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# Cutting the Hangman's Noose: African Initiatives to Abolish the Death Penalty

by *Tim Curry*

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**I**N THE PAST YEAR, the African Commission on Human and Peoples' Rights (African Commission) has taken a series of significant steps aimed at abolishing the death penalty throughout Africa. In its 37th Ordinary Session, held from April 27 - May 11, 2005, the African Commission passed a resolution creating a Working Group on the Death Penalty with the aim of devising a plan to eliminate capital punishment in Africa. During its November - December 2005 session, the Commission passed a second resolution naming two commissioners and five experts to represent the five regions of Africa as members of the Working Group.<sup>1</sup> This second resolution stressed that there was a growing trend against the use of capital punishment in international law and mandated the Working Group to develop a report on the issue and a strategic plan for abolishing the practice.<sup>2</sup> Although the African Commission's actions are encouraging, it remains to be seen what effects they will have on states that insist the death penalty is a viable form of punishment.

penalty from its constitution or legal code. Fortunately, the experiences of African states that have recently abolished the death penalty demonstrate that strong and effective leadership can affect significant change on a national scale. As this article will show, African states that have abolished the death penalty have done so in three ways: through legislation, through judicial rulings, or through executive action. Public and private movements that are trying to influence change in retentionist countries can learn much from these examples.

## THE AFRICAN COMMISSION'S POWER TO "RECOMMEND"

THE ORGANIZATION OF AFRICAN UNITY (OAU), the precursor to the African Union (AU), unanimously adopted the African Charter on Human and Peoples' Rights (African Charter) in 1981.<sup>6</sup> The signatories intended it to be the mechanism for protecting human rights on the continent, and it was the first limitation on the national authority of the States Parties with respect to human rights.<sup>7</sup> Article 30 of the African Charter established the

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Africa is an incredibly diverse continent. With 53 national governments and several thousand ethnic cultures, it is nearly impossible to determine an “African” view on any single topic, yet empirical evidence demonstrates that there is growing support for abolishing the death penalty. Of the 53 states in Africa, 13 have abolished the death penalty for all crimes.<sup>3</sup> Of the 40 states that retain the death penalty in law, half are considered “abolitionist in practice” because they have not executed a single individual in the past decade and are believed to have an official or unofficial moratorium on executions.<sup>4</sup> Unfortunately, 20 African states maintain the use of the death penalty as a viable form of punishment for at least some crimes.<sup>5</sup>

Even if the African Commission ultimately issues a resolution recommending that African governments abolish the death penalty, it is questionable whether it would have any real effect. African Commission resolutions are non-binding. Any government that would be willing to follow the recommendation would still have to navigate its own domestic political process to remove the death

African Commission to “promote human and peoples’ rights and ensure their protection in Africa.” Since its inauguration in 1987, however, the African Commission’s power to “promote” and “protect” has proven limited.

## THE RESPONSIBILITY TO PROMOTE HUMAN RIGHTS

The African Commission has a mandate to study human rights issues, develop reports and recommendations to African governments, and generally promote a dialogue on human rights through conferences and symposia.<sup>8</sup> It is under this rubric that the African Commission created the Working Group on the Death Penalty. Under Article 45(1)(b) of the African Charter, the Commission must “formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental problems upon which African governments may base their legislation.”<sup>9</sup>

## THE RESPONSIBILITY TO PROTECT HUMAN RIGHTS

The African Commission has the power to hear “communications” or complaints filed by states, individuals, or non-governmental organizations (NGOs) that are petitioning the

Commission for a ruling on an alleged violation of the African Charter. Based on these communications, the Commission issues a report outlining its findings and makes “such *recommendations* as it deems fit” to the governments concerned and the AU<sup>10</sup> (emphasis added). Under the communication system, the African Commission has no power to enforce any remedy for violations. Although the Commission may use public pressure to influence a state’s actions, states are not obligated to comply with its recommendations and many do not.

### THE AFRICAN COMMISSION’S HISTORY WITH THE DEATH PENALTY

THE AFRICAN COMMISSION’S recent resolutions establishing the Working Group on the Death Penalty and creating its mandate are not the first instances in which the Commission has addressed capital punishment. The African Commission first adopted a resolution encouraging African states to abolish the death penalty in 1999. That resolution called upon “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.”<sup>11</sup> Although the resolution was encouraging for death penalty abolitionists, its tentative language did little to influence government action.

Even with these public comments against the death penalty, the African Commission itself has ruled that the death penalty, when administered within a fair and proper domestic penal system, is not a violation of the African Charter and thus is legally acceptable. Article 4 of the African Charter reads, “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”<sup>12</sup> In the case of *Forum of Conscience v. Sierra Leone*, the African Commission stated that “any violation of this right without due process amounts to arbitrary deprivation of life.”<sup>13</sup> Thus, when a state follows proper judicial procedures and protects a defendant’s right to a fair trial, the African Commission does not consider a death sentence a violation of the African Charter. Later, in the case of *Interights et. al. (on behalf of Mariette Sonjaleen Bosch) v. Botswana*, the Commission found that the accused had not been deprived of due process within the Botswana judicial system and that her death sentence did not violate Article 4 of the African Charter.<sup>14</sup>

It is commendable that the African Commission is willing to tackle this important and controversial topic. The Working Group’s efforts will bring much-needed discussion of the death penalty and, conceivably, some public pressure on retentionist governments. Given the weak enforcement power of the African Commission, however, and its continued rationalization of the “legality” of the death penalty, any real change in the laws will have to come on a national level. In states that have strong retentionist attitudes, this will likely be an uphill battle.

### SOUTH AFRICA: THE COURTS ABOLISH THE DEATH PENALTY

FOR MUCH OF ITS APARTHEID HISTORY, South Africa was one of the world leaders in state-sanctioned executions. In the 1980s, 1,109 prisoners were hanged by the South African government.<sup>15</sup> In 1993, following the end of apartheid, the Republic of South Africa approved a new interim Constitution, Section 11(2) of which provided for the right to life.<sup>16</sup> Death penalty opponents

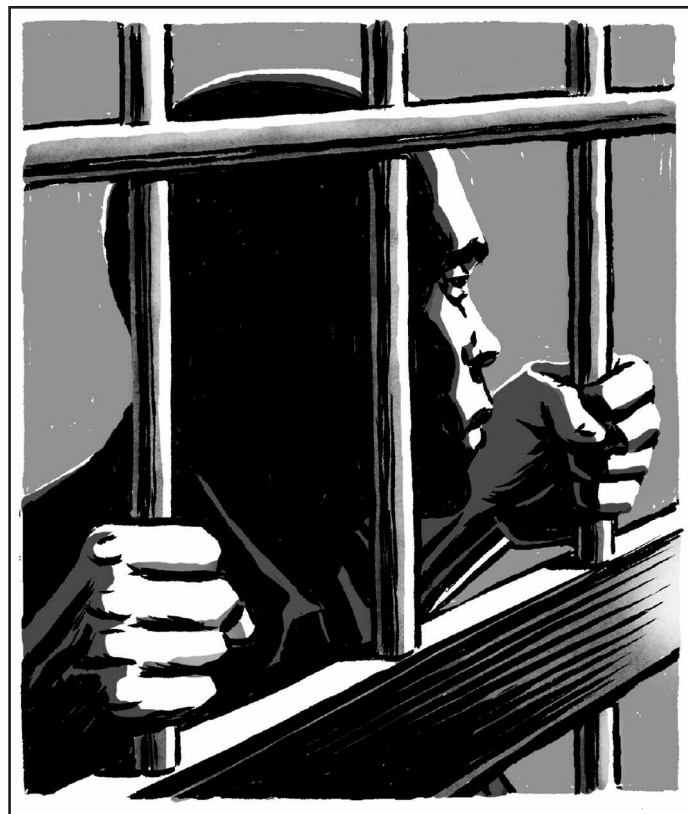
argued that it was at odds with the 1977 law authorizing capital punishment, and the issue eventually went to court.<sup>17</sup>

In its 1996 decision in *State v. Makwanyane*, South Africa’s Constitutional Court abolished capital punishment by holding that the death penalty was an unconstitutional violation of the right to life. Justice Chaskalson, writing for a unanimous court, reasoned, “[R]etribution cannot be accorded the same weight under our Constitution as the rights to life and dignity ... It has not been shown that the death sentence would be materially more effective to deter or prevent murder than the alternative sentence of life imprisonment would be.”<sup>18</sup>

When the current Constitution was approved in 1996, South Africa’s Parliament retained the “right to life” provision from the interim Constitution. Parliament’s inclusion of that provision in the new Constitution thereby placed a legislative stamp of approval on the Court’s ruling. Ten years after the abolition of the death penalty and despite the call of some political and public interest groups to reinstate capital punishment in the face of an ever-increasing crime rate, the decision has not been seriously challenged.

### SENEGAL: THE LEGISLATURE ABOLISHES THE DEATH PENALTY

IN DECEMBER 2004, SENEGAL’S Parliament overwhelmingly passed legislation that abolished the use of the death penalty. Although the bill enjoyed strong support from large segments of



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society, it also sparked vigorous social and religious debate throughout the country. Leading opposition to the bill was one of Senegal’s most influential Muslim organizations, the Coalition of Islamic Associations (CAI). CAI’s leadership argued that the Qur’an expressly allows for the death penalty and insisted that its retention was necessary to deter crime.<sup>19</sup> In a country with a population that is 95 percent Muslim and where crime was on the rise, these arguments were convincing to many.

In response, proponents of the bill argued that the rise in crime was occurring despite the possibility of a death penalty sentence for convicted individuals. They pointed out that increased levels of unemployment, especially among youth, was the most likely cause of high crime rates. Retaining the death penalty, which was reserved primarily for murder, would do little to deter the assaults and robberies that made up the bulk of the increase in crime. Moreover, although religion played a large part in Senegalese society, proponents of the bill insisted that the death penalty was contrary to the values of traditional Senegalese culture.<sup>20</sup>

Since Senegal gained independence in 1960, the government has executed only two people, both in 1967. At the time of these executions, large numbers of religious and traditional leaders lobbied for clemency and noted that the death penalty violated the Senegalese peoples' belief that life was sacred. From 1967-2003 courts in Senegal refrained from handing down death sentences. In 2003, however, a court sentenced a man to death after convicting him of murdering a soldier.<sup>21</sup> Courts handed down three more death sentences in 2004.

When Senegal's Constitution was reformed in 2001, many human rights activists had pushed the government to include a provision outlawing the death penalty. President Abdoulaye Wade, however, was among those who resisted its complete abolition.<sup>22</sup> In the end, Article 7 of the new Constitution stated that all human life is sacred and inviolable, that the government has a responsibility to protect human life, and that every individual has "the right to life, liberty, security, freedom of personal development, [and] bodily integrity."<sup>23</sup> Although the Constitution made no exception to this right to life, the death penalty remained in the legal code.

The revived use of death sentences from 2003-2004 sparked a national debate. Many who had previously supported the retention of the death penalty, including President Wade, changed their views. In July 2004, following an apparent change of heart and with four prisoners sitting on death row, President Wade's government drafted a death penalty abolition bill and presented it to Parliament.<sup>24</sup> After several months of consideration, lawmakers approved the bill, which eliminated the death penalty and affirmed that all human life in Senegal was sacred and inviolable.

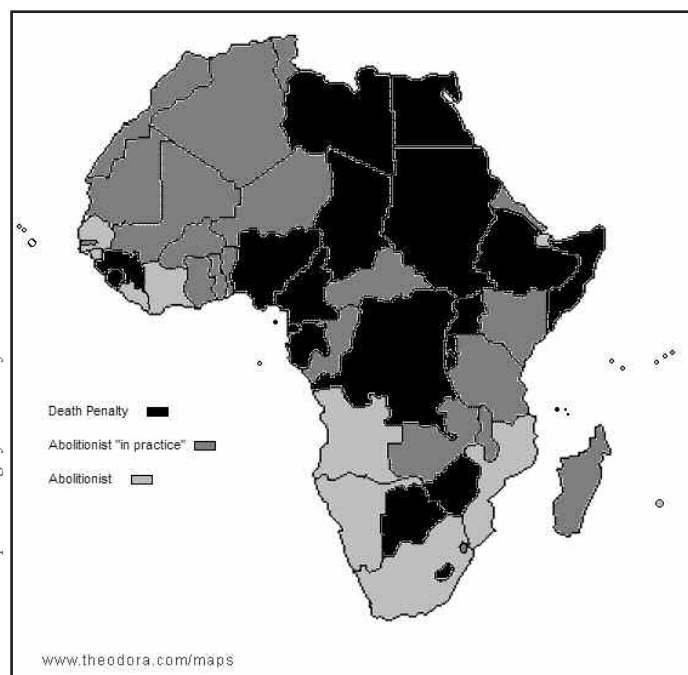
### **LIBERIA: EXECUTIVE ACTION ABOLISHES THE DEATH PENALTY**

LIBERIA BECAME THE MOST RECENT African state to abolish the death penalty when interim President Gyude Bryant endorsed Liberia's accession to the International Covenant on Civil and Political Rights Second Optional Protocol on September 16, 2005.<sup>25</sup> This Protocol abolishes the death penalty within the territories of all countries that sign or accede to it. Because Liberia acceded to the treaty, it required no further domestic ratification by the National Assembly. Thus, its prohibition against the death penalty for all crimes immediately became binding.

Prior to the 2004 peace deal that brought Bryant to power as interim President, Liberia had been involved in a bloody and gruesome civil war for over a decade. The UN-backed Special Court for Sierra Leone has indicted Liberia's previous President Charles Taylor for war crimes and crimes against humanity for his part in perpetuating civil war in neighboring Sierra Leone. Under the Taylor regime, the death penalty was a possible punishment for murder, armed robbery, terrorism, high treason, and gang rape if the rapist inflicted serious injury on the victim.<sup>26</sup> There were 14 official executions in Liberia in 2000, the last year any executions were reported.

Many accuse Taylor's regime of executing hundreds of people outside of any formal judicial process. As Bryant and his transitional government set about rebuilding Liberia, the death penalty did not receive much public attention. Moreover, there is little record of any public debate on whether to abolish the death penalty prior to Liberia's accession to the Second Optional Protocol.

Following the country's abolition of the death penalty, a new bill that sought to criminalize all forms of rape (at the time only gang rape was considered illegal) contained a provision for the death penalty in extreme cases. This ignited debate on the need for the death penalty and called into question its abolition under the Protocol. Although many human rights activists praised the bill's clarifications of the definitions of rape and sexual assault and applauded the bill's commitment to combating impunity for sexual crimes, many felt the inclusion of a death penalty went too far. As Dr. Charlotte Abaka, the United Nations Independent Expert on the Promotion and Protection of Human Rights in Liberia, explained, reinstating a death penalty in the law will place Liberia



Status of the death penalty by country.

in conflict with its international treaties and could open it to complaints before the international community.<sup>27</sup>

Ultimately, women's rights groups and the Ministry of Gender, eager to end debate on the bill and enshrine some protection for the women of Liberia, pushed to have the death penalty provision, as well as several other controversial clauses, removed from the bill.<sup>28</sup> The National Transitional Legislative Assembly passed the amended rape law in December 2005 and the death penalty remains illegal in Liberia.<sup>29</sup>

### **BOTSWANA: THE DIFFICULTY OF CHALLENGING A RETENTIONIST GOVERNMENT**

DESPITE THE SUCCESSES SOME AFRICAN states have made in abolishing the death penalty, many states continue to cling to the death penalty as a viable form of punishment. Botswana, often hailed as one of Africa's most successful democracies, is a staunch defender of capital punishment. Although Section 4 of Botswana's Constitution expressly asserts that "[n]o person shall be deprived

of his life intentionally,” it contains an exception for the death penalty.<sup>30</sup> This exception is further codified in the Botswana Penal Code, which allows for a death sentence in cases of murder, treason, and assault with intent to murder during piracy.<sup>31</sup>

Since gaining independence from Britain in 1966, Botswana has executed 38 individuals. The most recent executions took place on September 19, 2003, when the government of Botswana hanged three men. Government media made the announcement after the men had been executed and buried. The men’s families and attorneys were not informed of the executions prior to the radio announcement. Although no such notification is required under Botswana law, the men’s attorneys had been preparing an application for clemency to Botswana’s President. President Festus Mogae apparently signed the men’s death sentences without waiting for the application.<sup>32</sup>

### **BOTSWANA’S ABOLITION MOVEMENT**

There is strong public support in Botswana for the death penalty. Prior to 1997 there was little debate on this issue. That year, DITSHWANELO, Botswana’s only domestic NGO focusing exclusively on human rights issues, began a national campaign against the death penalty entitled “Who Has the Right to Kill?” As the debate gained momentum, it became clear that there was widespread opposition to abolishing the death penalty. Opinion letters in local newspapers and calls to radio talk shows demonstrated the outrage many people felt at the idea of eliminating capital punishment.

The movement became front-page news in 1999 when DITSHWANELO and its partner attorneys succeeded in convincing Botswana’s High Court to issue a stay of execution for two defendants, Tlhabologang Maauwe and Gwara Motswetla, just hours before the men were scheduled to be hanged. This was the first time any judicial authority had intervened on behalf of a condemned prisoner once the president had signed the death warrant. In the months that followed, DITSHWANELO and its attorneys demonstrated to the High Court that a serious error in the appeals process had deprived the men of a fair trial. As a result, the court set aside the convictions and death sentences and ordered a new trial.<sup>33</sup> By March 2005, with both men still in prison and the government unready or unwilling to proceed with a trial, DITSHWANELO and its attorneys convinced the High Court that the men’s constitutional right to a fair and speedy trial had been violated again. Noting that the men had been in prison without trial for more than five years, the judge vacated the murder charges and ordered Maauwe and Motswetla released.<sup>34</sup>

### **THE AFRICAN COMMISSION AFFIRMS THE USE OF THE DEATH PENALTY IN BOTSWANA**

The issue of how Botswana imposes the death penalty came before the African Commission in 2001. Interights, a British human rights NGO, sent a communication to the African Commission objecting to a death sentence the Botswana courts had handed down against Mariette Bosch in 1999. Although the African Commission has never found that the death penalty violates the African Charter, Interights claimed that the secrecy surrounding executions in Botswana and the lack of transparency in the clemency process made the imposition of the death penalty arbitrary and violated Article 4 of the Charter.<sup>35</sup> In response to the communication, the African Commission wrote to the President of Botswana on March 27, 2001, and requested a stay in Bosch’s execution until the Commission could rule on the matter. The

Commission never received a reply and officials in Botswana hanged Bosch five days later.<sup>36</sup>

Despite the death of its client, Interights continued with the case in the hopes of effecting some change in Botswana. In its final decision, the African Commission emphasized that international law was increasingly opposed to the use of the death penalty and it encouraged all States Parties, including Botswana, to refrain from use of the death penalty. Ultimately, however, the Commission upheld the legality of the death penalty under the African Charter and ruled that the secrecy of executions and the clemency process did not make the deprivation of life arbitrary under the African Charter because the sentence was the result of a fair trial.

### **THE STRUGGLE CONTINUES**

Armed with the African Commission’s decision, Botswana’s government maintains that the death penalty is a valid form of punishment. It often cites strong public support for capital punishment as justification for continuing the practice. Given its history of limited cooperation with the African Commission, it is doubtful that Botswana would change its policies even if the African Commission issued a formal recommendation that States Parties reform their

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domestic legislation to eliminate all use of capital punishment.

This does not mean, however, that the fight for abolition is over. DITSHWANELO and other domestic and international groups continue to advocate for an end to the death penalty in Botswana. Further, despite the retentionist stance of Botswana’s public and the executive branch of government, the courts in Botswana have demonstrated that they are willing and able to place some limits on the unfettered use of the death penalty. Although the courts cannot eliminate the practice because it is legitimized by the Constitution, they can ensure that capital crimes are tried under the strictest of scrutiny and that the government fulfills its obligations to conduct fair and speedy trials.

### **CONCLUSION AND RECOMMENDATIONS**

EVEN WHEN THERE IS A STRONG MOVEMENT to abolish the death penalty in one branch of government, a cooperative effort is often necessary to ensure that capital punishment is eliminated perma-

nently. Although South Africa's Constitutional Court abolished the death penalty, it was the Parliament's approval of the decision and its incorporation of the decision's founding principles into the new Constitution that assured the decision's finality. In Senegal the legislature ultimately abolished the death penalty, but the President's support was instrumental in combating opposition to the bill. Finally, although the Liberian interim President's accession to an international treaty eliminated capital punishment, it took cooperation among various NGOs, governmental ministries, and the National Assembly to ensure that new laws allowing for the death penalty were not passed.

In several African states, some government sectors have displayed strong anti-death penalty sentiments, but a lack of cooperation from other branches has hampered abolition movements. In Nigeria, despite President Olusegun Obasanjo's anti-death penalty stance and an executive branch recommendation that all executions in Nigeria be put on hold until major judicial reforms can be made, the courts continue to hand down death sentences and the legislature has failed to address the issue.<sup>37</sup> Similarly, despite a legislative requirement that the government of Sierra Leone implement recommendations from the country's Truth and Reconciliation Commission (TRC), the President's office flatly rejected a TRC recommendation that the death penalty be abolished without delay.<sup>38</sup>

The African Commission's decision to create a Working Group on the Death Penalty is a commendable step along the road toward abolishing the death penalty throughout Africa. The African Commission, however, needs to go beyond merely recommending that the death penalty be abolished if it truly hopes to create change. It must publicly insist that States Parties initiate a concerted campaign to pressure national governments to reform their domestic legislation. Moreover, under its promotion authority in the African Charter, the African Commission should urge the AU to amend the African Charter to eliminate the word "arbitrary" from Article 4. The African Commission must adopt a clear and unequivocal stance that no state should be able to deprive anyone of the right to life, regardless of whether it is arbitrary or accomplished through due process.

Ultimately, much of the struggle against the death penalty will be fought on the national level. As the success in some African states demonstrates, cooperation among various private actors and branches of governments is needed to affect permanent change. Anti-death penalty groups that are able to create or identify allies in several government sectors are likely to see more success than those who concentrate all their efforts on a narrow target. Concededly, a multi-sector approach can be more difficult, but as a Malawian proverb states, "You cannot pick up a pebble with one finger."  
**HRB**

## ENDNOTES: Cutting the Hangman's Noose

<sup>1</sup> *Final Communiqué of the African Commission on Human and Peoples' Rights*, 38th Ordinary Sess., available at [http://www.achpr.org/english/communiqués/communiqué38\\_en.htm](http://www.achpr.org/english/communiqués/communiqué38_en.htm) (Dec. 5, 2005).

<sup>2</sup> *Angola Press*, "African Human Rights Commission Approves Resolutions" (Dec. 24, 2005).

<sup>3</sup> The African states that have abolished the death penalty for all crimes are Angola, Cape Verde, Cote d'Ivoire, Djibouti, Guinea-Bissau, Liberia, Mauritius, Mozambique, Namibia, São Tomé & Príncipe, Senegal, Seychelles, and South Africa. Amnesty International USA, "Statistics on The Death Penalty in Africa," <http://www.amnestyusa.org/news/document.do?id=ENGACT500162005> (last updated Oct. 10, 2005).

<sup>4</sup> States that are considered "abolitionist in practice" are Algeria, Benin, Burkina Faso, Central African Republic, Congo-Brazzaville, Eritrea, Gambia, Ghana, Kenya, Madagascar, Malawi, Mali, Mauritania, Morocco, Niger, Swaziland, Tanzania, Togo, Tunisia, and Zambia. *Id.*

<sup>5</sup> The states that retain the death penalty in practice are Botswana, Burundi, Cameroon, Chad, Comoros, Democratic Republic of Congo, Egypt, Equatorial Guinea, Ethiopia, Gabon, Guinea, Lesotho, Libya, Nigeria, Rwanda, Sierra Leone, Somalia, Sudan, Uganda, and Zimbabwe. *Id.*

<sup>6</sup> The African Charter on Human and Peoples Rights entered into force on October 21, 1986.

<sup>7</sup> African Commission on Human and Peoples' Rights, *Information Sheet No. 1*, "Establishment: The African Commission on Human and Peoples' Rights," at 2-3 [hereinafter Commission Info. Sheet].

<sup>8</sup> *Id.* at 4.

<sup>9</sup> African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, Article 45(b)(1) [hereinafter African Charter].

<sup>10</sup> African Charter at art. 53-54; Commission Info Sheet at 5.

<sup>11</sup> *Resolution Urging the State to Envisage a Moratorium on Death Penalty*, ACHPR /Res.42(XXVI)99 (1999).

<sup>12</sup> African Charter at art. 4.

<sup>13</sup> *Forum of Conscience v. Sierra Leone*, African Commission on Human and Peoples' Rights, Comm. No. 223/98 (2000) at ¶ 19.

<sup>14</sup> *Seventeenth Annual Activity Report of the African Commission on Human and Peoples' Rights 2003-2004*, "Decision on communication 240/2001 – *Interights*

*et al (on behalf of Mariette Sonjaleen Bosch) v. Botswana*" at ¶ 22-29.

<sup>15</sup> Graeme Simpson and Lloyd Vogelmann, *Centre for the Study of Violence and Reconciliation*, "The Death Penalty in South Africa" (1989). The United States carried out 117 executions from 1980-1989. U.S. Dept of Justice, Bureau of Justice Statistics.

<sup>16</sup> The Constitutional Court decided the constitutionality of the death penalty under section 11(2) of the interim constitution. That section's "right to life" provision was adopted as Section 11 of the current (1996) Constitution of the Republic of South Africa, thus extending the Court's ruling.

<sup>17</sup> *The State v. T Makwanyane and M Mchunu*, Case No. CCT/3/94 (June 6, 1995) at ¶ 2.

<sup>18</sup> *Id.* at ¶ 146. Although the decision was unanimous, the other ten Justices each wrote separate concurring opinions to underscore and expand on the views of Justice Chaskalson.

<sup>19</sup> *Inter Press Service*, "Senegal: President Takes on Islamic Groups in Death Penalty Debate," <http://www.wwrn.org/article.php?id=14273&sec=36&cont=3> (Aug. 25, 2004).

<sup>20</sup> *Id.*

<sup>21</sup> UN Office for the Coordination of Humanitarian Affairs, *IRIN News*, "SENEGAL: Rare death sentence revives debate on capital punishment," (Sept. 24, 2003).

<sup>22</sup> *Id.*

<sup>23</sup> Constitution of the Republic of Senegal, art. 7 (translation from French by the author), available at [http://www.gouv.sn/textes/const\\_detail.cfm?numero=TITREII](http://www.gouv.sn/textes/const_detail.cfm?numero=TITREII) (accessed May 14, 2006).

<sup>24</sup> World Wide Religious News, *Africa-Western Africa-Islam*, "Senegal: President Takes on Islamic Groups in Death Penalty Debate," <http://www.wwrn.org/article.php?id=14273&sec=36&con=63> (accessed June 11, 2003).

<sup>25</sup> Office of the United Nations High Commission on Human Rights, Second Optional Protocol to the International Covenant on Civil and Political Rights (Dec. 15, 1989), available at <http://www.ohchr.org/english/countries/ratification/12.htm> (accessed Apr. 9, 2006).

<sup>26</sup> Hands of Cain, "Liberia Fact Sheet," <http://www.handsofcain.org/banca-dati/schedastato.php?idcontinente=25&nome=liberia> (accessed Apr. 9, 2006).

<sup>27</sup> United Nations Mission in Liberia, "Weekly Press Briefing" <http://www.unmil.org/read.asp?newsID=915&cat=pb> (Oct. 16, 2005).

