Hanging and the mandatory death penalty in Africa: the significance of *Rajabu v Tanzania*

*Andrew Novak**
https://orcid.org/0000-0002-7049-1015

ABSTRACT: In November 2019, the African Court on Human and Peoples' Rights in *Rajabu v Tanzania* issued its first major decision related to the substance of the death penalty. The Court found that Tanzania's mandatory death penalty violated article 4 of the African Charter on Human and Peoples' Rights (the right to life), because it constituted an 'arbitrary' deprivation of life. This decision accords with case law from other international treaty bodies and judgments of domestic courts. In addition, the Court found that hanging as a method of execution was 'inherently degrading,' a notable finding because most retentionist African countries still use hanging. By assessing the mandatory death penalty under article 4 instead of article 7 (right to a fair trial), the Court's holding has limited applicability to other mandatory sentences, but the author contends that the Court should extend this precedent in the future to mandatory life imprisonment. The most important question that remains open is whether article 4 requires an individualised sentencing hearing in every case, including where persons with mandatory death sentences have already had their sentences commuted to imprisonment terms by the president without an opportunity to present mitigating evidence. *Rajabu* significantly contributes to the erosion of the death penalty in Africa and is an incremental precursor to total abolition under article 4 of the Charter.

TITRE ET RÉSUMÉ EN FRANCAIS:

La pendaison et la peine de mort obligatoire en Afrique: la contribution de l'affaire *Rajabu c. Tanzanie*

RÉSUMÉ: En novembre 2019, la Cour africaine des droits de l'homme et des peuples a rendu, dans l'affaire *Rajabu c. Tanzanie*, sa première décision majeure liée à la substance de la peine de mort. La Cour a estimé que la peine de mort obligatoire en Tanzanie violait l'article 4 de la Charte africaine des droits de l'homme et des peuples (le droit à la vie), car elle constituait une privation 'arbitraire' de la vie. Cette décision est conforme à la jurisprudence d'autres organes de traités internationaux et aux jugements des tribunaux nationaux. En outre, la Cour a estimé que la pendaison en tant que méthode d'exécution était 'intrinsèquement dégradante', une conclusion notable car la plupart des pays africains favorables au maintien de la peine de mort y ont encore recours. En évaluant la peine de mort obligatoire en vertu de l'article 4 plutôt que de l'article 7 (droit à un procès équitable), la décision de la Cour a une applicabilité limitée aux autres peines obligatoires, mais l'auteur soutient que la Cour devrait étendre ce précédent à l'avenir à l'emprisonnement à vie obligatoire. La question la plus importante qui reste ouverte est de savoir si l'article 4 exige une audience de détermination de la peine individualisée dans tous les cas, y compris lorsque des personnes condamnées à la peine de mort obligatoire ont déjà vu leur peine commuée en peine d'emprisonnement par le président sans avoir eu la

* BA (George Washington), MSc (London), JD (Boston), PhD (Middlesex); Assistant Professor, George Mason University, Department of Criminology Law and Society; anovak2@gmu.edu.

A Novak 'Hanging and the mandatory death penalty in Africa: the significance of *Rajabu v Tanzania*' (2021) 5 *African Human Rights Yearbook* 401-419
http://doi.org/10.29053/2523-1367/2021/v5a18

possibilité de présenter des preuves atténuantes. *Rajabu* contribue de manière significative à l'érosion de la peine de mort en Afrique et constitue un précurseur progressif de l'abolition totale en vertu de l'article 4 de la Charte.

KEY WORDS: death penalty, mandatory, hanging, Tanzania

CONTENT:

1 INTRODUCTION

On 28 November 2019, the African Court on Human and Peoples' Rights (African Court) found Tanzania's mandatory death penalty violated the right to life and the right to human dignity, respectively articles 4 and 5 of the African Charter on Human and Peoples' Rights.[1] This case, *Ally Rajabu and others v Tanzania*, was brought by four Tanzanian death row inmates as applicants who argued that Tanzanian law was incompatible with the African Charter to the extent that judges did not have discretion to substitute a lesser sentence than death upon conviction for murder.[2] The applicants also argued that hanging as a method of execution violated article 5.[3] In addition to articles 4 and 5, the applicants also argued that their fair trial rights were violated under article 7 of the African Charter to the extent that their death sentences were not imposed in a reasonable time and by a competent court, though these claims were ultimately rejected.[4] While the 10 judges of the panel unanimously agreed with the outcome, two wrote separate concurring opinions on different aspects of the main decision. The first concurrence, by Judge Chafika Bensaoula, pertained to admissibility of the case owing to the applicants' delay in filing the application at the African Court.[5] The second and more substantive concurrence by Judge Blaise Tchikaya conceived the Court's judgment on the merits as too

1 Article 4 states: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.' Article 5 states: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.' African Charter on Human and Peoples' Rights (1981).

2 *Ally Rajabu and Ors v Tanzania*, Application 7/2015, African Court on Human and Peoples' Rights, Judgment (28 November 2019).

3 *Rajabu* (n 2) para 115.

4 *Rajabu* (n 2) paras 60-91.

5 *Ally Rajabu and Ors v Tanzania*, Application 7/2015, African Court on Human and Peoples' Rights, Concurring Opinion of Chafika Bensaoula (28 November 2019).

limiting and instead advocated a broader holding against the legality of the death penalty per se in international law.[6]

Rajabu and others v Tanzania closed the merits question left open in *Dexter Eddie Johnson v Ghana*, decided by the African Court earlier in 2019.[7] In *Johnson*, the Court found a challenge to the mandatory death penalty in Ghana to be inadmissible owing to that applicant's earlier filing at the UN Human Rights Committee, which resulted in that body's finding that Ghana's mandatory death penalty regime violated article 6 of the International Covenant on Civil and Political Rights (ICCPR).[8] The African Court interpreted the *non bis in idem* principle as preventing the applicant from bringing the same merits question to two different international human rights treaty bodies, pursuant to the principles of finality codified in article 56(7) of the African Charter.[9] Notably, Judge Tchikaya, the concurring judge in *Rajabu* who advocated for total prohibition of the death penalty under article 4 of the African Charter, also dissented in *Johnson*, arguing that Johnson's claim was admissible under a more expansive reading of article 56(7).[10]

The death penalty for murder was mandatory at English common law, a colonial-era holdover that has now been abolished in the overwhelming majority of Commonwealth countries.[11] An unusually strong consensus has developed at international tribunals and

6 *Ally Rajabu and Ors v Tanzania*, Application 7/2015, African Court on Human and Peoples' Rights, Concurring Opinion of Blaise Tchikaya (28 November 2019).

7 A Novak 'A missed opportunity on the mandatory death penalty: A commentary on *Dexter Eddie Johnson v Ghana* at the African Court on Human and Peoples' Rights' (2019) 3 AHRY 456. This volume also included an interesting rebuttal by Mwiza Jo Nkhata. MJ Nkata 'Is the African Court's decision in *Dexter Eddie Johnson v Ghana* a missed opportunity? A reply to Andrew Novak' (2019) 3 *African Human Rights Yearbook* 470. This rebuttal argued first that Johnson's counsel did not frame Ghana's violation as 'continuing' and therefore the alleged violation was the same as that before the UNHR Committee. The rebuttal also notes that my argument assumed what it also sought to prove: in other words, the Court should find a case against the mandatory death penalty is admissible because it is a violation of the African Charter. The rebuttal took the position that progress against the death penalty and the mandatory death penalty in particular 'has not been uniform and universal' – in other words, not as self-evident as I portrayed it. Nkhata, 476. I note that to date, only three jurisdictions have upheld the mandatory death penalty as constitutional in a direct challenge: Malaysia and Singapore, which are persistent objectors and have constitutions without protections for the right to life or prohibition on cruel and degrading punishment, and Ghana, where the Supreme Court frankly misapplied its own law in *Dexter Johnson v Republic* (2011) 2 SCGLR 601, the very situation that I advocated the African Court should redress (but see the decision of the Tanzania High Court in *Kambole v Attorney General*, [2019] TZHC 6 (18 July 2019), finding the mandatory death penalty constitutional without reaching the merits).

8 *Dexter Eddie Johnson v Ghana*, Application 16/2017, African Court on Human and Peoples' Rights, Ruling (Jurisdiction and Admissibility) (28 March 2019).

9 *Johnson* (n 8) paras 54-55.

10 See *Dexter Eddie Johnson v Ghana*, Application 16/2017, African Court on Human and Peoples' Rights, Ruling (Jurisdiction and Admissibility), Dissenting Opinion of Blaise Tchikaya (28 March 2019).

11 A Novak *The global decline of the mandatory death penalty: constitutional jurisprudence and legislative reform in Africa, Asia, and the Caribbean* (2014) 3-4.

domestic constitutional courts that an insufficiently individualised sentence could be too harsh and therefore constituted cruel and degrading punishment.[12] The African Commission's General Comment 3, issued in 2015, categorically prohibits mandatory death sentences, as does the 2018 General Comment on the Right to Life from the UN Human Rights Committee.[13] In addition to international lawmaking on this point, state practice has also evolved. In the past five years, only four Commonwealth countries – Nigeria, Pakistan, Malaysia, and Singapore – carried out death sentences that were mandatory upon conviction, and even these have declined in number over time.[14] As considered below, the uniformity of state practice and the decline of mandatory death sentences may be evidence of an emerging peremptory norm that all death sentences must be tailored to the offense and the offender, in accordance with the restriction that the death penalty be limited only to the 'most serious crimes' under article 6 of the ICCPR.[15] It is axiomatic that the death penalty is in rapid and irreversible decline across the world and that a prohibition on the death penalty in international law is in progressive development.[16] The African Court's decision in *Rajabu* tightens the screws on capital punishment and is another milestone in the incremental abolition of capital punishment through collateral or procedural challenges.[17]

12 See *Woodson v North Carolina* (1976) 428 US 280; *Mithu v Punjab* (1983) 2 SCR 690 (India); *Reyes v Queen* [2002] UKPC 11 (Belize); *Fox v Queen* [2002] 2 AC 284 (PC) (Saint Kitts and Nevis); *Balson v State* [2005] 4 LRC 147 (PC) (Dominica); *Coard v Attorney General* [2007] UKPC 7 (Grenada); *Queen v Monelle* Criminal Case 15/2007 (Antigua and Barbuda HCJ, 18 September 2008); *Bowe v Queen* (2006) 68 WIR 10 (PC) (Bahamas); *Nervais and Severin v Queen* [2018] CCJ 19 (AJ) (Barbados); *Kafantayeni v Attorney General* [2007] MWHC 1 (Malawi); *Attorney General v Kigula* [2009] 2 EALR 1 (Uganda SC); *Muruatetu v Republic* (14 December 2017) Petitions 15/2015 and 16/2015 (Kenya SC); *Bangladesh Legal Aid and Services Trust v Bangladesh* (2010) 30 BLD (HCD) 194. For the Inter-American Commission on Human Rights, see *Edwards v Bahamas* case 12.067, Inter-American Commission on Human Rights, Report No 48/01, OEA/SerL/V/II.111, doc 20 (2000). For the UNHR Committee, see *Thompson v Saint Vincent & the Grenadines* Communication 806/1998, UNHR Committee, UN Doc CCPR/C/70/D/806/1998 (2000).

13 General Comment 36 on article 6 of the International Covenant on Civil and Political Rights, On the Right to Life, UNHR Committee (30 October 2018), UN Doc CCPR/C/GC/36, at para 37; African Commission on Human and Peoples' Rights, General Comment 3 on the African Charter on Human and Peoples' Rights: the right to life (article 4), adopted at 57th Ordinary Session of the African Commission on Human and Peoples' Rights (4 to 18 November 2015).

14 S Lehrfreund 'Undoing the British colonial legacy: the judicial reform of the death penalty' in CS Steiker & JM Steiker (eds) *Comparative capital punishment* (2019) 272, 298. Note that Botswana, the only Sub-Saharan African country to consistently carry out executions, does not have a mandatory death penalty. Novak (n 11) 78-85.

15 International Covenant on Civil and Political Rights (1966) art 6(2):

16 R Hood 'Staying optimistic' in L Scherdin (ed) *Capital punishment: A hazard to a sustainable criminal justice system?* (2014) 297-300; W Schabas 'International law, politics, diplomacy and the abolition of the death penalty' (2004) 13 *William & Mary Bill of Rights Journal* 418-19.

17 For further reading on the use of human rights litigation to attack collateral or procedural aspects of the death penalty with the goal of total abolition, see Q Whitaker 'Challenging the death penalty in the Caribbean: Litigation at the

With no executions since 1994, Tanzania is 'de facto abolitionist,' defined as a country that has not carried out an execution in the last ten years.[18] The right to life at article 14 of the Tanzanian Constitution is strong and does not specifically authorise the death penalty: 'Every person has the right to live and to the protection of his life by the society in accordance with law.'[19] Although the Tanzanian High Court found the death penalty unconstitutional in 1994, this decision was later overturned by the Court of Appeal.[20] In that case, which received significant academic criticism, the Court of Appeal ruled the death penalty was cruel and degrading punishment, but was nonetheless constitutional because of a 'lawful sanction' exception that was incorporated into the constitutional definition of torture.[21] However, *Mbushuu* did not directly address the *mandatory* nature of Tanzania's death penalty directly. This fell to a later case, *Kambole v Attorney General*, in which the High Court found that the mandatory death penalty was constitutional because of the Court of Appeal's decision in *Mbushuu*, rejecting the petitioner's argument that only a discretionary death penalty was saved rather than a mandatory one.[22] Consequently, until the Court of Appeal directly addresses the question, the mandatory death penalty will remain in section 197 of the Penal Code, which authorizes the mandatory death penalty for murder. The societal consensus appears to be that the President will regularly commute death row to life imprisonment, which creates its own challenges of delay and uncertainty.[23] In her study of fair trial rights in death penalty cases, Chenwi observed that Tanzanian death row inmates often receive inadequate legal representation, owing to poor remuneration for indigent defense counsel.[24]

Like the Tanzanian constitution, the African Charter does not provide explicit authorisation for capital punishment, although the subsequent charters on children's rights and the rights of women do

Privy Council' in J Yorke (ed) *Against the death penalty: International initiatives and implications* (2008) 101; KA Akers & P Hodgkinson 'A critique of litigation and abolition strategies: A glass half empty' in P Hodgkinson (ed) *Capital punishment: New perspectives* (2013) 29 (for a critical perspective on this process).

18 Amnesty International *Death sentences and executions 2020* (2021) 58, https://www.amnesty.org/download/Documents/ACT5037602021ENGLISH.PDF.

19 Tanzania Constitution art 14 (1977).

20 *Republic v Mbushuu* [1994] TZHC 7 (22 June 1994); A Gaitan & B Kuschnik 'Tanzania's death penalty debate: an epilogue on *Republic v Mbushuu*' (2009) 9 AHRLR 459, at 472-474 (noting that the Court of Appeal reversed the High Court decision by finding that the death penalty, although constituting torture, was nonetheless justified by the public interest).

21 A Gaitan & B Kuschnik 'Tanzania's death penalty debate: An epilogue on *Republic v Mbushuu*' (2009) 9 AHRLR 459, at 467-469.

22 *Kambole v Attorney General* [2019] TZHC 6 (18 July 2019).

23 LP Shaidi 'The death penalty in Tanzania: law and practice' Paper presented at the British Institute of International and Comparative Law Conference, application of the death penalty in Commonwealth Africa (10-11 May 2004) (noting that presidential clemency reconciles public support for the death penalty with official nonuse).

24 L Chenwi 'Fair trial rights and their relation to the death penalty in Africa' (2006) 55(3) *International and Comparative Law Quarterly* 609, at 628.

include explicit death penalty prohibitions for juveniles and pregnant women, respectively.[25] In 2015, the African Commission published a new General Comment 3 on the Right to Life (Article 4), which states at paragraph 24: 'In no circumstances shall the imposition of the death penalty be mandatory for an offence.'[26] The General Comment also states that while the death penalty is not prohibited per se by the African Charter, it may only be applied for intentional killing, and with a fair individual trial in civilian court and an opportunity to seek clemency. The General Comment prohibits the death penalty for pregnant or nursing women, children, the elderly, and persons with intellectual disabilities, and obligates states parties to transparency in the sentencing and execution process, including dignified treatment of next of kin.[27]

The African Commission's case law on the death penalty has primarily concerned fair trial rights. In a case against Malawi, the African Commission found a violation where the defendant facing the death penalty did not have the right to counsel or the right to appeal.[28] In several cases involving Nigeria, the African Commission found violations of article 7 (right to a fair trial) where the death sentence was pronounced by a specially-created court, where the defendant faced intimidation or harassment, or where the defendant was presumed guilty before conviction.[29] In *Interights (on behalf of Bosch) v Botswana*, the African Commission did not find a violation of article 4 (right to life) or article 7 (right to a fair trial) of the African Charter, as the trial court properly considered the evidence and mitigating factors and the defendant had reasonable time to seek clemency.[30] In 2013, the African Commission considered the death penalty again in *Spilg (on behalf of Kobedi) v Botswana*, in which the Commission found no violation of the African Charter either for hanging as a method of execution or of delay in executing a sentence where the delay was the fault of the defendant.[31] However, the Commission did find a violation

25 L Chenwi 'Breaking new ground: The need for a protocol to the African Charter on the abolition of the death penalty in Africa' (2005) 5 *African Human Rights Law Journal* 89, at 92-93.

26 African Commission on Human Rights, General Comment 3 on the African Charter: The right to life (article 4), adopted 4-18 November 2015.

27 African Commission, General Comment No 3.

28 *Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi*, consolidated with *Achuthan (on behalf of Aleke Banda)* (2000) AHRLR 144 (African Commission on Human and Peoples' Rights 1995).

29 *International Pen (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (African Commission on Human and Peoples' Rights 1998); *Constitutional Rights Project (in respect of Akamu and Ors) v Nigeria* (2000) AHRLR 180 (African Commission on Human and Peoples' Rights 1995). See also *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (African Commission on Human and Peoples' Rights 2000) (finding the denial of the right to appeal to violate article 7).

30 *Interights (on behalf of Mariette Sonjaleen Bosch) v Botswana* (2003) AHRLR 55 (African Commission on Human and Peoples' Rights, 6-20 November 2003).

31 *Spilg, Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v Botswana*, Communication 277/2003, African Commission on Human and Peoples' Rights (12 October 2013).

of article 5 because of Botswana's failure to notify the family or legal representatives of the pending execution.[32]

In 2015, the Commission considered *Interights & Ditshwanelo (on behalf of Ping) v Botswana*, which modified the decision in *Spilg (Kobedi)* without citing it. In *Interights (Ping)*, the petitioners raised both article 4 (life) and article 5 (degrading punishment) claims.[33] As to article 4, the petitioners claimed that Botswana's *pro deo* system of legal aid, the presumption in favour of death known as the doctrine of extenuating circumstances, and the lack of genuine clemency consideration violated the right to life.[34] The Commission dismissed these claims, finding that Botswana's procedure for legal aid, consideration of mitigating factors, and petition process for clemency were compliant on paper with the African Charter. However, the Commission did find a violation of article 5, on the grounds that hanging as a method of execution was cruel and degrading, and the secrecy of the execution process violated human dignity. The Commission rejected, as in *Spilg (Kobedi)*, the 'death row syndrome' argument on the basis that the delay in Ping's death sentence was not sufficiently established. Interestingly, the Commission in *Interights (Ping)* started from the premise that international law had to authorise a method of execution, rather than from the premise that methods of execution were acceptable unless they violated international law. According to the Commission, 'Currently, no method of execution has been found to be acceptable under international law. This complicates the current inquiry since it seems that no method of execution is appropriate under international law.'[35] The Commission's implication here is that the death penalty was lawful under the African Charter but no methods of execution were permissible. In 2015, the African Commission also considered a draft protocol on the abolition of the death penalty, but other African Union policy organs did not act on it.[36] Against this background, the African Court decided its first major death penalty case in *Rajabu v Tanzania*.[37]

32 *Spilg (on behalf of Kobedi)* (n 32) at para 177.

33 *Interights & Ditshwanelo (on behalf of Oteng Modisane Ping) v Botswana*, Communication 319/2006, African Commission on Human and Peoples' Rights (4-18 November 2015).

34 I have argued elsewhere that Botswana's 'doctrine of extenuating circumstances' operates as a presumption in favor of death and is neither as rational nor as transparent as a truly discretionary death penalty. In an 'extenuating circumstances' jurisdiction, the defendant has the burden of proving mitigating factors, unlike a discretionary death penalty where the prosecutor must prove aggravating factors. I believe the 'doctrine of extenuating circumstances' does not comport with the ICCPR's requirement to limit the death penalty to only the 'most serious crimes' under article 6. See A Novak 'Capital sentencing discretion in Southern Africa: A human rights perspective on the doctrine of extenuating circumstances in death penalty cases' (2014) 14(1) *African Human Rights Law Journal* 24. In *Ping*, the African Commission rejected the distinction I am making. For more on Botswana's *pro deo* system and clemency proceedings, see E Maxwell & A Mogwe *In the shadow of the noose* (Ditshwanelo 2006).

35 *Interights (on behalf of Ping)* (n 33) at para 85.

36 Amnesty International *The state of African regional human rights bodies and mechanisms: 2019-2020* (2020) 27.

37 See Amnesty International (n 36) 25.

2 THE DECISION IN *ALLY RAJABU AND OTHERS V TANZANIA*

In its analysis of jurisdiction, the Court found that the Application properly alleged a violation of the African Charter within the Court's scope of review.[38] The Court also determined that the case was admissible because the applicants exhausted domestic remedies and filed the Application within reasonable time.[39] In their cases, all applicants had their convictions affirmed on appeal and filed their cases about two years after the sentences became final, appropriate considering that the applicants were 'lay, indigent and incarcerated.'[40] The other criteria of admissibility were not in dispute.

On the merits, the applicants alleged three violations of the African Charter: a violation of articles 4 (right to life), 5 (right to dignity), and 7 (right to a fair trial). Additionally, the applicants also alleged a violation of article 1, a state's duty to comply with the Charter, owing to Tanzania's failure to amend its penal code to prohibit the mandatory death sentence.[41] An article 1 violation is derivative and requires the Court to find a violation of another right under the African Charter in order to show a violation.[42]

Turning first to the claim under article 7, the applicants alleged three violations of the right to a fair trial: first, that they were not tried in a reasonable time pursuant to article 7(1)(d); second, that the state did not provide the applicants with the right to be heard under article 7(1); and third, that the court that tried them was not competent because the preliminary hearing and trial were conducted by two different judges, in violation of article 7(1)(a).[43] The Court dismissed the first allegation, noting that the 'real' delay in processing the appeal was only two years rather than the 4 years, 2 months claimed by the Appellants as they had not shown that the fault for the entire delay was on the part of the state.[44] Rather, the applicants waited two years before filing the application for review with the Tanzanian appellate court, which accounted for half the total delay.[45] As to the second allegation, the African Court explained that the Tanzanian High Court used a standard of guilt beyond a reasonable doubt in determining its verdicts and had occasion to review all credible evidence.[46] The more specific allegations involved the High Court's reliance on witness testimony and

38 *Rajabu* (n 2) paras 18-33.

39 *Rajabu* (n 2) paras 34-54.

40 *Rajabu* (n 2) paras 49-50.

41 Article 1 states: 'The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.' African Charter on Human and Peoples' Rights (1981) art 1.

42 *Rajabu* (n 2) para 94.

43 *Rajabu* (n 2) paras 59-91.

44 *Rajabu* (n 2) paras 60-73.

45 *Rajabu* (n 2) para 71.

46 *Rajabu* (n 2) paras 74-85.

the investigation of a single police officer, both of which complied with Tanzanian law.[47] Insofar as the High Court's verdicts did not reveal any manifest error, the African Court found no violation of the right to be heard. Finally, as to the right to be heard by a competent court, the African Court explained that Tanzanian law did not require the judge who performed the preliminary hearing and the judge who presided over the trial to be the same person.[48]

Although the Court dismissed the applicants' claim that their death sentences violated the right to a fair trial, the judges did find violations of the right to life (article 4) and the right to dignity (article 5), and therefore a violation of article 1, Tanzania's duty to comply with the Charter.[49] As to the right to life, the Court in *Rajabu* explained that 'despite a global trend towards the abolition of the death penalty, including the adoption of the Second Optional Protocol to the International Covenant on Civil and Political Rights, the prohibition of the death sentence in international law is still not absolute.'[50] Although the ICCPR and the Inter-American Convention on Human Rights both have explicit savings for the death penalty in a narrow class of cases, article 4 of the African Charter states only in relevant part that '[n]o one may be arbitrarily deprived of this right.'[51] As the Court noted, the primary constraint here is that a deprivation of the right to life cannot be 'arbitrary,' and although article 4 does not mention the death penalty, by implication if a death sentence were passed according to law and by a competent court it would not be 'arbitrary'.[52] This holding will be disappointing to observers who see the abolition of the death penalty in international law as absolute, as argued in the concurring opinion by Judge Tchikaya, but it is not a surprising holding and accords with other international legal sources.[53]

Although the Court did not find the death penalty per se was 'arbitrary' under article 4, it did find that a death penalty that was

47 *Rajabu* (n 2) paras 81-83.

48 *Rajabu* (n 2) paras 86-91.

49 *Rajabu* (n 2) paras 114, 119-20, 126.

50 *Rajabu* (n 2) para 96.

51 African Charter on Human and Peoples' Rights (1981) art 4. Compare International Covenant on Civil and Political Rights (1966) art 6(2): 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime…' See also American Convention on Human Rights (1969) art 6: 'In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime.'

52 *Rajabu* (n 2) para 98.

53 General comment number 6 of the UNHR Committee states that while 'states parties are not obliged to abolish the death penalty totally they are obliged to limit its use and, in particular, to abolish it for other than the "most serious crimes".' The comment also states that 'abolition is desirable' and 'all measures of abolition should be considered as progress in the enjoyment of the right to life.' UNHR Committee, CCPR General Comment No 6: Article 6 (Right to life), 30 April 1982. The revised General Comment on the Right to Life, No 36, is more elaborate and contains far more restrictions on the death penalty, but does not go so far as to prohibit the death penalty altogether. See General Comment 36 (n 13).

mandatory on conviction was arbitrary, and therefore a violation of the Charter.[54] The Court's analysis of 'arbitrary' deprivation of life was searching, recalling the African Commission's earlier precedents in *Interights (on behalf of Bosch) v Botswana* that death sentences must be provided by law and imposed by a competent court.[55] In addition, the Court also cited the seminal death penalty cases *International Pen (Ken Saro-Wiwa) v Nigeria* and *Forum of Conscience v Sierra Leone* that any violation of fair trial rights under article 7 could make a death sentence an arbitrary deprivation of the right to life under article 4.[56] As to the arbitrariness of the mandatory death sentence, the African Court noted precedent from the UN Human Rights Committee in *Thompson v St Vincent and the Grenadines* that the mandatory nature of the death penalty was fundamentally arbitrary because it did not permit courts to consider whether the death penalty was appropriate in a particular case.[57] The Inter-American Court of Human Rights was in accord, noting in *Hilaire, Constaintine and Benjamin v Trinidad and Tobago* that because the mandatory death penalty 'automatically and generically imposes the death penalty for all persons found guilty of murder,' it was arbitrary under article 4 of the American Convention.[58] The African Court also cited the senior courts of Tanzania's near neighbours, Kenya, Malawi, and Uganda, which had found unconstitutional a similar penal code provision authorizing the mandatory death penalty.[59] Notably, however, the Court did not cite the African Commission's jurisprudence in *Spilg (on behalf of Kobedi)* and *Interights (on behalf of Ping)*, evidently because those cases only found violations of article 5, cruel and degrading treatment, rather than the right to life under article 4.

According to the African Court in *Rajabu*, the deprivation of life as 'arbitrary' should be measured according to three metrics: first, it must be provided for in law; second, it must be passed by a competent court; and three, the death penalty decision must comport with due process.[60] The Court found in mandatory death sentence cases, that the first two provisions were met since the trial courts complied with existing law. However, mandatory death sentences are 'arbitrary' because they violate the principle of due process, which extends not just to procedural rights at trial but also to sentencing.[61] Section 197 of Tanzania's penal code violated due process because the 'automatic and mechanical application of this provision in cases of murder' denied a convicted person the ability to present mitigating evidence and did not

54 *Rajabu* (n 2) para 111. Specifically, the Court found that Section 197 of the Tanzanian penal code did 'not uphold fairness and due process as guaranteed under article 7(1) of the Charter.' As a result, the provision violated article 4's prohibition on 'arbitrary' deprivation of life.

55 *Rajabu* (n 2) para 99, citing *Interights* (n 30).

56 *Rajabu* (n 2) para 100, citing *International Pen* and *Forum of Conscience* (n 29).

57 *Rajabu* (n 2) para 102, citing *Thompson* (n 12).

58 *Hilaire, Constantine & Benjamin v Trinidad & Tobago* Inter-American Court of Human Rights (ser C) No 94 (21 June 2002), paras 103-104.

59 These are summarised above in n 12.

60 *Rajabu* (n 2) para 104.

61 *Rajabu* (n 2) para 107.

have regard to the circumstances in which the offense was committed.[62] Contrary to the punishment fitting the crime, 'the trial court lacks discretion to take into account specific and crucial circumstances such as the participation of each individual offender in the crime.'[63] As a result, the Court determined that the mandatory death penalty in Section 197 of Tanzania's penal code violated the due process provisions of article 7(1) and therefore constituted 'arbitrary' deprivation of the right to life under article 4.[64] As noted, while article 4 does not explicitly save the death penalty, an exception could be implied so long as the deprivation of life was not 'arbitrary.' In balancing the right with the limitation, the Court explained that the 'right to life' was strongly worded and the exception to the right comparatively weaker.[65]

The violation of article 5, human dignity, focused on a different procedural aspect of the death penalty: hanging as a method of execution. According to the Court, 'many methods used to implement the death penalty have the potential of amounting to torture, as well as cruel, inhuman and degrading treatment given the suffering inherent thereto.'[66] Here the Court laid down a standard: 'in cases where the death penalty is permissible, methods of execution must exclude suffering or involve the least suffering possible'.[67] The Court found that hanging was 'inherently degrading' and 'inevitably encroaches upon dignity in respect of the prohibition of torture and cruel, inhuman and degrading treatment'.[68] As a result, the respondent state violated article 5 of the Charter. Notably, this is a strong holding as hanging is the predominant method of execution on the books in retentionist Africa.[69] Also of note is the citation to *Ng v Canada*, in which the UN Human Rights Committee found that asphyxiation with poison gas was cruel and degrading treatment.[70] The *Rajabu* court's condemnation of hanging as a method of execution comes after the African Commission's earlier ruling in *Interights (on behalf of Ping)* that found hanging to be a violation of article 5, though the Court did not directly cite that opinion.[71]

62 *Rajabu* (n 2) para 108.

63 *Rajabu* (n 2) para 109.

64 *Rajabu* (n 2) paras 111-114.

65 *Rajabu* (n 2) para 112.

66 *Rajabu* (n 2) para 118.

67 *Rajabu* (n 2) para 118.

68 *Rajabu* (n 2) para 119.

69 R Hood & C Hoyle *The death penalty: A worldwide perspective* (2015) 178-79.

70 *Charles Chitat Ng v Canada* (No 469/1991), UN Doc CCPR/C/49/D/469/1991 (1996) (UNHR).

71 The issue of hanging as a method of execution was initially raised before the African Commission in *Interights (on behalf of Bosch)*, but as the Commission noted in its decision: 'One of the six issues namely "whether the methods of execution in Botswana, by hanging, breached article 5 of the African Charter" was abandoned during the hearing of the matter at the African Commission's 31st Ordinary Session.' *Interights (on behalf of Bosch)*, (2003) AHRLR 55 (African Commission on Human and Peoples' Rights, 6-20 November 2003). However, the

The remainder of the decision concerned Tanzania's violation of article 1 for failing to comply with the African Charter followed by an analysis of reparations to the applicants. In summary, the Court ordered payment of 4 million Tanzanian shillings for the psychological impact of remaining on death row between the time of sentencing and the current judgment.[72] Citing to *Soering v United Kingdom* from the European Court of Human Rights, which concerned the so-called death row 'syndrome' (that is, the mental anxiety of death row), the *Rajabu* court agreed that the tension of a pending execution constituted psychological suffering.[73] The Court also ordered some non-pecuniary reparations, including a change to the Tanzanian penal code to ensure the death penalty was discretionary and to remove the sentence of hanging.[74] The Court found other claims for damages were not proven.

The substantive concurrence by Judge Blaise Tchikaya also merits brief commentary. Judge Tchikaya advocates for a stronger position that the death penalty is always 'arbitrary' and therefore violates article 4 of the African Charter. He traces the progressive development of an anti-death penalty norm in international law and notes the widespread moratoria on executions in most retentionist African countries.[75] This appears to be a philosophical difference between Judge Tchikaya and the rest of the Court: should international law reflect the consensus of existing state practice or should it make a normative statement in order to shape state practice going forward?[76] Observers have noted that death penalty cases frequently do both: a decision against the death

Commission found hanging to breach article 5 in *Interights (on behalf of Ping)* in 2015. As noted above, however, the Commission's rationale for this holding was extremely broad, stating that 'no method of execution has been found acceptable under international law.' *Interights (Ping)* (n 33) para 85. The implication in *Interights (Ping)* was that all methods of execution were violations of the African Charter, so that the death penalty could not be carried out at all. The *Rajabu* Court's failure to cite *Ping* directly may have been an implicit rejection of such a broad rationale.

72 *Rajabu* (n 2) paras 147-150.

73 *Rajabu* (n 2) para 149, citing *Soering v United Kingdom* (1989) 161 European Court of Human Rights (ser A). The UN Human Rights Committee has not found that delay alone constitutes cruel and degrading punishment but may be combined with prison conditions or other stresses of death row. See eg *Francis v Jamaica* (No. 606/1994), UN Doc CCPR/C/54/D/606/1994 (1995) (UNHR); *Johnson v Jamaica* (No 588/1994), UN Doc CCPR/C/56/D/588/1994 (1996) (UNHR).

74 *Rajabu* (n 2) paras 162-163.

75 *Rajabu*, concurring opinion of Judge Tchikaya (n 6) at paras 16-19, 22-27.

76 The descriptive versus normative debate is well known to international law scholars. See AE Roberts 'Traditional and modern approaches to customary international law: a reconciliation' (2001) 95 *American Journal of International Law* 761-62. As she writes, 'prescriptive and normative rules are often confused because both express an imperative to act. Prescriptive laws express a legal imperative to act (you should do x because x is legally required), while normative rules express a moral imperative to act (you should do x because x is morally required).' See page 761. In this case, Judge Tchikaya is taking a more normative position on what international law is compared to the rest of the Court. He says as much, noting that *Rajabu* 'limit[s] the Court's power of interpretation' and 'pays little attention to the Praetorian powers of the Human Rights judge to advance the protection of the right to life.' *Rajabu*, concurring opinion of Judge Tchikaya (n 6) at paras 21, 24.

penalty in one jurisdiction confirms the progressive abolition of the death penalty, but it also strengthens the normative case against capital punishment by extending that consensus further.[77] In this case, however, nothing is stopping the African Court from going still further toward death penalty abolition at a later time. The majority made clear that *Rajabu* is a human rights 'floor' rather than a 'ceiling' and does not prevent progress toward full abolition.

3 ANALYSIS

The first notable aspect of the decision in *Rajabu* is that the African Court analysed the mandatory death penalty under article 4 (right to life) rather than article 7 (right to a fair trial), treating the death penalty analysis separately from its article 7 analysis. Rather, the 'right to a fair trial' mattered in the article 4 analysis because it shed light on what 'arbitrary' deprivation of human life meant. The Inter-American Court of Human Rights decision in *Hilaire, Constantine and Benjamin v Trinidad and Tobago* as well treated the mandatory death penalty in its analysis of the 'right to life' under article 4 of the American Convention on Human Rights.[78] Because of a mandatory death sentence, the applicants' right to be heard was denied *after the verdict and on appeal*, not in the original trial, because the trial court had no jurisdiction to hear mitigating evidence in a sentencing hearing and the appellate court had no mitigating evidence to review.[79] As a result, the African Court could have construed the violation here as a violation of the right to be heard by a competent court under article 7 rather than as an 'arbitrary' deprivation of life under article 4.

Of course, the end result of either analysis is still the same: the mandatory death penalty violates the Charter. Using a 'right to life' analysis, however, may limit the applicability of *Rajabu* to other mandatory (non-death) sentences, because the Court's fault with Tanzania's mandatory death penalty was the 'arbitrary' deprivation of life not the mandatory nature of the sentence per se. Using an article 7 analysis rather than an article 4 analysis could well have opened the door to challenges of mandatory life imprisonment or mandatory minimum cases, because these too could arguably limit the ability of

77 R Hood & C Hoyle 'Towards the global elimination of the death penalty: a cruel, inhuman and degrading punishment' (2017) in P Carlen & LA França (eds) *Alternative criminologies* 409 ('The influence exerted by the weight of numbers as more and more countries have embraced the human rights case for abolition has itself strengthened the *normative* legitimacy of the case against capital punishment') (emphasis in original).

78 *Hilaire, Constantine & Benjamin v Trinidad & Tobago* Inter-American Court of Human Rights (ser C) No 94 (21 June 2002).

79 Section 197 of the Tanzanian penal code states: 'Any person convicted of murder shall be sentenced to death.' Tanzania Penal Code, chapter 16, Laws of Tanzania revised (1981).

appellate courts' jurisdiction to review sentences. By using a right to life analysis, the African Court is essentially saying 'death is different'.[80] In at least one category of cases, however, *Rajabu* may still be relevant: mandatory life imprisonment without parole cases. Academic observers have long cautioned that mandatory life without parole essentially constitutes a form of the death penalty in which the method of execution is abandonment.[81] Such a sentence would likely not satisfy the African Commission's General Comment 3, on the Right to Life (Article 4), which 'envisages the protection not only of life in a narrow sense, but of dignified life.'[82] The US Supreme Court relied on its decision abolishing juvenile capital punishment to prohibit mandatory life without parole to juveniles, for the first time bringing together its death penalty and non-death penalty jurisprudence.[83] In a case arising from Mauritius, the Judicial Committee of the Privy Council accepted the appellant's argument that a mandatory sentence of life imprisonment 'was subject to almost all the vices held to be inherent in the mandatory death sentence itself,' including its arbitrariness and lack of individualised consideration.[84] In *Makoni v Commissioner of Prisons*, the Zimbabwe Constitutional Court found unconstitutional a provision of that country's penal code that automatically made all life-term inmates ineligible for parole, relying in part on case law on the mandatory death penalty.[85] A 'death is different' approach has limitations, and it is encouraged that the African Court consider the 'right to life' expansively in a future challenge to mandatory life imprisonment, especially where no provision exists in law for parole or early release.

In *Rajabu*, the Court left open another urgent question: whether all death row prisoners have a right to an individualised sentencing hearing after conviction, or whether a summary process such as by an executive clemency authority, appellate court, or pardon/parole board is sufficient. This question would likely arise only if Tanzania attempts to short-circuit the individualised hearing process by 'batch-sorting' death row inmates as groups rather than as individuals. Likely,

80 The phrase 'death is different' is an inexact quote from Justice William Brennan's concurrence in *Furman v Georgia*, 408 US 238, 286 (1972) ('death is a unique punishment in the United States'). The phrase captures the U.S. Supreme Court's different Eighth Amendment standards in capital punishment cases versus non-capital punishment cases, a distinction that has come under significant and even withering criticism from scholars. RE Barkow 'The court of life and death: the two tracks of constitutional sentencing law and the case for uniformity' (2009) 107 *Michigan Law Review* 1145. Essentially, this criticism holds, courts should avoid applying more deferential punishment standards in non-death penalty cases: if a punishment is cruel and unusual in death, it may also be cruel and unusual in life.

81 C Appleton & B Grøver 'The pros and cons of life without parole' (2007) 47 *British Journal of Criminology* 597, 609-11; E Girling 'Sites of crossing and death in punishment: the parallel lives, trade-offs and equivalencies of the death penalty and life without parole in the US' (2016) 55 *Howard Journal of Crime and Justice* 345.

82 African Commission, General Comment 3.

83 *Miller v Alabama*, 567 U.S. 460 (2012), citing *Roper v Simmons*, 543 US 551 (2005).

84 *Boucherville v Mauritius* [2008] UKPC 37 (9 July 2008).

85 *Makoni v Commissioner of Prisons* [2016] ZWCC 8 (13 July 2016).

hundreds of inmates are on death row in Tanzania owing to its mandatory death penalty laws, notwithstanding a mass commutation of 256 inmates on 9 December 2020 in commemoration of the country's Independence Day.[86] Providing them all with an individualised sentencing hearing is a significant investment of time and resources. If the mandatory death penalty is arbitrary, it is also arbitrary for persons sentenced to death without a sentencing hearing who have had their sentences commuted by the president. Kenya, which had an even larger death row owing to the mandatory death penalty for robbery, has struggled with providing sentencing hearings not only to current death row inmates but to prior inmates whose sentences were commuted to life or terms of years without a sentencing hearing.[87] In April 2021, the Malawi Supreme Court of Appeal found the death penalty per se unconstitutional in part because of gaps created by its earlier decision striking down the mandatory death penalty, which left certain categories of prisoners – for instance, those whose cases were on appeal at the time and those whose sentences were already commuted to life – in legal limbo.[88] It is absolutely essential that the African Court make clear in the future that all Tanzanian death row inmates are entitled to an individualised sentencing hearing, *even if their sentences have already been commuted by the President*. The 'arbitrary' right to life violation is not cured through mass grants of executive grants of clemency, and indeed categorising prisoners based solely on the timing of a clemency grant would seem to accentuate rather than alleviate the arbitrariness.

The African Court's decision in *Rajabu* completes the unanimous condemnation of the mandatory death penalty by international human rights bodies, bringing the African Charter in line with the ICCPR and the American Convention on Human Rights. It also validates the consensus of domestic courts from across the Commonwealth where the mandatory death penalty has been abolished in recent years.[89] Since the development of international human rights law on this point so closely accords with the decline of the mandatory death penalty in state practice, we may even speak of a possible peremptory norm in development that a fact-finder in a capital case must have the ability to consider mitigating circumstances in sentencing.

The African Court's holding on hanging as a method of execution was much briefer, barely a page and a half. Yet, this holding has the potential to transform the administration of the death penalty in Sub-

86 Kizito Makoye 'Tanzania commutes death sentences of 256 convicts' *Anadolu Agency News* (9 December 2020), https://www.aa.com.tr/en/africa/tanzania-commutes-death-sentences-of-256-convicts/2071191 (accessed 2 February 2022).

87 Death Penalty Project *Pathways to justice: Implementing a fair and effective remedy following abolition of the mandatory death penalty in Kenya* (2019) (offering several proposals for streamlining sentencing hearings to large numbers of death row inmates).

88 *Khoviwa v Republic* [2021] MWSC 3.

89 In addition to the cases listed at n 12, see also P Jabbar 'Imposing a "mandatory" death penalty: a practice out of sync with evolving standards' in CS Steiker & JM Steiker (eds) *Comparative capital punishment* (2019) 133, 143-45; Lehrfreund (n 14) 292-98.

Saharan Africa insofar as nearly all retentionist African states rely on hanging as a method of execution.[90] Notably, the Court used article 5 of the Charter (right to dignity) rather than article 4 (right to life) to analyse hanging as a method of execution, which was consistent with the restrained nature of the *Rajabu* decision in not finding the death penalty per se to be a violation of article 4. In its 'hanging' holding, the Court laid out a standard: 'methods of execution must exclude suffering or involve the least suffering possible'.[91] The Court then determined hanging did not sufficiently exclude suffering. However, the Court provided no indication of what methods of execution would be permissible and did not require applicants to suggest an alternative method of execution (though we know, based on the Court's citation to *Ng v Canada*, that gas asphyxiation is also impermissible). This holding then has the potential to exclude all permissible methods of execution as violations of article 5, which would effectively find all executions to be violations of article 5.[92] This leads to the result advocated in the concurring opinion by Judge Tchikaya (total abolition of the death penalty in international law) but via the 'right to dignity' rather than the 'right to life.' This is a more progressive holding than the US Supreme Court in *Baze v Rees*, in which a death row inmate challenging a lethal injection protocol had to affirmatively provide a specific alternative that was less 'cruel and unusual,' essentially closing the door on challenges to methods of execution.[93]

The African Court's holdings as to the mandatory death penalty and to hanging lend clarity to African Commission jurisprudence by articulating simpler and clearer standards for what is permissible. In *Spilg (on behalf of Kobedi)*, the African Commission upheld hanging as a method of execution, stating that while hanging 'may not be compatible with respect for the inherent dignity of the individual and the duty to minimise unnecessary suffering,' the Complainants did not demonstrate that the execution 'would be, or was, carried out without due attention to the weight of the condemned'.[94] The Commission therefore ruled that aspect of the complaint was 'speculative.'[95] However, in 2015, the Commission ruled that 'no method of execution has been found to be acceptable under international law,' and rejected hanging as a method of execution in *Interights (on behalf of Ping)*.[96] In *Rajabu*, the African Court implicitly rejected the overbroad dicta in *Ping* that stated no methods of execution were acceptable under international law, which, if taken to its logical conclusion, would end the death penalty outright. Instead, the African Court declared hanging

90 Hood & Hoyle (n 69).

91 *Rajabu* (n 2) para 118.

92 All executions face the risk of physical pain, regardless of method. Hood & Hoyle (n 69) 178.

93 *Baze v Rees*, 553 U.S. 35 (2008). In this case, the Supreme Court ruled that failure to adopt an alternative method of execution (in this case, a different lethal injection protocol) was unconstitutional only when the alternative procedure was feasible and substantially reduced the risk of severe pain.

94 *Spilg (on behalf of Kobedi*) (n 31) at paras 169-170.

95 *Spilg (on behalf of Kobedi*) (n 31) at para 170.

96 *Interights (on behalf of Ping)* (n 33) para 85.

to be 'inherently degrading' in violation of article 5 and laid out a clearer standard that a method of execution 'must exclude suffering or involve the least suffering possible,' without requiring the applicants to suggest an alternative method.[97] The African Court's test for determining whether a death sentence was 'arbitrary' and therefore violative of article 4 was clearer than the *Kobedi* Commission's decision. In *Kobedi*, the African Commission used the 'most serious crimes' standard from article 6 of the ICCPR to uphold a death sentence for murder even though that phrase is not mentioned in article 4 of the African Charter.[98] Of note, unlike *Rajabu*, the *Kobedi* case did not involve a mandatory death sentence, as Botswana adheres to the 'doctrine of extenuating circumstances' which allows a judge to substitute a lesser sentence upon a showing that the defendant was less morally blameworthy for the crime.[99] *Rajabu* is a more favourable and more logical controlling precedent for future death penalty cases than *Kobedi* or *Ping* were.

The remaining question raised in *Rajabu* is, as the concurrence by Judge Tchikaya argues, whether article 4 of the African Charter can be used to prohibit the death penalty per se. Unlike article 4 of the American Convention or article 6 of the ICCPR, the African Charter provides no specific authorisation for capital punishment.[100] The Court's assumption that the phrase 'arbitrarily deprived of this right' in article 4 implicitly allows for a lawful death penalty is by no means the only interpretation possible. The arbitrariness of the death penalty is manifest: legal aid strains resources; death sentences are imposed disproportionately on the poor; forensic evidence and police investigations are limited; and the element of chance at each stage of the process leads to wrongful convictions.[101] And that does not mention the misuses of capital punishment during the colonial and post-independence periods, often for political reasons.[102] The Court's decision in *Rajabu* nonetheless aligns with its incremental jurisprudence restricting the death penalty on procedural grounds and is defensible in part because it reflects the progressive decline of the

97 *Rajabu* (n 2) at paras 118-119.

98 *Rajabu* (n 2) paras 105-109; *Spilg (on behalf of Kobedi)* (n 31) para 206.

99 The 'doctrine of extenuating circumstances' operates as a presumption in favor of the death penalty. It originated in South Africa in 1935. Sec 61 Criminal Procedure and Evidence (Amendment) Act 46 of 1935 (SA). See also DM Davis 'Extenuation: an unnecessary halfway house on the road to a rational sentencing policy' (1989) 2 *South African Journal of Criminal Justice* 211-212; D van Zyl Smit 'Judicial discretion and the sentence of death for murder' (1982) 99 *South African Law Journal* 86.

100 See n 51 and accompanying text.

101 S Babcock 'An unfair fight for justice: legal representation of persons facing the death penalty' in CS Steiker & JM Steiker (eds) *Comparative capital punishment* 96 (2019); A Novak *The death penalty in Africa: foundations and future prospects* (2014) 3-4.

102 AM Karimunda *The death penalty in Africa: the path towards abolition* (2014) 129, 177-78.

death penalty in state practice.[103] However, as the global abolition of the death penalty is progressive, nothing in the *Rajabu* decision prevents the Court from taking a stronger line against the death penalty in the future. Many Commonwealth African constitutions that retain the death penalty contain a right to life 'savings clause' that explicitly authorises the death penalty.[104] These 'savings clauses' are gradually themselves becoming more ambiguous or more restrictive over time (as in the recent constitutions of Kenya and Zimbabwe).[105] Tanzania is the only retentionist country in Commonwealth Africa that has an unqualified right to life in its national constitution, with no savings for the death penalty at all, a contradiction that still has not been reconciled by the Court of Appeal.[106] The African Court's decision in Rajabu will hopefully provide the impetus for domestic reform of Tanzania's mandatory death penalty regime and bring the country closer into compliance with the African Commission's General Comment on the Right to Life.[107]

4 CONCLUSION

The African Court's decision in *Rajabu v Tanzania* was a significant milestone in the global abolition of the mandatory death penalty for murder since it reinforced decisions of other international tribunals and a growing consensus of domestic courts in the English-speaking world. The decision was also more restrictive of the death penalty than earlier African Commission jurisprudence and better represents the Commission's General Comment 3 on the Right to Life (2015), which placed strict limits on the legality of the death penalty under the African Charter. The Court's second notable holding, finding hanging as a method of execution to be inherently degrading, was a significant advancement in international jurisprudence. In *Rajabu*, the Court accepted the African Commission's earlier decision that hanging violated article 5 of the African Charter, but using a more defensible and easier to apply standard than previously laid out.[108] Most importantly, the *Rajabu* decision will hopefully create domestic pressure to reform Tanzania's mandatory death penalty law. Because the Tanzanian

103 A Novak *The African challenge to global death penalty abolition: International human rights norms in local perspective* (2016) 23-24 (on incremental jurisprudence of African human rights system); Hood & Hoyle (n 90) 15 (on progressive global decline of the death penalty).

104 See eg Zambia Constitution art 12; Ghana Constitution art 13; Uganda Constitution art 22; Sierra Leone Constitution art 16; eSwatini Constitution art 15; Gambia Constitution art 18; Nigeria Constitution art 33; Botswana Constitution art 4(1).

105 Kenya Constitution art 26 (2010); Zimbabwe Constitution art 48 (2013).

106 Tanzania Constitution art 14 (1977).

107 Shortly after *Rajabu* was decided, Tanzania ousted jurisdiction of the African Court to hear individual complaints. See 'As African Court releases new judgments, Tanzania withdraws individual access' International Justice Resource Center (5 December 2019), https://ijrcenter.org/2019/12/05/as-african-court-releases-new-judgments-tanzania-withdraws-individual-access.

108 *Interights (on behalf of Ping)* (n 34) para 85.

Constitution provides for an unqualified right to life with no authorisation for the death penalty, the Court of Appeal will eventually have to revisit its own precedent and a pending lower court challenge upholding the death penalty.