

# Breaking new ground: The need for a protocol to the African Charter on the abolition of the death penalty in Africa

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## Summary

*The 1980s saw the drafting and adoption of international treaties on the abolition of the death penalty. In the European and Inter-American human rights systems, steps have been taken to abolish the death penalty by means of the adoption of protocols to their respective human rights treaties. Therefore, the African continent is the only region with a human rights treaty that does not have a protocol on the abolition of the death penalty. Human rights systems need to be constantly adapted to match changing conditions. Accordingly, in view of the international human rights developments and trends towards the abolition of the death penalty, this article addresses the need for a protocol to the African Charter on Human and Peoples' Rights on the question of the abolition of the death penalty in Africa.*

[W]e urge the OAU [now African Union] to strongly consider adopting an additional protocol to the African Charter aiming at the abolition of the death penalty.<sup>1</sup>

## 1 Introduction

The question addressed in this article is whether there is need for a

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<sup>1</sup> K Acheampong 'Reforming the substance of the African Charter on Human and Peoples' Rights: Civil and political rights and socio-economic rights' (2001) 1 *African Human Rights Law Journal* 185 201.

protocol on the abolition of the death penalty in Africa. The African Charter on Human and Peoples' Rights (African Charter)<sup>2</sup> makes no mention of the death penalty or the need to abolish it.<sup>3</sup> Further, only six African states have ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (CCPR), aiming at the abolition of the death penalty.<sup>4</sup> These states are Mozambique, that became a state party on 21 July 1993, Namibia, on 28 November 1994, Seychelles, on 15 December 1994, Cape Verde, on 19 May 2000, South Africa, on 28 August 2002, and Djibouti, on 5 February 2003.<sup>5</sup> Considering the few number of ratifications of the Second Optional Protocol, one might pose the question: Should one not encourage African states to ratify the existing Protocol instead of seeking the adoption of a new protocol addressing the same issue? The answer is simple. African states have realised that international human rights instruments do not always address the unique problems of the continent.<sup>6</sup> Therefore, a protocol to the African Charter would gain more legitimacy, as it will be African-specific. That is, it will take into consideration the unique problems of the continent. The above probably explains, in part, why not all the abolitionist and *de facto* abolitionist African states have ratified the Second Optional Protocol.

The legal basis for the adoption of a protocol on the abolition of the death penalty in Africa is found in article 66 of the African Charter. This article provides that 'special protocols or agreements may, if necessary, supplement the provisions of the present Charter'. Since the protocol would, most likely, take into consideration the unique problems of the continent, it stands a better chance of effectively supplementing the provisions of the African Charter than the Second Optional Protocol. The principles enshrined in the protocol would be relevant in interpreting other human rights instruments on the continent in general, and article 4 of the African Charter in particular.

This article begins by answering the question why there is a need for a protocol on the abolition of the death penalty in Africa. The experi-

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<sup>2</sup> Adopted on 27 June 1981 and entered into force on 21 October 1986 (OAU Doc CAB/LEG/67/3 rev 5 (1982) 21 *International Legal Materials* 58).

<sup>3</sup> Art 4 prohibits the 'arbitrary' deprivation of life, which some could interpret as permitting the death penalty.

<sup>4</sup> Adopted by the UN General Assembly on 15 December 1989, entered into force on 11 July 1991. The Protocol has been ratified by 54 states and signed by eight. For the ratification status of international instruments on the abolition of the death penalty, see <http://web.amnesty.org/pages/deathpenalty-treaties-eng> (accessed 25 February 2005).

<sup>5</sup> It should be noted that São Tomé and Príncipe (6 September 2000) and Guinea-Bissau (12 September 2000) are signatories to the Protocol.

<sup>6</sup> M Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 40.

ences of the United Nations (UN), European and Inter-American human rights systems on the subject are then considered. Subsequently, drawing from the experiences of the above systems, the article makes suggestions with regard to the drafting process and the content of such a protocol.

## 2 Why the need for a protocol?

The ultimate test for any legal system that purports to deal with human rights is the difference it makes to the lives of people.<sup>7</sup> The adoption of a protocol on the death penalty would definitely make a difference to the lives of people, especially those accused of capital offences. A protocol on the abolition of the death penalty in Africa has an important place in the framework of human rights protection in Africa. It would be essential in enhancing human rights protection in Africa. As article 4 of the African Charter makes no mention of the death penalty and has not been interpreted in the context of the death penalty, a protocol to the African Charter on the abolition of the death penalty is necessary to afford full protection of the right to life and, generally, to clarify the situation of the death penalty in Africa.

Why adopt a protocol? Why not push for the interpretation or amendment of article 4 of the African Charter? These are questions that would certainly cross the minds of many. At present, the African Commission on Human and Peoples' Rights (African Commission) is the supervisory body of the African Charter. According to article 45(3) of the African Charter, the African Commission would only be in the position to interpret article 4 in the context of the death penalty, if it is requested to do so by a state party, an institution of the African Union (AU), or an organisation recognised by the AU. Alternatively, if the African Commission were presented with a direct challenge to the death penalty based on article 4, then it would be in a position to interpret article 4.

This could be a problematic route with regard to addressing the question of the abolition of the death penalty in Africa, as inspired boldness has not been the hallmark of the African Commission and several scholars have commented generally on the relative inefficacy, thus far, of the Commission.<sup>8</sup> Nevertheless, abolitionist state parties (including *de facto* abolitionists), institutions of the AU and African organisations are encouraged to request an interpretation of article 4 of the African Charter in the light of the abolition of the death penalty in

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<sup>7</sup> C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 155 156.

<sup>8</sup> D van Zyl Smit 'The death penalty in Africa' (2004) 4 *African Human Rights Law Journal* 1 7.

Africa. The adoption of a protocol on the abolition of the death penalty would facilitate an interpretation of article 4.

Regarding the question of an amendment of article 4 of the African Charter,<sup>9</sup> it might not be feasible at the moment considering the status of abolition in Africa. Only 12 African countries have abolished the death penalty in law and practice.<sup>10</sup> Therefore, most African states still retain the death penalty in their statutes, despite the growing international human rights standards in general,<sup>11</sup> and standards on the abolition or limitation of the death penalty in particular.

Furthermore, a protocol on the abolition of the death penalty in Africa is desired, considering the international human rights developments and trends towards the abolition of the death penalty.<sup>12</sup> In particular, the developments and trend towards the abolition of the death penalty in Africa necessitates such a protocol. This is even more so, considering that for human rights systems to be efficient, they need to be constantly adapted to match changing conditions. One of the means of such adaptation could be through the adoption of protocols to supplement the existing human rights instruments.

The changing conditions in Africa indicate a trend towards the abolition of the death penalty. First, when the African Charter was adopted in 1981, it was not made clear whether the drafters intentionally omitted reference to the death penalty. However, in 1990, a trend towards abolition of the death penalty was evidenced with the adoption of the African Charter on the Rights and Welfare of the Child;<sup>13</sup> and

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<sup>9</sup> Art 68 of the African Charter states as follows: 'The present Charter may be amended if a State party makes a written request to that effect to the Secretary-General of the Organization of African Unity. The Assembly of Heads of State and Government may only consider the draft amendment after all the States parties have been duly informed of it and the Commission has given its opinion on it at the request of the sponsoring State. The amendment shall be approved by a simple majority of the State parties. It shall come into force for each State which has accepted it in accordance with its constitutional procedure three months after the Secretary-General has received notice of acceptance.'

<sup>10</sup> These countries are Cape Verde (1981), Mozambique (1990), Namibia (1990), São Tomé and Príncipe (1990), Angola (1992), Guinea Bissau (1993), Seychelles (1993 (abolished the death penalty for ordinary crimes in 1979)), Mauritius (1995), Djibouti (1995 (only one person had received a death sentence since independence in 1977 and the sentence was commuted)), South Africa (1997 (abolished the death penalty for ordinary crimes in 1995)), Côte d'Ivoire (2000) and Senegal (2004).

<sup>11</sup> Generally, the above standards are relevant as most African states are parties to major international human rights instruments, some, which aim at limiting the imposition of the death penalty. For the status of ratification of international and regional (African) human rights instruments by African states, see C Heyns (ed) *Human rights law in Africa* (2004) 48 106.

<sup>12</sup> For a discussion of the international human rights developments and trends towards abolition, see, generally, W Schabas *The abolition of the death penalty in international law* (2002).

<sup>13</sup> Adopted in July 1990 and entered into force on 19 November 1999 (OAU Doc CAB/LEG/24.9/49 (1990)).

in 2003, with the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.<sup>14</sup> Both instruments place restrictions on the imposition of the death penalty on certain categories of persons — persons below 18 years of age and expectant mothers or mothers of infants and young children.<sup>15</sup> Their adoption is a commendable step towards the abolition of the death penalty in Africa.

In 1999, for the first time, the African Commission came close to addressing the question of the abolition of the death penalty. The Commission passed a resolution urging states to envisage a moratorium on the death penalty, to limit its imposition to the most serious offences and to reflect on the possibility of abolishing the death penalty.<sup>16</sup> In *Interights et al (on behalf of Bosch) v Botswana*,<sup>17</sup> the African Commission, again, came close to addressing the question of the abolition of the death penalty in Africa. The Commission, in its decision, tactfully concedes that the abolition of the death penalty in Africa is desirable, when it encourages African states to take all measures to refrain from using the death penalty.<sup>18</sup>

The adoption of a protocol on the abolition of the death penalty would fortify the above recommendations of the African Commission. In view of the emerging debate on the question of the death penalty in Africa,<sup>19</sup> the African system would be more responsive to the needs of a protocol on the subject. This is because the debate in itself is already an important contribution towards the improvement of the system in affording better protection of human rights in general.

Other developments on the African continent indicate changing conditions with regard to the death penalty. There has been progress towards the commutation of death sentences on the African continent. For example, in 2003 in Kenya, the death sentences of 195 persons were commuted and 28 others, who were under the sentence of death and had

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<sup>14</sup> Adopted by the 2nd ordinary session of the Assembly of the African Union (AU) in Maputo, 11 July 2003.

<sup>15</sup> See arts 5(3) & 30(e) of the African Children's Charter and art 4(2)(j) of the African Women's Protocol.

<sup>16</sup> Thirteenth Annual Activity Report (1999-2000) Annex IV.

<sup>17</sup> Communication 240/2001, *Interights et al (on behalf of Bosch) v Botswana* Seventeenth Annual Activity Report: 2003-2004 (African Commission). The Seventeenth Annual Activity Report was adopted by the Assembly of the AU during its 4th ordinary session, held in Abuja, Nigeria from 30 to 31 January 2005 (Assembly/AU/Dec 56(IV)).

<sup>18</sup> n 17 above, para 52.

<sup>19</sup> During the Commission's 36th ordinary session (2004), for the first time in the Commission's agenda, the death penalty was one of the issues discussed. Commissioner Chirwa initiated debate on the death penalty in Africa, urging the Commission to take a clear position on the subject. She recommended that in view of the international and human rights developments and trends, it is necessary for the continent to initiate constructive debate on the question of the death penalty in Africa.

served 15 to 20 years in prison, were released.<sup>20</sup> In 2004 in Cameroon, a new decree was passed, which provides for the commutation of the death sentences of persons originally sentenced to death before the date of signature of the decree.<sup>21</sup> A *de facto* moratorium has been in place in Zambia since 1997, and the President has promised never to sign execution warrants.<sup>22</sup> On 19 April 2003, Mwanawasa appointed a commission to review the Constitution, with one of the specific terms of reference being to advise on the future of the death penalty in Zambia.<sup>23</sup>

Also, in Nigeria, on 13 November 2003, the government set up the national study group on the death penalty, which was tasked with preparing an advisory opinion to guide the government on whether or not to abolish the death penalty.<sup>24</sup> The study group recommended that an official moratorium on executions be put in place until the Nigerian criminal justice system can ensure fundamental fairness and due process in capital cases and minimise the risk of innocent people being executed.<sup>25</sup>

The Truth and Reconciliation Commission (TRC) of Sierra Leone just concluded its report, in which it recommended, *inter alia*, the abolition of the death penalty and the immediate repeal by parliament of all laws authorising the use of capital punishment.<sup>26</sup> The TRC further recommended the introduction of a moratorium on all judicially sanctioned executions and the immediate commutation of existing death sentences.<sup>27</sup> Also, in April 2004, the Ugandan Minister of Justice and Constitutional Affairs, Mukwaya, said the government was considering substituting the death penalty with long jail terms.<sup>28</sup>

What is more, there has been significant progress towards ending the death penalty in Southern Africa,<sup>29</sup> following intense lobbying from human rights activists in the region. There is also an apparent abolition trend in the countries of the Economic Community of West African States (ECOWAS).<sup>30</sup>

<sup>20</sup> Hands Off Cain *The death penalty worldwide: 2004 report* (2004) 50.

<sup>21</sup> Art 1 of Decree No 2004/344 of 29 December 2004 on the commutation and remission of sentences. The Decree was published in *Cameroon Tribune* No 8258/4457 of 31 December 2004 13. It should be noted that art 3 of the Decree precludes the application of art 1 on repeat offenders and persons sentenced for, *inter alia*, assault causing the death of a minor, and theft with violence entailing the death of a person.

<sup>22</sup> Hands Off Cain (n 20 above) 51.

<sup>23</sup> As above.

<sup>24</sup> E Anaba 'Law and human rights: Death penalty: Options for the government — Study group' *Vanguard* (Lagos) 5 November 2004.

<sup>25</sup> As above.

<sup>26</sup> The TRC Report is available at <http://www.iss.co.za> (accessed 25 February 2005).

<sup>27</sup> As above.

<sup>28</sup> Hands Off Cain (n 20 above) 56.

<sup>29</sup> See D Mavunduse 'A new millennium free from death penalty in Southern Africa' <http://www.sardc.net/editorial/sanf/1999/09/30-09-199-nf2.htm> (accessed 25 February 2005).

<sup>30</sup> Amnesty International *West Africa: Time to abolish the death penalty* (2003) AI Index: AFR 05/003/2003.

Moreover, some African states, especially *de facto* abolitionist states, for example Malawi and Kenya, hang on to capital punishment with clearly little commitment to use it as a means of crime control. This lack of commitment and the above developments could be understood to mean that some African states have recognised the undesirability of the death penalty, thus rendering the continent more susceptible to the idea of the adoption of a protocol on the abolition of the death penalty.

The flaws in the application of the death penalty in Africa should convince the AU and African states that a protocol on the abolition of the death penalty in Africa is much needed. For example, in relation to innocent defendants, the finality of the death penalty in itself is problematic. If an innocent person is unjustly imprisoned, he can be released and compensated if it is discovered. But unlike all other criminal punishments, the death penalty is uniquely irrevocable. If an innocent person is killed, the person cannot be brought back to life if it is discovered that the person was unjustly executed.

Convictions for capital crimes have to be free of error so as to ensure that an innocent person is not sentenced to death.<sup>31</sup> However, the possibility of error cannot be excluded from any system of justice because of certain factors, which affect any case that comes before the court, that are almost certainly present to some degree in all court systems. These factors include the difference that exists between the rich and the poor, between good and bad prosecutors, between good and bad defence, between severe and lenient judges, between judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class.<sup>32</sup> Therefore, despite the procedural safeguards that have to be followed before the death penalty is imposed, there is still the chance of judicial error, leading to the conviction of innocent persons.<sup>33</sup>

There have been reports of persons from countries in Africa, for example Malawi, being released from prison, sometimes after many years in custody, on the grounds of their innocence.<sup>34</sup> Also, persons have been sentenced to death in Uganda and released after many years

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<sup>31</sup> Despite the evolving standards of proof, such as DNA testing, the risk of executing the innocent still exists. Notwithstanding the use of DNA testing in the USA, eg, the most influential and troubling aspect of the death penalty is the demonstrable failure of the system to convict and sentence only the guilty; see H Bedau 'The present situation of the death penalty in the United States' in Council of Europe *Death penalty: Beyond abolition* (2004) 209.

<sup>32</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 54 (*Makwanyane*).

<sup>33</sup> Eg, notwithstanding the sophisticated legal system of the United Kingdom, the inbuilt checks and balances in the system of criminal procedure, persons have been convicted and executed as a result of judicial error; see G Devenish 'The historical and jurisprudential background to the application of the death penalty in South Africa and its relationship with constitutional and political reform' (1992) 5 *South African Journal of Criminal Justice* 1 17.

<sup>34</sup> R Hood *The death penalty: A worldwide perspective* (2002) 132.

on grounds of their innocence. For example, Mpagi was on death row for 19 years in Luzira Maximum Security Prison for murder. It later turned out that the man he was accused of having murdered was alive. His conviction was therefore the result of an irresponsible justice system and indifferent investigators.<sup>35</sup>

In addition, capital punishment is a source of agonising controversy among judges who have moral reservations about the death penalty and who are legally obliged in certain circumstances to impose it.<sup>36</sup> Arbitrariness in the use of the death penalty cannot be eliminated because of the imperfections inherent in criminal trials. At every stage of the process, there is an element of chance, as the outcome is dependent upon factors such as the way the police investigate the case, the way the prosecutor presents the case, how effectively the accused is defended, the personality and particular attitude to capital punishment of the trial judge and, if it goes on appeal, the judges who are selected to hear the appeal.<sup>37</sup> Overall, the outcome is dependent on respect for fair trial rights, and the degree of chance can be reduced if fair trial rights are respected.<sup>38</sup> Nonetheless, inadequate legal aid and prosecutorial discretion, for example, result in some defendants being sentenced to death and executed while others convicted of similar crimes are not.<sup>39</sup>

Lastly, a protocol on the abolition of the death penalty in Africa is needed because, in the presence or absence of an extradition treaty, a state party to the protocol can invoke it to refuse extradition from its state to a country in which capital punishment still exists. This has been the case in the European system in which Protocol No 6 (discussed below) has been invoked to refuse requests for extradition from a Council of Europe member state to third countries in which capital punishment still exists.<sup>40</sup>

The foregoing paragraphs have illustrated that there is a need for the adoption of a protocol to the African Charter on the question of the abolition of the death penalty in Africa. The adoption of a protocol

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<sup>35</sup> See 'Foes of death penalty making gradual gains in Africa' *The New York Times* 20 October 2004.

<sup>36</sup> Devenish (n 33 above) 19.

<sup>37</sup> *Makwanyane* (n 32 above) para 48.

<sup>38</sup> Regrettably, to a great extent, increased concern about the use of the death penalty in Africa is as a result of the death penalty being imposed after trials that do not conform to international and national fair trial standards. Eg, trials are conducted after excessive delay, and in some cases defendants have no access to legal assistance and lack proper defence.

<sup>39</sup> E Prokosch 'The death penalty versus human rights' in Council of Europe (n 31 above) 29.

<sup>40</sup> H Krüger 'Protocol No 6 to the European Convention on Human Rights' in Council of Europe (n 31 above). Also see, generally, *Soering v United Kingdom* Judgment of 7 July 1989, Ser A Vol 161 (European Court of Human Rights) (1989) 11 EHRR 439.



would be the ideal option in enhancing human rights protection in general, and the right to life in particular, on the continent.

### 3 Comparative international experiences

Protocols on the abolition of the death penalty have been adopted under the UN, European and Inter-American human rights systems. The adoption of protocols on the death penalty in the European and Inter-American systems explains why encouraging African states to ratify the Second Optional Protocol to CCPR should not be the only option, as it is also necessary to adopt a regional protocol on the death penalty. Thus, Africa is the only system that is yet to adopt a protocol on the abolition of the death penalty. The experiences of the UN, European and Inter-American systems in this regard could therefore provide some guide with regard to the process of adoption (drafting and otherwise) and content of a protocol on the abolition of the death penalty in Africa.

#### 3.1 The United Nations experience

The first draft of the Second Optional Protocol to CCPR was submitted to the UN General Assembly at its 1980 session, which stated in its article 1 as follows:<sup>41</sup>

- 1 Each State party shall abolish the death penalty in its territory and shall no longer foresee the use of it against any individual subject to its jurisdiction nor impose nor execute it.
- 2 The death penalty shall not be re-established in States that have abolished it.

The resolution, to which the draft was annexed, was adopted with consensus.<sup>42</sup> After several drafts, in respect of which various governments made comments, the final Protocol (Second Optional Protocol to CCPR) was adopted in 1989, with 59 votes in favour, 26 against and 48 abstentions.<sup>43</sup> Those who deal with human rights on a daily basis, such as governments, were involved in the process. The Preamble of the Protocol states that measures towards abolition should be seen as progress in the enjoyment of the right to life. The Protocol abolished the death penalty, but gave states the option to use it in wartime. Article 1 of the Protocol provides:

- 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.

<sup>41</sup> Schabas (n 12 above) 174. According to the draft art 2, art 1 would be regarded as an additional article to CCPR, and no derogation could be permitted from art 1.

<sup>42</sup> See UN Doc A/C 3/35/SR.84 paras 9-10.

<sup>43</sup> For a discussion of the drafting process, see Schabas (n 12 above) 171-182.

Article 2(1) provides:

No reservation is admissible to the present Protocol, except for a reservation made at the time of ratification or accession that provides for the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime.

A more nuanced position was preferred — abolition of the death penalty in peacetime — as most states retained the death penalty for crimes committed under military law or in exceptional circumstances. It was therefore thought that, allowing for the option of using the death penalty in wartime would make it possible for more states to accede to, or ratify the protocol. It should be noted that a notice to the UN Secretary-General of the relevant provisions in the national legislation applicable during wartime must accompany reservations to the Protocol, which are only permissible at the time of ratification.<sup>44</sup>

Furthermore, article 3 of the Second Optional Protocol to CCPR requires state parties to the Protocol to include in their periodic reports to the UN Human Rights Committee, information on the measures adopted to give effect to the Protocol. The provisions of the Protocol apply as additional provisions to CCPR and article 1 is not subject to any derogation under CCPR.<sup>45</sup>

### 3.2 The European experience

The drafting of a protocol on the abolition of the death penalty in the European human rights system was preceded by studies on capital punishment in Europe.<sup>46</sup> Likewise, in the UN system, the campaign that ended up with the adoption of the Second Optional Protocol began slowly, with a study of the death penalty and of its effectiveness as a deterrent.<sup>47</sup> Following proposals from the Parliamentary Assembly and conferences of ministers of justice of the Council of Europe in 1982, the Committee of Ministers mandated its Steering Committee for Human Rights to 'prepare a draft additional protocol to the European Convention on Human Rights abolishing the death penalty in peacetime'.<sup>48</sup> It took one year to prepare the text and it was adopted in 1983.

The Protocol (Protocol No 6) abolished the death penalty in peacetime only.<sup>49</sup> Article 1 state: 'The death penalty shall be abolished. No

<sup>44</sup> Art 2(2) Second Optional Protocol to CCPR.

<sup>45</sup> Art 6 Second Optional Protocol to CCPR.

<sup>46</sup> See eg M Ancel *The death penalty in European countries* (1962).

<sup>47</sup> Schabas (n 12 above) 155.

<sup>48</sup> Krüger (n 40 above) 88.

<sup>49</sup> Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, adopted on 28 April 1983, entered into force on 1 March 1985 (ETS 114). The Protocol has been ratified by 44 states and signed by six.

one shall be condemned to such a penalty or executed.’ Article 2 provides as follows:

A state may make provision in its law for the death penalty in respect of acts committed in time of war or imminent threat of war; such penalty shall apply only in 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 law.

The word ‘peacetime’ was not included in the Protocol so as to avoid drawing attention to the wartime exception.<sup>50</sup> The difference between Protocol No 6 and the protocols in the other systems is that Protocol No 6 applies in peacetime only, whereas the other protocols abolish the death penalty in wartime as well, although they permit state parties to make a reservation on this point. Nevertheless, the adoption of Protocol No 13 corrected the situation.<sup>51</sup>

The adoption of Protocol No 13 followed a recommendation of the Parliamentary Assembly of the Council of Europe that the Committee of Ministers draw up an additional protocol abolishing the death penalty in both peace- and wartime.<sup>52</sup> The reasons advanced in support of the need for an additional protocol were: First, the death penalty is inhuman and degrading punishment. Second, its imposition has proved ineffective as a deterrent, and, owing to the fallibility of human justice, also tragic through the execution of the innocent. Third, there was no reason why capital punishment should be inflicted in wartime, when it is not inflicted in peacetime. The Parliamentary Assembly stated that there is lack of legal safeguards and high risk of executing the innocent when applying wartime death sentences.<sup>53</sup> The points put forward by the Parliamentary Assembly are also flaws in the application of the death penalty in Africa, thus necessitating the need for a protocol on the abolition of the death penalty in Africa.

As a result of the Parliamentary Assembly’s recommendation, Protocol No 13 abolishes the death penalty in all circumstances — both peacetime and wartime. The Protocol provides in its preamble that ‘abolition of the death penalty is essential for the protection of [the right to life] and for the full recognition of the inherent dignity of all human beings’. Articles 1, 2, 3 and 5 of the Protocol read:

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<sup>50</sup> Schabas (n 12 above) 287.

<sup>51</sup> 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, adopted by the Committee of Ministers in February 2002, entered into force on 1 July 2003. Thirty countries have ratified the Protocol and 13 have signed but are yet to ratify the Protocol. For a discussion of the drafting process, see C Ravaud ‘The case law of the institutions of the European Convention on Human Rights’ in Council of Europe (n 31 above) 112-113.

<sup>52</sup> See Parliamentary Assembly of the Council of Europe Recommendation 1246 (1994) on the abolition of the death penalty.

<sup>53</sup> As above.

**Article 1 — Abolition of the death penalty**

The death penalty shall be abolished. No one shall be condemned to such penalty or executed.

**Article 2 — Prohibition of derogations**

No derogation from the provisions of this Protocol shall be made under Article 15 of the Convention.

**Article 3 — Prohibition of reservations**

No reservation may be made under Article 57 of the Convention in respect of the provisions of this Protocol.

**Article 5 — Relationship to the Convention**

As between the States Parties the provisions of Articles 1 to 4 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

As seen from the provisions above, the legal effect of Protocol No 13 is that it neutralises article 2 of Protocol No 6. Protocol No 13 therefore provides an excellent example for other human rights systems to follow.

### 3.3 The Inter-American experience

The extension of the application of the death penalty in some states and proposals from Uruguay and other states on the abolition of the death penalty prompted the Inter-American Commission on Human Rights to raise the idea of an additional protocol to the American Convention on Human Rights<sup>54</sup> on the abolition of the death penalty.<sup>55</sup> The Inter-American Commission justified the need for a protocol on the basis that, when the American Convention was adopted, prevailing conditions would not have permitted abolition, but that there had been an evolution since then.<sup>56</sup> Drawing from this explanation, a protocol on the abolition of the death penalty in Africa is needed, bearing in mind the growing international trend on the abolition of the death penalty, which is also evidenced in Africa.

The above led to the adoption of the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.<sup>57</sup> The Preamble outlines explanations for the adoption of the Protocol. These include: First, everyone has an inalienable right to life, which cannot be suspended for any reason. Second, the abolition of the death penalty helps to ensure more effective protection of the right to life. Third, the death penalty has irrevocable consequences, forecloses the correction of judicial error and

<sup>54</sup> Adopted in 1969, entered into force in 1978 (reprinted in *Basic documents pertaining to human rights in the Inter-American system* OEA/Ser L/V/II 4 Rev 9, 31 January 2003 27).

<sup>55</sup> Schabas (n 12 above) 350-351.

<sup>56</sup> As above.

<sup>57</sup> Adopted on 8 June 1990, entered into force on 28 August 1991 (OAS Treaty Series No 73 (1990), reprinted in *Basic documents pertaining to human rights in the Inter-American system* OEA/Ser L V/II 82 doc 6 Rev 1 80 (1992)). The Protocol has been ratified by eight states and signed by one. Despite the poor ratification status, the Protocol could still serve as a source of reference for Africa.

precludes the possibility of changing or rehabilitating those convicted. The above are not unique to the Inter-American system, as they are also associated with the application of the death penalty in Africa and elsewhere. The above therefore provides the basis for the adoption of a protocol on the abolition of the death penalty in Africa.

The Protocol to the American Convention, same as the Second Optional Protocol, abolishes the death penalty, but allows states to reserve the right to use the death penalty in wartime. Article 1 provides:

The States Parties to this Protocol shall not apply the death penalty in their territory to any person subject to their jurisdiction.

Article 2(1) provides:

No reservations may be made to this Protocol. However, at the time of ratification or accession, the States Parties to this instrument may declare that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature.

The Inter-American and UN approaches have been seen by Schabas as more fully abolitionist than the European approach in Protocol No 6.<sup>58</sup> This is because the latter applies only in time of peace, whereas the former applies at all times, except where a state entered a reservation under article 2. A point worth noting is the fact that article 2 of the Protocol to the American Convention makes reference to international law, which the Second Optional Protocol does not. The reference to international law implies that, when applying the death penalty in wartime, the restrictions on the application of the death penalty contained in other international law instruments applicable in wartime have to be respected.<sup>59</sup>

#### **4 Suggestions on the drafting process and contents of the protocol**

The experiences of other human rights systems provide guidance with regard to the drafting process and content of a protocol on the abolition of the death penalty in Africa. The following suggestions are therefore made, based on the lessons learned from the experiences of the UN, European and Inter-American human rights systems.

With regard to the drafting process, it is suggested that experts

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<sup>58</sup> Schabas (n 12 above) 352.

<sup>59</sup> These include the Geneva Conventions (Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (Third Geneva Convention), 75 UNTS 13 and Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention) 75 UNTS 287); and the additional protocols (Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)).

should be appointed to draft the Protocol. The process has to be participatory, through the involvement of various interested parties who use human rights daily, such as lawyers, non-governmental organisations (NGOs), government officials, academics and civil society.

On the content of the protocol, the following recommendations are made. First, since the Protocol would aim at the abolition of the death penalty, the approach of the UN and Inter-American system on the issue of the application of the Protocol is recommended. The Protocol should abolish the death penalty in peace- and wartime, allowing for a reservation at time of accession or ratification to use the death penalty in wartime. As was the case with the Second Optional Protocol to CCPR and Protocol No 6, the word 'peacetime' should not be included in the Protocol, so as to avoid drawing attention to the wartime exception.

Allowing for the possibility of using the death penalty in wartime will encourage ratification of the Protocol by states that are not prepared to renounce the use of the death penalty during wartime. Besides, the political priority at the moment is first of all to obtain and ensure observance of a continent-wide moratorium on executions, which could subsequently be consolidated by the complete abolition of the death penalty in Africa.<sup>60</sup> The first step to achieving this would be the adoption of a protocol that allows for the possibility of the death penalty in wartime.

Furthermore, the approach in Protocol No 13 — abolishing the death penalty in all circumstances — cannot be taken in Africa due to the absence of a continent-wide moratorium on executions. It was possible in Europe, as there existed a moratorium on executions throughout Europe.

Second, the Protocol should set a time frame within which, after ratification, the Protocol cannot be denounced until the expiry of that time period. For example, a state party could denounce Protocol No 6 only after the expiry of five years from the date on which it became a party to it and after six months' notice to the Secretary-General of the Council of Europe.<sup>61</sup> Since the African Charter is silent on denunciation, the Protocol would have to set its own time frame for any denunciations. Allowing for a possibility of denunciation would also encourage ratification of the Protocol.

Third, the articles abolishing the death penalty and those dealing with reservations or derogations should be regarded as additional arti-

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<sup>60</sup> The same argument was used in the European human rights system to justify the abolition of the death penalty in peace time only, under Protocol No 6; see Ravaud (n 51 above) 112.

<sup>61</sup> Art 15 of the European Convention on Human Rights (adopted in 1950, entered into force on 3 September 1953 (ETS 5 213 UNTS 222)) sets down the above conditions for denunciation. Since arts 1 to 5 of Protocol No 6 are regarded as additional articles to the Convention, art 15 of the Convention applies to the Protocol.

cles to the African Charter. A provision of this nature is important, as the Protocol would supplement the provisions of the African Charter in ensuring greater protection for human rights in Africa.

Fourth, generally, since some of the provisions of the Protocol would be regarded as additional articles to the African Charter, reservations or derogations under the African Charter in respect of the Protocol should be prohibited. This will give more force to the provisions of the Protocol.

Fifth, the Protocol should make reference to international law in the article dealing with reservation to use the death penalty in wartime, thus following the approach of the Inter-American human rights system on this aspect. This would afford greater protection of the rights of those facing the death penalty during wartime because, as noted above, international law treaties applicable in wartime would have to be respected.

Sixth, the Protocol on the abolition of the death penalty in Africa should provide that states include in their periodic reports to the African Commission the measures taken to give effect to the Protocol. A provision to this effect would provide a mechanism by which the implementation of the Protocol can be monitored.

Lastly, in drafting other provisions of the Protocol, guidance should be sought from the Protocols in the UN, European and Inter-American human rights systems. The experiences of these systems exist as a reference, as they have been successful in adopting protocols on the abolition of the death penalty, and the European system has gone further to adopt a protocol abolishing the death penalty in all circumstances. Since some countries in the Inter-American human rights system share almost similar social, economic and political problems like the African states,<sup>62</sup> the experience of this system is instructive to Africa.

## 5 Conclusion

A good human rights system is one that is able to accommodate the realities and imperatives of human rights. In view of this, I have merely presented in this article an opinion as to how the African human rights system could deal with the question of the abolition of the death penalty, by adopting a protocol on its abolition. The need for a protocol on the abolition of the death penalty in Africa is justified, *inter alia*, on the basis that it would enhance the protection of human rights in general and the right to life in particular. Drawing from the experiences of the UN, European and Inter-American human rights systems, I have also

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<sup>62</sup> K Quashigah 'African Charter on Human and Peoples' Rights: Towards a more effective reporting mechanism' Occasional Paper 13, Centre for Human Rights (2002), <http://www.chr.up.ac.za> (accessed 25 February 2005).

made a few suggestions regarding the drafting process and the content of such a protocol. It is hoped that the AU, including government officials and civil society in general, would take note of the need for a protocol on the abolition of the death penalty in Africa and initiate a more thorough discussion on the subject.