

Does the Death Penalty amounts to Torture? A Comparative Study of Sierra Leone and the United States of America.

By

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LL.M HUMAN RIGHTS THESIS

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ACKNOWLEDGEMENT	iii
INTRODUCTION	1
CHAPTER ONE	6
GENERAL OVERVIEW OF THE DEATH PENALTY	6
1.1 HISTORICAL BACKGROUND OF DEATH PENALTY	6
1.2. LITERATURE REVIEW (GENERAL).....	10
1.3. LITERATURE REVIEW (FROM THE AFRICAN POINT OF VIEW)	16
1.4. CRIMES PUNISHABLE BY THE DEATH PENALTY	18
1.5. THE LEGAL SYSTEM IN SIERRA LEONE	20
1.6. METHOD OF EXECUTION.....	23
1.7. THE MANDATORY NATURE OF THE DEATH PENALTY	25
1.8. THE DEATH PENALTY IN SIERRA LEONE	27
1.9. THE DEATH PENALTY IN THE UNITED STATES OF AMERICA.....	30
CHAPTER TWO	32
INTERNATIONAL LAW AND THE DEATH PENALTY	32
2.1. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS	32
2.2. REGIONAL HUMAN RIGHTS CONVENTIONS.....	37
2.3. INTERNATIONAL COURTS AND TRIBUNALS	41
CHAPTER THREE	43
THE ARGUMENTS FOR AND AGAINST THE DEATH PENALTY	43
3.1. PUBLIC OPINION.....	43
3.2. DETERRENCE	44
3.3. RETRIBUTION	49
3.4. INCAPACITATION.....	51
3.5. MISCARRIAGE OF JUSTICE (EXECUTION OF AN INNOCENT PERSON)	52
CHAPTER FOUR	54
THE DEATH PENALTY AMOUNTS TO TORTURE	54
4.1 GENERAL OVERVIEW OF TORTURE	54
4.2. THE DEATH ROW PHENOMENON	58
4.3. TORTURE FROM THE UNITED STATES OF AMERICA POINT OF VIEW	68
4.4. TORTURE FROM THE SIERRA LEONE POINT OF VIEW	70
CHAPTER FIVE	76

CONCLUSION	76
BIBLIOGRAPHY	79

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INTRODUCTION

The death penalty has been carried out by most societies in the world mainly to punish very serious crimes¹. This has continued for quite a long time.² In recent times especially in the 19th and 20th centuries, the death penalty has become a very serious heated debate, mainly due to the inhuman treatment of people around the world, for instance in Europe as a result of the brutal treatment of people in concentration camps³. The death penalty is defined in Black's Law Dictionary as, "State-imposed death as punishment for a serious crime. This is also termed capital punishment"⁴. This means that the death penalty is the highest punishment in many countries where a person who has been convicted for a serious crime which has death as its penalty is killed by the state. Worldwide, there is a serious debate in abolishing the death penalty and gradually the world is moving to support this view. Also there is a "progressive move of the world towards the abolition of the death penalty in international law since 1948"⁵. Organizations such as the European Union, the Council of Europe, the Organisation of American States (OAS) and the United Nations with the Optional Protocol II of the International Covenant on Civil and Political Rights (ICCPR) have called for the abolition of capital punishment. Also international Courts and Tribunals such as the European Court of Human Rights⁶, the International Court of

¹ Hood, Roger, "The Death Penalty. A World- Wide Perception" (Oxford. Clarendon Press),(1996). Pg 54-66.

² Hashem Dezhbakhsh Paul H. Rubin and Joanna M. Sheperd. Does Capital Punishment have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data. Clemson University and Emory University. 2005. Pg 1

³ Dr. Klara Kereszi suggestion in marking this thesis.

⁴ Garner, Bryan, A. (Editor in Chief). Black's Law Dictionary. Seventh Edition. West Group. St. Paul, Minn., 1999. Pg 407.

⁵ Schabas, A, William. The Abolition of the Death Penalty in International Law. (2nd Edition), Cambridge University Press,1997, Pg 1(See also, Schabas, A, William, International Law and Abolition of the Death Penalty: Recent Developments. ILSA Journal of International & Comparative Law. Spring, 1998.

⁶ See Protocol 6 of the ECHR

Justice, the International Criminal Court, the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone do not have death penalty as one of their punishment even for grave crimes such as genocide, war crimes and crimes against humanity. This is also true for most of the Human Rights Conventions in the world.

However, on the other hand, many countries including Sierra Leone and the United States of America continue to retain it. The death penalty is the highest punishment in Sierra Leone. It has imposed for certain crimes since independence and even before. It is stated in the Constitution of Sierra Leone, as follows, “No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offences under the laws of Sierra Leone, of which he has been convicted”⁷. These crimes are Murder, treason, mutiny and robbery with aggravation. Murder is a common law offence. Treason is provided for by the Treason and State Offences Act 1963 and Section 30 (1) and Section 31 (1) of the Armed Forces of the Republic of Sierra Leone Act 1961. Mutiny is provided for by Section 37 (1) of the Armed Forces of the Republic of Sierra Leone Act 1961 and robbery with aggravation is provided for under the Larceny Act of 1916. In the past 20 years, there have been a number of executions which raised the concern of the domestic and international community. A major example of such executions was in December 1992 when 26 people (9 civilians and 17 military and police officers) were executed on the charges of treason by a special military court martial established by the then ruling junta government, the National Provisional ruling Council (NPRC). Also, in November, 1994, 12 soldiers were executed after being convicted by the Court Martial. Furthermore, in 1998, 24 soldiers were executed by Sierra Leone Peoples Party (SLPP)

⁷ The Constitution of Sierra Leone, Act No. 6 of 1991. Article 16.

government after being convicted by the Court Martial. On the other hand, people are on regular bases sentenced to death by the civilian courts but they remain in death row and are not executed. The Supreme Court, the Court of Appeal, the High Court and a military Court Martial all have the power to impose the death penalty for crimes committed within the jurisdiction of Sierra Leone which includes its territorial waters⁸. The Truth and Reconciliation Commission (TRC)⁹ report published in 2004 clearly state that Sierra Leone maintaining the death penalty in its laws is a gross violation of the right to life and call on the government to abolish the death penalty for all crimes¹⁰. However, the government discarded this recommendation in its “White Paper”¹¹ reaction to the TRC report and with this Sierra Leone still retains the death penalty. Also, the African Commission on Human and People’s Right (African Charter) adopted in 1981 which Sierra Leone is a party to have done a lot to promote the abolition of the death penalty within Africa. The African Commission in its first resolution on the death penalty in 1999 encourages member states to abolish the death penalty.

Over the years, the United States of America has generated a heated debate on the death penalty. The use of the death penalty and the debate on its abolition started a long time ago¹². For instance Wisconsin was “one of the first States to abolish the death penalty”¹³ in 1853. The heated debate came on the light especially with the publication of Sociologist Thorsten Sellin work in which he did a “careful comparisons of the evolution of homicide rates in contiguous

⁸ Tejan-Cole, Abdul. The Death Penalty in Sierra Leone. Country Report presented at The First International Conference on the Application of the Death Penalty in Commonwealth Africa, May, 2004. Entebbe, Uganda. Pg 4.

⁹ Truth and Reconciliation Commission Report. See <http://www.trcsierraleone.org> for a full version of the TRC report.

¹⁰ Ibid

¹¹ White Paper of the Sierra Leone Government on the Report of the Truth and Reconciliation Commission, June 2005

¹² Hashem Dezhbakhsh Paul H. Rubin and Joanna M. Sheperd. Does Capital Punishment have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data. Clemson University and Emory University. 2005. Pg 1

¹³ Issues in Administering the Death Penalty. State of Wisconsin. Legislative Reference Bureau. Research Bulletin 06-2, October 2006. Pg 1.

states from 1920 to 1963 led to doubts about the existence of a deterrent effect caused by the imposition of the death penalty”¹⁴. This work is believed to have had a strong influence on the death penalty and “execution virtually ceased in the late 1960s”¹⁵. This was followed by the ruling of the case *FURMAN v. GEORGIA*¹⁶, where the Supreme Court held that the death penalty was “cruel and unusual punishment”¹⁷ which overturned the death penalty. This decision “invalidated the state and federal death-penalty statutes that existed at the time”¹⁸. The US stopped all execution between 1968 and 1977¹⁹. However, in the case *GREGG v. GEORGIA*²⁰ the Supreme Court opened “the way for the return of the death penalty”²¹.

There is a strong debate about the death penalty between proponents of it and those who are against it. Supporters of it argue that it deters crimes. Also, that it is less expensive than life imprisonment and that it is the most appropriate form of punishment. Furthermore, it is the best way of retribution. On the other hand, those who are strong opponent of the death penalty argue that it is a gross violation of human rights. Also, that it has led to the execution of wrongfully convicted persons. They also claim that it is a political tool in some countries to eradicate political opponents and that it does not deter criminals rather it encourages a culture of violence. This research paper will be focused on the application of the death penalty in Sierra Leone and

¹⁴ John Donohue and Justin J. Wolfers. Uses and Abuses of Empirical Evidence in the Death penalty Debate. American Law & Economics Association Annual Meeting. Berkeley Electronic Press. 2006. Pg 792 Citing Thorsten Sellin, Homicides in Retentionist and Abolitionist States, in Capital Punishment. 1967. Pg 135

¹⁵ Issues in Administering the Death Penalty. State of Wisconsin. Legislative Reference Bureau. Research Bulletin 06-2, October 2006. Pg 1.

¹⁶ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁷ Hashem Dezhbakhsh Paul H. Rubin and Joanna M. Sheperd. Does Capital Punishment have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data. Clemson University and Emory University. 2005. Pg 4

¹⁸ Stephen P. Klein, Richard A. Berk, Laura J. Hickman Race and the Decision to Seek the Death Penalty in the Federal Cases. Infrastructure, Safety and Environment. 2006. Pg. 2.

¹⁹ Hashem Dezhbakhsh Paul H. Rubin and Joanna M. Sheperd. Does Capital Punishment have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data. Clemson University and Emory University. 2005. Pg 5

²⁰ *Gregg v. Georgia*, 428 U.S. 153, 1976

²¹ *Ibid*, Pg 2.

will be compared with the jurisdiction of the United States of United States. This thesis will be focused on the usefulness of abolishing the death penalty from the African point of view and therefore will be mainly based on Sierra Leone.

It is aimed to prove that the death penalty amounts to torture. The death penalty amounts to torture due to the fact that persons convicted for crimes that amounts to death penalty are not executed and will be in prison for a long time uncertain of their fate. They go through a mental torture of contemplating on the appointed time they will be executed, the mode of execution and the pains they will experience. This thesis will answer a few questions which are as follows:

A) Does the death penalty serve as a deterrent to crime?

B) Does the death penalty amounts to torture?

C) What is the best mechanism of applying the death penalty and will the abolition of the death penalty promotes human rights principles?

This research work will deal with the issue of torture as a human right violation as a result of the imposition of the death penalty in Sierra Leone and will be compared to the system operating in the United States of America.

CHAPTER ONE

GENERAL OVERVIEW OF THE DEATH PENALTY

1.1 HISTORICAL BACKGROUND OF DEATH PENALTY

It is very difficult to get an exact time when the death penalty came into force. This thesis will mostly deal with the modern era especially the 20th Century. However, there are many accounts of different period in history in respect of the death penalty which “has been a mode of punishment since time immemorial”²². The death penalty was a major punishment mentioned several times in the Bible. It is believed that the Bible mentioned the death penalty eighteen times in the Old Testament²³. Examples of this are found in the following passages of the Bible; in Genesis 9:6, it states that “Whoever sheds man’s blood. By man his blood shall be shed; for in the image of God He made man”²⁴. Also, in the book of Leviticus 20:10, it states that “The man who commits adultery with another man’s wife, he who commits adultery with his neighbor’s wife, the adulterer and the adulteress, shall surely be put to death”²⁵. Furthermore, in the same book of Leviticus 24:16, it states that “And whoever blasphemes the name of the Lord shall surely be put to death. All the congregation shall certainly stone him { ... } When he blasphemes the name of the Lord, he shall be put to death”²⁶.

In the New Testament, Jesus Christ was executed when the death penalty was imposed on him as a crime of blasphemes²⁷. According to Randa in the Society's Final Solution: A History and

²² Honorable Justice Anthony Bahati. The Death Penalty Debate. Speaking as Chairman of the Tanzanian Law Reform Commission. Pg 1. Available at

²³ Byler, Ron, J. Death Penalty Resolution. Nashville 2001 Delegate Actions Congregational Follow-up Resources for Death Penalty Resolution. 2001. Pg 1. Available at

²⁴ The Holy Bible. New King James Version. Nelson Bibles Publishers. 1982. Genesis 9:6

²⁵ Ibid, Leviticus 20:10

²⁶ Ibid, Leviticus 24:16

²⁷ See the New Testament of the afore-mentioned Bible.

Discussion of the Death Penalty²⁸, “the first established death penalty laws date as far back as the Eighteenth Century B.C. in the Code of King Hammurabi of Babylon, which codified the death penalty for 25 different crimes”²⁹. It was also included strongly in the Hittite Code of the Fourteenth Century. It is also believed that the Romans practice the death penalty starting from the fifth century B.C and was a prescribed punishment in the Roman law of the twelve tablets were “death sentences were carried out by such means as crucifixion, drowning, beating to death, burning alive, and impalement”³⁰.

In Britain, the death penalty became a major punishment during the tenth Century when hanging was the usual mode of execution for various crimes³¹. This was however halted by William the Conquer who stopped executions for all crimes “except in times of war”³². This was to change in the Sixteenth Century during the monarch of Henry VIII, where “as many as 72,000 people are estimated to have been executed... for such capital offenses as marrying a Jew, not confessing to a crime, and treason”³³. This was to increase in the next two centuries and in the 18th Century 222 offences had the death penalty as punishment which includes minor offences such as “stealing, cutting down a tree, and robbing a rabbit warren”³⁴. However, this was to

²⁸ Randa, L. (Editor). *Society's Final Solution: A History and Discussion of the Death Penalty*, University Press Of America. 1997. Cited by Michigan State University and Death Penalty Information Center, 2006 in the Article the Death Penalty: History. 2006. Pg 1. Available at

²⁹ Ibid, Pg.1

³⁰ The Athenian legal system was first written down by Draco in about 621 B.C, though Solon later repealed Draco's Code and published new laws but retained Draco's homicide statutes. In fact the word draconian derives from draco's laws. See Randa, L. (Editor). *Society's Final Solution: A History and Discussion of the Death Penalty*, University Press Of America. 1997.

³¹ The Death Penalty: History. Michigan State University and Death Penalty Information Center, 2006 in the Article the Death Penalty: History. 2006. Pg 1.

³² Ibid. Pg 1

³³ Ibid. Pg 1.

³⁴ Ibid. Pg 1.

reduce between 1823 and 1837 when the death penalty was abolished for more than 100 offences³⁵.

The death penalty was also carried out in China since time immemorial, a leading country which still retains it. According to LU Hong in his 'China's Death Penalty: Reforms on Capital Punishment'³⁶, "China has had a long history of the death penalty with the earliest available record dating back to the Shang Dynasty (1700-1027 BC)"³⁷. This was mainly on the basis of retribution, deterrence and incapacitation³⁸. This continued until the 20th Century when it was widely used as a political tool to suppress uprising, corrupt practices and heavily utilized during the "strike-hard campaigns"³⁹. Today, China accounts for the country with the highest executions in the world and the use of it are based on the policy that it cannot be abolished, cannot be used excessively and flawed executions must be avoided⁴⁰.

It is very difficult to get an accurate account of the history of the death penalty in Africa. However, from different writings, it is believed that the death penalty was widely used in pre-colonial times in many African Societies for 'offences' such as witchcraft, murder, adultery and

³⁵ Randa, L. (Editor). *Society's Final Solution: A History and Discussion of the Death Penalty*, University Press Of America. 1997. Cited by Michigan State University and Death Penalty Information Center, 2006 in the Article the Death Penalty: History. 2006. Pg 1.

³⁶ LU Hong. *China's Death Penalty: Reforms on Capital Punishment*. EAI Background Brief No. 412. November 2008.

³⁷ Ibid, Pg 7.

³⁸ Liu, Yongping. *Origins of Chinese Law-Penal and Administrative Law in its Early Development*. New York: Oxford University Press. 1998. Cited by LU Hong. *China's Death Penalty: Reforms on Capital Punishment*. EAI Background Brief No. 412. November 2008. Pg. 7

³⁹ Liu, Renwen. *Death Penalty Policies: The World View and China's Perspectives*. 2003. Posted on the website of the University Services Centre of the Chinese University of Hong Kong at http://www.usc.cuhk.edu.hk/wk_wzdetails.asp?id=2623. Cited by Liu, Yongping. *Origins of Chinese Law-Penal and Administrative Law in its Early Development*. New York: Oxford University Press. 1998. Cited by LU Hong. *China's Death Penalty: Reforms on Capital Punishment*. EAI Background Brief No. 412. November 2008. Pg. 7

⁴⁰ Chen, Xingliang, *The New Horizon of Contemporary Criminal Law in China* (Beijing, China; The Chinese University of Politics and Law Press, 2002), P.544

treason⁴¹. Sierra Leone was no exception. In pre-colonial Sierra Leone the death penalty was imposed for witchcraft and cannibalism. The major reason was to get rid of these people who were seen as very bad to the society⁴². During colonialism, the British employed the death penalty for certain crimes some of which were unknown to the African society and many people were put to death based on retribution and deterrence. However, in both pre-colonial and colonial periods, it was said that justice was very flawed. After gaining independence, most African countries maintained the death penalty. Most of the laws used by the colonial powers were maintained, for instance, the Larceny Act of 1916⁴³ of the Laws of Sierra Leone.

Sierra Leone gained independence on the 27th April, 1961, when the British handed over the administration of the state to the locals of Sierra Leone. The new Sierra Leonean politicians maintained the death penalty and included it in Section 211 of the Criminal Procedure Act 1965 of Sierra Leone which states that “Every sentence of death shall direct that the person condemned shall be hanged by the neck until he is dead, but shall not state the place of execution”⁴⁴. This has been stated in all the constitutions of Sierra Leone after independence including the present one in force which was enacted in 1991, the Sierra Leone Constitution Act No. 6 of 1991 which states in Section 16(1) as follows: “No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the laws of Sierra Leone, of which he has been convicted.”⁴⁵

⁴¹ Tejan-Cole, Abdul. The Death Penalty in Sierra Leone. Country Report presented at The First International Conference on the Application of the Death Penalty in Commonwealth Africa, May, 2004. Entebbe, Uganda. Pg 4.

⁴² Tejan-Cole, Abdul. The Death Penalty in Sierra Leone. Country Report presented at The First International Conference on the Application of the Death Penalty in Commonwealth Africa, May, 2004. Entebbe, Uganda. Pg 4.

⁴³ See the Larceny Act 1916 Laws of Sierra Leone

⁴⁴ See the Criminal Procedure Act. 1965, Laws of Sierra Leone.

⁴⁵ Section 16(1) of the Sierra Leone Constitution, Act No. 6 of 1991.

Many people have been sentenced to death and have been executed over the years since independence. The last to be executed were 24 military officers in October, 1998 after been convicted for treason by the Military Court Marshall⁴⁶.

Great Britain was to have so much influenced on the use of the death penalty in the United States of America. The invasion of the US by European settlers especially from Great Britain saw them imported the death penalty to the country⁴⁷. Therefore, the “death penalty has existed (with a brief interruption) at both the federal and state levels in the United States since the nation’s birth”⁴⁸ just like Sierra Leone. The first recorded death sentence and execution was done in 1608 when George Kendall was executed in Virginia after been convicted for “spying for the Spanish”⁴⁹. This has continued throughout the history of the United States of American until date. Today, Laws in respect of the death penalty varied from state to state. With 38 states and the Federal system still retaining the death penalty, the USA is one of the leading countries still practicing capital punishment⁵⁰.

1.2. LITERATURE REVIEW (GENERAL)

The issue of the death penalty has been a heated debate in the world for a long time. It has been the subject of many writers in books and articles. Roger Hood has been one of the most active

⁴⁶ This execution is well examined by Abdul Tejan-Cole. See Tejan-Cole, Abdul. The Death Penalty in Sierra Leone. Country Report presented at The First International Conference on the Application of the Death Penalty in Commonwealth Africa, May, 2004. Entebbe, Uganda.

⁴⁷ The Death Penalty: History. Michigan State University and Death Penalty Information Center, 2006 in the Article the Death Peath: History. 2006. Pg 1. Available at

⁴⁸ Stephen P. Klein, Richard A. Berk, Laura J. Hickman. Race and the Decision to Seek the Death Penalty in the Federal Cases. Infrastructure, Safety and Environment. 2006. Pg. 2.

⁴⁹ Acker, James, R. The Death Penalty: An American History. University at Albany. Contemporary Justice Review, 2003, Vol. 6(2), pp169

⁵⁰ See Ibid

writers in this field. In his book *The Death Penalty: A world-Wide Perspective*⁵¹, he gave a vivid picture of how the death penalty is perceived around the world in different countries and regions. This is a useful piece of work as it is difficult to come across a well documented literature from a global perspective. It points out the changes in attitude of various countries and organisations and deals with the report of the Secretary General of the United Nations entitled ‘Capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty’.⁵² In assessing the various countries in the world in respect of the death penalty, he states that there are countries that have abolished the death penalty and have continue as abolitionist since then. However, he acknowledges that there are various countries that have in one time abolished the death penalty, but reintroduced it again. He therefore believes that there will always be the reintroduction of the death penalty unless it is removed from the laws of a state and it is confirmed by the state with an adoption and ratification of an international instrument or convention such as the Second Protocol to the International Covenant on Civil and Political Rights.⁵³ It is expressly stated in the Second Protocol to the International Covenant on Civil and Political Rights that, “Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction”.⁵⁴ This however, was opposed by many countries who wanted to retain the death penalty.⁵⁵

⁵¹ Hood, Roger, “The Death Penalty. A World- wide Perception” (Oxford. Clarendon Press),(1996).

⁵² United Nations Report. Capital punishment and implementation of the safeguards guaranteeing the protection of the rights of those facing the death penalty’. (E/ 1995/ 78 Add. 1 and Corr.1). Presented to the Economic and Social Council in June, 1995.

⁵³ Hood, Roger, “The Death Penalty. A World- Wide Perception” (Oxford. Clarendon Press), (1996). Pg 52.

⁵⁴ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Adopted and proclaimed by the General Assembly resolution 44/128 of 15 December, 1989

⁵⁵ See Schabas, A, William. *The Abolition of the Death Penalty in International Law.* (2nd Edition), Cambridge University Press,1997, Pg 149-191

Hood deals with other various crimes that the death penalty is imposed for apart from murder. He states that even though majority countries that still retain the death penalty, it is only carried out for “the most serious crimes”, that is the killing of another. In some countries such as Sierra Leone, Nigeria and China it has been imposed for political offences such as treason, mutiny, spy and rebellion. Whereas, in some countries such as Egypt and Japan, it is a punishment to be involved in terrorist acts, taking of hostages, kidnapping, and piracy acts⁵⁶. Furthermore, some countries in Asia, Middle-East and Africa impose the death penalty for drug trafficking. While in some countries such as Bangladesh and China the death penalty is carried out for economic crimes such as corruption, embezzlement, fraud and smuggling. In several Islamic countries such as Saudi Arabia, Pakistan, and Sudan, the death penalty is imposed for acts such as adultery, sodomy, rape, sacrilege, and ‘apostasy’ or blasphemy.⁵⁷ Hood gives a United Nations survey data on the degree of sentencing and executing of people by some countries, which was however of a limited nature and not very accurate as only few countries responded to the survey.⁵⁸ He went on to state that the Economic and Social Council has over the years came up with resolutions for the safeguard and protection of persons facing the death penalty such as not to be carried out on elderly persons, juveniles, pregnant women, insane and mentally retarded and not to be applied retrospectively. However, most countries still retaining the death penalty do not regard most of these as safe guard’s principles.⁵⁹

Even though, Professor Hood gave detailed analysis on how recent researches have failed to established strongly that the imposition of the death penalty deters crime⁶⁰, he did not take a

⁵⁶ Hood, Roger, “The Death Penalty. A World- Wide Perception” (Oxford. Clarendon Press),(1996). Pg 54-66

⁵⁷ Ibid. Pg 54-66

⁵⁸ Ibid. Pg 67-80

⁵⁹ Ibid, Pg 81-143

⁶⁰ Ibid, Pg 211-212

clear cut stand as a proponent for the abolition of the death penalty and give strong reasons why it should be abolished and the recommendation he may suggest to countries that still retain it and give possible alternative mechanism to punish offenders of serious crimes. It is true that he is a proponent of the abolition of the death penalty, but he fails to address the main argument for its abolition such as torture and discrimination which this work will be focused on.

William A. Schabas has been a strong proponent for the abolition of the death penalty and in his book *The Abolition of the Death Penalty in International Law*⁶¹, he points out the progressive move of the world towards the abolition of the death penalty in international law since 1948. He deals with the issue of the death penalty in respect of the main international and regional documents such as the Universal Declaration of Human Rights (UNHR)⁶², the International Covenant on Civil and Political Rights (ICCPR)⁶³, the Second Protocol to the International Covenant on Civil and Political Rights⁶⁴, the four Geneva Conventions of 1949, the European Convention on Human Rights (ECHR)⁶⁵, and the American Convention on Human Rights (ACHR)⁶⁶. He states that the support for the abolition of the death penalty started with the drafting of the UNHR in 1948. For Schabas, even though the death penalty is not mentioned in the UDHR, drafters of the UDHR keenly took it into cognizance and was very vital in the drafting of Article 3 of the Declaration which he consider as an Article intended at an ultimate

⁶¹ Schabas, A, William. *The Abolition of the Death Penalty in International Law*. (2nd Edition), Cambridge University Press, 1997,

⁶² United Nations Declaration of Human Rights (UNHR), General Assembly Resolution 217 A (III), U.N. Doc. A/810 (1948)

⁶³ International Covenant on Civil and Political Rights, (1976) 999 UNTS 171,

⁶⁴ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Adopted and proclaimed by the General Assembly resolution 44/128 of 15 December, 1989 entered into force Jul. 7, 1991

⁶⁵ Convention For The Protection of Human Rights and Fundamental Freedoms ('European Convention on Human Rights'), (1955) 213 UNTS 221,

⁶⁶ The American Convention on Human Rights. 1144 UNTS 123. Adopted in 1978.

aim to abolish the death penalty.⁶⁷ At this time however only a few countries had abolished the death penalty, therefore it took decades for this issue to be given serious consideration. In other human rights instruments to be followed, especially the ICCPR, the ECHR, the ACHR, the death penalty was included in them as an exception to the right to life. This is in the sense that the right to life protects a person from the death penalty unless were it is impose in law as an exception.⁶⁸ On the other hand, there are 3 main international protocols that declare the abolition of the death penalty⁶⁹. These three protocols however, accept the use of the death penalty in cases of war. According to Schabas, this was done as a result of encouraging various states to ratify them.⁷⁰ Schabas's work is a good piece from the international point of view. However, the scope of his work did not deal properly with the issue on how it is perceive from the African point of view and how the African regional body responsible for human rights position has been since its formation. He does not deal with national legislation and case law of some African countries and how some African countries have refused to complied with international standard regarding the death penalty.

⁶⁷ Ibid, Pg 44. Also, See Article 3 of the Universal Declaration of Human Rights (UNHR), General Assembly Resolution 217 A (III), U.N. Doc. A/810 (1948)

⁶⁸ Schabas, A, William, *International Law and Abolition of the Death Penalty: Recent Developments*. ILSA Journal of International & Comparative Law. Spring, 1998. Pg 2.

⁶⁹ See Protocol 6 to the Convention for the Protection of Human Rights and Fundamental freedoms Concerning the Abolition of the Death penalty, E.T.S. no. 114, entered into force Mar. 30, 1985; Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Adopted and proclaimed by the General Assembly resolution 44/128, entered into force Jul. 7, 1991; Additional Protocol to the American Convention on Human Rights to Abolition of the Death penalty, O.A.S.T.S. no. 73, 29 I.L.M. 1447, entered into force Oct. 6, 1993.

⁷⁰ Schabas, A, William, *International Law and Abolition of the Death Penalty: Recent Developments*. ILSA Journal of International & Comparative Law. Spring, 1998. Pg 300.

A piece of work that is very similar to this thesis is that of *When the State Kills: The Death Penalty v. Human Rights*⁷¹ by Amnesty International. This report clearly opposes the death penalty as a gross violation of human rights which should be eliminated entirely from the world. It gives an assessment of about 180 countries around the world. In a brilliant manner, its analyses various arguments given by proponents of the death penalty and in return show how they “fail the tests of logic and experience”⁷² and gives recommendation for complete abolition⁷³. The report starts strongly that “The time has come to abolish the death penalty worldwide”⁷⁴. The report states that the death penalty is a cruel practise and should be abolished. It deals with the issue of the death penalty as argued by proponents that it serves as a deterrent. This report in countering this argument gives the example that most times when people commit murder they don’t calculate the punishment but do it out of passion when emotions overrides reason⁷⁵. Also, it argues against the point of retribution raised by proponent of the death penalty, which is that a person who had committed a very serious crime like murder should be executed for the “demand of justice”⁷⁶, which is paying a person for committing an ‘evil deed’, this on the other hand amounts to injustice and it suggests that there may be other ways apart from resorting to the death penalty to ensure justice⁷⁷. It gives account of the death penalty in practice which mostly leads to discrimination against certain groups such as poor, mentally retarded people, racial

⁷¹ Amnesty International. *When the State kills...The death penalty v. human rights*-published by Amnesty International.1989

⁷² Ibid. Pg 1.

⁷³ Ibid. Pg 1.

⁷⁴ Ibid. Pg 1.

⁷⁵ Ibid. Pg 10.

⁷⁶ Ibid. Pg 16.

⁷⁷ Ibid. Pg 16-18.

groups and people of minority groups⁷⁸. This report also presents the death penalty as a cruel act which amounts to torture and inhuman act especially the mode of execution and life during death row.

1.3. LITERATURE REVIEW (FROM THE AFRICAN POINT OF VIEW)

This is what Tim Curry in his journal ‘Cutting the Hangman’s Noose: African Initiatives to Abolish the Death Penalty’⁷⁹ tries to do. In this journal, he points out the fact that the African Commission on Human and People’s Right (African Charter) adopted in 1981, has done a lot to promote the abolition of the death penalty within Africa. He points out that the African Commission in its first resolution on the death penalty in 1999 encourages member states to abolish the death penalty. This resolution requires “all states parties that still maintain the death penalty to: a) limit the imposition of the death penalty only to the most serious crimes; b) consider establishing a moratorium on executions of death penalty; [and] c) reflect on the possibility of abolishing death penalty.”⁸⁰ He states that in the 37th Ordinary Session of the African Commission held between April 27th and May 11th, 2005, where the African Commission adopted a resolution creating a Working Group on the Death Penalty with the intention of creating a plan to eliminate the imposition of the death penalty in Africa of which, “...Any government that would be willing to follow the recommendation would still have to navigate its own domestic political process to remove the death penalty from its constitution or legal code...”⁸¹ However, resolutions by the African Commission are not binding on member

⁷⁸ Ibid, pg 27

⁷⁹ Tim Curry in his journal Cutting the Hangman’s Noose: African Initiatives to Abolish the Death Penalty. Human Rights Brief. Spring, 2006.

⁸⁰ African Commission on Human and Peoples’ Rights, Resolution, Urging the State to Envisage a Moratorium on Death Penalty. ACHPR/Res.42 (XXVI)99 (1999)

⁸¹ Tim Curry in his journal Cutting the Hangman’s Noose: African Initiatives to Abolish the Death Penalty. Human Rights Brief. Spring, 2006. Pg 1.

states and the weak nature of its enforcement power, Tim Curry suggests that “any real change in the laws will have to come on a national level”⁸². Also, the African Commission has stated that the death penalty if carried out in a lawful manner according to “fair and proper domestic penal system”⁸³ will not amount to a violation of the African Charter. This will not be the case if a person is arbitrarily deprived of his right to life as was stated in the case *FORUM OF CONSCIENCE v. SIERRA LEONE*, where the African Commission held that, “any violation of this right without due process amounts to arbitrary deprivation of life”⁸⁴. He gave some examples of countries in Africa such as South African, Senegal and Liberia where they have abolished the death penalty and in countries like Nigeria and Sierra Leone where one branch of the government had tried over the years to abolish the death penalty but have been unsuccessful due to opposition from other branch.⁸⁵ For instance, the Legislative branch had proposed to the Executive in Sierra Leone to implement the recommendation of the Truth and Reconciliation Commission (TRC)⁸⁶ to immediately abolish the death penalty, however, this was turned down by the office of the president. In as much as he recommends ways in which the African Commission can help in pressurizing national governments to abolish the death penalty, he fails to highlight the various ways in which the imposition of the death penalty amounts to gross violation of human rights such as torture and discrimination of which this thesis will be about.

⁸² Ibid, Pg 2.

⁸³ Ibid, Pg 2

⁸⁴ *FORUM OF CONSCIENCE v. SIERRA LEONE*, African Commission on Human and Peoples’ Rights, Comm. No. 223/98 (2000) at 19.

⁸⁵ Tim Curry in his journal *Cutting the Hangman’s Noose: African Initiatives to Abolish the Death Penalty*. Human Rights Brief. Spring, 2006. Pg2-4.

⁸⁶ Final Report of the Sierra Leone Truth and Reconciliation Commission, Vol. 2. Ch. 3 (Oct. 2004). http://trcsierraleone.org/drwebsite/publish/printer_v2c3.shtml

1.4. CRIMES PUNISHABLE BY THE DEATH PENALTY

The death penalty for most countries is carried out for “the most serious crimes”⁸⁷. In Sierra Leone, there are four crimes punishable by death. The death penalty is mandatory for the following crimes: Murder, treason and other related offences, mutiny and robbery with aggravation⁸⁸. Murder which is the willful killing of anyone is a common law offence for which the death penalty is mandatory⁸⁹. Section 5 of the Homicide Act of 1957⁹⁰ prescribes that the death penalty shall be imposed for the murder done in the cause of stealing, shooting or explosion, resisting or avoiding arrest or in the course of escape and killing of a policeman. Treason and other related offences is provided for under S. 3 (1) of Treason and State Offences Act 1963⁹¹ and S. 30(1) and S.31 (1) of the Armed Forces of the (Republic) of Sierra Leone Act 1961. Any person found guilty by the court for treason and other related offences shall face the death penalty. Mutiny is prescribed under the Sierra Leone Armed Forces Act which provides the death penalty for anyone found guilty of committing mutiny⁹². Finally, robbery with aggravation is an offence prescribed under the Larceny Act 1916 as amended by the Larceny (Amendment) Act No. 16 of 1971⁹³ and it carries the death penalty. This however means that a person can

⁸⁷ Hood, Roger, “The Death Penalty. A World- Wide Perception” (Oxford. Clarendon Press),(1996). Pg 54

⁸⁸ Mahtani, Sabrina and Robert Phillips. The Death Penalty in Sierra Leone: Time for Change. Lawyers Centre for Legal Assistance (LAWCLA). 2007. Pg 1.

⁸⁹ The English Offences Against the Person Act, 1861 is still applicable in Sierra Leone by reason of Sec. 74 of the Sierra Leone Courts Act No. 31 of 1965. s.5 Homicide Act 1957 proscribes the death penalty for Murders done in the course of or furtherance of theft. Any murder committed by shooting or explosion. Any murder done in the course of or for the purpose of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody. Any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting. In the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a police officer so acting.

⁹⁰ See Section 5 of the Homicide Act of 1957, Laws of Sierra Leone.

⁹¹ See Section 3(1) of the Treason and State Offences Act 1963, Laws of Sierra Leone, Section 30(1) and Section 31(1) of the Armed Forces of the (Republic) of Sierra Leone Act 1961, Laws of Sierra Leone.

⁹² Section 37 (1) Armed Forces of the [Republic] of Sierra Leone Act 1961, Laws of Sierra Leone.

⁹³ This amended Section 23 of the Larceny Act 1916 stating “Every person who (a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person; (b) robs any person and, at the time of or immediately before or immediately after such robbery, uses any

involve in robbery irrespective of whether someone was killed or not, yet the death penalty can be imposed if he/she is guilty of the offence of robbery with aggravation. This was held not to be a very serious crime to carry the death penalty in the case *LUBUTO v. ZAMBIA*⁹⁴. In this case, the Human Rights debated on the issue of mandatory death penalty for aggravated robbery and was of the view “that the imposition of mandatory death penalty for aggravated robbery where no one was killed or wounded during the robbery is a violation of Article 6 (2) of the ICCPR; which allows for the imposition of the death penalty only “for the most serious crimes”. This was also the result in the case *THOMPSON v SAINT VINCENT AND THE GRENADINES*⁹⁵ in which the Human Rights committee was of the opinion that imposing the death penalty in this case “would constitute an arbitrary deprivation of life in violation of article 6 (1) of the International Covenant on Civil and Political Rights.

In the United States of America, the death penalty is imposed mainly for murder. The United States do not have a mandatory imposition of the death penalty for all cases of murder⁹⁶ but is based on the Jury making a case by case assessment⁹⁷. Therefore, in principle the death penalty is reserved for the “worst of the worst” murderers⁹⁸. Therefore, the death penalty must “only be

personal violence to any person; shall be guilty of felony and on conviction liable to suffer death.” See further Bankole Thompson, *The Criminal Law of Sierra Leone* (1999, Maryland: University Press of America) at 109 – 110
⁹⁴ 39 Lubuto v Zambia, Communication 390/1990, UN Doc. CCPR/C/55/D/390/1990/Rev. 1, 31 October 1995, para 3.1

⁹⁵ Thompson v Saint Vincent and Grenadines, Communication 806/1998, UN Doc. CCPR/C/70/D/806/1998, October 2000, para 8.2

⁹⁶ See Victor Streib, *Death Penalty in a Nutshell*. 2003. Pg. 70. (“Statutes which make the death penalty mandatory for a certain crime have been held unconstitutional by the Supreme Court”). Traditionally, only first-degree murderers were eligible for death, though the death penalty has been added in a number of jurisdictions or a variety of other forms of murder that are “similar” to first-degree murder in that they also expose the offender to the risk of capital punishment. See also pages 66, 68. Cited by Virginia E. Sloan in *The Death Penalty Revisited* July, 2005. Pg. 11. Available at www.constitutionproject.org

⁹⁷ Ibid, Pg. 11.

⁹⁸ Jonathan Simon and Christina Spaulding, *Tokens of Our Esteem: Aggravating Factors in the Era of Deregulated Death Penalties*, *The Killing State: Capital Punishment in Law, Politics, and Culture*. Pg. 81. (Ed. Austin Sarat 1999). Also see Michael A. Foley, *Arbitrary and Capricious: The Supreme Court, The Constitution, and The Death Penalty*. 2003. Pg. 189.

applied for murder”⁹⁹. This was the reason why the Supreme Court held in the case COKER v. GEORGIA that the death penalty was “excessive for rape of an adult woman”¹⁰⁰ However, there are other serious crimes such as “the running of large-scale drug enterprises”¹⁰¹ which may carry the death penalty in some States.

1.5. THE LEGAL SYSTEM IN SIERRA LEONE

Legal systems differ with countries. The Sierra Leonean legal system was born out of the British system. According to Section 120(1) of the Constitution of Sierra Leone of 1991, the judicial power of Sierra Leone shall be vested in the Judiciary¹⁰². The Judiciary of Sierra Leone which is headed by the Chief Justice comprises the Supreme Court, the Court of Appeal, the High Courts,(Constituting the Superior Court of Jurisdiction in Sierra Leone¹⁰³), the Magistrates Court and the Local Courts(the inferior courts). Also, there is a Court Marshall which only tries military officers for committing crimes when they are in service¹⁰⁴.

THE SUPREME COURT

The Supreme Court is the highest superior court in the land and is the final court of appeal in Sierra Leone¹⁰⁵. There is a right of appeal to the Supreme Court from a judgment of the Court of

⁹⁹ Issues in Administering the Death Penalty. State of Wisconsin. Legislative Reference Bureau. Research Bulletin 06-2, October 2006. Pg 3.

¹⁰⁰ Coker v. Georgia, 433 U.S. 584, 979 S.Ct. 2861 (1977)

¹⁰¹ Amnesty International. Death Penalty Facts. AIUSA Death Penalty Campaign. Updated August, 2010. Available at www.amnestyusa.org/abolish

¹⁰² Section 120(1) of the Constitution of Sierra Leone, Act. No 6 of 1991

¹⁰³ Section 128(3) of the Constitution of Sierra Leone, Act No. 6 of 1991.

¹⁰⁴ Hanatu Kabbah. Sierra Leone Legal System and Legal Research. November, 2006. See. [Http://www.nyulawglobal.org/globalex/Sierra_Leone.htm](http://www.nyulawglobal.org/globalex/Sierra_Leone.htm)

¹⁰⁵ Section 122(1) of the Constitution of Sierra Leone, Act. No. 6 of 1991.

Appeal in any criminal matter which has been brought to the Court of Appeal, arising from a judgment of the High Court.¹⁰⁶ This is followed by the Court of Appeal.

THE COURT OF APPEAL

According to Section 129(1) of the constitution, the Court of Appeal has “jurisdiction to hear and determine any appeal from judgment, decrees or order of the High Court and such other appellate jurisdiction as may be granted by the constitution or any other law”¹⁰⁷. The Court of Appeal hears appeals from judgments of the High Court.¹⁰⁸ Next is the High Court.

THE HIGH COURT

The High Court has jurisdiction to hear any criminal or civil matters that come before it for trial at first instance. In accordance with Section 132(1) of the constitution of Sierra Leone, “The High Court of justice shall have jurisdiction in civil and criminal matters and such other original appellate and other jurisdiction as may be conferred upon it by the constitution or any other law”¹⁰⁹. It is in the High Court that persons are convicted and sentenced to death of which they can appeal to the Court of Appeal and if unsuccessful then to the Supreme Court. This is followed by the Magistrate Court.

THE MAGISTRATE’S COURT

The Magistrate’s Court is the inferior court of judicature in Sierra Leone. However, this Court does not decide on cases that carry the death penalty. It may only do so on preliminary

¹⁰⁶ Section 123(1) of the Constitution of Sierra Leone. Act. No. 6 of 1991.

¹⁰⁷ Section 129(1) of the Constitution of Sierra Leone, Act. No. 6 of 1991.

¹⁰⁸ Section 129 (1) Constitution of Sierra Leone 1991 grants the Court of Appeal jurisdiction to hear and determine appeals from any judgment, decree or order of the High Court of Justice or any Justice of the High Court and such other appellate jurisdiction as may be conferred upon it by this Constitution or any other law.

¹⁰⁹ Section 132(1) of the Constitution of Sierra Leone. Act. No. 6 of 1991.

investigation to determine whether there is sufficient evidence to warrant a referral to the High Court¹¹⁰.

COURT MARTIAL

Sierra Leone has a Court Marshal established in accordance with Section 84 of the Republic of Sierra Leone Military Act¹¹¹. These Tribunals are empowered to try persons subject to military law, in addition to offences against the general law applicable to all persons who joined the army¹¹². A Court Marshall consists of the President and not less than 2 other Officers, but in the trial of an Officer or Warrant Officer, it should consist of at least 5 Officers¹¹³. There is provision for a Judge Advocate to be appointed to advise the Court Marshall in matters of law and procedure and to advise the tribunal before deliberating on its findings¹¹⁴. Court Marshals have jurisdiction to try and punish persons subject to military law for 2 classes of offences created by Part V the Republic of Sierra Leone Military Act. Court Marshals can even impose the death penalty for offences such as treason, mutiny, murder and robbery with aggravation. The right of appeal against decision of the Court Marshal was removed in 1971. In accordance with Section 129 of Act No 16 of 1971, Laws of Sierra Leone¹¹⁵, “The decisions of a court-martial shall not be questioned in any court of law”¹¹⁶. However, this decision faced wide criticize and the right of appeal was introduced by the Armed Forces of the (Republic) of Sierra Leone (Amendment) Act

¹¹⁰ See Criminal Procedure Act 1965, Laws of Sierra Leone.

¹¹¹ Act No. 34 of 1961

¹¹² Section 85 of this Act provides that the officers having power to convene courts-martial include the Force Commander or any general officer, Brigadier or Colonel or officers of corresponding rank commanding a body of troops or any officer for the time being acting in the place of the Force Commander or such general officer, Brigadier or Colonel or officer of corresponding rank.

¹¹³ Section 86 of the Sierra Leone Military Forces Act No.34 of 1961, Laws of Sierra Leone

¹¹⁴ Section 123 of the Sierra Leone Military Forces Act No.34 of 1961, Laws of Sierra Leone.

¹¹⁵ Act No 16 of 1971, Laws of Sierra Leone.

¹¹⁶ Ibid, Section 129

of 2000¹¹⁷. Section 129 of this Act states that, “an appeal shall lie from decisions of court martial to the court of appeal with the leave of that court¹¹⁸”. This however “introduced a limited right of appeal from the decisions of a court-martial to the Court of Appeal”¹¹⁹. It should be noted that the Supreme Court, the Court of Appeal, the High Court and the Court-Martial all have the power to impose the death penalty for crimes committed within the territory of Sierra Leone, including its territorial waters¹²⁰.

1.6. METHOD OF EXECUTION

The methods of execution of convicted persons vary from state to state. For a long time in history of the death penalty, such methods as “burning at the stake, breaking on the wheel, slow strangulation, crushing under elephant's feet, throwing from a cliff, boiling in the oil, stoning to death etc”¹²¹.

Also, methods such as guillotine, hanging and the garrote, headman’s axe, firing squad, gas chambers, electrocution, lethal injection were used¹²². However, some of these methods are still

¹¹⁷ Act. No 13 of 2000, Laws of Sierra Leone.

¹¹⁸ Section 129 of the Armed Forces of the (Republic) of Sierra Leone (Amendment) Act. No 13 of 2000, Laws of Sierra Leone.

¹¹⁹ Mahtani, Sabrina and Robert Phillips. The Death Penalty in Sierra Leone: Time for Change. Lawyers Centre for Legal Assistance (LAWCLA). 2007. Pg. 4.

¹²⁰ Abdul Tejan-Cole, The Death Penalty in Sierra Leone, country report presented at The First International Conference on the Application of the Death Penalty in Commonwealth Africa, 10-11 May 2004, Entebbe, Uganda,4 available at www.biicl.org

¹²¹ Dr. N.M. Ghatate. Law Commission of India. Consultation Paper on Mode of Execution of Death Sentences and Incidental Matters. Pg. 6.

¹²² Dr. N.M. Ghatate. Law Commission of India. Consultation Paper on Mode of Execution of Death Sentences and Incidental Matters. Pg 6-15. In this work, the author states as follows: “The source of the present description is based on the secondary source of data. The Law Commission owes the origin of present information from the various reports of the studies conducted by various Commissions, e.g. the New York Commission of Inquiry, 1888, Royal Commission on Capital Punishment 1949 - 1953. The reliance is also placed on newspaper reports, articles, books. For more information, please find reference as follows

(1) Scott - Story of Capital Punishment, Oxford University Press (SC Judges Library, classification No.343.253).

(2) The Library of Criminology, Elizabeth Orman Tuttle, London Stevenes,Soursluit, Chicago Quernd, Books 1961

(3) Administration of Death Penalty in U.S. International Commission of Jurists, Report of Mission, June 1996

been used in the world by various countries. Execution was usually done in public where large crowd of people would witness the solemn ceremony¹²³. The method of execution in Sierra Leone in pre-colonial and colonial period is not well documented. With the enactment of the Criminal Procedure Act in 1965, it provides in Section 121 that, “every sentence of death shall direct that the person condemned shall be hanged by the neck until he is dead but shall not state the place of execution”¹²⁴. Therefore, in this case it is not to be done in public. This is only the case for civilian executions as those facing the death penalty after convicted by Court Martial are executed by firing squad. This was the case in October, 1998, when 24 military officers convicted for the offence of treason by the Court Martial were executed by firing squad in public attended by thousands of onlookers¹²⁵. Persons facing execution are “usually informed 24 hours before his execution and the Welfare Officer performs deals with last wishes”¹²⁶.

The United States of America has over the last two centuries adopted three main methods of executions which are electrocution, gas chambers and lethal injection¹²⁷. Electrocution was first introduced by New York State in 1889 and first used the following year¹²⁸. In 1924, the gas chamber was first introduced by the state of Nevada¹²⁹. This was followed with the introduction of the lethal injection by Oklahoma in 1977 and first carried out by Texas on 7th December

¹²³ Banner, S. *The death penalty: An American history*. Cambridge, MA: Harvard University Press. 2002. Pg. 31-32.

¹²⁴ Section 121 of the Criminal Procedure Act. No , 1965, Laws of Sierra Leone.

¹²⁵ This execution is examined by Abdul Tejan-Cole. See Tejan-Cole, Abdul. *The Death Penalty in Sierra Leone*. Country Report presented at The First International Conference on the Application of the Death Penalty in Commonwealth Africa, May, 2004. Entebbe, Uganda.

¹²⁶ Mahtani, Sabrina and Robert Phillips. *The Death Penalty in Sierra Leone: Time for Change*. Lawyers Centre for Legal Assistance (LAWCLA). 2007. Pg. 5.

¹²⁷ *Issues in Administering the Death Penalty*. State of Wisconsin. Legislative Reference Bureau. Research Bulletin 06-2, October 2006. Pg 7.

¹²⁸ Denno, D. W. (1994). Is electrocution an unconstitutional method of execution? *The engineering of death over the century*. William and Mary Law Review, 35, 551–692. Cited by Acker, James, R. *The Death Penalty: An American History*. University at Albany. Contemporary Justice Review, 2003, Vol. 6(2), pp180

¹²⁹ Banner, S. *The death penalty: An American history*. Cambridge, MA: Harvard University Press. 2002. Cited by Acker, James, R. *The Death Penalty: An American History*. University at Albany. Contemporary Justice Review, 2003, Vol. 6(2), pp180

1982¹³⁰. Presently, “lethal injection is used throughout the nation, with the exception of Nebraska which continues to rely on electrocution to carry out executions”¹³¹

In 2003, the UN Commission on Human Rights resolutions strongly requested all states that still retain the death penalty to ensure that “where capital punishment occurs, it shall be carried out so as to inflict the minimum possible suffering and shall not be carried out in public.”¹³²

1.7. THE MANDATORY NATURE OF THE DEATH PENALTY

The mandatory nature of the death penalty has come under heated debate around the world. In accordance with Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), “No one shall be arbitrarily deprived of his life”¹³³. This impliedly forbids the mandatory imposition of the death penalty. In the case of *LUBUTO v. ZAMBIA*¹³⁴, the Human Rights Committee in considering whether the death penalty as a mandatory punishment for armed with aggravation was constitutional or not, held that “Considering that in this case use of firearms did not produce the death or wounding of any person and that the court could not under the law take these elements into account in imposing 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 ICCPR.”¹³⁵ Therefore, Zambia was in violation of the ICCPR. Also, the Special Rapporteur for Extrajudicial, Summary or Arbitrary Executions Philip Alston in 2004

¹³⁰ The Death Penalty: History. Michigan State University and Death Penalty Information Center, 2006 in the Article the Death Penalty: History. 2006. Pg 9.

¹³¹ Acker, James, R. The Death Penalty: An American History. University at Albany. Contemporary Justice Review, 2003, Vol. 6(2), pp180

¹³² Commission on Human Rights Resolution 2003/67 para 3(i)

¹³³ Article 6(1) of the International Covenant on Civil and Political Rights

¹³⁴ *Lubuto v. Zambia*, UN Human Rights Committee 1995, Communication No. 390/1990, U.N. Doc. CCPR/C/55/D/390/1990/Rev.1 (1995). See further, Amnesty International, Zambia: Time to Abolish the Death Penalty, July 2001, AI Index: AFR 63/004/2001

¹³⁵ Ibid.

stated that “The mandatory death penalty which precludes the possibility of a lesser sentence being imposed regardless of the circumstances is inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment”¹³⁶. This was further reiterated in 2005 when the United Nations Commission on Human Rights in a Resolution called on all states that still retain the death penalty not to impose it as a mandatory sentence¹³⁷.

In 2001, the Eastern Caribbean Court of Appeal held that the mandatory death sentence was arbitrary¹³⁸. This was followed by the Judicial Committee Privy Council’s decision in 2002 that the mandatory death sentence was unconstitutional¹³⁹. This was the same case for Belize¹⁴⁰ and St. Lucia¹⁴¹.

Furthermore, many African Countries have moved away from the mandatory sentence. For instance, Zambia changed its policy of mandatory sentence to discretionary for murder.¹⁴² Also, in 2005 the Ugandan Constitutional Court held that the mandatory death sentence affects the discretion of a judge in dispensing justice which can lead to inhuman or degrading punishment¹⁴³. In 2003, it also held that the mandatory death sentence in Jamaica conflicts with Jamaica’s constitutional provisions which prohibit inhuman or degrading punishment.¹⁴⁴

¹³⁶ Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, 22 December 2004, UN document E/CN.4/2005/7

¹³⁷ United Nations Commission on Human Rights, Resolution 2005/59

¹³⁸ Spence and Hughes v The Queen, ECCA, 2 April 2001.

¹³⁹ Berthill Fox v R (Appeal No 66 of 2000) St Christopher and Nevis, 11 March 2002. (The Privy Council is the final court of appeal for many Caribbean and Commonwealth countries)

¹⁴⁰ Patrick Reyes v R (Appeal No 64 of 2001) Belize, 11 March 2002

¹⁴¹ R v Peter Hughes (Appeal No 91 of 2001) St. Lucia, 11 March 2002

¹⁴² R.Hood, ‘The Death Penalty: A Worldwide Perspective,’ Oxford University Press [3rd Edition- 2002] 41

¹⁴³ Kigula v Attorney General, Constitutional Petition No 6 of 2003, Uganda, 10 June 2005

¹⁴⁴ Lambert Watson v. The Queen (Appeal No. 36 of 2003) Jamaica, 7 July 2004

Sierra Leone still maintains a mandatory death sentence for the offences that crimes the death penalty. This in a sense means that judges are under a duty to impose the death sentence once an accused is found guilty for such offences. This is also the case for many other countries such as Malawi, where there is a mandatory death sentence for the crimes of murder and treasons¹⁴⁵.

The United States of America do not implore the use of mandatory death sentence....A major reason for this was to avoid arbitrary sentence, as it did not allow for the individual circumstances of the offender to be considered, and was therefore unconstitutional.¹⁴⁶

1.8. THE DEATH PENALTY IN SIERRA LEONE

Sierra Leone is a beautiful country situated in the West coast of Africa which gained independence from Britain on 27th April, 1961 ‘after about a century and a half of direct rule’¹⁴⁷. Since independence and even long before Sierra Leone have practices the death penalty. The current Constitution in force¹⁴⁸ states in Section 16 that “No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the laws of Sierra Leone, of which he has been convicted.”¹⁴⁹

There are no reliable historical records on the death penalty during pre-colonial and colonial period even though it is believed to have existed during this period. Also, not much was recorded

¹⁴⁵ Aron Rollin, CCPS and CBA Intern in Lilongwe, Malawi, Centre for Capital Punishment Studies Internship Report November, 2003. Cited by Mahtani, Sabrina and Robert Phillips. The Death Penalty in Sierra Leone: Time for Change. Lawyers Centre for Legal Assistance (LAWCLA). 2007.

¹⁴⁶ Lockett v. Ohio, U.S. 586 (1978).

¹⁴⁷ Jones, Marcus. W. S. Legal Development and Constitutional Change in Sierra Leone (1787-1971). Arthur H. Stockwell Ltd. 1988. Pg. 7

¹⁴⁸ The Constitution of Sierra Leone Act. No 6 of 1991.

¹⁴⁹ Section 16(1) of the Constitution of Sierra Leone. Act. No 6 of 1991

on the execution of military officers in 1973 and persons accused of treason in 1987. What is so clear is the execution in December, 1992 of 26 people (9 civilians and 17 military and police officers who were summarily executed by the then junta regime of the National Provisional Ruling Council (NPRC) after being tried and convicted for treason by a Court Martial¹⁵⁰. This was followed in November, 1994 of the execution of 12 soldiers which included a 77 year old warrant officer, Amara Conteh after they were also convicted for treason by the Court Martial. This was responsible for the resignation of the then Attorney-General and Secretary of State for Justice, Franklyn Kargbo to resign in protest of the execution¹⁵¹.

In 1998, the Court Martial of Sierra Leone sentenced 34 soldiers to death after been convicted for treason during their involvement with the coup in 1997 when President Ahmed Tejan-Kabba's government was overthrown. Going against the appeal from the United Nations Human Rights Committee for stay of execution, the government of Sierra Leone carried out the execution of 24 military officers and giving clemency to 10¹⁵². Before the execution however, there was a case against the government of Sierra Leone in the Human Rights Committee which was *MANSARAY ET AL v SIERRA LEONE*¹⁵³. The authors of the communication were military officers facing the death penalty after been convicted for treason and mutiny and sentenced to death by the Court Martial. They were given no right to appeal the convicted and despite calls from the Committee's Special Rapporteur for New Communications to the Government of Sierra Leone under Rule 86 of the Rules of Procedure, to stay the execution of

¹⁵⁰ Amnesty International, Sierra Leone: Amara CONTEH and 11 others, AI Index: AFR 51/06/94 available at http://www.africa.upenn.edu/Urgent_Action/amnst_srlene.html

¹⁵¹ Ibid

¹⁵² This execution is well examined by Abdul Tejan-Cole. See Tejan-Cole, Abdul. The Death Penalty in Sierra Leone. Country Report presented at The First International Conference on the Application of the Death Penalty in Commonwealth Africa, May, 2004. Entebbe, Uganda.

¹⁵³ Communication No. 839, 840, 841/1998, Submitted 12 and 13 October 1998. Concluded on 16 July 2001

the authors while the communications were under consideration by the Committee, 12 of the authors were executed¹⁵⁴. The government of Sierra Leone failed to respond to repeated query from the Committee. This was held to have violated the International Covenant on Civil and Political Rights (ICCPR)¹⁵⁵. Also, the African Commission held that the Government of Sierra Leone violated Articles 4 and 7(1) of the African Charter of Human and Peoples' Rights, for the same executions¹⁵⁶.

After the execution in October, 1998, "there has been a de facto moratorium on executions"¹⁵⁷. However, this does not mean that people have not been sentenced to death since then. It is estimated that 15 men were sentenced to death from 1999-2003¹⁵⁸.

On 20th December, 2004, 10 men who were former members of the Armed Forces Revolutionary Council (ARFC) and Revolutionary United Front (RUF) and a civilian were convicted by the Courts of Sierra Leone and sentenced to death for an alleged armed attack in January 2003 on the armoury at Wellington barracks, which was said to be a plot to overthrow the Government of Sierra Leone¹⁵⁹. This was widely condemned by the civil society and international organisations. It came "only weeks after the Truth and Reconciliation Commission recommended abolition of

¹⁵⁴ This execution is well examined by Abdul Tejan-Cole. See Tejan-Cole, Abdul. The Death Penalty in Sierra Leone. Country Report presented at The First International Conference on the Application of the Death Penalty in Commonwealth Africa, May, 2004. Entebbe, Uganda.

¹⁵⁵ The Government of the Republic of Sierra Leone ratified the ICCPR on 23rd November 1996.

¹⁵⁶ The Government of the Republic of Sierra Leone were held to have violated Articles 4 and 7(1)(a) of the African Charter of Human and Peoples Rights, which was ratified by Sierra Leone on 21 September 1983. See further Forum of Conscience v Sierra Leone, African Commission on Human and Peoples' Rights, Comm. No. 223/98 (2000) <http://www1.umn.edu/humanrts/africa/comcases/223-98.html>

¹⁵⁷ Mahtani, Sabrina and Robert Phillips. The Death Penalty in Sierra Leone: Time for Change. Lawyers Centre for Legal Assistance (LAWCLA). 2007. Pg. 7.

¹⁵⁸ Ibid, See <http://www.statistics-sierra-leone.org/ASD%202004/CHAPTER%20%204.htm#>

¹⁵⁹ Amnesty International, Amnesty International expresses dismay at 10 death sentences for treason, 21 December 2004, AI Index: AFR 51/009/2004

the death penalty”¹⁶⁰. According to Sabrina Mahtani, “interviews undertaken with prison officials indicated that at least 30 people have been sentenced to death since 1998”¹⁶¹. People are still sentenced in the Courts of Sierra Leone even in 2010 and are awaiting execution in the Pademba road prisons. According to Director of Amnesty International in Sierra Leone Mr Sheriff, there are more than 12 people of which about 3 are female on death row¹⁶².

1.9. THE DEATH PENALTY IN THE UNITED STATES OF AMERICA

In the United States of America, “the death penalty has existed (with a brief interruption) at both the federal and state levels...since the nation’s birth”¹⁶³. The first recorded death sentence and execution was done in 1608 when George Kendall was executed in Virginia after been convicted for “spying for the Spanish”¹⁶⁴. In 1846, Michigan was the first state to abolish the death penalty for all crimes except that of treason. This was followed by Rhode Island and Wisconsin when they abolished it for all crimes¹⁶⁵. However, the death penalty continued until 1972 when there was a brief moratorium with the decision of *FURMAN V. GEORGIA*¹⁶⁶, in which the Supreme Court held that the death penalty was a “violation of the Eighth Amendment’s cruel and unusual

¹⁶⁰ Mahtani, Sabrina and Robert Phillips. *The Death Penalty in Sierra Leone: Time for Change*. Lawyers Centre for Legal Assistance (LAWCLA). 2007. Pg. 7 & 8.

¹⁶¹ *Ibid*, pg. 8.

¹⁶² In an interview with Mr Brima Sherriff, Director of Amnesty International, Sierra Leone held on 18th November 2010.

¹⁶³ Stephen P. Klein, Richard A. Berk, Laura J. Hickman. *Race and the Decision to Seek the Death Penalty in the Federal Cases. Infrastructure, Safety and Environment*. 2006. Pg. 2.

¹⁶⁴ Acker, James, R. *The Death Penalty: An American History*. University at Albany. *Contemporary Justice Review*, 2003, Vol. 6(2), pp169

¹⁶⁵ *The Death Penalty: History*. Michigan State University and Death Penalty Information Center, 2006 in the Article *the Death Peath: History*. 2006. Pg 3. Available at See R. Bohm, "Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States," Anderson Publishing, 1999. And W. Schabas, "The Abolition of the Death Penalty in International Law," Cambridge University Press, second edition, 1997.

¹⁶⁶ 408 U.S. 238, 1972.

punishments clause”¹⁶⁷ and therefore was unconstitutional. However, in 1976, in the case of *GREGG v. GEORGIA*¹⁶⁸, the Supreme Court reinstated the death penalty. It held that the death penalty was constitutional¹⁶⁹. Since then, over 1,000 people have been executed. An average of 30 persons executed annually¹⁷⁰. Presently, 38 States, the U.S. Military and the federal government have death penalty statutes. In 2005, 3,452 people are on death row in the United States of America¹⁷¹.

¹⁶⁷ Acker, James, R. The Death Penalty: An American History. University at Albany. Contemporary Justice Review, 2003, Vol. 6(2), pp172.

¹⁶⁸ 428 U.S. 153, 1976.

¹⁶⁹ See *GREGG v. GEORGIA*, 428 U.S. 153, 1976

¹⁷⁰ William P. Fay. A Culture of Life and the Penalty of Death. A Statement of the United States Conference of Catholic Bishops Calling for an End to the Use of the Death Penalty. Developed by the Committee on Domestic Policy of the United States Conference of Catholic Bishops. Washington, 2005. Pg 7

¹⁷¹ William P. Fay. A Culture of Life and the Penalty of Death. A Statement of the United States Conference of Catholic Bishops Calling for an End to the Use of the Death Penalty. Developed by the Committee on Domestic Policy of the United States Conference of Catholic Bishops. Washington, 2005. Pg 7

CHAPTER TWO

INTERNATIONAL LAW AND THE DEATH PENALTY

The trend in international law in respect of the abolition of the death penalty has been moving very fast and this is evident in several international human rights instruments, regional instruments and international courts decisions over the years. This chapter will focus on the role of international law in the abolition of the death penalty and will be divided into three areas: International human rights instruments; regional bodies and human rights instruments; and international and hybrid Courts.

2.1. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The major international instrument to be drafted after the Second World War by the General assembly of the United Nations was the Universal Declaration of Human Rights which nations adopted on 10th December, 1948, in order to prevent the repeat of barbaric acts that characterized the war. In its preamble it states “Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people {...}¹⁷²”. This declaration did not however, call for the complete abolition of the death penalty. It is believed that “the General Assembly of the United Nations contemplated calling for abolition, but then retreated cautiously, essentially because a majority of the world’s states still were not yet ready”¹⁷³. Chapter 3 of the NDHR nonetheless provides for the right to life in which it states

¹⁷² Preamble of the Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810.

¹⁷³ Schabas, William, A. The Abolition of Capital Punishment from an International Law Perspective. International Society for the Reform of Criminal Law 17th International Conference ‘Convergence of Criminal Justice Systems –

“Everyone has the right to life, liberty and security of the person¹⁷⁴”. Even though the death penalty is not mentioned in the UDHR, drafters keenly took into cognizance its abolition in the long run which was strongly responsible for the drafting of Article 3 of the Declaration in order to serve as an Article intended at an ultimate aim to abolish the death penalty.¹⁷⁵ At this time however only a few countries had abolished the death penalty, therefore it took decades for this issue to be given serious consideration.

However, the issue of the death penalty was to come up strongly in the drafting of the International Covenant on Civil and Political Right (ICCPR)¹⁷⁶ which was adopted by the United Nations General Assembly in 1966. The ICCPR is said to be “perhaps the most important human rights treaty in existence¹⁷⁷”. The U.S. State Department describes it as “the most complete and authoritative articulation of international human rights law that has emerged in the years following World War II¹⁷⁸”. This instrument reaffirms the right to life provision in the UDHR, in Article 6(1) it provides that, “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”¹⁷⁹. However, in Article 6(2), it “recognises capital punishment as an exception or limitation on the right to

Bridging the Gaps’, The Hague, 24-28 August 2003. Pg. 2. Paper adapted from the introduction to: Hans Goran Franck: *The Barbaric Punishment, Abolishing the Death Penalty in Sweden, Europe and Throughout the World*, The Hague: Kluwer Law International 2003.

¹⁷⁴ Universal Declaration of Human Rights, G.A. Res. 217 A (III) (1948). Article 3.

¹⁷⁵ Schabas, A, William. *The Abolition of the Death Penalty in International Law*. (2nd Edition), Cambridge University Press, 1997, Pg 1(See also, Schabas, A, William, *International Law and Abolition of the Death Penalty: Recent Developments*. ILSA Journal of International & Comparative Law. Spring, 1998 Ibid, Pg 44. Also, See Article 3 of the Universal Declaration of Human Rights (UNHR), General Assembly Resolution 217 A (III), U.N. Doc. A/810 (1948)

¹⁷⁶ International Covenant on Civil and Political Rights, (1976) 999 UNTS 171

¹⁷⁷ Dieter, Richard, C. *The Death Penalty and Human Rights: U.S. Death Penalty and International Law*. (Executive Director of the Death Penalty Information Center. Oxford Round Table. Pg 15. Available at

¹⁷⁸ U.S. Dept. of State, *Civil and Political Rights in the United States: Initial Report of the United States of America to the U.N. Human Rights Committee under the International Covenant on Civil and Political Rights*, July, 1994, at i (introduction). Cited by Dieter, Richard, C. *The Death Penalty and Human Rights: U.S. Death Penalty and International Law*. (Executive Director of the Death Penalty Information Center) Pg 15. Available at

¹⁷⁹ International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, Art. 6(1)

life”¹⁸⁰. Article 6(2) of the International Covenant of Civil and Political Rights (ICCPR) provides: “In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court”¹⁸¹

The safeguards and protection provided by Article 6(2) of the ICCPR do not in any way justify the retention of the death penalty by states¹⁸². This is the reason for the drafters to in Article 6(6) that “Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant”^{183,184}. Both Sierra Leone and the United States of America have ratified the ICCPR. However, the USA made a reservation of Article 6 of the ICCPR when it ratified it¹⁸⁵. The U.S. Reservation to Article 6 states as follows, “The United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws

¹⁸⁰ Schabas, William, A. The Abolition of Capital Punishment from an International Law Perspective. International Society for the Reform of Criminal Law 17th International Conference ‘Convergence of Criminal Justice Systems – Bridging the Gaps’, The Hague, 24-28 August 2003. Pg. 4. Paper adapted from the introduction to: Hans Goran Franck: The Barbaric Punishment, Abolishing the Death Penalty in Sweden, Europe and Throughout the World, The Hague: Kluwer Law International 2003.

¹⁸¹ International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, Art. 6(2).

¹⁸² Schabas, William A. The Abolition of the Death Penalty in International Law, 2nd edition, Cambridge University Press, Cambridge, United Kingdom, 1997, pp. 20, 22)

¹⁸³ International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, Art. 6(6)

¹⁸⁴ Schabas, William A. The Abolition of the Death Penalty in International Law, 2nd edition, Cambridge University Press, Cambridge, United Kingdom, 1997. Pg.73. Schabas noted that the reference in Article 6(2) “indicated not only the existence of abolitionist countries but also the direction which the evolution of criminal law should take”, while the reference in Article 6(6) “set a goal for parties to the covenant. The travaux préparatoires indicate that these changes were the direct result of efforts to include a fully abolitionist stance in the covenant. They represented an intention [...] to express a desire to abolish the death penalty, and an undertaking by States to develop domestic criminal law progressively towards abolition of the death penalty.” (Pg. 73)

¹⁸⁵ Schabas, A, William. The Abolition of the Death Penalty in International Law. (2nd Edition), Cambridge University Press,1997.

permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age”¹⁸⁶.

In 1989 the United Nations General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights¹⁸⁷ which calls for the total abolition of the death penalty except in cases where a state makes reservation in times of war¹⁸⁸. The preamble of the Second Protocol states that, “{...} abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights”¹⁸⁹. Article 1 state as follows: “(1) No one within the jurisdiction of a State Party to the present Protocol shall be executed. (2). Each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction”¹⁹⁰. However, only 72 states have ratified the Second Protocol as of 10th January, 2010¹⁹¹.

Also, in 1989, the United Nations adopted the Convention on the Rights of the Child (CRC) which strongly prohibits the imposition of the death penalty for juvenile offenders. Article 37(a) of this instrument states that “Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years

¹⁸⁶ U.S. Reservation to Article 6 of the ICCPR, UN Doc. ST/LEG/SER.E/13, p.175

¹⁸⁷ Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, opened for signature 15th December 1989, Doc. A-RES-44-128 (entered into force 11 July 1991)

¹⁸⁸ See Ibid. Article 2.

¹⁸⁹ Ibid. Preamble.

¹⁹⁰ Ibid. Article 1 and 2.

¹⁹¹ Abdullah, Bin, Rahman, Abdul. International Standards of Capital Punishment: Death Penalty. Human Rights Commission of Malaysia. 2010. Pg. 1.

of age”¹⁹². With the exception of the United States of America and Somalia, every country in the world has ratified the CRC¹⁹³.

Apart from the major international human rights instruments mentioned above, there are other international treaties, resolutions and conventions which have called for the complete or partial abolition of the death penalty. They include, Resolution 32/81 on capital punishment adopted by the United Nations General Assembly on the 8th December, 1977, which states that, “the main objective to be pursued in the field of capital punishment is that of progressively restricting the number of offences for which the death penalty may be imposed with a view to the desirability of abolishing this punishment.”¹⁹⁴. Also, the United Nations Commission on Human Rights adopted a Human Rights Resolution 2005/56 in April, 2005, titled ‘Promotion of peace as a vital requirement for the full enjoyment of all human rights by all’, in respect of the death penalty which calls on all states that still retain the death penalty to abolish it completely, and in the interim to have a moratorium on all awaiting executions¹⁹⁵. The United Nations General Assembly also approved Resolution 62/149 titled ‘Moratorium on the use of the death penalty’ which calls on all states still retaining the death penalty to have a moratorium on all awaiting

¹⁹² See Convention on the Rights of the Child. Article 37(a).

¹⁹³ See B. Crossette, Tying Down Gulliver With Those Pesky Treaties, N.Y. Times, Aug. 8, 1999 (Week in Review). Cited by Dieter, Richard, C. The Death Penalty and Human Rights: U.S. Death Penalty and International Law. (Executive Director of the Death Penalty Information Center. Oxford Round Table. Pg 18. Available at

¹⁹⁴ U.N. General Assembly resolution 32/61, 8 December 1977, paragraph 1.

¹⁹⁵ United Nations Commission on Human Rights Resolution 2005/56 , 20 April 2005. See Official Records of the Economic and Social Council, 2005, Supplement No. 3 and corrigenda (E/2005/23 and Corr.1 and 2), chap. II, sect. A.

executions with an aim to abolish the death penalty entire¹⁹⁶. Finally, there is the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).¹⁹⁷

2.2. REGIONAL HUMAN RIGHTS CONVENTIONS

“In parallel to the United Nations instruments, regional human rights systems have also emerged in Europe, the Americas, Africa and the Arab world{ ... } All four instruments recognise the right to life”¹⁹⁸. The first of these regional instruments was the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁹⁹ commonly known as the European Court of Human Rights (ECHR) drafted by the Council of Europe in 1950 is the main instrument that protects human rights and fundamental freedoms in Europe. The European Convention provides for a high degree of individual protection. This Convention is enforced by the European Court of Human Rights based in Strasbourg, France²⁰⁰. Even though pre-dating the International Covenant on Civil and Political Rights, the ECHR strongly provides for the right to life and provides for the death penalty in limited circumstances²⁰¹.

Article 2 of the Convention provides that “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

¹⁹⁶ United Nations General Assembly Resolution 62/149. Moratorium on the use of the death penalty. 26 February 2008. Available at <http://www.consilium.europa.eu/uedocs/cmsUpload/N0747271.pdf>

¹⁹⁷ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

¹⁹⁸ Schabas, William, A. The Abolition of Capital Punishment from an International Law Perspective. International Society for the Reform of Criminal Law 17th International Conference ‘Convergence of Criminal Justice Systems – Bridging the Gaps’, The Hague, 24-28 August 2003. Pg. 2. Paper adapted from the introduction to: Hans Goran Franck: The Barbaric Punishment, Abolishing the Death Penalty in Sweden, Europe and Throughout the World, The Hague: Kluwer Law International 2003.

¹⁹⁹ Convention For The Protection of Human Rights and Fundamental Freedoms (‘European Convention on Human Rights’), (1955) 213 UNTS 221,

²⁰⁰ European Court of Human Rights based in France.

²⁰¹ Bertil, Duner, and Hanna, Geurtsen. The Death Penalty and War. Swedish Institute of International Affairs. The International Journal of Human Rights, Vol. 6. No. 4. 2002. Pg. 4.

following his conviction of a crime for which this penalty is provided by law”²⁰² Between 1955 and the early 1980s, there was a serious debate for the abolition of the death penalty in the Council of Europe “bitterly fought between retentionist and abolitionist states²⁰³,” the retentionist states’ view was to prevail and on 28th April, 1983, the Committee of Ministers adopted the Sixth Protocol to the ECHR Concerning the death Penalty²⁰⁴. Article 1 of Protocol No. 6 states that, “The death penalty shall be abolished. No one shall be condemned to such penalty or executed²⁰⁵”.

However, in accordance with Article 2, this was only during peacetimes. Article 2 provides that, “A State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law²⁰⁶”. This was followed by the decision of the Parliamentary Assembly of the Council of Europe in 1994 “that any country wishing to join the Council should agree to implement an immediate moratorium on executions and then sign and ratify, within a number of years, Protocol No. 6²⁰⁷. This condition made Europe de facto an area free from the death penalty²⁰⁸. This eventually led to the adoption of Protocol No.13 of the ECHR which prohibits the death penalty in all circumstances including war times. Article 1 provides that, “The death penalty shall be abolished. No one shall be

²⁰² Convention For The Protection of Human Rights and Fundamental Freedoms (‘European Convention on Human Rights’), (1955) 213 UNTS 221, art. 2(1).

²⁰³ Bertil,Duner, and Hanna, Geurtsen. The Death Penalty and War.Swedish Institute of International Affairs. The International Journal of Human Rights, Vol. 6. No. 4. 2002. Pg. 4.

²⁰⁴ See Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, ETS 114

²⁰⁵ Ibid. Article 1.

²⁰⁶ Ibid, article 2.

²⁰⁷ Bertil,Duner, and Hanna, Geurtsen. The Death Penalty and War.Swedish Institute of International Affairs. The International Journal of Human Rights, Vol. 6. No. 4. 2002. Pg. 5.

²⁰⁸ Ibid, Pg 5.

condemned to such penalty of execution²⁰⁹”. As a result of this there is presently no country in the Council of Europe or the European Union that still retain the death penalty. It should be noted that European countries took the lead to abolish the death penalty based on mainly two points which are: Firstly, the enlightenment of Europe especially when the person’s right to life emerged and the contractual explanation of the connection between the citizens and the state emerged. Secondly, due to the barbaric acts committed during the World War II²¹⁰.

This was followed by the American Convention on Human Rights²¹¹ which adopted by the General Assembly of the Organization of American States in 1969. This Convention like the others afore-mentioned provides for the right to life²¹². It however provides for the imposition of the death penalty only for countries that have not abolished it and “may be imposed only for the most serious crimes {...} rendered by a competent court {...}”²¹³, “In addition to pregnant women and juveniles, capital punishment is also prohibited in the case of persons over seventy years of age²¹⁴”. It further states that, “the death penalty shall not be reestablished in states that have abolished it²¹⁵”. Therefore, it restricts the circumstances in which the death penalty can be imposed. The Protocol No. 2 to the America Convention on Human Rights to Abolish the Death Penalty adopted in 1990, provides that any nation that is a party to the America Convention on Human Rights may sign this Protocol which eliminate the death penalty in all circumstances with

²⁰⁹ Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances. Vilnius, 3.V. 2002. European Treaty Series No. 187 Available at <http://www.echr.coe.int/library/annexes/187E.pdf>

²¹⁰ Dr. Klara Kereszi suggestion in marking this thesis.

²¹¹ The American Convention on Human Rights. 1144 UNTS 123. Adopted in 1978.

²¹² See The American Convention on Human Rights. 1144 UNTS 123. Dopted in 1978. Article 4(1).

²¹³ Ibid, Article 4(2).

²¹⁴ Schabas, William, A. The Abolition of Capital Punishment from an International Law Perspective. International Society for the Reform of Criminal Law 17th International Conference ‘Convergence of Criminal Justice Systems – Bridging the Gaps’, The Hague, 24-28 August 2003. Pg. 5. Paper adapted from the introduction to: Hans Goran Franck: The Barbaric Punishment, Abolishing the Death Penalty in Sweden, Europe and Throughout the World, The Hague: Kluwer Law International 2003.

²¹⁵ Ibid, Article 4(3).

the exception that they may declare, upon signing, the intent to retain the death penalty in time of war for serious military crimes, in keeping with international law²¹⁶. In this case, the state is obligated to inform the OAS secretary general of its national legislation regarding the use of the death penalty during times of war.

In the African context, the Organisation of African Unity adopted the African Charter on Human and Peoples Rights²¹⁷. It makes provision for the protection of the right to life in accordance with Article 4 which states that “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right²¹⁸. However, the African Charter did not mention the issue of the death penalty²¹⁹. The African Commission adopted its first resolution on the death penalty in 1999 which encourages member states to abolish the death penalty.²²⁰ In the 37th Ordinary Session of the African Commission held between April 27th and May 11th, 2005, the African Commission adopted a resolution establishing a Working Group on the Death Penalty with the purpose of creating a plan to completely abolish the imposition of the death penalty in Africa of which, “{...} Any government that would be willing to follow the recommendation would still have to navigate its own domestic political process to remove the death penalty from its constitution or legal code {...}”²²¹.

²¹⁶ See The Protocol No. 2 to the American Convention on Human Rights to Abolish the Death Penalty adopted in 1990

²¹⁷ African Charter of Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 Rev. 5. Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986). Available at http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf

²¹⁸ Ibid, Article 4

²¹⁹ Ibid, See the complete version of the Charter

²²⁰ African Commission on Human and Peoples’ Rights, Resolution, Urging the State to Envisage a Moratorium on Death Penalty. ACHPR/Res.42 (XXVI)99 (1999)

²²¹ Tim Curry in his journal Cutting the Hangman’s Noose: African Initiatives to Abolish the Death Penalty. Human Rights Brief. Spring, 2006. Pg 1.

Finally, the Arab Charter of Human Rights²²² which was adopted in 1994 by the League of Arab States also provides for the “inherent right to life”²²³ It however provides for the imposition of the death penalty under Article 6 for “the most serious crimes in accordance with the laws in force at the time of commission of the crime and pursuant to a final judgment rendered by a competent court”²²⁴. Article 7 “prohibits its use for political crimes, and excludes it for crimes committed under the age of eighteen and for both pregnant women and nursing mothers, for a period of up to two years following childbirth”²²⁵.

2.3. INTERNATIONAL COURTS AND TRIBUNALS

The International Criminal Court (ICC), which is a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes, the maximum penalty is life imprisonment²²⁶, Also, both the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) established in 1993 and 1994 respectively by the United Nations Security Council excluded the death penalty for all

²²² Arab Charter on Human Rights, (1997) 4 IHRR 850. Came into force on 15th March, 2008.

²²³ Ibid, Article 5.

²²⁴ Ibid, Article 6.

²²⁵ Schabas, William, A. The Abolition of Capital Punishment from an International Law Perspective. International Society for the Reform of Criminal Law 17th International Conference ‘Convergence of Criminal Justice Systems – Bridging the Gaps’, The Hague, 24-28 August 2003. Pg. 6. Paper adapted from the introduction to: Hans Goran Franck: The Barbaric Punishment, Abolishing the Death Penalty in Sweden, Europe and Throughout the World, The Hague: Kluwer Law International 2003.

²²⁶ See Article 77 Rome Statute of the International Criminal Court. Adopted in 1998, but came into force on 1st July, 2002. <http://www.un.org/law/icc/statute/romefra.htm>

crimes including very serious crimes such as genocide, crimes against humanity and war crimes { ... }²²⁷

Finally, the Special Court of Sierra Leone a hybrid Court established by the United Nations and the Government of Sierra Leone, to try persons who committed war crimes and crimes against humanity during the civil war of Sierra Leone, do not have the death penalty as one of its punishments²²⁸.

²²⁷ The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda were established under UN Security Council resolutions 825 of 25 May 1993 and 955 of 8 November 1994, respectively.

²²⁸ The Special Court was established by Security Council Resolution 1315 (2000), 14 August 2000. See Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, U.N. Doc. S/2000/915

CHAPTER THREE

THE ARGUMENTS FOR AND AGAINST THE DEATH PENALTY

3.1. PUBLIC OPINION

Due to the high rate of murder in the United States of America, the death penalty over the years has had a strong public support. Even though there is no strong accurate data supporting this claim, the Gallup polls mainly conducted in the twentieth century shows strong American public opinion in favour of the death penalty²²⁹. Banner in assessing public opinion on the death penalty in America states that, “for state legislatures to abolish capital punishment. The death penalty is so popular that abolition will be impossible without a significant shift in public opinion. Such shifts have occurred several times in the past 250 years, however, and may well occur again. In the past they have been caused by changing attitudes about the extent to which crime is a consequence of the criminal’s free will, changes that at the time seemed to flow from better understandings of human behavior. We can expect similar developments in the future {...} [T]he balance of Americans’ beliefs about free will is not likely to remain static forever. When it changes, so too will opinion on capital punishment”²³⁰

It is difficult to get a research on public opinion towards the death penalty in Sierra Leone. In

²²⁹ See Bohm, Robert, M. American Death Penalty Opinion, 1936-1986: A Critical Examination of the Gallup Polls, in *The Death Penalty in American: Current Research*. (Robert M. Bohm ed., 1991. Pg 113.

²³⁰ Banner, S. (2002). *The death penalty: An American history*. Cambridge, MA: Harvard University Press. Pg. 310-311

fact, there has been no study or opinion poll done in Sierra Leone on whether to still retain the death penalty or not²³¹.

Justice Chaskalson in *STATE v. MAKWANYANE*²³² states that it is wrong to allow public opinion to influence policy on the death penalty. He states that, "...the issue of constitutionality of capital punishment, cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. Those who are entitled to claim the protection [of the democratic process], include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and weakest amongst us, that all of us can be secure that our own rights will be protected"²³³

3.2. DETERRENCE

For over a long time in the history of the death penalty, proponents of it have argued that "the death penalty deters the commission of crimes"²³⁴. On March, 10th 1973, President Richard Nixon of the United States of America stated that "contrary to the views of some social theorists, I am convinced that the death penalty can be an effective deterrent against specific crimes"²³⁵. In the 1970s, there were a series of articles published especially in the United States of America

²³¹ Abdul Tejan-Cole, *The Death Penalty in Sierra Leone*, 7. The only opinion poll that was conducted in Sierra Leone in 2002 by Campaign for Good Governance, 26% of people interviewed agreed that those prosecuted by the Special Court should face the death penalty, whereas 43% did not agree and 31% answered that they were not sure. (Campaign for Good Governance, *Opinion Poll on the TRC and Special Court*, available at <http://www.slugg.org>)

²³² *State v Makwanyane*, Constitutional Court of the Republic of South Africa, 1995 Case No.CCT/3/94, [1995] 1 LRC 269. Constitutional Court of the Republic of South Africa, 1995 Case No.CCT/3/94, [1995] 1 LRC 269, Judgement of Justice Chaskalson.

²³³ *Ibid*, paragraph 88

²³⁴ Aubry, Jeffrion, Lentol, Joseph and Weinstein, Helene. *The Death Penalty in New York*. A report on five public hearings on the death penalty in New York conducted by the Assembly standing committees on Codes, Judiciary and Correction, December 15, 2004 - February 11, 2005. April, 2005. Pg.18. Available at

²³⁵ Statement by Richard Nixon on March 10, 1973, Cited by Lamperti, John. *DoesCapital Punishment Deter Murder? A brief look at the evidence*. Available at http://www.dartmouth.edu/~chance/teaching_aids/books_articles/JLpaper.pdf

which “claimed a scientific basis for the assertion that potential murderers can be deterred from homicide by the threat of execution²³⁶”. The main proponent of this view in the 1970s was economist Isaac Ehrlich, who was “inspired by the theoretical work of the University of Chicago’s Gary Becker²³⁷”. Ehrlich published his first article titled *The Deterrent Effect of Capital Punishment: A Question of Life and Death*²³⁸, “a technical piece using econometric methods²³⁹” to measure the deterrence effect in which he strongly argued that the death penalty deters a lot of crimes. In fact he stated that each execution prevents eight murders²⁴⁰. His work was very influential and even cited in the case of *GREGG v. GEORGIA* in 1976 which reinstated the death penalty²⁴¹. It was stated in the case as follows “There are carefully contemplated murders, such as the murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act²⁴²”. It was also made reference to in the amicus brief filed by the U.S. Solicitor General in *Fowler v. North Carolina*²⁴³. This work also influenced the work of other proponent of the deterrent view, for instance, James Q. Wilson in his publication ‘Thinking About Crime’ states as follows “People are governed in their daily lives by rewards and penalties of every sort. We shop for bargain prices; praise our children for good behavior and scold them for bad; expect lower interest rates to stimulate home building and fear that higher ones will depress it; and conduct ourselves in public in ways that lead our friends

²³⁶ Fagan, Jeffrey. *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*. WALTER C. RECKLESS MEMORIAL LECTURE. Columbia University. 2005. Pg 255

²³⁷ Ibid, Pg 255. See also Becker, Gary, S. *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968)

²³⁸ Ehrlich, Isaac. *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975);

²³⁹ Fagan, Jeffrey. *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*. WALTER C. RECKLESS MEMORIAL LECTURE. Columbia University. 2005. Pg 255-256

²⁴⁰ Ehrlich, Isaac. *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); See also Ehrlich, Isaac. *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977).

²⁴¹ Fagan, Jeffrey. *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*. WALTER C. RECKLESS MEMORIAL LECTURE. Columbia University. 2005. Pg 255-256

²⁴² *Gregg v. Georgia* (1976) 428 U.S. 153, 186

²⁴³ 428 U.S. 904 (1976).

and neighbors to form good opinions of us. To assert that “deterrence doesn’t work” is tantamount to either denying the plainest facts of everyday life or claiming that would-be criminals are utterly different from the rest of us”²⁴⁴. This argument was strongly criticized and challenged by various publications including influential journals in the Yale Law Journal²⁴⁵.

The deterrence argument was held to be highly flawed in the South African landmark case *State v Makwanyane* decided by the south African Constitutional Court which abolished the death penalty completely in South Africa in 1995. In his reason for deciding that the death penalty has no deterrent effect, rather it is “a cruel, inhuman and degrading punishment”²⁴⁶, Justice Arthur Chaskalson states that “We would be deluding ourselves if we were to believe that the execution of the few people sentenced to death during this period [1990–95], and of a comparatively few other people each year from now onwards will provide the solution to the unacceptably high rate of crime {...} The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the state must seek to combat lawlessness”.²⁴⁷ This is very similar to Beccaria’s point of view²⁴⁸.

Furthermore, in abolishing the death penalty in 1993, the former Gambian president, Sir Dawda

²⁴⁴ Wilson, James, Q. *Thinking About Crime* (Random House rev. ed.) 1983. Pg. 121.

²⁴⁵ See Editors’ Introduction, *Statistical Evidence on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 164 (1975); David C. Baldus & James W.L. Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich’s Research on Capital Punishment*, 85 YALE L.J. 187 (1975);

²⁴⁶ Constitutional Court of the Republic of South Africa, 1995 Case No.CCT/3/94, [1995] 1 LRC 269, Judgement of Justice Chaskalson.

²⁴⁷ *State v Makwanyane*, Constitutional Court of the Republic of South Africa, 1995 Case No.CCT/3/94, [1995] 1 LRC 269, Judgement of Justice Chaskalson, paragraph 129

²⁴⁸ See Cesare, Bonesana, Beccaria *An Essay on Crimes & Punishments 1738-1794*. New York, Stephen Gould. 1809. Cited by Van der Vyner, Johan, D. *Torture as a Crime Under International Law*. Albany Law Review. Vol. 67.

Jawara, stated that the Government had taken the decision with the firm conviction that: “The death penalty has no value, no useful purpose in relation to crime prevention or control”²⁴⁹

In addition, Roger Hood, the then Director of the Centre for Criminological Research at Oxford University has stated in a seminar held in Ukraine that, “{...} the issue is not whether the death penalty deters some people, but whether, when all the circumstances surrounding the use of capital punishment are taken into account, it is a more effective deterrent than the alternative sanction: most usually imprisonment for life or very long indeterminate periods of confinement.”²⁵⁰ He concludes “that econometric analyses have not provided evidence from which it would be prudent to infer that capital punishment has any marginally greater deterrent effect than alternative penalties.”²⁵¹ According to him, it does not make sense for states to still retain the death penalty on the grounds that it deters crimes²⁵². Also, in his research on this subject for the United Nations in 1988 and updated in 2002, he states that “the fact that the statistics {...} continue to point in the same direction is persuasive evidence that countries need not fear sudden and serious changes in the curve of crime if they reduce their reliance upon the death penalty.”²⁵³ In the U.S. Supreme Court case *FURMAN V. GEORGIA*²⁵⁴, Justice Marshall stated that “In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect”²⁵⁵.

²⁴⁹ Apolo Kakaire, ‘Death Penalty: Total or Partial Abolition? The case for total abolition’ ‘Your Rights Magazine’ Vol. VI No. 1 May 2003, Uganda Human Rights Commission

²⁵⁰ Hood, Roger. ‘Capital Punishment, Deterrence and Crime Rates,’ Seminar on the Abolition of the Death Penalty, Kyiv [Ukraine], 28-29 September 1996: Council of Europe Parliamentary Assembly; Doc As / Jur [1996] 70, p.6, para 23

²⁵¹ Ibid. Pg. 6, para 27

²⁵² Ibid. Pg. 6.

²⁵³ Hood, Roger, *The Death Penalty: A Worldwide Perspective*, third edition (London: Oxford University Press, 2002), p.214.

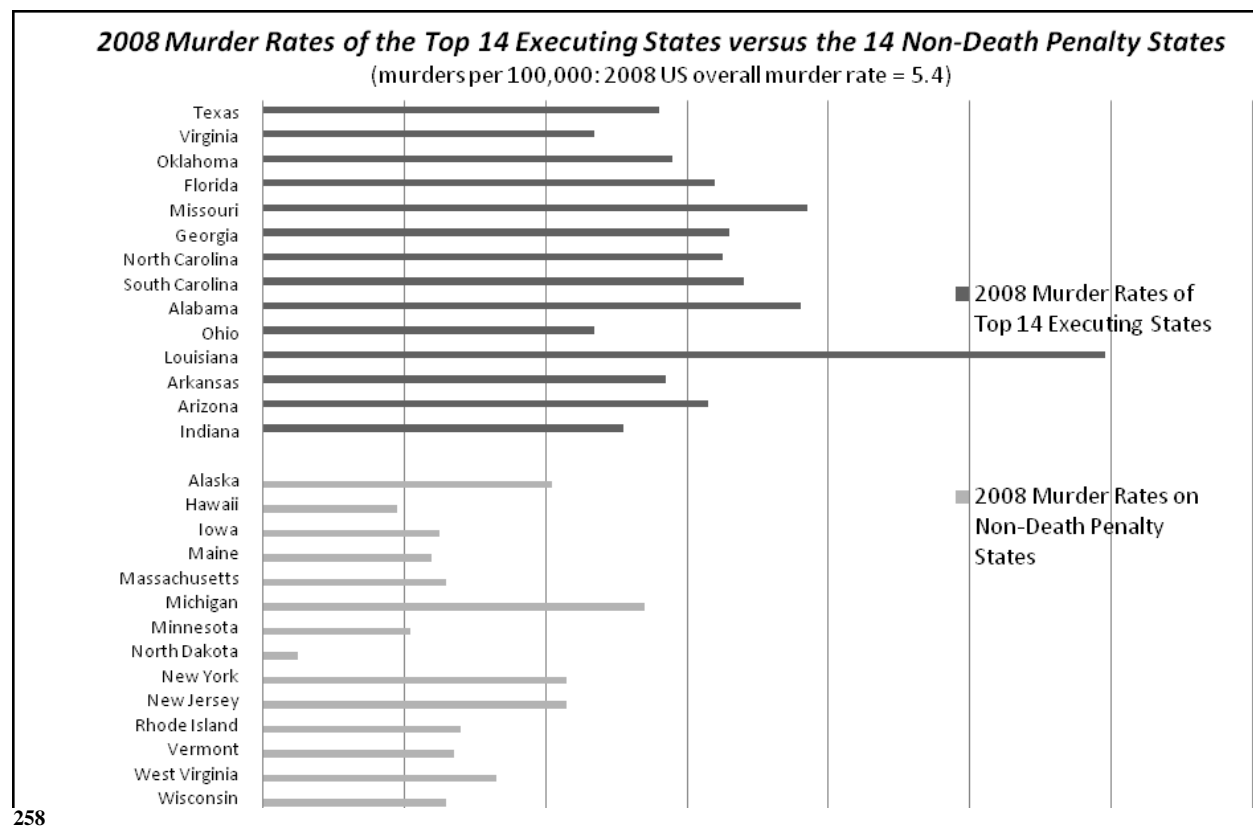
²⁵⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

²⁵⁵ Justice Marshall statement in *Furman v. Georgia*, 408 U.S. 238 (1972).

It is a fact that the United States carries has a far higher rate of murder than that of any Western European countries that do not have the death penalty²⁵⁶

Even in the USA, researches has shown that there are more crimes especially murder committed in states with the death penalty than states without it, for instance, an “FBI data shows that all 14 states without capital punishment in 2008 had homicide rates at or below the national rate²⁵⁷”.

Please see below.



²⁵⁶ Banner, Stuart. *The Death Penalty: An American History*. 2002. Pg 113. See also Michael Tonry & Richard S. Frase, eds., *Sentencing and Sanctions in Western Countries*. 2001. Pg 13

²⁵⁷ Amnesty International article *Death Penalty Facts*. Updated August, 2010. AIUSA Death Penalty Abolition Campaign. Pg. 8. Available at www.amnestyusa.org/abolish.

²⁵⁸ This chart was directly copied from Amnesty International article *Death Penalty Facts*. Updated August, 2010. AIUSA Death Penalty Abolition Campaign. Pg. 8. Available at www.amnestyusa.org/abolish. It was cited in this article that this source is from FBI's "Crime in the United States, 2008". See also www.deathpenaltyinfo.org

3.3. RETRIBUTION

Retribution is a major justification for the imposition of the death penalty given by most proponent of it. This has been the case since a long time ago and is usually linked to the ‘an eye for an eye, a tooth for a tooth’ in the Holy Bible²⁵⁹, which means ‘life for a life’. Immanuel Kant in supporting retribution as a justification for the death penalty stated that, “[e]ven if a civil society resolved to dissolve itself ... the last murderer lying in the prison ought to be executed {...}”²⁶⁰. In the case of *INC. v. VIRGINIA*²⁶¹, the Court was of the opinion that “[it] cannot erase from people’s consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution”²⁶². In the same year Walter Berns published his book ‘Defending the Death Penalty’²⁶³ in which he supported retribution as a justification. He states that, “in a country whose principles forbid it to preach, the criminal law is one of the few available institutions through which it can make a moral statement {...} To be successful, what it says—and it makes this moral statement when it punishes—must be appropriate to the offense and, therefore, to what has been offended. If human life is to be held in awe, the law forbidding the taking of it must be held in awe; and the only way it can be made awful or awe inspiring is to entitle it to inflict the penalty of death”²⁶⁴,

The desire for retribution is understandable, particularly considering the effect a murder would have on the family of a victim. However, this should not breed revenge. For instance, in the ruling of the South Africa case *STATE v. MAKWANYANE*, Justice Chaskalson, have stressed

²⁵⁹ The Holy Bible. New King James Version. Nelson Bibles Publishers. 1982. Leviticus 24:20

²⁶⁰ Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, William Hastie, translator (T. & T. Clark 1887). Cited by Cassell, Paul G in Defense of the Death Penalty. IACJ Journal Summer 2008. Pg 21

²⁶¹ *Inc. v. Virginia*²⁶¹ (1980) 448 U.S. 555, 571.

²⁶² Ibid

²⁶³ Berns, Walter. Defending the Death Penalty. 26 Crime & Delinquency 1980. Pg. 509.

²⁶⁴ Ibid

that the death penalty is not the only way to express moral outrage. He stated that “The righteous anger of family and friends of the murdered victim, reinforced by the public abhorrence of vile crime, is easily translated into a call for vengeance. But capital punishment is not the only way that society has of expressing its moral outrage at the crime that has been committed. We have long outgrown the literal application of the biblical injunction of ‘an eye for an eye, and a tooth for a tooth’. Punishment must to some extent be commensurate with the offence, but there is no requirement that it be equivalent or identical to it”²⁶⁵. Also, in the Tanzanian case of *REPUBLIC v MBUSHUU AND ANOTHER*²⁶⁶ Mwalusanya J describes retribution as some crude urge for vengeance. It states as follows “[Even] if it is the case that the majority of the public do subscribe to some sort of an eye-for-an-eye retaliation approach in murder cases, a progressive government will not feel obliged to execute persons simply to satisfy some crude urge for vengeance. Rather, it will assume the responsibility for informing the public and seek to influence their views in a more enlightened direction. Often vengeful sentiments stem from fear in the face of increasing rates of violent crime. The death penalty, however, is not an instant solution to violent crime and the government should not hold it out as such. Retribution has no place in a civilised society and negates the modern concepts of penology”²⁶⁷. The South African Nobel Peace Prize laureate Archbishop Desmond Tutu has described executions as "vengeance, not justice" and has stated that "to take a life when a life has been lost is revenge, it is not mercy" and that justice allowed for mercy, clemency and compassion. "These virtues are not weakness,"²⁶⁸

²⁶⁵ *State v Makwanyane*, Constitutional Court of the Republic of South Africa, 1995 Case No.CCT/3/94, [1995] 1 LRC 269, Judgement of Justice Chaskalson, paragraph 129

²⁶⁶ *Mbushuu and Another v Republic* (1995) 1 LRC 216

²⁶⁷ *Ibid.*

²⁶⁸ People's Weekly World Newspaper, 01/18/03 <http://www.pww.org/article/view/2773/1/133>/George Ryan and The Making of Death Penalty History, Trinidad and Tobago News, 15 January 2003 <http://www.trinidadandtobagonews.com/Simmons.html>

3.4. INCAPACITATION

Incapacitation is another strong justification for the application of the death penalty. Proponents of the death penalty vehemently argue that the death penalty prevents dangerous murderer to return back to society and commit potential crimes especially repeat of murder. This is so because life imprisonment does not guarantee that the prisoner may not get clemency from the authority one day and may return back to society²⁶⁹

Opponents of the death penalty have in return argued that murderers and dangerous persons should be sentenced to “life imprisonment without parole”²⁷⁰. This will ensure that they are never release to the public and will be in jail forever until they die. They are also of the opinion that incapacitation is only useful other side the prison, which means that inmates could not commit crime outside the prison, but he could commit some inside the prison and the victim could be not only fellow inmates, but also the professionals who are working at the prison. Therefore, this is not a strong reason²⁷¹.

²⁶⁹ Aubry, Jeffrion, Lentol, Joseph and Weinstein, Helene. The Death Penalty in New York. A report on five public hearings on the death penalty in New York conducted by the Assembly standing committees on Codes, Judiciary and Correction, December 15, 2004 - February 11, 2005. April, 2005. Pg. 21.

²⁷⁰ Ibid, Pg 21-22

²⁷¹ Dr. Klara Kereszi suggestion in marking this thesis.

3.5. MISCARRIAGE OF JUSTICE (EXECUTION OF AN INNOCENT PERSON)

A major argument by opponent of the death penalty is miscarriage of justice. In this sense not everyone convicted in the court is truly guilty of the offence convicted for. Therefore, an innocent person can be put to death by wrongful conviction. Former Governor of Illinois George Ryan in January 2000 in declaring a moratorium on execution in the state of Illinois just after the 13th death row inmate was released from prison based on wrongful conviction states that, “I cannot support a system which, in its administration, has proven so fraught with error and has come so close to the ultimate nightmare, the state’s taking of innocent life {...} Until I can be sure that everyone sentenced to death in Illinois is truly guilty, until I can be sure with moral certainty that no innocent man or woman is facing a lethal injection, no one will meet that fate”²⁷²

Also, in the landmark case of *FURMAN v. GEORGIA* in 1972, Justice Thurgood Marshall stated that, “No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real {...} We have no way of judging how many innocent persons have been executed, but we can be certain that there were some.”²⁷³. This was the case in the British case of *BIRMINGHAM SIX* of 1975 which involved six men who were sentenced to life imprisonment and 16 years later it was revealed that their conviction was wrong and they were in fact innocent. They were released in 1991²⁷⁴. They would have been executed if the death penalty was still in force in Britain, and when they discovered their innocence, they

²⁷² Amnesty International. Death Penalty and Innocence. Available at <http://www.amnestyusa.org/death-penalty/death-penalty-facts/death-penalty-and-innocence/page.do?id=1101086>

²⁷³ *Furman-v-Georgia*, 408 U.S. 238, 367-68 [1972]

²⁷⁴ This is an edited extract of Michael Howard’s speech in the debate concerning the restoration of the death penalty in the House of Commons. Criminal Justice and Public Order Bill, 21st February 1994. Hansard cols. 45-46. Cited by Sabrina

would not have been able to bring them back to life. In 1994, the then Home Secretary Michael Howard stated that he had constantly voted for the death penalty, but that he had had a second thought on the issue especially due to the decision of the Court on miscarriages of justice cases, such the Birmingham Six case. He states that, “the fault lies not in the machinery but in the fallibility and frailty of human judgment”²⁷⁵.

Bedau, Radelet and Putnam have in their work identified 416 cases in the United States of America in which wrong persons were convicted and sentenced to death between 1900 and 1991. At the time of their publication, 66 more wrongful convictions were confirmed. These wrongful convictions were based mainly on prosecution witnesses’ perjury, mistaken eyewitness testimony and flawed police investigation. It has been revealed nowadays through DNA tests in USA²⁷⁶ that many people who are convicted are not guilty.

In Sierra Leone, the Truth and Reconciliation Commission (TRC) in its final report states that in the past many persons especially politicians were executed by previous Sierra Leone governments wrongly. Such persons were Mohamed Sorie Fornah and Ibrahim Bash-Taqi during President Siaka Stevens’ government; Francis Minah and G. M. T. KaiKai in the days of President J. S. Momoh and Bambay Kamara and others in December 1992 under the junta government of Captain Valentine Strasser²⁷⁷. It was against this backdrop that Captain Strasser

²⁷⁵ This is an edited extract of Michael Howard’s speech in the debate concerning the restoration of the death penalty in the House of Commons. Criminal Justice and Public Order Bill, 21st February 1994. Hansard cols. 45-46. Cited by Sabrina

²⁷⁶ See preface to the revised edition of M. Radelet, H.A. Bedau & C. Putnam, ‘In Spite of Innocence’ [Northeastern University Press: Boston. 1995]

²⁷⁷ Truth and Reconciliation Commission Report, Vol 2, Chapter 2: Findings, para 424

in responding to questions during the TRC finding stated that the said execution of 26 persons during his era in December, 1992 were, “the biggest or only mistake my government made”²⁷⁸.

CHAPTER FOUR

THE DEATH PENALTY AMOUNTS TO TORTURE

4.1 GENERAL OVERVIEW OF TORTURE

The most acceptable definition for the term torture is given by Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. This defines torture as “the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity²⁷⁹. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions”²⁸⁰.

²⁷⁸ Transcripts of TRC Public Hearings, Thematic & Institutional Hearings, 30th July 2003, Tapes 37-38 – Valentine Strasser at 253 & 270

²⁷⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Article 1.

²⁸⁰ Ibid.

Torture has been used by almost all societies in the world for various reasons such as to obtain confession²⁸¹, information, suppress oppositions²⁸² or used as “a form of punishment”²⁸³. However, “torture was not considered illegal in some criminal justice systems”²⁸⁴. Cesare Beccaria in ‘An Essay on Crimes & Punishments’, stated that, “The torture of a criminal during the course of his trial is a cruelty consecrated by custom in most nations”²⁸⁵. For instance, Tasswell-Langmead in his book, ‘English Constitutional History: From the Teutonic Conquest to the Present Time’ made reference of the case of the rector of St. George church in Somersetshire Edmund Peacham in 1615 suspected of seditious conspiracy was, “was put to the rack and examined { . . . } ‘before torture, in torture, between torture, and after torture’”²⁸⁶.

Today, “torture is the grossest violation of fundamental human rights. It destroys the dignity of persons by degrading their bodies with injuries, which are sometimes irreparable and causing severe damage to minds and spirits. The horrific consequences of this terrible human rights violation spread to the family of the victims and into their social surroundings. Through these acts, the values and principles upon which democracy and human rights are based and any form of human dignity lose their significance”²⁸⁷. However, torture is widely condemned in the world and almost every international, regional and domestic human rights instrument prohibits the

²⁸¹ Stubbs, William . The Constitutional History of England 375–76. 1987. Pg 3. Cited by Van der Vyner, Johan, D. Torture as a Crime Under International Law. Albany Law Review. Vol. 67. Pg 427.

²⁸² Lea, Charles, Henry. Torture. (In Edward Peters ed., Univ. of Pa. Press 1973) (1866). Pg 141.

²⁸³ Van der Vyner, Johan, D. Torture as a Crime Under International Law. Albany Law Review. Vol. 67. Pg 427.

²⁸⁴ Ibid, pg 427

²⁸⁵ Cesare, Bonesana, Beccaria An Essay on Crimes & Punishments 1738-1794. New York, Stephen Gould. 1809. Cited by Van der Vyner, Johan, D. Torture as a Crime Under International Law. Albany Law Review. Vol. 67. Pg 427.

²⁸⁶ Taswell-Lanham, Pitt, Thomas. English Constitutional History: From the Teutonic Conquest to the Present Time. 1946. Pg 391. See John H. Langbein. Torture and the Law of Proof: Europe and England in the Ancien Regime. 1977. Pgs 89 & 139

²⁸⁷ Kuxing: Torture in Tibet. A special Report. Tibetan Centre for Human Rights & Democracy. Pg 5.

practice of torture and there is no derogatory provision that allows torture in any form²⁸⁸. Shue describes it as “a cruel assault upon the defenseless”²⁸⁹ and Schulz states that it is an “inherently abhorrent”²⁹⁰. In the case *Wilson v. City of Chicago*, Chief Judge Posner stated that, “[E]ven a murderer has a right to be free from torture”²⁹¹. In the International Criminal Tribunal for Yugoslavia (ICTY) case of *PROSECUTOR v. DELALIC* in 1998, it was stated that torture has over the years been recognised “as a peremptory norm of general international law”, that is ‘ius cogens’ accepted by almost every states in the world²⁹².

Torture has been treated with so much seriousness in every major international human rights instrument. Starting with the Universal Declarations on Human Rights (UDHR), the world has recognised the fact that torture is not acceptable in any form. Article 5 of the UDHR clearly states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”²⁹³. Also, in Article 7 of the International Covenant on Civil and Political Rights of 1966, it states as follows, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”²⁹⁴. It was in 1984 that the United Nations adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

²⁸⁸ Shue, Henry. Torture. 7 PHIL. & PUB. AFF. 124. (Stating that “[n]o other practice except slavery is so universally and unanimously condemned in law and human convention”); and William F. Schulz, The Torturer’s Apprentice, THE NATION, May 13, 2002, at 26 (arguing that individuals who do not condemn torture are tyrants). Cited by Van der Vyner, Johan, D. Torture as a Crime Under International Law. Albany Law Review. Vol. 67. Pg 429.

²⁸⁹ Shue, Henry. Torture. 7 PHIL. & PUB. AFF. Pg 130

²⁹⁰ Schulz, William, F. The Torturer’s Apprentice, THE NATION, May 13, 2002. Pg 26

²⁹¹ *Wilson v. City of Chicago*, 6 F.3d 1233, 1236 (7th Cir. 1993). Statement by chief Judge Posner.

²⁹² *Prosecutor v. Delalic*, No. IT-96-21-T, ¶ 452, 454 (International Criminal Tribunal for Yugoslavia 1998).

<http://www.un.org/icty/celebici/trialc2/judgement/cel-tj981116e-1.htm>

²⁹³ Universal Declaration of Human Rights, General Assembly Resolution 217A of Dec. 10 1948. Article 5. Available at <http://www.un.org/Overview/rights.html>

²⁹⁴ International Covenant on Civil and Political Rights. General Assembly Resolution 2200 (XXI) of 16 Dec. 1966. Article 7. Available at <http://treaties.un.org/doc/db/survey/CovenantCivPo.pdf>

“placing an obligation on States Parties to take “effective legislative, administrative, judicial, or other measures to prevent acts of torture” within their respective territories and to incorporate the crime of torture as defined in the Convention into their national criminal justice systems”²⁹⁵. It provides a clear definition of torture²⁹⁶. The Convention on Torture has two strong features which are: Firstly, Torture cannot be accepted in any circumstances. This is in accordance with Article 2(2), which states that, “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”²⁹⁷. Secondly, the Torture Convention “The Convention follows the principle of compulsory universal application: that is to say, it is made applicable to all countries of the world (and not only to States Parties) so that even acts of torture committed in a non-Party country are punishable in a State Party to the Convention”²⁹⁸ as provided by Article 5 of the Convention²⁹⁹. Based on the wordings of the Torture convention, four vital points can be deduced, which are “a) there must be severe physical or psychological pain or suffering caused to the victim; b) it must be for a purpose; c) it must be a deliberate act; and d) it must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or person acting in an official capacity”³⁰⁰.

²⁹⁵ Van der Vyner, Johan, D. Torture as a Crime Under International Law. Albany Law Review. Vol. 67. Pg 431. Available at. Citing the work of Burgers, Herman & Danelius Hans. The United Nations Convention against Torture: A Handbook on the Convention against Torture and other Cruel, inhuman or degrading treatment or Punishment. 1988. Pg 178

²⁹⁶ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Article 1.

²⁹⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Article 2(2).

²⁹⁸ Van der Vyner, Johan, D. Torture as a Crime Under International Law. Albany Law Review. Vol. 67. Pg 431. Available at

²⁹⁹ See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984). Article 5.

³⁰⁰ Kuxing: Torture in Tibet. A special Report. Tibetan Centre for Human Rights & Democracy. Pg 9. Available at

Regional human rights instruments such as European Convention for the Protection of Human Rights and Fundamental Freedoms³⁰¹, American Convention on Human Rights³⁰², African Charter on Human and Peoples Rights³⁰³ also prohibit torture in all circumstances.

The main idea in this work is a new legal doctrine which challenges the imposition of the death penalty in the sense that for countries which practice the death row phenomenon such as Sierra Leone and the United States of America³⁰⁴ the argument of “death row phenomenon has explicitly been recognised as a violation of human rights in several international and domestic tribunals”³⁰⁵. The purpose of this chapter is to clearly show that the death row phenomenon amounts to torture of convicted persons waiting to be executed.

4.2. THE DEATH ROW PHENOMENON

Death row phenomenon can be best described as the long delay in prison of a person after he/she has been sentenced to death and awaits execution. Many pundits have gone further to discuss death row phenomenon in terms of the harsh treatment of prisons’ conditions in addition to long delay, that is, the “brutal, dehumanizing conditions of imprisonment”³⁰⁶. Therefore, death row phenomenon is “to be defined as prolonged delay under the harsh conditions of death row”³⁰⁷.

³⁰¹ Convention For The Protection of Human Rights and Fundamental Freedoms (‘European Convention on Human Rights’), (1955) 213 UNTS 221,

³⁰² The American Convention on Human Rights. 1144 UNTS 123. Adopted in 1978.

³⁰³ African Charter of Human and Peoples’ Rights, OAU Doc. CAB/LEG/67/3 Rev. 5. Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986). Available at http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/Banjul%20Charter.pdf

³⁰⁴ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law. EJIL (2000), Vol. 11, No. 4, 833-856. Pg, 833.

³⁰⁵ Ibid, Pg, 834.

³⁰⁶ Ibid, Pg, 834.

³⁰⁷ Ibid, Pg, 836.

Firstly, I will start with the concept of delay. This according to Patrick Hudson³⁰⁸ is “a fairly recent development”³⁰⁹. This is so as in the nineteenth century, executions were carried out immediately probably few hours or days the person was convicted to death. However, this is not the case today, for instance, in the USA, “the average length of time between sentence and execution has steadily increased from 51 months in 1977, to 133 months in 1997”³¹⁰. In Sierra Leone, presently there are convicted prisoners who are in Pademba Road prison that have been there for more than ten years waiting to be executed³¹¹. There are many factors responsible for this delay generally in most countries. The three main factors are firstly, the support for the death penalty is at a rapid decline, secondly, there are increasing laws mainly human rights principles that protect the rights of even convicted prisoners. This also accounts for appeals in international Tribunals such as the United Nations Human Rights Committee³¹². Thirdly, most convicted prisoners do not want to be executed and will do anything under the sun to prevent execution even if it means staying in prison for an uncertain period of time and sadly so even if it constitutes torture³¹³. The first and third points mainly the case for Sierra Leone. On the other hand, the harsh conditions of the prisons sum up the death row phenomenon. The death row section in any prison is different from that of the other sections. It is “an area in a prison which houses inmates awaiting execution, aptly described as a prison within a prison”³¹⁴. In most cases, prisoners are put in a cell where they stay for almost 23 hours a day and very little contact with

³⁰⁸ See Ibid, Pg 834.

³⁰⁹ Ibid, Pg 834.

³¹⁰ Bureau of Justice Statistics, Capital Punishment, 1997, Time Under Sentence of Death Sentence and Execution, by Race, 1977-1997, 20, Table 12. Cited by Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law. EJIL (2000), Vol. 11, No. 4, 833-856. Pg, 833.

³¹¹ An interview with Mohamed Sorie Kamara, Senior Prison officer of the Pademba Road Prison. Interview conducted in person on the 18th October, 2010.

³¹² Schabas, A, William. The Death Penalty as Cruel Treatment and Torture. 1996. Cambridge University Press Pg, 98.

³¹³ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law. EJIL (2000), Vol. 11, No. 4, 833-856. Pg, 835.

³¹⁴ Ibid, Pg. 835.

the rest of the world and all they do is think about the crimes they had committed and sometimes how they had been wrongly convicted for crimes they did not commit. Also, they think of their family members and loved ones and how their subsequent execution will impact them. In addition, they think of the “pending execution”³¹⁵ in respect of the time, pains and whether there will ever be a moratorium³¹⁶. In many occasions, “prisoners will face the moment of their execution, only to have a last minute stay granted, forcing them to relive their suffering until the next execution date”³¹⁷.

In Sierra Leone, with most of the death row inmates there is no date of execution slatted. Prison officers take advantage of this by extorting money from them with the assurance that their execution rests in their hands and if they do not want to be executed they should pay money directly to them³¹⁸. These conditions definitely lead to excessive mental torture and at times even physical deterioration³¹⁹ which might result to the situation that “some prisoners are reduced to little more than the living dead”³²⁰. It was against this backdrop that an Indian Judge Krishna Iyer J in the case of *RAJENDRA PRASAD v. STATE OF UTTAR PRADESH*³²¹ states that, “the (prisoner) must, by now, be more a vegetable than a person and hanging a vegetable is not a

³¹⁵ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law. *EJIL* (2000), Vol. 11, No. 4, 833-856. Pg, 835.

³¹⁶ Ibid, Pg 835 and an interview with Mohamed Sorie Kamara, Senior Prison officer of the Pademba Road Prison. Interview conduct in person on the 18th October, 2010.

³¹⁷ Ibid, Pg. 835.

³¹⁸ An interview with Mohamed Sorie Kamara, Senior Prison officer of the Pademba Road Prison. Interview conduct in person on the 18th October, 2010.

³¹⁹ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law. *EJIL* (2000), Vol. 11, No. 4, 833-856. Pg, 835.

³²⁰ Ibid, pg, 835.

³²¹ *Rajendra Prasad v. State of Uttar Pradesh* (1979) 3 SCR 78, at 130.

death penalty³²²”. Therefore, “executing such persons is inconsistent with the purposes of the death penalty, as the prescribed punishment was death, not torture followed by death”³²³.

It was in light with this that Professor Robert Johnson in his book *Death Work: A Study of Modern Execution Process* stated that the death row amounts to torture³²⁴. He stated that “that the notion that torture must involve overt physical violence is needlessly narrow. The pain and torture may take any form, physical, psychological, or both. Worse yet, according to Johnson, some contend that prisoners come to hunger for execution as an escape from the life they suffer on death row”³²⁵.

Also, the Judicial Committee of the Privy Council held in the case of *PRATT AND MORGAN v. ATTORNEY-GENERAL FOR JAMAICA*³²⁶ that, “In their Lordships’ view a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve... the death row phenomenon must not become established as a part of our jurisprudence”³²⁷.

The case of *SOERING v. UNITED KINGDOM*³²⁸ decided by the European Court of Human Rights is a landmark case in the area of death row phenomenon which, “changed the landscape of death row phenomenon cases forever, providing a seed of legitimacy for the doctrine in

³²² See Schabas, A, William. *The Death Penalty as Cruel Treatment and Torture*. 1996. Cambridge University Press Pg. 99 making reference of Judge Krishna Iyer J Statement in the case of *Rajendra Prasad v. State of Uttar Pradesh* (1979) 3 SCR 78, at 130.

³²³ Hudson, Patrick. *Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law*. *EJIL* (2000), Vol. 11, No. 4, 833-856. Pg. 836.

³²⁴ Johnson, Robert. *Death Work: A Study of Modern Execution Process*. Wadsworth Publishers. 2ed Edition. 1998

³²⁵ *Dying Twice: Incarceration on Death Row. A Symposium Held at the Association of the Bar of the City of New York*. June 17, 2002. Panelists NORMAN L. GREENE WILLIAM D. BUCKLEY RUSSELL STETLER. JOSEPH INGLE MICHAEL B. MUSHLIN Copyright ©, 2003 Norman L. Greene, et al. Pg. 855.

³²⁶ *Pratt and Morgan v Attorney-General for Jamaica*. (1994) 2 AC 1: (1993) 3 WLR 995: (1993) 4 All ER 769

³²⁷ *Ibid* at 786.

³²⁸ *Soering v. United Kingdom*, ECHR, (1989), Series A, No. 161; (1989) 28 ILM 1063; (1989). 11 European Human Rights Report 439

Tribunals around the world”³²⁹. Even though not very applicable to the jurisdictions of Sierra Leone and the United States of America, it had influenced the decisions of the courts in the two jurisdictions. The fact of the case is as follows: Jens Soering was brought to the United States of America as a child by his German Diplomat father and grew up in Virginia where he met his girl-friend Elizabeth Haysom. Both of them hated Haysom’s parents and decided to kill them. Soering executed the plan and stabbed both to death. Immediately, they escaped arrest and went to the United Kingdom. After six months, they were arrested on the allegation of cheque fraud. The USA officially requested the UK government for their extradition. Haysom did not challenge the extradition and so she was sent back to the USA where she was sentenced to 90 years imprisonment. However, Soering contested his extradition on the fears that if he returns to the USA, he would be convicted of murder and sentenced to death. The extradition treaty in question requires the USA to assure the UK that the death penalty would not be imposed³³⁰. For the UK government, that had wanted “an assurance from the prosecuting authorities of the relevant (US) State that a representation would be made to the judge at the time of sentencing that it is the wish of the United Kingdom that the death penalty should be neither imposed or carry out”³³¹. Soering did not believe that this assurance would prevent the State of Virginia from executing him. Therefore, he exhausted his domestic remedies in the UK which did not prevent his extradition, he then petitioned the European Commission of Human Rights and the European Court of Human Rights claiming violation under Article 3, 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms³³². However, for the

³²⁹ Ibid

³³⁰ See the Extradition Treaty: United States-United Kingdom, 8 June 1972

³³¹ Soering v. United Kingdom, ECHR, (1989), Series A, No. 161; (1989) 28 ILM 1063; (1989). 11 European Human Rights Report 439 at Para. 37.

³³² European Convention for the Protection of Human Rights and Fundamental Freedoms, (1955) 213 UNTS221; ETS 5.

purposes of this thesis, Article 3 is the most relevant and will be discussed further. Article 3 prescribes that, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”³³³. This case was a novelty in law, in the sense that he did not challenge the cruelty or torture aspect of the imposition and execution of the death penalty³³⁴, rather “he sought to demonstrate that Article 3 would be violated due to the unique circumstances of his case, especially the long delays in Virginia between the death sentence and execution (usually six to eight years)”³³⁵.

The Commission first considered the case and dealt with four major areas which are; firstly, whether the extradition to a country where there is a risk of torture and cruel treatment would impose responsibility on the extraditing country. They held it would be responsible. Secondly, they considered whether the death penalty violates the European Convention. Due to the fact that Article 2 of the Convention prescribes for the imposition of the death penalty, this was not a question of violation. However, the Commission considered the death row phenomenon which could raise an issue under the Convention³³⁶. Thirdly, the Commission considered the risk of the sentence of death in the state of Virginia which Soering could face if he is extradited. The Commission held that, “notwithstanding the assurance and the existence of mitigating factors, the risk that the applicant will be sentenced to death is a serious one³³⁷”. The final consideration was whether the death penalty amounts to “a degree of seriousness contrary to Article 3 of the

³³³ Ibid, Article 3.

³³⁴ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law. *EJIL* (2000), Vol. 11, No. 4, 833-856. Pg, 836.

³³⁵ Ibid, Pg.839.

³³⁶ Soering v. United Kingdom, ECHR, (1989), Series A, No. 161; (1989) 28 ILM 1063; (1989). 11 European Human Rights Report 439. Para. 102.

³³⁷ Ibid, Para. 120

Convention³³⁸”. The major argument that Soering put forward in this respect was the excessive delay in the appeal process in the state of Virginia which may take a long time probably up to eight year, well mostly due to the inmates’ delay.

In this vain the Commission held that due to the fact that this delay is mostly caused by the inmate to prevent or extend his execution³³⁹, it does not amount to torture or cruel treatment. On this basis, the Commission was of the opinion “that the death row phenomenon did not rise to a level of seriousness which violated Article 3 of the European Convention³⁴⁰”. The matter was however referred to the European Court of Human Right³⁴¹.

The Court in agreeing with the majority of the Commission’s decision disagreed strongly with the Commission on the point whether the death row phenomenon amounts to a violation of Article 3 of the European Convention. The Court considered the following points; firstly, the Court addressed the issue of the length of detention before the execution which is mostly caused by the prisoner, nonetheless, it refuses to blame the prisoner for this as it is aimed at saving him from execution. The Court noted that: “just as some lapse of time between sentence and execution is inevitable if appeal safe-guards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safe-guards to the full {...} The consequences is that the prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of

³³⁸ Ibid, Para, 122

³³⁹ Ibid, Para, 128

³⁴⁰ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law. EJIL (2000), Vol. 11, No. 4, 833-856. Pg, 841.

³⁴¹ Soering v. United Kingdom, ECHR, (1989), Series A, No. 161; (1989) 28 ILM 1063; (1989). 11 European Human Rights Report 439

death³⁴²”. Against this backdrop, the Court unanimously concluded that the delay constitutes torture and cruel treatment. Secondly, the Court addressed the “impact of the conditions on death row, such as the homosexual abuse and physical assaults³⁴³”. It concluded that “Whilst it might thus well be justifiable in principle, the severity of a special regime such as that operated on death row... is compounded by the fact of inmates being subject to it for a protracted period lasting on average six to eight years³⁴⁴”. In determining how his age and mental state would affect him if he was to experience the death row phenomenon, the Court held that they are “contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3³⁴⁵”.

In concluding the Court finally held as follows: “{ ... } having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant’s extradition to the United States would expose him to a real risk of treatment going beyond the threshold set by Article 3”³⁴⁶. This landmark case set the bedrock for other Courts around the world “to embrace the death row phenomenon”³⁴⁷ and have been cited in many cases and books.

³⁴² Ibid, Para, 106.

³⁴³ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law. *EJIL* (2000), Vol. 11, No. 4, 833-856. Pg, 842.

³⁴⁴ *Soering v. United Kingdom*, ECHR, (1989), Series A, No. 161; (1989) 28 ILM 1063; (1989). 11 European Human Rights Report 439. Para. 107.

³⁴⁵ Ibid, Pg 109.

³⁴⁶ *Soering v. United Kingdom*, ECHR, (1989), Series A, No. 161; (1989) 28 ILM 1063; (1989). 11 European Human Rights Report 439. Para. 111.

³⁴⁷ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law. *EJIL* (2000), Vol. 11, No. 4, 833-856. Pg, 842.

The United Nations Human Rights Committee over the years after the ruling in *SOERING'S* case had decided a lot of jurisprudences in respect of the death row phenomenon which are brought under Article 7 of the ICCPR³⁴⁸. Sierra Leone and the United States of America both have ratified this instrument. However, they have not signed the Optional Protocol which abolishes the death penalty completely and gives prisoners on death row “the right to petition the Committee with alleged infraction”³⁴⁹. The Committee also “will not accept delay alone as a violation of the ICCPR, but it will examine the facts of a particular case” in order to determine if it amounts to torture or cruel punishment³⁵⁰.

This was the relevant points decided in the some cases including the case of *PRATT AND MORGAN v. ATTORNEY-GENERAL FOR JAMAICA*³⁵¹, where it was held by the Judicial Committee of the Privy Council that keeping a convicted prisoner on death row a period of 14 years in harsh conditions amounted to torture and inhuman or degrading punishment which violates Section 17(1) of the Constitution of Jamaica. The Privy Council came to the conclusion that, "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute “inhuman or degrading punishment or other treatment”³⁵². But it decided that there was no violation in this case. Also, in the case of *COX v. CANADA*³⁵³, where Cox challenged his extradition to Pennsylvania as he claimed he would be at a risk of torture in death row. The Committee in deciding against him

³⁴⁸ See Article 7 of the International Covenant on Civil and Political Rights (ICCPR), (1976), 999 UNTS 171 which states “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

³⁴⁹ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law. *EJIL* (2000), Vol. 11, No. 4, 833-856. Pg, 844.

³⁵⁰ *Ibid*, Pg 844.

³⁵¹ *Pratt and Morgan v Attorney-General for Jamaica* [1994] 2 A.C. 1

³⁵² *Ibid*

³⁵³ *Cox v. Canada*. (No. 539/1993), UN Doc. CCPR/C/48/D/490/1993 (1994)

stated that there would be violation only if the prison condition was bad, and the possibility of appeal would take an unreasonable amount of time³⁵⁴.

However, there was a change in the jurisprudence of the Committee in 1994 with the case of FRANCIS v. JAMAICA³⁵⁵, where it was held that “it would examine the extent to which any delay was imputable to the state, the conditions of imprisonment, and the impact on the person involved {...} this analysis, and these considerations, constitute the proper inquiry in death row phenomenon cases”³⁵⁶. The fact of the case is that the Jamaican Court of Appeal had prevented the prisoner to appeal due to the fact that they had not issued a written judgment for 13 years irrespective of numerous requests by the prisoner. He had spent 13 years on death row in bad prison conditions where he was beaten, threaten to be put to death, and provoked by prison staff which adversely affected him mentally and resulted to him behaving like an animal. The Committee held that there was a violation of Article 7 of the ICCPR³⁵⁷. This was the one and only time the Committee accepted the death row phenomenon as described above. However, it has still been rigid with its approach to this concept and “has continually stated that it would be willing to accept the doctrine under the proper set of facts. Judging from the high standard the Committee has set, it may be very hard to prove a case”³⁵⁸.

Also, in some African countries, the courts have dealt with cases of the death row phenomenon.

A case in point is CATHOLIC COMMISSION FOR JUSTICE AND PEACE IN ZIMBABWE

³⁵⁴ Ibid.

³⁵⁵ Francis v. Jamaica. (No. 606/1994), UN Doc. CCPR/C/54/D/606/1994 (1995)

³⁵⁶ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law. EJIL (2000), Vol. 11, No. 4, 833-856. Pg, 846.

³⁵⁷ See Francis v. Jamaica. (No. 606/1994), UN Doc. CCPR/C/54/D/606/1994 (1995)

³⁵⁸ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner’s Human Rights Under International Law. EJIL (2000), Vol. 11, No. 4, 833-856. Pg, 846.

v. ATTORNEY-GENERAL decided by the Supreme Court of Zimbabwe it was held that in being held for between four and six years after being convicted and sentenced to death constituted to torture and inhuman or degrading punishment³⁵⁹ and the sentences were converted to life imprisonment. However, the Parliament of Zimbabwe quickly amended the Constitution which expressly state that death row delay will not amount to torture or cruel treatment³⁶⁰

Asia has not been an exception in this area, this can be seen in the Indian case of MADHU MEHTA v UNION of INDIA³⁶¹ where the Supreme Court of India held that an eight-year wait for the outcome of a mercy petition to the President for a convicted prisoner who was awaiting the execution amounts to torture and so was commuted to life imprisonment³⁶².

4.3. TORTURE FROM THE UNITED STATES OF AMERICA POINT OF VIEW

The Constitution of the United States of American does not provide for prevention of torture. Article 7 (Eight Amendment) prohibits “cruel and unusual punishment”³⁶³. However, the United States of America ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 in 1990³⁶⁴. As a result of this, it enacted the Torture Convention Implementation Act³⁶⁵, “with a view to bringing the U.S. criminal code into conformity with the Convention directives”³⁶⁶. The Act defines torture as, “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or

³⁵⁹ Catholic Commission for Justice & Peace in Zimbabwe v. Attorney-General, 14 Hum. Rts. L.J. 323 (1993).

³⁶⁰ Constitution of Zimbabwe Amendment (No. 13) Act 1993.

³⁶¹ [1989] 3 S.C.R. 775

³⁶² See Madhu Mehta v. Union of India [1989] 3 S.C.R. 775

³⁶³ See Article 7 of the Constitution of the United States of America.

³⁶⁴ 136 CONG. REC. 36, 198 (1990). Cited by Van der Vyner, Johan, D. Torture as a Crime Under International Law. Albany Law Review. Vol. 67. Pg 434.

³⁶⁵ See Torture Convention Implementation, Pub. L. No. 103-236, 108 Stat. 463 (1994).

³⁶⁶ Van der Vyner, Johan, D. Torture as a Crime Under International Law. Albany Law Review. Vol. 67. Pg 434.

suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control”³⁶⁷

The United States of America is notorious for delay which is widely responsible for a lot of prisoners on death row. This can explain the reservations they made to the ICCPR, in which they rejected the argument of the European Court of Human Rights in the Soering case that the death row phenomenon constitutes cruel and inhuman treatment³⁶⁸. In 1996, there was an average delay from the period of sentence to execution for 45 prisoners that were executed which was 10.5 years³⁶⁹. However, there has been inconsistency with the Courts in respect of dealing with the death row phenomenon and Courts have been reluctant to deal with the death row phenomenon³⁷⁰. Although this deliberation had started a long time ago, it has not been fully accepted in contemporary times. This issue was brought up in the case of *Re: MEDLEY*³⁷¹, where it held by the Supreme Court that, “When a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it...as to the precise time when his execution may take place”³⁷². This was followed in the case of *PEOPLE v. ANDERSON*³⁷³, where the Supreme Court of California was of the opinion that delay in prison after trial and to the date of execution can amount to cruel and inhuman

³⁶⁷ 18 U.S.C. § 2340 (2000). See the Torture Convention Implementation Act

³⁶⁸ John Dugard & Christine Van den Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 1998. Pg, 187-189.

³⁶⁹ Bureau of Justice Statistics, *Capital Punishment, 1996, Time under Sentence of Death and Execution, by Race, 1977-1996*, 12, Table 12.

³⁷⁰ Hudson, Patrick. *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law*. EJIL (2000), Vol. 11, No. 4, 833-856. Pg. 853

³⁷¹ *Re: Medley* 134 US 160 (1890)

³⁷² Statement made in the case of *Re: Medley* 134 US 160 (1890) cited by Hudson, Patrick. *Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law*. EJIL (2000), Vol. 11, No. 4, 833-856. Pg. 853

³⁷³ *People v. Anderson*, 493 P 2d 880, (Cal. 1972).

treatment. However, in most other cases around US such as *CHESSMAN v. DICKSON*³⁷⁴, where the convicted person had sent 11 years in death row, the Court was of the opinion that it does not amount to torture or cruelty. This might change in the future but as of now, there is no strong stance by the Courts to determine that the death row phenomenon amounts to torture. In the case of *LACKEY v. TEXAS*³⁷⁵, Justice Stevens stated that, “Though the importance and novelty of the question...are sufficient to warrant review by this Court, those factors also provide a principled basis for postponing consideration of the issue until it has been addressed by other Courts”³⁷⁶. This was also the case in 1998 in the case of *ELLEDGE v. FLORIDA*³⁷⁷ concerning a prisoner who had been in death row for 23 years, where the majority held that there was no beneficial reason to review the death row phenomenon. Justice Breyer dissented with the view that a review would in fact benefit the criminal system³⁷⁸. Even though the Courts have not been very effective in handling the death row phenomenon, some states executive have over the done treated it so seriously. For instance, in 2003, there was a landmark decision in the US by an outgoing Governor George Ryan who in the last day of his Governorship decided to commute all those on death row to life imprisonment based on the reason that the State had cleared more prisoners on death row than it had executed³⁷⁹.

4.4. TORTURE FROM THE SIERRA LEONE POINT OF VIEW

Sierra Leone has ratified most of the human rights instruments mentioned above and in the

³⁷⁴ *Chessman v. Dickson*, 275 F 2d 604 (9th Cir. 1960).

³⁷⁵ *Lackey v. Texas*, 514 US 1054 (1995)

³⁷⁶ Statement made by Justice Steven in the case of *Lackey v. Texas*, 514 US 1054 (1995)

³⁷⁷ *Elledge v. Florida*. 119 S Ct 366

³⁷⁸ *Ibid.* Justice Breyer’s dissent at 366.

³⁷⁹ See Stephen P. Garvey, *Is it Wrong To Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. Rev. 1319, 1319 n.1 (2004).

Constitution of Sierra Leone, it is provided for in Article 20(1) of the Sierra Leone Constitution that “No person shall be subject to any form of torture or any punishment or other treatment which is inhuman or degrading”³⁸⁰. It ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Sierra Leone does not have jurisprudence on death row phenomenon cases. No one has ever challenged it in Court. It has never been an issue in the Superior Court of Sierra Leone. People are still been convicted for crimes facing the death penalty, however, in the civilian court, once a person is sentenced to death, he is taken to the Pademba Road prison where he/she will be on death row probably for the rest of their lives. This I argue strongly amounts to torture. It is to be emphasised earlier that in order for the death row phenomenon to come into play, the physiological trauma and bad condition in the prison must be present. However, they are never sure whether they will be executed or not and live with this every day thinking they might be executed any day. The thought of the pains they may suffer, the thought of how their family members will react and so on is enough torture for any individual. In terms of the condition of the prison and the what prisoners on death row face a general survey was conducted by Sabrina Mahtani in 2005 of the main prison in Sierra Leone, that is, the Pademba Road prison located in Freetown where all death row prisoners are held. The condition in the prison is extremely bad and neglected³⁸¹. The main problem of the prison is overcrowding. This prison was built in 1904 and was meant for a capacity of 324 inmates, however, presently, there are more than 1,000

³⁸⁰ The Constitution of Sierra Leone Act, No.6 of 1991. Article 20 (1)

³⁸¹ This is from a personal point of view as I have visited the prison on a number of occasion and this is also supported by Mahtani, Sabrina and Robert Phillips. *The Death Penalty in Sierra Leone: Time for Change*. Lawyers Centre for Legal Assistance (LAWCLA). 2007.

prisoners³⁸². The building is badly kept with little or no maintenance, the walls are dilapidated, shortage of electricity and water supply³⁸³. This is indeed in violation to Rule 10 of the United Nations Standard Minimum Rules for the Treatment of Prisoners which states that “all accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and in particular to the cubic content of air, minimum floor space, lighting, heating and ventilation”³⁸⁴. Sanitary conditions are also poor as “there is a foul smell of sweat and each cell has only one toilet bucket”³⁸⁵.

Prisoners on death row are kept in a separate area from other convicted prisoners. These areas are always locked off from the other prisoners. They are under surveillance 24 hours a day by prison guards. Most times at night, there are no lights and their cells are completely dark³⁸⁶. All prisoners on death row are required to wear black shirts printed with ‘C’ in the front and are not allowed to join other convicted prisoners³⁸⁷. Beds are not provided for them and they only get mattresses to sleep. However, many of them have complained that they had to purchase these mattresses from prison staff. Therefore, those “who cannot afford to buy a mattress have to sleep on the floor”³⁸⁸.

³⁸² Mahtani, Sabrina and Robert Phillips. *The Death Penalty in Sierra Leone: Time for Change*. Lawyers Centre for Legal Assistance (LAWCLA). 2007. Pg, 32

³⁸³ Ibid, Pg 32.

³⁸⁴ Rule 10 of the United Nations Standard Minimum Rules for the Treatment of Prisoners

³⁸⁵ Mahtani, Sabrina and Robert Phillips. *The Death Penalty in Sierra Leone: Time for Change*. Lawyers Centre for Legal Assistance (LAWCLA). 2007. Pg, 39.

³⁸⁶ An interview with Mohamed Sorie Kamara, Senior Prison officer of the Pademba Road Prison. Interview conducted in person on the 18th October, 2010.

³⁸⁷ Mahtani, Sabrina and Robert Phillips. *The Death Penalty in Sierra Leone: Time for Change*. Lawyers Centre for Legal Assistance (LAWCLA). 2007. Pg, 37

³⁸⁸ Ibid, Pg, 38.

There is also the problem of shortage of food supply to the prisoners³⁸⁹ which is contrary to Principle 20(1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners which states that “Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength of wholesome quality and well prepared and served”³⁹⁰. According to Sabrina Mahtani, “some prisoners complained that they did not receive dinner {...} diet is not varied in any way and meat and fish seem to be only rarely available. Prison officials claimed that 1,400 Leones (less than £0.30) is spent on food per prisoner per day”³⁹¹.

Also, there is a problem of medical attention and very poor facilities. The Prison has only one medical doctor on full time bases and assisted by 8 nurses. However, only one nurse is assigned to the prisoners on death row. There is also allegation that prisoners only get medical attention when they pay money to the medical officers³⁹². Prisoners on death row usually suffer from rheumatism and pneumonia, due to the fact that do not sleep on beds and if you cannot purchase a mattress, then you have to sleep on the floor. Also, prisoners on death row allege that they suffer skin disease due to the fact that they stay in “solitary confinement” and so do not have access to water for showering³⁹³. “Many have also experienced hyper tension and anxiety due to the prospect of imminent execution”³⁹⁴.

³⁸⁹ Ibid. Pg. 40.

³⁹⁰ Principle 20(1) of the United Nations Standard Minimum Rules for the Treatment of

³⁹¹ Mahtani, Sabrina and Robert Phillips. *The Death Penalty in Sierra Leone: Time for Change*. Lawyers Centre for Legal Assistance (LAWCLA). 2007. Pg. 40.

³⁹² Ibid. Pg. 42.

³⁹³ Ibid. Pg. 44.

³⁹⁴ Ibid. Pg. 44.

There is also the major problem of mental disorder. There is “little provision for psychiatric health” in the prison. If a prisoner is suffering from a mental disorder he is suppose to be taken to the only mental hospital in Sierra Leone which is based in Freetown, however, prisoners on death row who are likely to suffer mental disorder are not allowed to be taken to this hospital but to be treated in the prison, but this is not practical as there is only one psychiatric doctor in Sierra Leone and he is permanently stationed at the hospital, therefore, they get no or limited access to mental treatment³⁹⁵.

Prisoners in the prison have limited access to visit from family members, friends and loved ones. Officially, prisoners on death row are allowed only one visit in two weeks for a period of about 10 minutes of which there is no privacy³⁹⁶. However, “over 50% of condemned prisoners have never been visited at Pademba Road by family members”³⁹⁷. There is allegation that visit is only allowed on the payment of bribes and “that prison officers had harassed and molested wives who were visiting their husbands on death row”³⁹⁸.

There is not much of allegation of physical abuse in the prison of prisoners on death row. However, there are strong allegations of “psychological abuse” on death row inmates. For instance, “prisoners stated that in January 2005 prison officers opened the doors to the gallows, which face the condemned cells, and cleaned and polished them in front of the condemned prisoners stating that they were getting them ready for use shortly”³⁹⁹. This is absolute torture.

³⁹⁵ Ibid. Pg. 46.

³⁹⁶ An interview with Mohamed Sorie Kamara, Senior Prison officer of the Pademba Road Prison. Interview conduct in person on the 18th October, 2010.

³⁹⁷ Mahtani, Sabrina and Robert Phillips. *The Death Penalty in Sierra Leone: Time for Change*. Lawyers Centre for Legal Assistance (LAWCLA). 2007. Pg. 49.

³⁹⁸ Ibid. Pg. 49.

³⁹⁹ Ibid. Pg. 49 & 50.

Death row brings us to a very practical issue, unfortunately, the pains an individual might suffer for the rest of his life. “The prisoner lies for years in his cell with a very real possibility hanging over him, every single day, that he will be killed”⁴⁰⁰. At any time in his sentence, the prison officers will approach him and inform him that, “it is time”⁴⁰¹. “To begin with, the people on death row are not dead yet. They may never be executed. Some may go back to the general prison population. Some may be exonerated. There is no basis for putting a prisoner into a situation where he is driven half or completely insane, if the thought that he was going to be executed was not enough to do that already. We simply should not torture people”.⁴⁰² From this standpoint, death row can be referred to as an “institutionalized hell”⁴⁰³. This was also supported by the Constitutional Court of South Africa in the case of *STATE V. MAKWANYANE*⁴⁰⁴ where they held that the “Death is the most extreme form to which a convicted criminal can be subjected. Its execution is final and irrevocable... Once sentenced, the prisoner waits on death row in the company of other prisoners under sentence of death, for the processes of their appeals and the procedures for clemency to be carried out. Throughout this period, those who remain on death row are uncertain of their fate, not knowing whether they will ultimately be reprieved or taken to the gallows. Death is a cruel penalty and the legal processes which necessarily involve waiting in uncertainty for the sentence to be set aside or carried out, add to the cruelty”⁴⁰⁵

⁴⁰⁰ Dying Twice: Incarceration on Death Row. A Symposium Held at the Association of the Bar of the City of New York. June 17, 2002. Panelists NORMAN L. GREENE WILLIAM D. BUCKLEY RUSSELL STETLER. JOSEPH INGLE MICHAEL B. MUSHLIN Copyright ©, 2003 Norman L. Greene, et al. Pg. 855.

⁴⁰¹ Rev. Carroll Pickett & Carlton Stowers, *Within These Walls: Memoirs of a Death House Chaplain*, ST. MARTIN'S PRESS, 2002, at 73; Norman L. Greene, *The Context of Executive Clemency: Reflections on the Literature of Capital Punishment*, 28 CAP. U. L. REV. 513, 525, n. 34 (2000).

⁴⁰² Dying Twice: Incarceration on Death Row. A Symposium Held at the Association of the Bar of the City of New York. June 17, 2002. Panelists NORMAN L. GREENE WILLIAM D. BUCKLEY RUSSELL STETLER. JOSEPH INGLE MICHAEL B. MUSHLIN Copyright ©, 2003 Norman L. Greene, et al. Pg. 855.

⁴⁰³ Hudson, Patrick. Does the Death Row Phenomenon Violate a Prisoner's Human Rights Under International Law. *EJIL* (2000), Vol. 11, No. 4, 833-856. Pg

⁴⁰⁴ *State v Makwanyane*. Constitutional Court of the Republic of South Africa, 1995 Case No.CCT/3/94, [1995] 1 LRC 269, Judgment of Justice Chaskalson.

⁴⁰⁵ *State v Makwanyane*, Constitutional Court of the Republic of South Africa, 1995 Case No.CCT/3/94, [1995] 1 LRC 269, Judgement of Justice Chaskalson.

CHAPTER FIVE

CONCLUSION

The death penalty has been practiced by most societies in the world in history. Today it is carried out by some countries for the very serious crimes even when a number of countries have abolished it. Due to its barbaric nature, the death penalty has attracted a heated debate about its usefulness and there is continue positive trend moving towards complete abolition around the world, especially with international and regional organizations, Tribunal and institutions.

This thesis mainly dealt with the modern era of the imposition of the death penalty in many countries and mainly focused on Sierra Leone and the United States of America.

Sierra Leone and the United States of America continue to use the death penalty to punish offenders of certain heinous crimes. Sierra Leone stated the imposition of the death penalty a long time ago and had its last execution in 1998. The United States of America has experience the imposition of the death penalty since the early establishment of the country and continue until 2010. In both countries there have been strong challenges for its abolition from both international and national pressure, however, there is a lack of will power from the authorities to

completely do away with it. On the other hand, there is a school of thought which believes that retaining the death penalty is very useful for the survival of machinery of justice in a given state.

This research work was aimed at proving that the death penalty amounts to torture and mainly focused on how the death row phenomenon amounts to torture. This study about the death penalty does not deal with torture as a result of its imposition by the courts but the failure to execute an individual who is kept in prison for a long uncertain time after conviction to face the death penalty. It was against this backdrop that I came to the conclusion that the death penalty amounts to torture. This is what is known as the death row phenomenon. This answers the question of the relationship between the death penalty and criminality especially when the provisions of human rights instruments in respect of torture are violated. This led to the inevitable question of what is the best mechanism of applying the death penalty and will the abolition of the death penalty promote human rights principles? And my conclusion is that abolishing the death penalty in Sierra Leone, the United States of America and the world at a whole is the best solution to prevent torture in respect of death row phenomenon and this will promote human right principles.

The main idea in this work is a new legal doctrine which challenges the imposition of the death penalty in the sense that for countries which practice the death row phenomenon such as Sierra Leone and the United States of America explicitly led to violation of human rights prescribes which is true of several international and domestic tribunals. The purpose of this thesis was to clearly show that the death row phenomenon amounts to torture of convicted persons waiting to be executed. The conditions of prison cells especially for developing countries such as Sierra Leone is in a very bad state and prisoners do not get access to basic facilities that are to be available under the minimum standard prescribe for prisoners.

It is seen clearly in the argument that the death penalty does not necessarily deter crimes and might promote miscarriage of justice, in this vain it is not useful in any civilised society. As a result even though my argument in this thesis is not challenging the imposition of the death penalty by the Court but the fact that it amounts to torture due to death row phenomenon, I am strongly of the opinion that it is not a good method of punishment and has a clear link with criminality especially the manner it is carried out. Therefore, I suggest a complete abolition of the death penalty. Public opinion is shifting vehemently to this view in the world. Against this backdrop, life without the possibility of being set free should be a sentencing option in all death penalty cases in every jurisdiction that imposes the death penalty. In abolishing the death penalty, it would prevent the death row phenomenon which would be totally absent.

Torture is a very serious crime in the international legal system and is almost all international and national human rights instruments in the world deal with the issue of torture as a non-derogatory norm. Therefore, if the death penalty in the sense of the death row phenomenon amounts to torture then it makes it a crime to impose the death penalty on persons without immediate execution. Against this backdrop, I strongly suggest that it is completely abolish.

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INTERVIEW

Mohamed Sorie Kamara, Senior Prison officer of the Pademba Road Prison. Interview conducted in person on the 18th October, 2010.

