abolition of the death penalty, although they eventually failed to obtain parliamentary approval.⁹⁶

"The courts are ready to put right injustice when an adequately prepared case is placed before them"

George Bizos

Moratorium on the use of the death penalty

Many countries that abolish the death penalty do so years or sometimes decades after they have last carried out an execution. Whether the moratorium is introduced in law (*de jure*) or only in practice (*de facto*), the death penalty is easier to abolish if executions have not taken place for a long time. Not only does this allow States to gather information on the impact of abolition, it also acts as a sensitisation period, often undermining the deterrence argument by demonstrating a lack of change in crime rates.

Once example is **Madagascar**, where no executions had been carried out since before independence in 1960. Although death sentences were still being handed down, they were considered symbolic and it was generally understood that they would not be implemented.⁹⁷ Abolition had been discussed in Madagascar for many years but southern provinces opposed it due to its perceived deterrence effect against violent crime, particularly by cattle thieves.⁹⁸ Although the moratorium alone probably would not have resulted in abolition of the death penalty, it undoubtedly helped facilitate the debate.

Other examples in Africa where long moratoria preceded abolition of the death penalty are **Senegal** (43 years), **Côte d'Ivoire** (40 years), **Republic of Congo** (33 years), **Togo** (31 years), **Benin** (25 years), **Gabon** (25 years), **Djibouti** (at least 18 years), **Mauritius** (18 years), **Seychelles** (at least 17 years), **São Tomé and Príncipe** (at least 15 years), **Burundi** (12 years), and **Guinea-Bissau** (7 years).

Of the countries in Southern Africa which still legally maintain the death penalty, all but Botswana have had *de facto* moratoria in place for at least a decade, and often longer: **Swaziland** since 1983, **Malawi** since 1992, **Lesotho** since 1995, **Zambia** since 1997 and **Zimbabwe** since 2005.

96. *The Comoros*, Death Penalty Worldwide Database. Accessed via <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=comoros> on 25 April 2017.

97. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 22.

98. *Ibid.*

In an effort to work towards abolition of the death penalty through the use of a moratorium, the African Commission on Human and Peoples' Rights adopted in 1999 a resolution on a moratorium on the use of the death penalty, urging African Union member States to work towards a moratorium and subsequent full abolition of the death penalty.⁹⁹ A subsequent resolution was adopted in 2008.¹⁰⁰ Similarly, the United Nations General Assembly adopted in December 2007 its first resolution on a moratorium on the use of the death penalty.¹⁰¹ 104 countries voted in favour and 54 against, with the rest abstaining or not recording a vote.¹⁰² There have been 5 subsequent resolutions adopted since then, in 2008¹⁰³, 2010¹⁰⁴, 2012¹⁰⁵, 2014 and 2016¹⁰⁶, all of which recorded a higher number of votes in favour than previous years, with the exception of 2016. Notably, both Swaziland and Malawi both voted in favour of the moratorium in 2016, for the first time displaying their willingness to “establish” or “maintain [...] a moratorium on executions with a view to abolishing the death penalty.”¹⁰⁷

UN General Assembly voting records on the resolution on a moratorium on the use of the death penalty (Southern African countries)

	2012	2014	2016
Swaziland	Against	No vote recorded	In favour
Malawi	Abstained	Abstained	In favour
Lesotho	Abstained	No vote recorded	Abstained
Zambia	Abstained	Abstained	Abstained
Zimbabwe	Against	Against	Against
Botswana	Against	Against	Against

Although the establishment of a *de facto* moratorium can be a helpful, logical and sometimes necessary first step towards abolition of the death penalty, it often removes the urgency to work towards a moratorium *de jure* or full abolition, and carries the risk that a country might resume executions.¹⁰⁸ One example is **Chad**, which maintained a moratorium between 1991 and 2003, and then until 2015, before abolishing the death penalty in 2016 and subsequently re-instating it again 6 months later for acts of terrorism.¹⁰⁹ Similarly, **The Gambia** resumed executions in 2012 after a 27-year moratorium. Other examples are **Pakistan**, which ended its 6-year moratorium in 2014 following the Peshawar school attack that left 141 people dead (the majority of whom children), **Nigeria**, which resumed executions in 2014 after a 7-year moratorium, and **Indonesia**, which ended its 5-year moratorium in 2013. With the exception of The Gambia, all of these countries have been carrying out executions steadily ever since. Long moratoria can also result in a lack of public

99. AU Doc. ACHPR/Res 42.

100. AU Doc. ACHPR/Res.136(XXXIV)08.

101. UN Doc. A/RES/62/149.

102. *General Assembly adopts landmark text calling for moratorium on death penalty* (2007), United Nations. Accessed via <http://www.un.org/press/en/2007/ga10678.doc.htm> on 20 April 2017.

103. 106 in favour and 46 against. See: UN Doc. A/RES/63/168.

104. 111 in favour and 41 against. See: UN Doc. A/RES/65/206.

105. 117 in favour and 38 against. See: UN Doc. A/RES/69/186.

106. 117 in favour and 40 against. See: UN Doc. A/RES/71/187.

107. *Ibid.*, article 9.

108. *Study on the question of the death penalty in Africa* (2011), Working Group on the Death Penalty in Africa, African Commission on Human and Peoples' Rights, p. 47.

109. *Chad*, Death Penalty Worldwide Database. Accessed via <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Chad> on 20 April 2017; “Chad reintroduces death penalty for acts of terror”, *BBC News* (2017). Accessed via <http://www.bbc.com/news/world-africa-33732176> on 20 April 2017; *Study on the question of the death penalty in Africa* (2011), Working Group on the Death Penalty in Africa, African Commission on Human and Peoples' Rights, p. 49.

interest in the issue, as was the case in **Suriname**, where an 87-year moratorium made it difficult to mobilize support for full abolition of the death penalty.¹¹⁰

Recommendations: Moratoria can be a useful step towards abolition. When working to achieve a vote in favour of the UN General Assembly vote on a moratorium on the use of the death penalty, it is useful for States to identify the main actors, such as the Foreign and Justice Ministries. Should their government be open to bilateral engagement with other countries, work with Embassies and Foreign Ministries of countries which are supporting abolition in the region. Try to achieve a legal moratorium, such as in **South Africa** in 1992 leading up to the 1995 abolition, and in **Tajikistan** in 2004.

Domestic influential individual(s)

Abolition of the death penalty is often achieved in part due to the strong support of an influential individual(s), be they a newly elected president, opposition leader, religious leader or other public figure. Influential figures also play a significant role in implementing or maintaining moratoria on executions.

In **Zimbabwe**, which has not executed anyone since 2005, abolition efforts are headed by Vice President Emmerson Mnangagwa, who survived death row under the Rhodesian regime and has subsequently become a fierce advocate for abolition. Also serving as Minister of Justice, he has indicated he will not sign death warrants, and that his ministry has launched campaigns to educate the public about abolition.¹¹¹ Although the 2013 Constitution still maintains the death penalty, steps towards abolition have been made by excluding men under 21 or over 70 years old at the time of the offence, as well as all women, and restricting the death penalty to only aggravated murder.¹¹²

In **Madagascar**, parliamentary support for abolition came from Jean Max Rakotomamonjy, the President of the National Assembly. Working with national and international human rights groups, Rakotomamonjy drafted and personally tabled the bill. This was the first time a private member's bill had been tabled by someone in his position in Madagascar's legislative history – that would eventually result in abolition of the death penalty.¹¹³

In **Benin**, abolition was achieved in part due to the efforts by President Yayi Boni, who was elected in 2006 after the country had been ruled by Mathieu Kérékou on-and-off for almost thirty years. Although Benin had not carried out executions since 1987, the Constitutional Court rejected a legal challenge in 1999, holding that the Constitution did not prohibit capital punishment.¹¹⁴ The newly elected Boni was initially hesitant to discuss opposition to the death penalty, partly due to its public support, until he took up the cause after civil society groups organised various campaigns, workshops and individual meetings with parliamentarians to mobilise support.¹¹⁵ Yayi Boni has since become a regional leader on abolition, not only achieving abolition in Benin in 2012, but also hosting various regional conferences on abolition in wider Africa.¹¹⁶

In **The Gambia**, where elections saw Adama Barrow become President last year after the country had been ruled by Yahya Jammeh for more than two decades, the former UN war crimes prosecutor and new Justice Minister Aboubacarr Tambadou has indicated the "*death penalty should*

110. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 32.

111. "Zim to eliminate death penalty – Mnangagwa" (2016), *The Herald*. Accessed via <http://www.herald.co.zw/zim-to-eliminate-death-penalty-mnangagwa/> on 20 April 2017.

112. Constitution of Zimbabwe (2013), article 48.

113. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 23.

114. Adrien Kolle Bamigbade, DCC 99-051, Constitutional Court of Benin, 1999.

115. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 4.

116. *Ibid.*, p. 5.

be obliterated from the country's statute books".¹¹⁷ The hope is this will result in the necessary legal and constitutional reforms.

Other public figures who played important roles in abolition of the death penalty in their countries are Minister of Justice Cheick Sako in **Guinea** – which abolished the death penalty for ordinary crimes – and Archbishop Desmond Tutu in **South Africa**.

Recommendations: When looking for suitable public figures to assist them with their campaign, identify who has the power to achieve the change they want. Try approaching influential members of parliament, the justice or home affairs minister, the prime minister and the president. Are there people with personal experience of the death penalty? Who has consistently spoken out about human rights? Outside politics, try to identify which public figures have a wide reach. Religious and community leaders, journalists, civil society organisations and celebrities, to name but a few, might all be able to exercise influence.

Public opinion and advocacy

One of the most cited reasons for countries to retain the death penalty is that the public is in favour of it. It is indeed rare for countries to abolish the death penalty based on strong public support and, in fact, opinion polls frequently show that there is still significant support for the death penalty in countries which have abolished it.¹¹⁸ However, accurately polling public opinion is actually very difficult: studies have shown that respondents' answers depend on the way questions are asked, what information is provided and whether there is a credible alternative penalty to the death penalty available.¹¹⁹ In order for the public to make an informed decision, they need to be aware of the facts, for example, the absence of evidence that the death penalty deters crime¹²⁰, and that the death penalty often costs the taxpayer more than other sentences available.¹²¹ Indeed, experience shows that it is often more productive to engage in public education efforts to inform the public about the facts surrounding the death penalty, rather than pursuing opinion polling.

One highly effective public education strategy is to work with the media mostly when they are free. Whether through newspapers, radio or television, the media's reach often far extends that of sensitisation meetings and other outreach activities. In **Malawi**, for example, a major television channel aired a documentary about Byson Kaula, a former death row prisoner who was released from prison after resentencing and who subsequently became a volunteer teacher, to which the public responded very positively.¹²² In **Canada**, media coverage of the case of Steven Truscott, who was wrongfully sentenced to death at the age of 14, led to a major shift in the public death penalty debate, paving the way for abolition.¹²³ In the **United States**, the media largely echo the debate on the death penalty. For instance, the coverage of the botched execution of Clayton Lockett in 2014 has led to increased public demands to abolish the death penalty.¹²⁴

117. "Gambia's Attorney General seeks removal of death penalty from justice system" (2017), *SMBC News*. Accessed via <https://gambia.smbcgo.com/2017/02/20/gambias-attorney-general-seeks-removal-of-death-penalty-from-justice-system/> on 20 April 2017.

118. *International polls and studies*, Death Penalty Info. Accessed via <https://deathpenaltyinfo.org/international-polls-and-studies-0> on 24 April 2017.

119. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 34.

120. *Moving away from the death penalty: arguments, trends and perspectives* (2014), OHCHR. Accessed via <http://www.ohchr.org/Lists/MeetingsNY/Attachments/52/Moving-Away-from-the-Death-Penalty.pdf> on 24 April 2017.

121. *Testimony before the commission to study the death penalty in New Hampshire* (2009), Death Penalty Information Center. Accessed via <https://deathpenaltyinfo.org/documents/NHTestimony09.pdf> on 24 April 2017.

122. MTN Documentary aired in 2016. See also accompanying article: "The amazing escape from hangman's noose" (2016), *The Times Group*. Accessed via <http://www.times.mw/the-amazing-escape-from-hangmans-noose/> on 24 April 2017.

123. *Pathways to abolition of the death penalty*, Death Penalty Worldwide, p. 9.

124. "Scene at botched Oklahoma execution of Clayton Lockett was a 'bloody mess'" (2014), *The Guardian*. Accessed via <https://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess> on 24 April 2017.

Besides media engagement, there are various other advocacy strategies to engage with the public. In **Botswana**, for example, human rights group DITSHWANELO – The Botswana Centre for Human Rights is working to educate the public on the death penalty by organising annual couch conversations, in which they invite people to speak about the death penalty, organising death penalty film festivals, and conducting trainings with journalists, amongst many other activities.¹²⁵ In **Zimbabwe**, human rights groups have erected billboards, organised marches, and written letters to politicians to inform them about the death penalty.¹²⁶ These are but a handful of examples of the types of activities that are being organised around the continent.

Advocacy opportunities

- Meetings and discussions (with decision-makers, experts, partner organisations, etc.)
- Strategic litigation
- Media (feature articles, press conferences, radio spots, leaflets, documentaries, etc.)
- Reports
- Workshops and trainings
- Writing submissions to decision-making bodies (Constitution drafting committees, parliamentary groups, treaty bodies, etc.)
- Marches and demonstrations
- Writing letters (to the president, parliamentarians, death row prisoners, etc.)
- Organising side events at human rights mechanisms (Human Rights Council, African Commission on Human and Peoples' Rights, Universal Periodic Review, etc.)
- Organising cultural events (film festivals, photo exhibitions, etc.)

Recommendations: One example of how an opinion poll can be helpful is **Ghana**, where the University of Cambridge conducted an extensive survey in 2015 following a recommendation by the Ghanaian Constitutional Review Commission. The survey showed that 48.3% of respondents were strongly opposed to the death penalty, with only 8.6% indicating strong support for the punishment.¹²⁷ That said, as considered above, public opinion polling is often fraught with difficulties, and it might be more helpful for abolition campaigns to engage in public education efforts. Examples include working with the media, organising events such as film festivals, holding marches, printing leaflets, holding press conferences, organising workshops and trainings and planning photo exhibitions, amongst other things. It can be useful to organise these types of activities around key dates, such as World Day Against the Death Penalty (10 October), Cities for Life – Cities Against the Death Penalty (30 November) and Human Rights Day (10 December).

“Restorative justice and botho or ubuntu are based firmly on the recognition of the fundamental humanity of even the worst offenders.”

Archbishop Desmond Tutu

125. DITSHWANELO Press Statement on World Day Against the Death Penalty (10 October 2015), DITSHWANELO – The Botswana Centre for Human Rights. Accessed via <http://www.ditshwane.org.bw/Press%20Statement%20on%20World%20Day%20Against%20the%20Death%20Penalty%202015.docx> on 24 April 2017.

126. *A big step closer to abolishing the death penalty in Zimbabwe?* (2013), Amnesty International. Accessed via <https://www.amnesty.org/en/latest/campaigns/2013/11/a-big-step-closer-to-abolishing-the-death-penalty-in-zimbabwe/> on 25 April 2017.

127. *Public opinion on the death penalty in Ghana* (2015), University of Cambridge. Accessed via <http://nebula.wsimg.com/6653665afb945630ea4f6c0beffe65bd?AccessKeyId=50A9833FCBD2E20E7634&disposition=0&alloworigin=1> on 24 April 2017.

Clemency

One of the ways countries have been able to maintain lengthy moratoria on the death penalty is by large-scale pardons of death row prisoners. In **Kenya**, for example, President Uhuru Kenyatta commuted to life the death sentences of 2,747 death row prisoners in October 2016, following in the footsteps of his predecessor who had done the same with more than 4,000 death row prisoners in 2009.¹²⁸ Similarly, consecutive presidents in **Zambia** have over the past decade commuted all death sentences to life to the point that in August 2015, only 4 people remained on death row.¹²⁹

Recommendations: Although legal abolition should be our goal, working to support the clemency process in-country can be useful to pave the way towards abolition. In **Botswana**, for example, human rights group DITSHWANELO – The Botswana Centre for Human Rights has brought successful legal challenges to make the overly opaque clemency process more transparent, in an effort to make clemency applications more accessible and successful.¹³⁰ In most countries, commutations take place on national holidays (e.g. Christmas, Easter and Mother’s Day), so it is worth scheduling advocacy efforts around these dates.

Mitigation investigation

When the Constitutional Court of **Malawi** abolished the mandatory death sentence, it did so on the basis that a court should be able to take into account the facts of the offender and circumstances of the offence when reaching a sentence.¹³¹ In such a process, facts which reduce the severity of a crime are called mitigating factors and facts which increase the severity are called aggravating factors. Examples of mitigating factors are intoxication, provocation, mental health issues and the age of the offender. As the death penalty is reserved for the worst crimes, courts should review the mitigating and aggravating factors to determine whether a case deserves the highest punishment according to the country’s penal code.

In **Malawi**, abolition of the mandatory death sentence meant that all 168 prisoners who had been sentenced to death under the mandatory death penalty prior to its abolition were ordered back to court to receive a new sentence, for which the court would take into account mitigating and aggravating factors. The Malawi Human Rights Commission worked with the legal teams and paralegals to conduct mitigation investigation to inform the court in these cases. As a result, of all the 148 hearings that have taken place as of July 2017, none have led to confirmation of the death sentence. The effects of mitigation investigation have also been felt outside of the resentencing process, with judges, lawyers, paralegals and others being more aware of the mitigating factors that should be considered at trial, such as mental health issues. As a result, Malawi only sentenced one person to death in 2016. The effects of a resentencing project in **Uganda** have been similar, with more attention being paid to mitigating factors at trial, leading to no death sentences being issued in the country in 2016.¹³²

Recommendations: In death penalty cases, the responsibility to conduct mitigation investigation falls mainly on the defence team. Mitigation investigation involves speaking to the defendant, eyewitnesses to the offence, the defendant’s family and friends, obtaining health records,

128. “Kenya commutes sentences of all death row inmates” (2016), *The Independent*. Accessed via <http://www.independent.co.uk/news/world/africa/kenya-death-row-inmates-spare-live-commute-sentence-a7378751.html> on 25 April 2017.

129. *Pardon prisoners on death row* (2016), World Coalition Against the Death Penalty. Accessed via <http://www.worldcoalition.org/Pardon-Prisoners-On-Death-Row.html> on 25 April 2017.

130. *DITSHWANELO Press Statement on the Execution of Patrick Gabaakanye* (2016), *The Botswana Gazette*. Accessed via <http://www.thegazette.news/?p=14938> on 25 April 2017.

131. *Kafantayeni and others v. The Attorney General of Malawi* (Constitutional Case No. 12 of 2005).

132. *Death Sentences and Executions 2016*, Amnesty International, p. 36.

conducting mental health assessments, finding birth records, and much more. A non-exhaustive list of mitigating factors is included below, but the following are of particular interest:¹³³

Common mitigating factors

- Age at the time of the offence
- Minor role in the offence
- Lack of premeditation
- Provocation
- Intoxication
- Mental health
- Evidence of good moral character
- Cooperation with the authorities
- Remorse
- Extreme poverty
- Good conduct in prison
- Family ties
- Evidence of rehabilitation

International and domestic law are in agreement that the death penalty should not be handed down to juveniles.

In countries where birth registration is non-existent, it is often difficult to prove someone's age, which can lead to children being wrongly prosecuted as adults. In **Malawi**, mitigation investigation as part of the resentencing process produced evidence that 16 of the 168 men and women who received the mandatory death penalty before abolition were found to have likely been a juvenile at the time of the offence. Investigators searched for statements from family members and traditional leaders, school records, identity papers, voting records, baptism records, marriage certificates and other documents in order to show their age, and they were subsequently released.

Of equal importance is the prohibition of the use of the death penalty against people with **mental or intellectual disabilities**, and the weight that is attached to mental health as a mitigating factor. Studies suggest that 43% of people who were executed in the **United States** between 2000 and 2015 were diagnosed with a mental illness at some point in their lives – as opposed to the overall national figure of 18%.¹³⁴ As mental illness is often underdiagnosed it is likely these figures are higher in reality, which means it is of even greater importance that mental illness is seriously considered as a mitigating factor. During the resentencing process in **Malawi**, the Malawi Human Rights Commission worked with mental health facilities in-country, as well as international mental health experts specialised in the death penalty, in order to assess all 168 prisoners who had previously received a death sentence. Although the exact number is unknown, a significant percentage of them were diagnosed with mental or intellectual disabilities and subsequently received lower sentences.

Mitigation investigation in death penalty cases is a highly specialised skill, benefiting from extensive experience and resources. In countries with limited to no resources for legal aid services, there is particular need for lawyers and other legal professionals such as paralegals to be trained in mitigation investigation and death penalty litigation in general. One useful resource is the best practices manual on representing individuals facing the death penalty, which was published in 2013 to provide lawyers with legal arguments and strategic guidance in their representation of individuals facing the death penalty worldwide.¹³⁵

Mitigation investigation alone will not lead to abolition of the death penalty. However, it is difficult to overstate the importance it has in challenging not only the mandatory death penalty, but also the death penalty in general. A large decrease in death sentences helps sensitise a country to life without the death penalty, and paves the way towards full abolition.

133. Also see: *Malawi mitigation investigation guide: a guide to best practices for mitigation investigation in capital cases* (2014), Reprieve. Accessed via <http://www.reprieve.org.uk/wp-content/uploads/2014/11/15-10-02-Malawi-Mitigation-Investigation-Guide-PRINT-VERSION.pdf> on 4 April 2017.

134. "Does the death penalty target people who are mentally ill? We checked", *The Washington Post* (2017). Accessed via https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked/?utm_term=.26848b898437 on 5 April 2017; "Nearly 1 in 5 Americans suffers from mental illness each year" (2014), *Newsweek*. Accessed via <http://www.newsweek.com/nearly-1-5-americans-suffer-mental-illness-each-year-230608> on 5 April 2017.

135. *Representing individuals facing the death penalty: a best practices manual* (2013), Death Penalty Worldwide. Accessed via http://www.worldcoalition.org/media/resourcecenter/EN-Death_Penalty_Manual_-_final_copy_01_16_13.pdf on 16 July 2017.

Engagement with traditional and religious leaders

Traditional leaders play an important role in most African societies. Tasked with representing their communities, they often act as a vital link between rural communities and the political capital, which makes them a helpful ally when engaging with the public on the topic of the death penalty. In **Zimbabwe**, the Chief Council, which is comprised of traditional leaders and whose members make up 23% of the Senate, unanimously voted in 2016 to abolish the death penalty.¹³⁶ They stated that “*capital punishment was not cultural, but a relic of the colonial era.*”¹³⁷ In **Malawi**, efforts are currently underway to survey all traditional leaders of the communities who have been involved in the sentence rehearing process after the abolition of the mandatory death penalty, in an effort to ascertain how their views on capital punishment have evolved over time.¹³⁸

Religious leaders also play a key role in many abolition efforts. Not only do they often have access to a much wider audience than politicians and advocacy groups, abolition arguments are often centred around religious values such as the right to life and the right to dignity. One example where religious groups are working together with advocacy groups is **Zambia**, where the Council of Churches has taken a unanimous stand against the death penalty and is actively involved in advocating for abolition.¹³⁹

Recommendations: Engagement with traditional and religious leaders can be very helpful as part of an abolition campaign, especially in countries where there is a strong disparity between the political elite and rural communities. Through working with traditional and religious leaders, it is often possible to reach a wider audience than through more traditional outreach activities such as media and sensitisation meetings. In countries where traditional leaders have an established political role, such as in **Zimbabwe** and **Botswana**, engagement can also result more directly in political change.

“...even though certain persons may not have the money to engage experienced attorneys and counsel, willing members of civil society, religious leaders and members of the legal profession are prepared to protect those in need as a matter of public duty.”

George Bizos

136. “Scrap death penalty, chiefs urge govt” (2016), *The Herald*. Accessed via <http://www.herald.co.zw/scrap-death-penalty-chiefs-urge-govt/> on 24 April 2017.

137. *Ibid.*

138. Sandra Babcock, Cornell University.

139. “Current constitution has many flaws and is poorly edited, say Christian Council of Churches” (2016), *Lusaka Times*. Accessed via <https://www.lusakatimes.com/2016/03/02/114283/> on 25 April 2017.

Engagement with minority groups

In **Tanzania** and **Malawi**, there has been a surge in crimes against people with albinism, with offenders seeking their body parts for witchcraft purposes, leading to increased public calls for the death penalty.¹⁴⁰ In cases like these, there is opportunity to engage with representatives of minority groups, such as people with albinism, to see if they are willing to speak out against the use of the death penalty.

Recommendations: When developing an abolition advocacy strategy, it is useful to identify which groups are targeted in particular in the crimes that lead to (increased calls for) the death penalty, and assess whether inviting representatives of such groups to speak out against the death penalty could be helpful. For example, in **Botswana**, human rights group DITSHWANELO – The Botswana Centre for Human Rights invited members of ‘Murder Victims’ Families for Human Rights’, an American organisation of family members of murder victims who oppose the death penalty, in an effort to give families of Botswanan murder victims a voice and facilitate discussions regarding the appropriateness of the death penalty.¹⁴¹

“Restoration heals and makes whole while retribution only wounds and divides us further.”

Archbishop Desmond Tutu

140. “Attacks on albinos in Malawi surge, body parts sold for witchcraft: Amnesty” (2016), *BBC News*. Accessed via <http://www.reuters.com/article/us-malawi-albinos-idUSKCN0YT0II> on 25 April 2017.

141. *DITSHWANELO Press Statement on World Day Against the Death Penalty, 10 October 2013*, DITSHWANELO – The Botswana Centre for Human Rights. Accessed via <http://www.ditshwanelo.org/bw/PDF-%20DITSHWANELO%20Press%20Statement%20on%20World%20Day%20Against%20the%20Death%20Penalty%202013.pdf> on 25 April 2017.

Conclusion

With the world moving steadily closer to global abolition of the death penalty, there is hope that the trend that has started in Southern Africa – of significantly reducing the number of executions and death sentences, and many countries adopting a *de facto* moratorium – will result in full abolition in the region before the first quarter of the 21st century. There is much that needs doing in order to achieve this result: the public should be educated about the facts surrounding the death penalty, parliamentarians should be given the technical support to successfully advocate for abolition and advantage should be taken of country-specific opportunities which facilitate discussion about abolition, such as periods of constitutional or penal reform. The adoption of the Draft Protocol to the African Charter on Human and People’s Rights will be an important step in this regard, bringing momentum to the effort to abolish the death penalty across Africa. That said, the campaign towards abolition of the death penalty is being fought around the world. It is therefore vital that those who have succeeded in abolishing the death penalty are able to share their experiences with the people who are working in retentionist countries. Although the process that leads to abolition of the death penalty is unique in each country, we believe that success is most achievable by working together and sharing research and expertise. We hope that this report will have contributed to this effort.

“As a corrective measure within society, one cannot help but conclude that capital punishment is inadequate.”

Archbishop Makhulu



This action is carried out as part of the project aiming at contributing to the abolition of the death penalty in sub-Saharan Africa in partnership with DITSHWANELO, FIACAT, FIDH and the World Coalition against the Death Penalty and with the financial support of the European Union Delegation to the African Union in Addis Ababa. The contents of this publication are the sole responsibility of FIDH and DITSHWANELO – The Botswana Centre for Human Rights, and can in no way be taken to reflect the views of the European Union.



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DITSHWANELO – The Botswana Centre for Human Rights is an advocacy organisation with a key role in the promotion and protection of human rights in Botswana. It was established in 1993. The Centre affirms human dignity and equality irrespective of gender, ethnicity, religion, sexual orientation, social status or political convictions. DITSHWANELO educates, researches, provides counselling and mediation on issues of human rights, with specific reference to the marginalised and the disempowered. The Centre works nationally, regionally and internationally. It has been the only organisation in Botswana, to use a comprehensive approach to human rights, since its establishment. The Centre works with the most vulnerable, including the poor who do not have access to justice; the indigenous peoples of Botswana (the Basarwa/ San) and other ethnic minorities; migrants; refugees; those facing the death penalty; gays, lesbians and bisexuals; and domestic workers.

DITSHWANELO is the only organisation which actively works on the death penalty in Botswana. The Centre began its death penalty related work in 1995. It focuses on awareness-raising, lobbying, research, legal assistance and other assistance in relation to the death penalty. Over the year the organisation has held various activities which advocate for the abolition of the death penalty.

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