

The death penalty under the International Covenant on Civil and Political Rights: Some reflections for African states

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Abstract

As part of the ongoing movement in support of the abolition of the death penalty across the world, this article presents a selection of cases brought before the United Nations Human Rights Committee (the Committee) on violations of the right to life. With a special focus on Zambian cases, the objective is to demonstrate how the Committee's views reflect its longstanding jurisprudence that the death penalty should only be applied in the most exceptional circumstances.

Introduction

The question of whether to apply the death penalty has always been controversial for many countries. It is now seven decades since the Universal Declaration of Human Rights (UDHR)¹ enshrined the right to life as a standard of achievement for all nations. The United Nations Human Rights Committee (Committee) is mandated with monitoring implementation of the International Covenant on Civil and Political Rights² (the Covenant) by state parties to the Covenant. The right to life is one of the human rights provided for in the Covenant. As part of its monitoring functions, the Committee receives and examines reports from state parties on their implementation of the right to life as well as

¹ United Nations General Assembly (UNGA), *Universal Declaration of Human Rights*, UN A/Res/217(III) 10 December 1948.

² *International Covenant on Civil and Political Rights*, 999 UNTS 171, 19 December 1966.

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considering individual complaints by individuals who claim violations of their right to life. In doing so, the Committee has produced considerable jurisprudence that aids in the interpretation of the right to life.

On its part, the United Nations (UN) has consistently called for the abolition of the death penalty, which it unequivocally frames as a human rights issue, calling on states to establish moratoriums with a view to abolish or at the least, reduce its application.³ The fact that the 2016 moratorium resolution was supported by a majority of 117 countries (40 voted against and 31 countries abstained from the vote), indicates that the case for abolition is becoming more compelling.⁴ On the African continent, the African Commission on Human and Peoples' Rights (African Commission) adopted a Draft Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty, following up on its long standing call to African states to establish moratoriums on the death penalty.⁵ An increasing number of African countries have become abolitionists such as Angola, Mozambique, Namibia and Rwanda. In others such as Kenya and Zambia, a moratorium has been in place for decades, meaning that condemned prisoners are not executed. Following the 2007 examination of Zambia's compliance with its obligations under the Covenant, the Committee noted that while Zambia has not followed some of its decisions, the country has maintained a *de facto* moratorium on executions in Zambia since 1997 and the commutation of many death sentences, even though a high number of persons remained on death row.

Against this background, this article presents a selection of cases brought before the Committee on the right to life within the abolition of the death penalty discourse in Zambia, which is similarly moot in most African countries. The objective is to demonstrate how the Committee's views reflect its longstanding jurisprudence that the death penalty should only be applied in the most exceptional circumstances.

³ *Moratorium on the use of the death penalty*, A/Res/71/187, adopted by the General Assembly on 19 December 2016.

⁴ Elise Guillot and Aurélie Plaçais, 'The UN General Assembly voted overwhelmingly for a 6th resolution calling for a universal moratorium on executions' World Coalition against the Death Penalty, 20 December 2016, <http://www.worldcoalition.org/The-UN-General-Assembly-voted-overwhelmingly-for-a-6th-resolution-calling-for-a-universal-moratorium-on-executions.html> accessed on 7 April 2020.

⁵ ACmHPR, *Resolution urging the state to envisage a moratorium on the death penalty*, ACHPR/Res 42 (XXVI) 15 November 1999.

Main international and regional norms on the right to life

The UDHR, in Article 3, recognises each person's right to life, declaring in absolute fashion that 'everyone has the right to life, liberty and security of the person'. The 1950 (European) Convention on Human Rights and Fundamental Freedoms (ECHR)⁶, in Article 2(1), guarantees the right to life:

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The ECHR makes provision for the death penalty as an exception to the right to life but unlike the Covenant, makes little provision for limitations or safeguards.

The Covenant, adopted in 1966, affirms, in Article 6, the right to life as inherent to every human being:

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

The remaining sub-paragraphs of Article 6 broaden the scope of Article 3 of the UDHR resulting in a much more elaborate scope of protection of the right to life. Accordingly, the death penalty is an exception to the right to life that cannot be imposed without rigorous procedural safeguards, nor should it be imposed on certain protected categories of persons such as children, expectant women and the elderly. In General Comment 36, the Committee, in monitoring implementation of the Covenant, has described the right to life as 'the supreme right'⁷ that should not be interpreted narrowly,⁸ nor should it be subjected to derogation.⁹ The Committee considers the right to life from a much broader perspective than the UDHR, imposing both a negative obligation on state parties not to arbitrarily deprive anyone of the right and a positive obligation to protect the right to life of anyone under its jurisdiction.

⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, ETS 5, 4 November 1950.

⁷ CCPR, *General comment No 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, 30 October 2018, para 2. See also, CCPR, *General Comment No 6 (1982) article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRI/GEN/1/Rev.1, 30 April 1982, para 1.

⁸ *General comment No 36*, para 3.

⁹ *General comment No 36*, para 2.

This trend of ‘restrict[ing] the application of the death penalty’¹⁰ continues in the Americas. Articles 4(1) and (4) of the 1969 American Convention on Human Rights (American Convention)¹¹ state respectively:

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

In no case shall capital punishment be inflicted for political offences or related common crimes.

The American Convention outlaws the death penalty - the reintroduction of or expansion of application of the death penalty - reflecting the sentiment of most Latin American countries that promoted the idea at the time of the adoption of the Convention. A notable addition to the safeguards provided by Article 4 is the exclusion of the use of the death penalty for political crimes and for the elderly.

Like other international and regional instruments, the 1981 African Charter on Human and Peoples’ Rights makes provision for the right to life. Article 4 states that:

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

Unlike the other instruments, it does not refer to the death penalty. However, the question of the death penalty has been the subject of considerable discussion within the African Commission,¹² resulting in the adoption of a resolution calling for a moratorium on the use of the death penalty in 1999.¹³

Protocol 6 to the ECHR, adopted in 1985,¹⁴ becomes the first binding international agreement to not simply restrict application but rather explicitly abolish the death penalty for peacetime offences, stating that ‘the death penalty shall be abolished. No one shall be condemned to such penalty or executed’.¹⁵ This was recognised from the fact that most European countries were opting for the abolition of the death penalty in their domestic laws.¹⁶

¹⁰ Preamble 1, *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, O.A.S. Treaty Series No 73 (1990), adopted June 8, 1990.

¹¹ *American Convention on Human Rights, “Pact of San Jose”*, Costa Rica, 22 November 1969, 1144 UNTS 123.

¹² See for example 56th Ordinary Session of the African Commission on Human and Peoples’ Rights, 21 April – 7 May 2015.

¹³ Resolution Urging States to Envisage a Moratorium on the DP 13 Activity Report of the ACHPR, OAU Doc. AHG/Dec.153 9XXXVI0, Annex IV.

¹⁴ Council of Europe, *Protocol 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of Death Penalty*, ETS 114, 28 April 1983.

¹⁵ Article 1, *Protocol 6 to the European Convention for the Protection of Human Rights Concerning the Abolition of the Death Penalty*, ETS 114, entered into force 1 March 1985.

¹⁶ William Schabas, ‘International law and the abolition of the death penalty,’ 4 *ILSA Journal of Interna-*

Further developments in international law culminated in the adoption of Protocol 13 in 2003, which bans the death penalty in all circumstances including for crimes committed in time of war or imminent threat of war as in time of peace. As in Protocol 6, no derogation or reservation is allowed under Protocol 13.

In 1989, Second Optional Protocol to the Covenant Aiming at the Abolition of the Death Penalty (Second Optional Protocol to the Covenant)¹⁷ was adopted and proclaimed by UN General Assembly, thus becoming specifically an abolitionist instrument of universal application.

The 1990 Protocol to the American Convention on the Abolition of the Death Penalty further formalises state parties' solemn commitment to refrain from using capital punishment in peacetime.

The African Commission adopted a text of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Abolition of the Death Penalty in Africa at its 56th Ordinary Session in May 2015 and continues to call upon African states to adopt and ratify the instrument.¹⁸

That said, countries that have ratified the Covenant undertake to respect citizens' right to life as enumerated in Article 6. Although not a signatory to the Second Optional Protocol to the Covenant, Zambia, a state party to the Covenant, may be considered *abolitionist de facto* as it has not carried out any executions since 1997. The significance of the Committee's findings is shown in the cases cited in the next section, where Zambians have petitioned the Committee having exhausted domestic remedies. The Committee has found Zambia to have consistently violated the right to life as provided for in Article 6 of the Covenant.

Violations of Article 6 of the Covenant determined by the Human Rights Committee

This section will review some of the jurisprudence of the Committee where it has found violations of the Covenant's Article 6 on the right to life. There will be a special focus on Zambian cases, based on the Committee's jurisprudence on Article 6 in general. The aim is to illustrate important concepts such as arbitrary

tional & Comparative Law, 1998.

¹⁷ 596 UNTS 8638.

¹⁸ ACmHPR, Final Communiqué of the 56th Ordinary Session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 21st April – 7th May 2015, para 33. See also, ACmHPR, Declaration of the Continental Conference on the Abolition of the Death Penalty in Africa (the Cotonou Declaration), 4 July 2014.

deprivation of life; most serious crimes; mandatory death penalty and fair trial guarantees in the interpretation of Article 6, which have informed the Committee's jurisprudence.

Inherent right to life

The Covenant affirms the right to life as inherent to every human being, echoing the preamble to the UDHR that recognises the inherent dignity and inalienable rights of every human being by virtue of membership of the human race. The Committee, in General Comment 36, notes that the expression 'inherent right to life' cannot be properly understood in a restrictive manner and the protection of this right requires that states adopt positive measures.¹⁹ In the same General Comment, the right to life is referred to as the supreme right from which no derogation is permitted 'even in situations of armed conflict and other public emergencies which threaten the life of the nation'.²⁰

Arbitrary deprivation of life

The deprivation of life must not be arbitrary.²¹ This is elaborated by the Committee by considering the protection against arbitrary deprivation of life.²² For this reason, state parties are required 'not only to punish deprivation of life by criminal acts but also to prevent arbitrary killings by their own security forces'.²³ The term 'arbitrary' is defined more broadly than that which is unlawful, but also that while the deprivation of life may be authorised by domestic law, any exception to this must be proportional, reasonable, and necessary.²⁴

In *Chongwe v Zambia*, the author/claimant claimed that he and others were the subject of an assassination attempt by agents of the State. The Committee's views were that the mere attempt on the life of Chongwe and others by agents of the State amounted to a violation of the right to life.²⁵ The Committee observed that the right to life:

¹⁹ General Comment 36, para 2, 3, 21. See also, General Comment 6, para 5.

²⁰ General Comment 36, para 2. See also General Comment 6, para 1.

²¹ General Comment 36, para 4.

²² General Comment 36, para 10ff. See also, General Comment 6, para 3.

²³ General Comment 6, para 3. See also, General Comment 36, para 6-7.

²⁴ General Comment 36, para 12.

²⁵ *Chongwe v Zambia*, Comm. No 821/1998, 2000, para 6.

[e]ntails an obligation of a state party to protect the right to life of all persons in its territory and subject to its jurisdiction. In the present case, the author has claimed, and the state party has failed to contest before the Committee that the state party authorised the use of lethal force without lawful reasons, which could have led to the killing of the author.²⁶

It must be emphasised that the Committee found a violation of Article 6(1) even when, as in this case, the assassination attempt was unsuccessful and did not result in loss of life. This underscores the obligation on states to respect the right to life, to refrain from activities that lead to arbitrary deprivation of life and to ensure that risks to human life are reduced.

Emphasis on the state's negative obligation not to deprive individuals of life arbitrarily and the finding of Article 6 violations has several precedents in the Committee's jurisprudence. One of the earliest of these is the case of *Dermot Barbato v Uruguay* concerning a complaint about the death of a prisoner held by the Uruguayan authorities. A report was not submitted surrounding the circumstances in which Mr Barbato died while in prison, nor the findings from the inquiries as to his death. The Committee noted that while it could not:

[a]rrive at any definite conclusion as to whether Barbato committed suicide, was driven to suicide, or was killed by others while in custody, the inescapable conclusion is that in all the circumstances, the Uruguayan authorities, whether by act or omission were responsible for not taking adequate measures to prevent Barbato's death while in custody, as required by Article 6(1) of the Covenant.²⁷

In the case of *Camargo v Colombia*, the State ordered a raid to be carried out in the author's home in the belief that a kidnapped person was being held prisoner in that house. A police patrol hid in the house to await the arrival of the kidnappers who were killed upon arrival. The Committee considered the action of the police to be 'disproportionate to the requirements of law enforcement and that the victims were arbitrarily deprived of life'.²⁸

Another instance where the Committee arrived at the view that there had been arbitrary deprivation of life concerned the hostage taking of some prison wardens in the case of *Burrell v Jamaica*. Mr Burrell was killed after the release of the wardens and after the resolution of the hostage situation. The Committee found Jamaica to have violated Article 6(1) in that the State failed to take effective

²⁶ *Chongwe v Zambia*, para 5.2.

²⁷ *Dermot Barbato v Uruguay*, Comm. No 84/1981, 1982, para 9.2.

²⁸ *Camargo v Colombia*, Comm. No 45/1979, 1982, para 13.3.

measures to protect Mr Burrell's life as a result of the disproportional use of force by them.²⁹

Even where State agents were not identified as the perpetrators as in the case of *Peiris v Sri Lanka*, the Committee found a violation of Article 6. In this case, the author and her family had been at the receiving end of death threats from the police. A few months later, the author's husband was shot dead by masked men. In its conclusion, the Committee was of the view that:

[t]he facts before it reveals that the death of the author/claimant's husband must be attributable to the State party itself. The Committee accordingly concludes that the State party is responsible for the arbitrary deprivation of life of the author's husband, in breach of Article 6 of the Covenant.³⁰

In *Umatalieva v Kyrgyzstan*, the son of the author died after police fired live rounds into a mass demonstration. Giving its views, the Committee observed that the:

[d]eprivation of life by the authorities of the State is a matter of utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities. The Committee takes into account that the arguments provided by the authors point towards the State party's direct responsibility for Eldiyar Umataliev's death through the excessive use of force, and considers that [...] there has been a violation of Article 6 paragraph 1 of the Covenant [...].³¹

The excessive and unreasonable use of force by the police, is a further factor in the finding of an arbitrary deprivation of the author's son's life as he died while exercising his right to freedom of assembly as guaranteed by Article 21 of the Covenant.

Central to the cases in this section is the finding by the Committee of arbitrary deprivation of life through excessive use of force and brutality mainly by law enforcement agencies but also by criminal acts. Article 6 of the Covenant states that the right to life must be protected by law. The Committee has established that where deprivation of life is authorised by domestic law, such deprivation is arbitrary if it lacks a legal basis, or is otherwise inappropriate, unjust and inconsistent with life-protecting laws and procedures. In this regard, General Comment 36 emphasises that 'state parties are expected to take all necessary

²⁹ *Burrell v Jamaica*, Comm. No 546/1993, 1996, para 9.5.

³⁰ *Peiris v Sri Lanka*, 1 Comm. No 862/2009, 2011, para 7.

³¹ *Umatalieva and Tashtanbekova v Kyrgyzstan*, Comm. No 1275/2004, para 9.5

measures intended to prevent arbitrary deprivation of life by their law enforcement officials'.³²

Most serious crimes

The death penalty may only be applied in the 'most serious crimes'³³ as reiterated by the Committee in *Lubuto v Zambia* in its elaboration on the meaning of most serious crimes. The author was convicted and sentenced to death under a domestic law, Penal Code of Zambia,³⁴ which provides for the imposition of the death penalty for aggravated robbery where firearms are used. The Committee noted that:

[t]he issue that must accordingly be decided is whether the sentence in the instant case is compatible with Article 6.2 of the Covenant, which allows for the imposition of the death penalty 'for the most serious crimes'. Considering that in the instant case the use of firearms did not produce the death or the wounding of any person and that the court could not under the law take these elements into account in imposing the sentence, the Committee is of the view that the mandatory imposition of the death sentence under these circumstances violates article 6, paragraph 2 of the Covenant.³⁵

For the Committee, reference to 'most serious crimes' reflects the importance that should be attached to a matter it considers of utmost gravity. Accordingly, it is incumbent on state parties that municipal law should regulate circumstances under which convicted persons may be denied the right to life. Even though states are not obliged to abolish the death penalty, they ought to limit it to the 'most serious crimes, and then only in the most exceptional cases and under the strictest limits'.³⁶ Further, according to General Comment 36:

The term 'the most serious crimes' must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing. Crimes not resulting directly and intentionally in death, such as attempted murder, corruption and other economic and political crimes, armed robbery, piracy, abduction, drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of Article 6, for the imposition of the death penalty.³⁷

In the Concluding Observations of Zambia's third periodic report,³⁸ the Committee reiterated its views that the mandatory imposition of the death sen-

³² Draft General Comment 36 para 13, and ff.

³³ Article 6 (2), ICCPR.

³⁴ *Penal Code of Zambia* Chapter 87.

³⁵ *Lubuto v Zambia*, Comm. No 390/1990, 1995, para 7.2.

³⁶ *General Comment 36*, para 5.

³⁷ *General Comment 36*, para 35. See also *General Comment 6*, para 7.

³⁸ CCPR/C/ZMB/CO/3, 9 August 2007.

tence for aggravated robbery in which a firearm is used is in violation of Article 6(2) of the Covenant. It further reiterated its view that the death penalty may be applied only for the most serious crimes, a category to which aggravated robbery with firearms does not belong.

Similarly, in the case of *Chisanga v Zambia*, the Committee noted:

The author's claim that the crime for which he was sentenced to death, namely aggravated robbery in which a firearm was used, is not one of the "most serious crimes" within the meaning of Article 6, paragraph 2, of the Covenant, the Committee recalls that the expression "most serious crimes" must be read restrictively and that death penalty should be an exceptional measure.³⁹

It referred to its jurisprudence in *Lubuto v Zambia*, noting that the imposition of the death penalty under Zambian laws 'is based solely upon the category of crime for which the offender is found guilty without giving the judge any margin to evaluate the circumstances of the particular offence'.⁴⁰ This means that less serious crimes not resulting directly and intentionally in death such as armed robbery cannot be considered as showing such a level of disregard for human life as to justify the death penalty. Finally, the Committee reiterated that:

States parties are under an obligation to review their criminal laws so as to ensure that the death penalty is not imposed for crimes which do not qualify as the most serious crimes.⁴¹

Mandatory death penalty

In the course of developing its jurisprudence, the Committee has deliberated on the issue of whether the mandatory death penalty as stipulated in domestic criminal code provisions, either generally or in relation to a specific offence, amounts to an 'arbitrary deprivation of life'. It could be argued that the Covenant admits the death penalty for the most serious cases, and that the Second Optional Protocol to the Covenant, is optional.⁴² However, the evolving jurisprudence of the Committee tends towards finding a mandatory death sentence to be a violation of Article 6(1). While its decisions in some earlier cases have not found a violation of Article 6, the Committee's jurisprudence has shifted in the last decade and it has now confirmed that a mandatory death penalty violates Article 6. In one of its earlier cases, *Brown v Jamaica*,⁴³ it found no violation in the manda-

³⁹ *Chisanga v Zambia*, Comm. No 1132/2002, 2005, para 7.4.

⁴⁰ *Chisanga v Zambia*, para 7.4.

⁴¹ *General Comment 36*, para 36. See also, *General Comment 6*, para 6.

⁴² UNGA, *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty*, A/Res/44/128 15 December 1989.

⁴³ *Brown v Jamaica*, Comm. No 775/1997, 1999, para 6.14.

tory nature of the author's death penalty, noting that Jamaican law distinguished between non-capital and capital murder and that capital murder is murder committed under aggravated circumstances. However, in *Carpo et al v Philippines* the Revised Penal Code of the Philippines provided for the automatic imposition of the death penalty in cases of murder or attempted murder.⁴⁴ The views of the Committee were that this amounted to a violation of Article 6 as the death penalty was 'imposed without due regard being able to be paid to the defendant's personal circumstances or the circumstances of the particular offence'.⁴⁵

In Zambia where the death penalty is mandatory for all cases of aggravated robbery with use of firearms, the Committee noted in *Chisanga v Zambia* that:

The mandatory imposition of the death penalty under the laws of the State party is based solely upon the category of crime for which the offender is found guilty, without giving the judge any margin to evaluate the circumstances of the particular offence.⁴⁶

In finding a violation of Article 6 in *Chisanga*, the Committee stated that:

This mechanism of mandatory capital punishment would deprive the author of the benefit of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment could be appropriate in the circumstances of his case. In the present case, the Committee notes that although the victim was shot in the thigh, it did not result in loss of life and finds that [the] imposition of death penalty in this case violated the author's right to life protected by Article 6 of the Covenant.⁴⁷

Thus, mandatory death sentences that leave domestic courts with no discretion on whether to issue the death sentence in the particular circumstances of a case are arbitrary in nature. In *Weerawansa v Sri Lanka*, the Committee noted that:

The State party does not contest that the death sentence is mandatory for the offence of which he was convicted, but argues that it has applied a moratorium on the death penalty for nearly 30 years. The Committee recalls its jurisprudence that the automatic and mandatory *imposition* of the death penalty constitutes an arbitrary deprivation of life, in violation of Article 6, paragraph 1 of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence. Thus, while observing the fact that the State party has imposed a moratorium on executions, the Committee finds that the *imposition* of the death penalty itself, in the circumstances, violated the author's right under Article 6(1), of the Covenant.⁴⁸

⁴⁴ Article 48, *Revised Penal Code of Philippines* (Act No 3815 of 1930).

⁴⁵ *Carpo et al v Philippines*, Comm. No 1077/2002, 2003, para 8.3.

⁴⁶ *Chisanga v Zambia*, Comm. No 1132/2002, para 7.4.

⁴⁷ *Chisanga v Zambia*, para 7.4.

⁴⁸ *Weerawansa v Sri Lanka*, Comm. No 1406/2005, 2009 para 7.2. [Emphasis in original]

Positive obligation to protect the life of persons in detention

In *Chiti v Zambia*, the author's husband died shortly after being released from prison, having been sentenced to death after being found guilty of treason. In spite of the fact that Mr Chiti did not die while in prison, the Committee considered that the author's allegation that her husband, Jack Chiti, was tortured at the Lusaka police headquarters for nine days, following his arrest on 28 October 1997 and that as a consequence of the torture inflicted, he was transferred to Maina Soko Military Hospital where he was diagnosed with an eardrum perforation.⁴⁹ The Committee further noted the author's claim that:

While imprisoned, her husband was diagnosed with prostate cancer but could not afford the prescribed drugs. The prison in which he was serving his sentence failed to provide him with these drugs. Neither was he provided with the high-protein diet recommended for the purposes of slowing down the spread of cancer. He was HIV-positive and was detained in inhuman conditions, denied adequate food, a clean environment and counselling.⁵⁰

The Committee noted that the State party denied the causal link between the conditions of detention and Mr Chiti's death, without providing further explanation. In the absence of a rebuttal from the State party, the Committee concluded that the State party failed to protect the life of Mr Chiti in violation of Article 6 of the Covenant.⁵¹ This finding underscores the Committee's views that individuals held in custody have an equal claim to the right to life and state parties' have an obligation to take effective measures to protect their lives. This case demonstrates the importance of providing medical care to prevent further deterioration of a prisoner's health in the face of a life-threatening disease.

In *Titiahonjo v Cameroon*, the author claimed that her husband was held in police cells following his arrest where he was severely tortured and was not provided with food for the duration of his detention. He was later transferred to Baffousam Military Prison where prisoners had died of meningitis, cholera and cerebral malaria. When his health deteriorated and he asked for medication, the prison nurse could not access his cell and he was found dead when the cell was finally opened.⁵² The Committee found that the State party had condoned 'the life-threatening conditions of detention at Bafoussam Military Prison, especially the apparently unchecked propagation of life-threatening diseases' and failure to

⁴⁹ *Chiti v Zambia*, Comm. No 1303/04, 2012, para 2.2.

⁵⁰ *Chiti v Zambia*, para 2.9.

⁵¹ *Chiti v Zambia*, para 12.2.

⁵² *Titiahonjo v Cameroon*, Comm. No 1186/2003, 2007, para 2.7.

allow medical personnel to access the cell.⁵³ Adverse and inhuman conditions of detention are a violation of Article 10 but in this case the violation was of such a grave nature that a violation of Article 6 of the Covenant was invoked. This is in line with the positive obligation of states parties to adopt measures to ensure enjoyment of the right to life.

In the case of *Lantsova v Russian Federation*, the Committee found a violation of Article 6(1) as the author's son died while in pre-trial detention. The Committee concluded that the State party had failed to take appropriate measures to protect Mr Lantsova's life and affirmed that:

It is incumbent on states to ensure the right of life of detainees and it is not incumbent on the latter to request protection. [...] It is up to the state party by organising its detention facilities to know about the state of health of the detainees as far as may be reasonably expected. Lack of financial means cannot reduce this responsibility.⁵⁴

This emphasises the need to monitor the health of individuals in custody on a regular basis.

Fair trial guarantees

In many death penalty cases, the Committee has upheld the principle of fairness of trials and maintained that the procedural guarantees provided for in the Covenant must be observed in each case. These include the right to a fair hearing by an independent tribunal, the presumption of innocence, minimum guarantees for the defence, and the right to review by a higher tribunal.⁵⁵ Failure to observe these fair trial guarantees is a violation of Article 6.

In fact, examining the conventional validity of the death penalty against fair trial guarantees forms the earliest approaches of the Committee. In *Mbenge v Zaire*, the Committee affirmed that the provisions of Article 6(2) required both substantive and procedural conformity of municipal law to the Covenant.⁵⁶ In this case the trial was held *in absentia*, and the author was sentenced twice to death, and learnt of the trials after their completion through press reports. The State failed to show that the author was summoned in a timely manner and informed of the proceedings against him.⁵⁷ Consequently, the violation by the State

⁵³ *Titiafonjo v Cameroon*, para 6.2.

⁵⁴ *Lantsova v Russian Federation*, Comm. No 763/1997, 2002, para 9.2.

⁵⁵ See Article 14, ICCPR.

⁵⁶ *Mbenge v Zaire*, Comm. No 16/1977, 1990, para 17.

⁵⁷ *Mbenge v Zaire*, para 14.1-2.

of the author's right to be tried in his presence and to afford him appropriate rights in the determination of the charges against him led to the finding that the death sentence pronounced was contrary to the provisions of the Covenant and therefore in violation of Article 6(2).⁵⁸

In the case of *Mvamba v Zambia*, the author was charged with murder, attempted murder, aggravated robbery and was sentenced to death by hanging. He alleged that fair trial guarantees were not observed as the tribunal that found him guilty was not independent and impartial, he was forced to plead guilty and his lawyer was not given time to prepare for his defence.⁵⁹ In addition, he had to wait eight years to have his case reviewed. In its views, the Committee recalled that the imposition of the death penalty following a trial in which provisions of the Convention have not been respected constitutes a violation of Article 6(1).⁶⁰

In *Gunan v Kyrgyzstan*, the author had been sentenced to death after an unfair trial.⁶¹ The Committee, taking note of the author's claim of a violation of his right to life under Article 6 of the Covenant, reiterated its jurisprudence that:

The imposition of a sentence of death upon conclusion of a trial, in which the provisions of Article 14 of the Covenant have not been respected, constitutes a violation of Article 6 of the Covenant. In light of the Committee's findings of a violation of Article 14, it concludes that the author is also a victim of a violation of his rights under Article 6, paragraph 2, read in conjunction with Article 14, of the Covenant.⁶²

In *Khoroshenko v Russian Federation*, the Committee took note of the author's claims that the public and in particular his relatives and the relatives of other accused were excluded from the main trial.⁶³ The State party did not refute this claim, other than stating that nothing in the case file confirmed the author's claim.⁶⁴ The Committee recalled its jurisprudence that:

All trials in criminal matters must, in principle, be conducted orally and publicly and that the publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large. Article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in

⁵⁸ *Mbenge v Zaire*, para 17. See also *Henry v Jamaica*, Comm no. 230/1987, para 8.5; *Morrison v Jamaica*, Comm no. 461/1991, 1998, para 8.7; *Daley v Jamaica*, Comm. no. 750/1997, 1998, para 7.7.

⁵⁹ *Mvamba v Zambia*, Comm no. 1520/2006, 2010, para 2.4.

⁶⁰ *Mvamba v Zambia*, para 6.7.

⁶¹ *Gunan v Kyrgyzstan*, Comm no 1545/2007, 2011, para 3.1.

⁶² *Gunan v Kyrgyzstan*, para 6.5.

⁶³ *Khoroshenko v Russian Federation*, Comm no. 1304/2004, 2011, para 2.6, 9.11.

⁶⁴ *Khoroshenko v Russian Federation*, para 4.5, 9.11.

the opinion of the court in special circumstances where publicity would be prejudicial to the interests of justice. The Committee observes that no such justifications have been brought forward by the State party in the instant case. In this respect, the Committee finds a violation of Article 14, paragraph 1 of the Covenant. In light of this conclusion, and given that the author has been sentenced to death following a trial held in violation of the fair trial guarantees, the Committee concludes that the author is also a victim of a violation of his rights under Article 6, read in conjunction with Article 14, of the Covenant.⁶⁵

In addition to a violation of Article 6 in the case of *Lubuto v Zambia*, the Committee noted that there was an eight-year delay between the author's arrest and the dismissal of his final appeal.⁶⁶ It acknowledged the State's explanation relating to the difficult economic situation in the country and lack of administrative support available to judges. Nonetheless it emphasised that 'the rights set forth in the Covenant constitute minimum standards which all state parties have agreed to observe'.⁶⁷ Therefore, the requirement that all accused are entitled to be tried without undue delay meant that the period of eight years between the author's arrest and the final decision of the Supreme Court was incompatible with Article 14 (3)(c).⁶⁸ Economic hardship does not excuse a state from full compliance with the Covenant.

Conclusion

The movement to abolish the death penalty highlights the pledge among nations of the world to promote each person's right to life as signatories to the UDHR. The ground-breaking provision in Article 3 of the UDHR set the standard for progressive international and regional interpretations of this right, demonstrating the inalienable nature of the right to life. As the cases that have come before the Committee have demonstrated, the right to life sets limits on what a state may or may not do to its citizens in protecting their right to life. In doing so, the Committee has found violations of the right to life as illustrated in its interpretation of attendant concepts such as arbitrary deprivation of life, most serious crimes, mandatory death penalty and fair trial guarantees that have informed its views.

⁶⁵ *Khoroshenko v Russian Federation*, para 9.11.

⁶⁶ *Lubuto v Zambia*, para 7.3.

⁶⁷ *Lubuto v Zambia*, para 7.3.

⁶⁸ *Lubuto v Zambia*, para 7.3.

Countries that have ratified the Covenant undertake to respect citizens' right to life as enumerated in the ICCPR. Although not a signatory to the Second Optional Protocol to the Covenant, Zambia, a State party to the Covenant, may be considered *abolitionist de facto* as it has not carried out any executions since 1997. The significance of the Committee's findings is that in the cases cited in this article, where Zambian nationals have petitioned the Committee on the basis of having exhausted domestic remedies, it has found Zambia to have consistently violated the right to life as provided for in Article 6 of the Covenant.

As is often the case in countries that still retain the death penalty, it is assumed that there is significant public support for the death penalty in Zambia. Such public support is influenced to some extent by the high levels of crime in the country that were prevalent in the 1990s, leading to death penalties being imposed by the courts. Notwithstanding citizens' perception of the need to deter high levels of crime,⁶⁹ there has yet to be a study that produces convincing empirical evidence of a decrease in levels of crime as a result of execution of those convicted and sentenced to death.⁷⁰ In this regard, it is worth recalling the words of High Court Judge Anthony Lawrence of Zambia who once remarked that his 'personal view is that there should not be any death penalty. This is too final. It has not worked in Nigeria where hanging and execution was carried out in public'.⁷¹

Following the 2007 examination of Zambia's compliance with its obligations under the ICCPR, the Committee noted, in its concluding observations that the Zambian authorities had not given effect to its views in *Labuto v Zambia* before his demise on death row. The Committee further noted the *de facto* moratorium on executions in Zambia since 1997 and the commutation of many death sentences even though a high number of persons remained on death row. The death penalty continues to be the subject of public discussion, as reflected in a debate by a parliamentary committee in 2015.⁷² Public opinion is still divided on the merits or demerits of abolition. The same could very well be said of many African countries.

⁶⁹ The (in)validity of this argument in supporting the death penalty was discussed convincingly by the Constitutional Court of South Africa in *S v Makwanyane and another* (CCT3/94) [1995] ZACC 3.

⁷⁰ Roger Hood and Carolyn Hoyle, *The death penalty: A worldwide perspective*, Oxford University Press, 2015.

⁷¹ Amnesty International, *When the State kills: The death penalty v human rights*, Amnesty International Publications, London 1989.

⁷² Austin Kaluba, 'Should the death penalty be abolished?' *Times of Zambia*, 30 Jan 2016.