81

LASU Law Journal

Vol. VII, No. 1, May/June 2010

LASU LJ 1-213 ISSN 1115837

Articles

i. The Nigerian Girl Child and the Challenges of Sexual Abuses
Olugbemi Fatula

ii. The Global Struggle for Legal Recognition of Unconventional Sexual Orientation: Any Hope for Nigeria's Lesbians, Gay, Bisexuals and Transgenders?
Funminiyi Adeleke

iii. A Jurisprudential Review of Death Penalty under Regional and International Human Rights Instruments: Implications for Nigeria
Ikenga Oraegbunam

iv. Overview of the Arrest and Release of Ships under Nigerian Laws: Practices and Procedures
Bose Lawal

v. Tax Clearance Certificates and Eligibility for Election into Public Office: Discordant Views of Courts and INEC
Kareem Adedokun

vi. Mainstreaming Principles of Islamic Banking into the Nigerian Banking System
Muhammed Akanbi

vii. An Overview of Tax Appeal Tribunal in Nigeria
Hafsat Sa'adu

viii. Modern Manifestation of Techniques and Instruments of Torture
Kolawole Odeku

ix. Judicial Interpretation of Constitutional Right to Personal Liberty and Imperativeness for the Establishment of Constitutional Courts
Lateef Ogboye

LASU Law Journal

EDITORIAL BOARD

Prof. Olusegun Yerokun	*Chairman*
Prof. Olanrewaju Fagbohun	Institute of Advanced Legal Studies
Prof. Felicia Monye	University of Nigeria, Nsukka
Prof. Iysa Ade Bello	Lagos State University, Ojo
Prof. Boyce Wanda	Nelson Mandela School of Law, South Africa
Prof. Kolawole Odeku	University of Limpopo, South Africa
Dr. Rufus Olaoluwa	Lagos State University

EDITORIAL COMMITTEE

Editor-in-Chief	Prof. Olusegun Yerokun
General Editor	Funminiyi Abiodun Adeleke, Ph.D.
Deputy Editor-in-Chief	Joel Olasunkanmi Anwo, Ph.D.

© Faculty of Law, LASU

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without prior written permission, except for permitted fair dealing under the law relating to Copyright. Application for permission for other use of copyright material including permission to reproduce extracts in other published works shall be made to the publishers. Full acknowledgement of author, publisher and source must be given.

The views expressed in this journal are those of the contributors and not necessarily those of the Faculty of Law of the Lagos State University.

Contents

i. | The Nigerian Girl Child and the Challenges of Sexual Abuses —Dr. Olugbemi Fatula 5

ii. | The Global Struggle for Legal Recognition of Unconventional Sexual Orientation: Any Hope for Nigeria's Lesbians, Gay, Bisexuals and Transgenders?—Dr. Funminiyi Adeleke 20

iii. | A Jurisprudential Review of Death Penalty under Regional and International Human Rights Instruments: Implications for Nigeria —Dr. Ikenga Oraegbunam 38

iv. | Overview of the Arrest and Release of Ships under Nigerian Laws: Practices and Procedures—Bose Lawal 58

v. | Tax Clearance Certificates and Eligibility for Election into Public Office: Discordant Views of Courts and INEC—Dr. Kareem Adedokun 74

vi. | Mainstreaming Principles of Islamic Banking into the Nigerian Banking System—Dr. Muhammed Akanbi 79

vii. | An Overview of Tax Appeal Tribunal in Nigeria—Hafsat Sa'adu 108

viii. | Modern Manifestation of Techniques and Instruments of Torture —Dr. Kolawole Odeku 116

ix. | Judicial Interpretation of Constitutional Right to Personal Liberty and Imperativeness for the Establishment of Constitutional Courts —Dr. Lateef Ogboye 130

Editorial services, page composition and book design, and print production by

FREE ENTERPRISE PUBLISHERS IBADAN

Guidelines for Authors

1. The *LASU Law Journal* is devoted to contemporary issues of relevance to the commercial, legal and academic community. It is published two times in a year and circulates within and outside Nigeria.

2. The Editorial Board welcomes the submission of articles which illuminate legal problems or issues currently confronted by governments, private enterprises, international organizations, etc., by setting them within their general legal, economic or political context. Of particular interest will be articles from academics contributing the fruits of their research into larger issues of law, economics and politics, as well as those which record the actual experience of lawyers resolving practical problems of developing legal devices or techniques.

3. Except in special circumstances, the Editorial Board will not consider articles published or to be published elsewhere. Authors are asked to confirm that their typescript is not and will not be so published.

4. Articles should be approximately 7,000–10,000 words; Notes 2,000–4,000. Title and author of the articles should be clearly indicated together with the brief personal description (maximum of 50 words) that the author would wish to appear. All materials should be clearly typed, double-spaced on A4 paper and be accompanied by a copy of the article either on computer disk or as an e-mail attachment. Footnotes should be numbered consecutively.

5. All materials for the journal must be in English. In special circumstances, articles written in a foreign language will be considered for translation and publication. Such articles when submitted to the Editorial Board must be accompanied by a synopsis in English.

6. Contributors are asked to use any of the recognized form of citation of legal materials. All typscripts to—

The Editor-in-Chief, *LASU Law Journal*
Faculty of Law
Lagos State University Ojo, Lagos.
E-mail: olusegunyerokun@yahoo.com

III.

A Jurisprudential Review of Death Penalty under Regional and International Human Rights Instruments: Implications for Nigeria

Ikenga K. E. Oraegbunam[1]

Abstract

The issue of punishment generally and of death penalty in particular has been, from the earliest times, a subject of concern to scholars and people of diverse persuasions. Philosophers, theologians, moralists, jurists, politicians, psychologists, sociologists, criminologists, human-rights scholars, and so on have each argued from their own perspectives and proffered many theories in connection therewith. Some hold that death penalty should not only be retained in the dispensation of criminal justice, but also that the category of crimes that attract capital punishment be widened. Others maintain that death penalty should be removed for it amounts, for instance, to a legalized violation of an individual's fundamental right to life and right not to be subjected to cruel, inhuman or degrading treatment or punishment. Others still believe that it would not be in the best interest of national security and safety to outlaw death penalty in toto; rather the practice should be restricted to more serious and heinous crimes. These three positions represent the global perspectives on the issue. This paper is a jurisprudential review of death penalty issues in regional and international standards. The study seeks to adumbrate the implications of these standards for the Nigerian penal justice system. The methodology employed in this study is therefore hermeneutical and critical.

1. Introduction

VARIOUS INTERNATIONAL AND REGIONAL INSTRUMENTS have made death penalty an issue of human right. Anchoring their provisions on the right to life, the instruments all agree that right to life is most basic and fundamental, without which all other rights lose their significance. It goes without saying that international human rights law has evolved over time from demands for more humane treatment of fellow human beings developed, as it were, by religious leaders, philosophers and jurists over the centuries. The United Nations Organization no doubt has also played no mean role in this development. Through negotiations, human rights norms have crystallized into specific and detailed directives of international law in covenants and treaties, which under relevant conditions can be enforced in domestic courts of law.[2] Thus, the international bill of rights made up of the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) have been extensively elaborated through the adoption of numerous conventions and declarations by both the U.N. and its specialized agencies, and at the regional level. Surely, these instruments form a wide-ranging but interrelated normative system. The thrust here is to critically delineate the tenets of these standards on death penalty and the implications they hold for Nigeria's penal justice system. This is particularly germane in our era of globalization, when what happens in one corner of the globe exerts a ripple-effect on others. Below is a brief discourse on some of the instruments relevant to the subject of death penalty.

1 Ikenga Oraegbunam, Ph.D., is Lecturer in the Faculty of Law, Nnamdi Azikiwe University, Awka

2. An Analysis of Regional and International Standards on Death Penalty

The Universal Declaration of Human Rights (UDHR)

The UDHR[3] is the foundation of contemporary human rights law and provides "a common understanding" of the human rights and fundamental freedoms referred to in the U.N. Charter. Its provisions are regarded as those of customary international law because of the extent to which States have followed it in practice.[4] Acts such as genocide, slavery, murder, or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violation of internationally recognized rights, are considered violations of customary international law. It has thus been suggested that the UDHR represents a codification of customary norms[5] and that it has become a part of "the constitutional structure of the world community."[6]

UDHR states: "Everyone has the right to life, liberty and security of the person."[7] It provides for the right to life without particularly providing for either abolition or re-

2 In Nigeria, for instance, if any of the international human rights instruments is domesticated or enacted into law by the National Assembly, such an instrument will automatically be enforced in domestic courts. See section 12(1) of the 1999 Constitution (as amended).

3 Although this is not a legally binding document, it was adopted by the U.N. General Assembly on Dec. 10, 1948 as a common standard for the achievement for all peoples and all nations and has been affirmed as such by the Vienna Declaration and Plan of Action, UN Doc. A/CONF. 157/24.

4 T. Buergenthal, *International Human Rights Law in a Nutshell*, Minnesota: West Group, 1988, 31–32.

5 J.P. Humphrey, "The Universal Declaration of Human Rights: Its History, Impact and Judicial Character," in B.G. Ramcharan (ed.), *Human Rights: Thirty Years after the Universal Declaration*, Martinus Nijhoff Publishers, Dordrecht, 1984.

6 L.B. Sohn, "The New International Law: Protection of the Right of Individuals Rather than States," *American University Law Review* 32,1982, 16–17.

7 Article 3, UDHR.

tention of the death penalty. In fact, the report of the Secretariat of the U.N., in a summary analysis of the death penalty debate, describes article 3 as being "neutral."[8] Be that as it may, it has been argued that the UDHR's silence on the issue of death penalty envisages the abolition of capital punishment. Certainly, this view is strengthened by several important resolutions of the General Assembly, and the Economic and Social Council which, when dealing with the limitation and ultimate abolition of capital punishment, cite article 3 of the UDHR in their preambles, implying that it is in fact favorable to abolition.[9] Furthermore, the Secretary-General's report of 1973 on capital punishment asserts that article 3 implies limitation and abolition of death penalty.[10] Hence, this antipathy to death penalty can be taken as the most likely interpretation of the article, because it has maintained its pertinence with the ICCPR and its second Optional Protocol and various specialized and regional instruments.[11]

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR, which derives from the UDHR, treats the death penalty as derogation from the right to life. According to Rodley, if this were not the case, issues relating to the prohibition of torture or other cruel, inhuman and degrading treatment or punishment would not have arisen.[12] Indeed, the death penalty has been defined as cruel, inhuman or degrading punishment in a Secretariat statement to the sixth Congress on the Prevention of Crime and the Treatment of Offenders.[13] A cursory look at the provisions of ICCPR would show that it clearly approves of a country's choice to abolish the death penalty, but it does not require a country to eliminate the use of capital punishment to be party to the Covenant. Article 6 provides thus—

1. 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.
2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious of 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.
3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State party to the present Covenant to derogate in any way from any provision assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay the abolition of capital punishment by any State party to the present covenant.

8 UN Doc. A/CONF.87/9.
9 G.A. Res. 2393 (XXIII); G.A. Res. 2857 (XXVI); G.A. Res. 32/61; G.A. Res. 44/128; ESC Res. 1745 (LIV); ESC Res. 1930 (LVIII).
10 UN Doc. E/5242, para II.
11 W.A. Schabas, *The Abolition of Death Penalty in International Law*, Cambridge University Press, 2002, 24.
12 N.S. Rodley, *The Treatment of Prisoners under International Law*, Oxford: Clarendon Press, 1999, 206.
13 UN Doc. A/CONF.87/9, para 98.

That this article which, pursuant to article 4(2) of the same Covenant, may not be derogated from, is capable of two interpretations. According to Schabas, it can be interpreted as permissive and cognizant of the fact that the death penalty is beyond the scope of the right to life; or, on the other hand, as being restrictive, admitting the existence of death penalty as a regrettable and temporary compromise, but viewing it as fundamentally incompatible with the right to life in its most pure expression.[14] However that may be, the Human Rights Committee (HRC), charged with the duty of hearing State reports, individual complaints and interpretation of the ICCPR, has commented that this article strongly suggests that abolition is desirable.[15]

Analysis of the provisions would show that for the Covenant, death penalty can only be carried out when various conditions are satisfied: (a) commission of a serious crime, (b) in accordance with the law at the time of commission of the crime, (c) not contrary to other provisions of the ICCPR and the Convention on the Prevention and Punishment of the Crime of Genocide, (d) pursuant to a final judgment rendered by a competent court, (e) accused should be given a chance to have amnesty, pardon or commutation of sentence, (f) it should not be on a person below the age of eighteen or a pregnant woman. These conditions are articulated and reiterated in The Safeguards Guaranteeing the Protection of those Facing the Death Penalty (The Safeguards),[16] which emphasize humane treatment for those on Death Row. Let us look at these conditions one by one.

(a) "Serious crime"

The expressions "serious" or "most serious" are not defined in the Covenant. Thus it is not clear what fits into the category of "serious" or "most serious" crime. However, the HRC has pointed out that this clause should be "read restrictively" to imply that the death penalty should be a "quite exceptional measure."[17] Again, The Safeguards declare that the ambit of the term "most serious crimes" should not go beyond intentional crimes with lethal or other extremely grave consequences.[18] According to the Secretary-General, the phrase means that "the offences should be life-threaten-

14 Schabas, *op. cit.*, 95.
15 General Comment 6(16). This impression is also contained in UN Doc. CCPR/C/SR. 264&22; UN Doc. CCPR/C/SR Add. 1, 382–383.
16 ESC Res. 1984/50; G.A. Res. 39/118. These were adopted by the Economic and Social Council in 1984 and subsequently endorsed by the General Assembly
17 Report of the HRC, GAOR, 37th session, Suppl. 40 (A/37/40), 94. HRC means Human Rights Committee of the UNO. The Committee is responsible for hearing States' reports, individual complaints, and interpretation of International Covenant on Civil and Political Rights.
18 ESC Res. 1984/50; G.A. Res. 39/118.

ing in the sense that it is a very likely consequence of the action."[19] Hence, the HRC has reiterated the views of the Special Rapporteur on extrajudicial, summary or arbitrary executions,[20] urging States not to impose the death penalty for nonviolent financial crimes or for nonviolent religious practices or expressions of conscience.

Besides, the Secretary-General has distinguished three categories of "most serious offences," namely, ordinary offences, offences against the State, and military and wartime offences.[21] Offences aimed at the domination of a social class or at overthrowing the basic economic and social orders, theft in aggravated circumstances, sexual intercourse with a female relative under 15, or arousing of religious and sectarians feelings or propagation of Zionist ideas, may not stand the test of a "most serious crime" in the sense of article 6 of the Covenant.[22]

Furthermore, the HRC has adumbrated a number of individual offences that do not meet the standard of "most serious crimes." These include apostasy,[23] abetting suicide,[24] homosexual acts,[25] illicit sex,[26] espionage,[27] evasion of military responsibility,[28] to mention but a few. State parties that impose the death penalty for political offences,[29] conspiracy between civil servants and soldiers,[30] misappropriation of State or public property,[31] treason,[32] espionage,[33] and refusal to divulge previous political activities,[34] have been criticized. The Committee has further advocated for the reduction of the number of crimes that are punishable by the death penalty.[35]

The net effect is that the expression "most serious crimes" appears to be confined to murder. In the case of *Cox v. Canada*,[36] the HRC noted that the applicant was to be tried for complicity in two murders, which were said to be "undoubtedly very serious crimes." The Committee has commented that the imposition of the death penalty for crimes that do not result in loss of human life is contrary to the Covenant.[37] In *Lubuto v. Zambia*,[38] where the offender had received a mandatory sentence of death for armed robbery, the Committee stated thus:

19 UN Doc. E/2000/3, para 79.
20 UN Doc. E/CN 4/1999/39, para 63.
21 UN Doc. E/1995/78, para 53–60.
22 UN Doc. E/1990/38, para 41.
23 Concluding Observations, Sudan, UN Doc. CCPR/C/79 Add. 85, para 8.
24 Concluding Observation, Sri Lanka, UN Doc. CCPR/C/97 Add. 56, para 14.
25 Concluding Observations, Sri Lanka, UN Doc. CCPR/C/79 Add. 85, para 8.
26 Second Periodic Report of Sudan; Annual Report of HRC, 1998, UN Doc. 53/40, para 119.
27 Concluding Observations, Cameroon, UN Doc. CCPR/C/79 Add. 116, para 14.
28 Fourth Periodic Report of Iraq; Concluding Observations, para 11.
29 UN Doc. CCPR/C/SR. 200, 19 (1980).
30 Initial Report of Mali, UN Doc. CCPR/C/1/Add. 49.
31 Initial Report of Mongolia, UN Doc. CCPR/C/1/Add. 38; UN Doc. CCPR/C/SR 197, para 6 (Janca); UN Doc. CCPR/C/SR.198, para 21 (Kousishev); UN Doc. CCPR/C/SR. 198, para 32 (Sadi).
32 UN Doc. CCPR/C/SR. 258, para 10 (Tomuschat).
33 Concluding Observations, Cameroon, UN Doc. CCPR/C/79 Add. 116, para 14.
34 UN Doc. CCPR/C/SR. 200, para 42 (Prado Vallejo).
35 Initial Report of Madagascar, UN Doc. CCPR/C/1 Add. 14 and Initial Democratic Report of Yemen, UN Doc. CCPR/C/50/Add. 2.
36 539/1993, para 16. 2.
37 Second Periodic Report of Iran, UN Doc. CCPR/C/79 Add. 25, para 8.
38 No 390/1990. UN Doc. CCPR/C/55/D/390/Rev. L&7.2.

> Considering that in this case the 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 Covenant.

(b) "In accordance with the law at the time of commission of the crime"

This clause means that the law providing for capital punishment should not be retrospective, expressing the principle *nullum crimen, nulla poena sine lege*,[39] in article 15 of the ICCPR. This has been argued to also imply that should death penalty be abolished after the commission of the crime, the offender ought to benefit from it and be sentenced to a lighter punishment as provided for in general terms in article 15.[40]

(c) "Not contrary to other provisions of the ICCPR and the Convention on the prevention of the crime of genocide"

The implication of this clause is that it is unlawful to enact a law that makes exercise of right protected under the ICCPR a capital offence. This means that there must be no discrimination in imposing capital punishment on the basis of race, religion or other grounds provided for under the ICCPR. The reference to the Genocide Convention emphasizes that massive use of capital punishment could result into a disguised genocide, which is unlawful.[41]

(d) "Pursuant to a final judgment rendered by a competent court"

This clause refers to the procedural guarantees of a fair trial, as enshrined in article 14 of the Covenant. The effect is that even in times of emergency, the death penalty can only be carried out pursuant to a final judgment, being the result of a fair trial, even though article 14 is not included in the list of nonderogable articles[42] in article 4.[43] In *Reid v. Jamaica*,[44] the HRC referred to its General Comment 6(16) by reiterating that the procedural guarantees prescribed in the ICCPR must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defense, and the right to review by a higher tribunal. It further added that in capital punishment cases, the duty of State parties to observe rigorously all the guarantees for a fair trial set out in article 14 is even more imperative.[45]

(e) "Amnesty, pardon or commutation of sentence"

The intendment of this clause is that, before the execution of the death penalty,

39 *Lege* is a cognate or conjugate of the Latin word *lex-legem*, meaning law. So, *nulla crimen, nulla poena sine lege* is a criminal-law principle which states that "an act will not be an offence if the punishment therefore is not prescribed and enacted into law. See S. 36(12) of the 1999 Constitution. It is also found in constitutions of so many common law countries, at least.
40 C.K. Boyle, "The Concept of Arbitrary Deprivation of Life," in Ramachran, 213–214.
41 GAOR, 12th Session, annexes, agenda item 33, UN Doc. A/3764 and Add. 1, 36 para 116.
42 The non-derogable articles include articles 6, 7, 8 (para 1&2), 11, 15, 16 and 18.
43 Summary of Arbitrary Executions, Report by S. Wako, Special Rapporteur of the Commission on Human Rights, E/CN. 4/1983/16, 14, para 59.
44 No. 250/1987; *Monguya Mbenge & ors. v. Zaire* (16/1977), Report of the HRC, GAOR, 38th session, supplement No. 40, Annex X.
45 *Ibid.*

the accused has the right to amnesty, pardon or commutation of sentence. This is for the purposes of mitigating the death penalty in countries where it is still imposed, and implies that every effort should be made to avoid capital punishment. The implication is that, though not all people sentenced to death may necessarily be granted amnesty or pardon, yet they have at least a right to have their requests for pardon considered.

(f) "Not on a person below the age of eighteen or a pregnant woman or an insane person"

The Covenant prohibits imposition of death penalty on people below the age of eighteen. The Convention on the Rights of the Child (CRC)[46] provides that the death penalty cannot be meted out to a person who commits a crime while under the age of eighteen.[47] This provision has been construed to mean that even if the offender was convicted when over the age of eighteen, he or she cannot be sentenced to death insofar as he or she committed the offence when under the age of eighteen.[48] The United States expressed reservations on this prohibition but the HRC had expressed the view that such reservation is invalid as it is contrary to international customary law to execute pregnant women or children. HRC further held that any reservation to this effect would be inconsistent with the object and purpose of the ICCPR.[49]

However, the provision on pregnant women is not clear on whether the prohibition of the death penalty still persists even after the woman is delivered of her baby or after miscarriage or abortion. Dinstein argues that if the rationale for exempting pregnant women from capital punishment is to prevent the killing of an innocent child, then the woman can be executed after the child is born, or when the pregnancy has been terminated by abortion or miscarriage.[50] But if the reasoning is that a woman having dependent children must be kept alive to bring them up, then the woman should not be executed.[51] Besides, the HRC commented on Morocco's initial report, where it was reported that pregnant women were not executed until forty days after delivery,[52] that it was cruel to execute a woman after delivering a child.[53] This is in consonance with paragraph 3 of the Safeguards, which not only prohibits execution of pregnant women but also new mothers, in addition to children and the insane.

(g) "Humane treatment"

It was held in *Furman v. Georgia*[54] that death penalty induces mental torture and involves the denial of the convict's dignity and humanity. Thus, attempts are made by international law to reduce the effects of the death penalty as much as possible. The

46 Articles 7 & 37. Convention on the Rights of the Child 1989. It was ratified by Nigeria in 1991.
47 CRC, Article 7.
48 R. Sapienza, "International Legal Standards on Capital Punishment," in Ramcharan, 288.
49 General Comment 24 (51), para 8.
50 Y. Dinstein, "The Right to Life, Physical Integrity and Liberty," in L. Henkin (ed.), *The International Bill of Rights: The International Covenant on Civil and Politics Rights*, Columbia University Press, New York, 1981, 115; R Lillick, "Civil Right," in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, Oxford: Clarendon Press, 1984, 121.
51 Boyle, 231-244.
52 Initial Report of Morocco, UN Doc. CCPR/C/10/Add. 10.
53 UN Doc. CCPR/C/SR. 327, para 8 & 29; UN Doc. CCPR/C/SR. 328, para 22.
54 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2nd 346 (1972); *S. v. Makwanyane & Mchunu*, 1995 (3) S.A 39, (CC).

HRC has stated that the death penalty must be carried out in such a manner as to cause the least possible physical and mental suffering.[55] In the same way, The Safeguards require the penalty to be executed in a way that inflicts the minimum possible suffering.[56] In considering these principles, the HRC has been cautious and has refused to consider the time element as a factor bringing the case within article 7 of the ICCPR, which prohibits torture, cruel or inhuman degrading punishment or treatment.[57] In *Johnson v. Jamaica*,[58] the majority of the HRC members stated that to impose a time limit explicitly or implicitly would indicate to a state that the penalty should be carried out before the limit expires. It was contended, however, that this would thus discourage initiatives such as moratoria or simply executive reluctance to order execution when abolition is not politically feasible and thereby possibly encouraging the use of executions. This is relevant if it is only the time factor being considered in the absence of other conditions that can turn such detention into torture or cruel, inhuman degrading treatment or punishment.[59] It was found that a 51-month delay between conviction and appeal violated articles 6, 14(3) (c), and 14(5) of the Covenant.

Moreover, the HRC has found that poor conditions on Death Row violate articles 5, 6, 10(1), and 14(3) (c) of the Covenant.[60] It discovers too that a delay close to 20 hours, that is, waiting until 45 minutes before the scheduled execution before communicating a reprieve to the accused, violated article 7 of the ICCPR which required, in its view, commutation of the sentence. HRC also found violations of article 14 (3) and (5). With regard to the method of execution, the Committee has held that gas asphyxiation[61] is a violation of article 7 or the ICCPR, while a lethal injection is not. It is likely that stoning would be held as a violation because it intends and indeed inflicts prolonged pain and suffering.[62]

The Second Optional Protocol to the ICCPR[63]

The Second Optional Protocol refers to the abolition of the death penalty as desirable, and the preamble states that all measures of abolition should be considered as progress in the enjoyment of the right to life. It provides that no one within the jurisdiction of a State party shall be executed. Article 2 thereof permits reservation of the application of the death penalty in times of war, pursuant to a conviction for a most serious crime of a military nature committed during wartime. Even as the term "in time of war" is not defined, it could still mean internal armed conflict or civil war or international armed conflict. However, the similar provision in the European Protocol has been construed

55 General Comment 20 (44), Report of the HRC, UN Doc. A/47/40 (1992), Annex VI A, para 6.
56 The Safeguards, para 9.
57 539/1998; UN Doc. CCPR/C/57/WP. 1 (1996).
58 558/1994; UN Doc. CCPR/C/56/D/558/1994 (1996), paras 8: 2–8, 4.
59 *Ibid.*
60 *Kelly v. Jamaica* (253/1987); Reports of the HRC, GAOR, 46th Session, Supplement No. 40 (1991); Annex XI D, paras. 3.8, 5.7 and 6.
61 *Ng v. Canada* (469/1991); Report of the HRC, Vol. 11 GAOR, 49th session, supplement No. 40 (1994), Annex IX CC, paras 2.1 & 16.4.
62 *Ibid.*; Appendix A: Herndl (Austria); Sadi (Jordan).
63 The entire Second Optional Protocol to the ICCPR is on the desirability of abolition of the death penalty. All the articles of the protocol are on that subject matter.

to mean international armed conflicts rather than civil war.[64] The term "state of war" has been interpreted to include imminent threat of war.[65] Under article 3 of the Second Protocol, State parties are required to report about their progress on the abolition of the death penalty, and according to articles 4 and 5, if a State party has already accepted the Inter-State and Individual Communications Procedure for the Covenant (ISICPC), they are also applicable to the Second Optional Protocol. However, a State may declare otherwise at the time of ratification or accession. Article 6 describes the provisions of the Second Optional Protocol as additional provisions to the ICCPR. It emphasizes that the requirements of due process, provided by article 14 of the ICCPR, apply to cases of military death penalty as well as the relevant provisions of humanitarian law by the effect of article 5(2) of the ICCPR, which provides for non-derogation.

Regional human rights systems

Various developments have been witnessed in human rights protection in regional systems. The Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[66] was the first international regional human rights treaty. It was followed by the Organization of American States' American Convention on Human Rights (ACHR),[67] the Organization of African Unity's (now African Union) African Charter on Human and People's Rights (ACHPR),[68] and more recently the Arab Charter.[69] A brief discussion of their provisions on the death penalty may be quite helpful.

European human rights system

The ECHR,[70] the longest established regional human rights treaty, in its preamble clearly states that the purpose of the ECHR is to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration on Human Rights. Article 2 provides thus:

> 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 court following the conviction of a crime for which this penalty is provided by law.

The effect is that this article provides for death penalty as a clawback to the right to life. It does not provide for safeguards or limitations on its use save for the sentence being passed by court,[71] and for a crime for which the penalty is provided by law. However, the ECHR, in the case of *McCann & Ors v. United Kingdom*,[72] held that article 3 of the Convention must be interpreted and applied so as to make its safeguards practical and

64 Nigel Rodley, *The Treatment of Prisoners Under International Law*, New York: O.U.P., 1987, 183.
65 UN Doc. E/CN.4 / Sub.2 /1987/20 para 168.
66 This came into force Sept. 3, 1953.
67 This was adopted in 1969 and came into force in 1978.
68 The OAU (now AU) adopted this Jun. 27, 1981 in Nairobi, Kenya. It entered into force Oct. 21, 1986.
69 This was adopted Sept. 15, 1994.
70 It entered into force Sept. 3, 1953.
71 De Wilde, *Ooms & Versyp v. Belgium*, Jun. 18, 1971, Series A, vol. 12; *Ringeisen v. Austria*, Jul. 16, Series A, vol. 84.
72 Sept. 27, 1995. series A, vol. 324.

effective. It further held that article 2 not only safeguards the right to life but also sets out the circumstances when the deprivation of life may be justified, and that the article ranks as one of the most fundamental provisions in the Convention, which in peacetime admits of non-derogation under article 15. Thus, together with article 3, which provides for the right against torture, article 2 enshrines one of the basic values of the democratic societies making up the Council of Europe.

The Court also left open the possibility that the limitations in other instruments, such as the prohibition of execution for other crimes committed while under the age of 18, are implicit in the wording of article 2.[73] It could therefore be argued that the limits on the use of the death penalty and the safeguards are implicit in the article.

In *Kirwood v. United Kingdom*,[74] the European Commission considered the possibility that the death penalty, although ostensibly permitted by the Convention, raises issues under article 3 which prohibits torture. However, Kirwood's application was declared inadmissible on the ground that he had failed to demonstrate that detention on Death Row was inhuman and degrading treatment.

Be that as it may, later developments led to the adoption and coming into force of the Sixth Optional Protocol to the ECHR[75] in 1985, which abolishes the death penalty in peacetime. It provides that a State may make provisions in its law for the death penalty in respect of acts committed in times of war or imminent threat of war. War in this case means international armed conflict, and the conditions for carrying out the death sentence laid out in article 2 apply.[76]

Yet further developments at the European Conference of Ministers[77] called for the complete abolition of capital punishment and more respect for fundamental freedoms and especially the right to life.[78] Thus, the Conference passed a resolution which abolishes the death penalty in times of war as well as in times of peace. Further still, the European Council meeting in Nice, in December 2000, together with the European Parliament and the Commission, jointly issued the Charter of Fundamental Rights.[79] The Charter provides for the right to life in article 2, which specifically holds that no one shall be condemned to death or executed. As if this was not enough, abolition of death penalty has become a requisite for relevant nation's full participation in such organizations as the Council of Europe and the European Union. Consequently, capital punishment is almost completely wiped out in Europe.

American human rights system

Schabas has noted that the American human rights system has been said to pio-

73 Soering v. United Kingdom & Germany (App. No. 14038) 108.
74 (App. No. 10308/83), (1985) 37 DR 158, 184.
75 The Council of Europe's ECHR was adopted in 1950 and came into force Sept. 3, 1953. It was the first international regional human rights treaty. The convention and its protocols aim at taking steps toward collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights 1948.
76 Sapienza, 292.
77 This was held in conjunction with the 50th Anniversary of the ECHR on Nov. 4, 2000.
78 Amnesty International, Death Penalty News, 2000. <http://webs.amnesty.org/aidoc/aidoc_pdf.nsf/index/ACT530012001ENGLISH/&File/ACT5300101.pdf>.
79 This Charter abolishes in toto the practice of death penalty in the whole of Europe and calls for more respect for fundamental freedoms and the right to life, in particular. The Charter commemorates the 50th Anniversary of the ECHR on Nov. 4, 2000.

neer abolition of the death penalty.[80] It began like the U.N. with a declaration[81] in 1948 and completed this with a convention.[82] The American declaration, although textually silent on the death penalty, is a norm that prevents arbitrary use of capital punishment. The American Convention on Human Rights (ACHR) in article 4 is quite similar to the ICCPR, but goes further in providing for safeguards and limitations on the death penalty, excluding its use for political crimes and on the elderly. It particularly provides that once a State has abolished the death penalty, it cannot reinstate it.

The Additional Protocol, like the Optional Protocol and Protocol No. 6, which came into force in 1993, is a more restrictive agreement than its original Convention. Under this protocol, no ratifying country may impose the death penalty on any person within its jurisdiction. In addition, ratifying parties cannot make any reservations to the Additional Protocol.[83]

African human rights system

The African Charter on Human and People's Rights (African Charter) provides 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 right.[84]

This provision could probably have been influenced by article 6 of the ICCPR. However, it makes no specific mention of the death penalty. Heyns[85] states that the article does not favor any side of the death penalty debate, but the provision has also been construed to mean that the Charter permits the death penalty, provided that it is imposed in accordance with the law.[86] The African Commission, which is responsible for the interpretation of, and receiving communications of violations of the Charter,[87] has held that arbitrary and brutal executions constitute violations of article 4.[88] In its Resolution Urging States to Envisage a Moratorium on the Death Penalty,[89] the Commission—

1. Urges all State parties to the African Charter on Human and People's Right that still maintain the death penalty to comply fully with their obligations under the treaty and to ensure that persons accused of crimes for which the death penalty is a competent sentence are afforded all the guarantees in the African Charter.
2. Calls upon State parties that still maintain the death penalty to—
   a. Limit the imposition of the death penalty to the most serious of crimes.
   b. Consider establishing a moratorium on executions, especially in cases where there may not have been full compliance with international standards for a fair trial.
   c. Reflect on the possibility of abolishing the death penalty.

The African Commission, in the Resolution, interprets the Charter in line with the ICCPR. The Resolution acknowledges the use of the death penalty but restricts it to the "most serious of offences" and urges compliance with the guarantees in the Charter and international standards for a fair trial in carrying out the sentence. Asking State parties to reflect on the possibility of abolishing the death penalty implies that the African Commission considers abolition of the death penalty as a desirable end.

Be that as it may, article 7 of the African Charter provides that those sentenced to death are entitled to the right to fair trial. Article 7, nonetheless, is not as detailed as the one in the ICCPR and has been described as inadequate.[90] Many of the crucial aspects of the right to a fair trial are not provided for, like the right to a public hearing, the right to interpretation, the right against self-incrimination and the right against jeopardy. However, the African Commission has interpreted the Charter to include some of these elements in its "Resolution on the Recourse Procedure and Fair Trial,"[91] and in various communications.[92] Furthermore, the Commission can draw inspiration from international law principles.[93] It has condemned States that carry out the death penalty without according the accused procedural guarantees.[94]

Like the ICCPR and the CRC, the recent Charter on the Rights and Welfare of the Child[95] provides that the death penalty cannot be imposed for crimes committed by children, wherein a child is defined as one below the age of 18.[96] It has been interpreted to mean that even if the person was convicted when over the age of 18, he or she cannot be sentenced to death because he or she had not yet come of age at the time of commis-

80 Schabas, *op. cit.*, 14.

81 American Declaration of the Rights and Duties of Man.

82 American Convention on Human Rights. The U.S. is not a party to this Convention.

83 The Additional Protocol, Optional Protocol (1990) and Protocol No. 6 though request to the American Convention on Human Rights. While the Additional Protocol is more restrictive in the sense that ratifying parties cannot make any reservations thereto, the Optional Protocol and Protocol No. 6 are not that restrictive. Reservations are allowed the ratifying parties.

84 Article 4, African Charter.

85 C. Heyns, "Civil and Political Rights in the African Charter," in M. Evans & R. Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2000*, Cambridge University Press, 2002, 149.

86 K. Mbaya, "Les Droits de l'Homme en Afrique," 1992, 197, cited in W.A. Schabas, *op. cit.*; A.N. Makubuya, "The Constitutionality of the Death Penalty in Uganda: A Critical Enquiry," *East African Journal of Peace and Human Rights* 6(2): 222, 2000.

87 Article 45(3), African Charter.

88 Communications 54/91, 98/93, 164/97&210/98 Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit, Association Mauritanienne des Droits de l'Homme v. Mauritania, Thirteenth Activity Report 1999–2000.

89 Adopted at the 26th Ordinary Session of the African Commission on Human and Peoples Rights, Kigali, Rwanda, Nov. 1–15, 199, Doc/05 (xxvi) INF. 19.

90 Heyns, 155.

91 Resolution on the Right to Recourse Procedure and Fair Trial, Fifth Annual Activity Report of the African Commission on Human and People Rights 1991–1992.

92 See footnote n. 412 above; Communication 206/97, Center for Free Speech v. Nigeria, Thirteenth Activity Report 1999–2000, and Communication 215/98, Rights International v. Nigeria, Thirteenth Activity Report 1999–2000.

93 Articles 60 & 61, African Charter.

94 Communications 137/94, 154/96 & 161/97, International Pen, Constitutional Rights Project, Inter-Rights on Behalf of Ken Saro-Wiwa Jr. and Civil Liberties Organization v. Nigeria, Twelfth Activity Report 1998–1999, Annex 5, para 104.

95 This entered into force Nov. 29, 1999.

96 Article 5 (3), African Children's Charter.

sion of the crime.[97]

On the execution of women, the more recent Protocol to the African Charter on the rights of women in Africa,[98] provides for the right to life, and particularly that in those countries where the death penalty exists, the death sentence should not be carried out on pregnant or nursing women. This is a positive development toward the abolition of the death penalty in the African human rights system.

Arab Charter on Human Rights[99]

The Arab Charter, which was adopted on Sept. 15 1994, provides for the right to life,[100] but recognizes the legitimacy of the death penalty for the "most serious crimes." It equally holds that anyone sentenced to death has the right to seek pardon or commutation of the sentence.[101] It prohibits the death penalty for political crimes[102] and excludes capital punishment for crimes committed while under the age of eighteen and for pregnant women and nursing mothers for a period of up to two years following childbirth.[103]

International humanitarian law

International humanitarian law is the law applicable in times of war and armed conflicts. Several norms on the subject of the death penalty have evolved in this law. Article 3 common to the four Geneva Conventions prohibits the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people. It is also provided that no prisoner of war may be tried or sentenced for an act that is not forbidden by the detaining power or by international law in force at the time the same act was committed.[104] There is also a further provision that prisoners of war and protecting powers shall be informed, as soon as possible, of the offences which are punishable by the death sentence under the laws of the detaining power.[105] Other offences shall not thereafter be made punishable by the death penalty without the concurrence of the power upon which the prisoners of war depend; that is, the law under which the detention is carried out.

Civilians are protected against unlawful use of capital punishment by provisions contained in the fourth Geneva Convention[106] relative to the protection of civilians in times of war. Under article 70, they are protected against arrest, prosecution or conviction for acts committed or opinions expressed before the occupation. The occupying power can impose the death penalty on a protected person only in cases where the person is guilty of espionage, serious acts of sabotage against the military installations of

97 F. Viljoen, " The African Charter on the Rights and Welfare of the Child," in C.J. Davel (ed.), *Introduction to Child Law in South Africa*, Lansdowne: Juta Law, 2000, 220.
98 This was adopted Mar. 28, 2003.
99 Adopted Sept. 15, 1994. There is doubt that this Charter has yet come into force.
100 Article 5, Arab Charter.
101 *Ibid.*, article 10.
102 *Ibid.*, article 11.
103 *Ibid.*, article 12.
104 Article 99, Third Geneva Convention.
105 *Ibid.*, article 100.
106 *Ibid.*, article 70.

the occupying power, or international offences which have caused the death of one or more persons. This is especially where such offences were punishable by death under the law of the occupied territory in force before the occupation began. Furthermore, the Geneva Conventions have provisions on the right to a fair trial in articles 99, 100 and 105 of the third Convention, and articles 71 and following of the fourth Convention. More still, international humanitarian law, which has clearly been influenced by international human rights law, prohibits execution of pregnant women or who have infants,[107] and is restricted to the most serious of crimes,[108] thereby contributing to a minimum standard of protection of individuals.

International criminal law

For a very long time, the death penalty has been considered an appropriate punishment under international criminal law.[109] The charter of the International Military Tribunal authorized the Nuremberg Court to impose upon a convicted war criminal death or such other punishment as shall be determined to be just.[110] The sentencing provisions of the charter of the Tribunal for the Far East (the Tokyo Tribunal) had similar provisions.

The Genocide Convention adopted in 1948 was in favor of a general pronouncement, pointing to a yet-to-be created International Criminal Court (ICC) that in the end gave primary responsibility for genocide prosecutions to the State where the crime took place.[111] It required State parties to establish "effective" penalties for genocide within their domestic legal systems.[112] Later instruments indicate the emerging trend of abolition of the death penalty. The International Criminal Tribunals for Rwanda and Yugoslavia provide that sentences be limited to imprisonment and that they be established, taking into account the criminal courts in Rwanda and the former Yugoslavia, as the case may be.[113] More recently, the Rome Statute of the ICC[114] has excluded the death penalty.[115] According to Schabas, this is a significant benchmark in an unquestionable trend toward abolition of the death penalty.[116] This view is in tandem with those of the Secretaries-General of the U.N.[117] and the E.U.[118]

3. Implications for Nigeria

There is no doubt that the foregoing discussions indicate that the emerging customary

107 Article 76 (3), Additional Protocol 1, II.
108 Article 68, Geneva Convention IV.
109 Cf. Schabas, 235.
110 Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishment of the Charter of the International Military Tribunal (IMT), (1951) 82 UNTS 279, art. 27.
111 Convention for the Prevention and Punishment of the Crime of Genocide (1951) 78 UNTS 277 vi. Also in W.A. Schabas, *Genocide in International Law*, Cambridge University Press, 2000.
112 Article V, The Convention.
113 Statute of the International Criminal Tribunal for the Former Yugoslavia, article 25; Statute of the International Criminal Tribunal in Rwanda, article 24.
114 Adopted July 17, 1998.
115 Articles 6 & 7.
116 W.A. Schabas, Abolition of the Death Penalty, op. cit., 258.
117 *Report of the UN Secretary-General on Capital Punishment*, UN Doc. E/2000/3, para 66.
118 "EU Memorandum on the Death Penalty," in *European Union Annual Report on Human Rights*, 11317/00, 81.

norm is the abolition of the death penalty at both international and regional levels. The norms of the American convention on the death penalty are more advanced than those of the European and United Nations systems. The African human rights system is moving toward that norm, though at a slower rate. The future of Arab human rights system is uncertain, although the Arab Charter is in line with emerging trends. It is imperative for countries that have not abolished death penalty to enforce safeguards and limitations.

Indeed, for most, if not all, parts of Europe, abolition of death penalty is a *fait accompli*, for it is a condition precedent for any country wishing to belong to the Council of Europe. Yet outside Europe, the principle of territorial sovereignty and integrity, plus the monistic approach to international legal instruments, have made it possible for some countries to remain retentionist in spite of being signatories to the relevant international laws, if they so desire. For instance, even as article 6 of ICCPR clearly approves of a country's choice to abolish the death penalty, it still does not require the country, unlike the European Council Charter, to eliminate the use of capital punishment in order to be party to the Covenant. Therefore, the practice in retentionist States is not inconsistent with existing international conventions and protocols, so that each State still enjoys the right to choose whether to retain or abolish capital punishment, including the right to classify criminal acts which constitute capital crimes.

Death penalty had been recognized and enforced under the various constitutions that Nigeria had ever operated, whether colonial or autochthonous. Besides, pre-Independence the colonial authorities had under the operative laws recognized and executed the death penalty.[119] This legal status quo has remained and maintained by the 1999 Constitution. This is implicated in the wordings of section 33(1)—

> Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.

It is thus observed that death penalty is allowed as a clawback or derogation from the fundamental right to life, as framed in the clause "... save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria." It is equally observed that the only possible sentence of a court relating to right to life and in respect of a criminal offence which one can be found guilty, must be that of death. Therefore, even as the expression "death penalty" is not used, its implication is quite glaring in the provision of section 33(1). This derogation has a fundamental basis on section 45(1) (a)&(b), which allows for a general restriction of the exercise of fundamental rights in the interest of defense, public safety, public order, public morality or public health, or for the purpose of protecting the rights and freedoms of other persons.[120] The constitutional legitimacy of this derogation seems necessary for, if a

119 R. v. Nungu (1953), *WACA*. 379; R. v. Adi (1955), 15 *WACA*. 6; R. v. Obi (1957) *WRNLR*. 19 are some of the pre-Independence cases that involved the death penalty.

120 Although section 45 of the 1999 Constitution seems to be specific to the fundamental rights to private and family life (section 37), religion, thought and conscience (section 38), expression and press (section 39), peaceful assembly and association (section 40), and movement (section 39), for the purpose of the derogations, yet in our considered view, nothing prevents the intention of the legislature from being extended to other fundamental rights.

murderer is allowed a field day without execution of a death sentence on him as a result of his fundamental right to his life, then public safety, order, or rights and freedoms of other persons might well pay dearly for it. We are not oblivious, however, to the burning question of whether or not it is only by death penalty that the dastardly act of a particular murderer is curbed, or whether death penalty would even deter future murderers. But one thing is certain: if a murderer, X, whom a court of competent jurisdiction finds guilty, is executed by facing the death penalty, X will never commit any murder again since he had ultimately been removed from his society and any other society.

Besides, a cursory look at the provision of section 33(1) would reveal its identity, in every material particular, with the provisions of sections 18(1) and 30(1) of the Republican Constitution 1963, and the 1979 Constitution, respectively. The challenge which was posed to the above time-honored constitutional penal measure in the cases of *Onuoha Kalu v. The State*[121] and *Lateef Adeniji v. The State*[122] constituted an opportunity for a judicial stamping of the constitutional provision.

121 In Onuoha Kalu v. The State, (1998) 13 *NWLR* (pt. 583) 531, the appellant had been convicted of murder at the Lagos State High Court. The conviction was affirmed by the Court of Appeal. At the Supreme Court the appellant obtained leave to raise the issue of constitutionality of death penalty imposed on him. Succinctly put, this issue, arising for the first time for judicial construction and determination, was whether the death penalty amounts to torture, inhuman and degrading treatment and therefore unconstitutional, null and void. On Friday, December 18, 1998, the Supreme Court ruled in this case which, inter alia, decided and reiterated the constitutional validity of death penalty in Nigeria. In coming to this decision, the apex court took the view that the right to life guaranteed by section 30(1) of the 1979 Constitution, under which the case was determined, is qualified to the extent that life may be lawfully terminated in execution of the sentence of a court in respect of a criminal offence of which a person has been found guilty. The Court further held that the combined effect of sections 30(1), 31(1), 213(2)(d) and 220(1)(e) of the 1979 Constitution, as well as sections 319(1) of the Criminal Code Law of Lagos State established beyond doubt that death penalty is real and constitutional in Nigeria, provided that it is inflicted pursuant to the sentence of a court of law in a criminal offence, of which an accused person has been found guilty. Making a comparative analysis of similar provisions in the constitutions of Tanzania, Zimbabwe, South Africa, India, the United States, Hungary, and Jamaica, the Supreme Court held that death penalty is not peculiar or unique to Nigeria. It concluded that death penalty is advocated and supported in other jurisdictions. Consequently, the full Court unanimously rejected the contention of the appellant that the death penalty prescribed under section 319(1) of the Lagos State Criminal Code is inconsistent with the 1979 Constitution. Having dismissed and disposed of the appellant's complaints against the constitutional legitimacy of the death penalty, the Supreme Court next turned to the issue of whether the death penalty amounts to torture, inhuman and degrading treatment and thus a violation of section 31(1) of the 1979 Constitution, which if favorably determined will render the death penalty unconstitutional. However, relying on section 42 of the Constitution, the Court tacitly refused to resolve the issue, holding instead that it is a matter that falls for determination by a High Court in a separate proceeding that should be instituted by the appellant for that purpose. By virtue of this provision, especially that of section 42(2) of 1979 Constitution, the Court declined jurisdiction to entertain the issue of whether death penalty amounts to torture, inhuman and degrading treatment and which issue touches on fundamental right. The Supreme Court therefore held that original jurisdiction on such issues clearly vests on a High Court in the State. Therefore, since the matter was first raised in the Supreme Court, it would be a misnomer for it to be entertained by the Supreme Court as of first instance. The Supreme Court thus concluded that it is a matter that falls for determination by a High Court in the State, namely, Lagos, in accordance with the provision of section 42(1) & (2) of 1979 Constitution. The question of constitutional validity of death penalty was also an issue in Lateef Adeniji v. The State. Citing Iguh J.S.C. (as he then was) in Onuoha Kalu v. The State, Oguntade J.C.A. reiterated that the "death penalty prescribed by section 319 (1) of the Lagos State Criminal Code Law cannot be said to be inconsistent with the 1979 Constitution. The Court held that, "death penalty as per sections 30(1), 213(2), 220(1)(e) is expressly recognized by the said Constitution. Thus, the death penalty in Nigeria can by no stretch of the imagination be said to be invalid or unconstitutional." The Court further held that, "the right to life prescribed under section 30(1) of the 1979 Constitution is clearly a qualified right. It is not unqualified. The imposition or execution of the death sentence in Nigeria is not subjected to any form of arbitrary, discriminatory or selective exercise of discretion on the part of any court or any other quarters whatever." Therefore, in light of the constitutional provisions and the relevant case law cited above, and many other decided cases, it is crystal-clear that death penalty is still legitimate in Nigeria.

122 (2000) 2 NWLR (pt. 645) 354; *Uzoukwu v. Ezeonu II* (1991) 6 NWLR (pt. 200) 708.

As if that was not enough, article 4 of the ACHPR[123] implicitly permits death penalty when it provides, *inter alia*, that "no one may be *arbitrarily* deprived of his right to life." Hence, though the article recognizes human beings as inviolable and holds that every human shall be entitled to respect for his person, yet its further provision that "no one may be arbitrarily deprived of his life underscores a clawback to, or derogation, from the right to life under relevant situations. The express mention of the word "arbitrarily" in the context of the article implies that there can be circumstances in which one can be deprived of his right to life, provided such circumstances are not arbitrary. Therefore, it is inappropriate for the learned writer, Ibidapo-Obe, to regard the tone of article 4 of the African Charter as non-derogable.[124] It has to be noted that the provisions of the ACHPR have now become part of the Nigerian body of laws, after having been domesticated and incorporated pursuant to African Charter on Human and Peoples Rights (Ratification and Enforcement) Act,[125] in line with section 12(1)[126] of the 1999 Constitution. The net effect is that, as part of our domestic laws, the provisions of African Charter can be enforced by the courts in accordance with its judicial powers, as provided for in section 6, and in all other laws relating thereto.[127]

Again, even as Nigeria has not domesticated the provisions of International Covenant on Civil and Political Rights 1966,[128] yet it has been a signatory to the instrument, which article 6 provides, for possibility of death penalty. Article 6(1) states to the effect that "every human being has the inherent right to life which shall be protected by law." Like article 1 of the African Charter, it also holds that "no one shall be *arbitrarily* deprived of his life," thus granting that there is the possibility of circumstances that can result to a derogation from one's right to life. It even recommends, in article 6(2), that death sentence in countries which have not abolished death penalty be imposed only for the most serious crimes, in accordance, *inter alia*, with the law in force at the time of the commission of the crime. Although the general tone of article 6(1)–(6) is that of antipathy to the death penalty, yet it accedes to the fact that situations can arise in which the sentence can be meted out. Be that as it may, the provisions of the Covenant had not been ratified pursuant to section 12(1) of the 1999 Constitution, and as such not yet part of Nigerian body of laws. But if the monistic theory of the relationship between international law and municipal law were anything to go by, then Nigeria would have an obligation to abide by the provisions of the Covenant. Epitomized in the doctrine *pacta sunt servanda*, monism bars a State party to a treaty from invoking its municipal law to defeat its international obligations. Monism therefore holds that international law takes precedence over domestic law and may limit the applicability of national laws. But unfortunately in Nigeria, by virtue of section 12(1) of the 1999 Constitution, in *pari materia* with section 12(1) of 1979 Constitution, Nigeria is in sympathy with the opposite

123 Jun. 20, 1981. Entry into force Oct. 21, 1986.

124 A. Ibidapo-Obe, *A Synthesis of African Law*, Concept Publications, Lagos, 2005, 137.

125 Cap A 9, L.F.N. 2004. The effect of this domestication has received judicial blessings in Ogugu & Ors v. The State (1994) 9 NWLR (pt. 366) 1; Abacha v. Fawehinmi (2000) 6 NWLR (pt. 660) 228; Nemi v. A.-G. Lagos (supra).

126 Section 12 (1) states that "no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."

127 *Ogugu & Ors v. The State* (*supra*); *Abacha v. Fawehinmi* (*supra*).

128 Adopted Dec. 16, 1966 and entered into force Mar. 23, 1976.

theory of "inverted monism," by which domestic law takes precedence over international law, with the effect that "no treaty between the Federation of Nigeria and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly."

Besides, article 3 of the UDHR, to which Nigeria is a signatory, provides that "everyone has the right to life, liberty and security of persons." Thus, unlike the 1999 Constitution, the African Charter, the International Covenant on Civil and Political Rights, the right to life declared by UDHR is not qualified. The effect is that death penalty is not by any stretch of the imagination saved by the provisions of article 3 thereof.

The domino effect of the foregoing discussion is that death penalty as prescribed by the criminal legislations in Nigeria is not unconstitutional. Murder,[129] culpable homicide punishable with death,[130] intentional homicide,[131] presiding over or being present at unlawful trial by ordeal leading to death,[132] directing, controlling or presiding at unlawful trial by ordeal resulting to death of a party,[133] are all capital offences. Other offences that attract death penalty include brigandage, with culpable homicide punishable with death/lurking house trespass or housebreaking where death is caused,[134] fabricating or giving false evidence leading to death of an innocent person,[135] death of the woman or of child in the course of abortion,[136] abetment of suicide of a child, insane person, delirious person, idiot, intoxicated.[137] Still others are treason,[138] treachery,[139] armed robbery,[140] adultery,[141] rape,[142] sodomy,[143] witchcraft and juju offences,[144] possession of criminal charms,[145] cannibalism,[146] unlawful possession of human corpse or any part thereof,[147] incest,[148] and certain types of kidnapping and deprivation of liberty.[149] The implication is that death penalty in relevant cases is still the law in Nigeria and which law is consistent with the Constitution in force.

129 Section 316 of Criminal Code (CC).

130 Section 221 of Penal Code (PC).

131 Section 200(a) of Sharia Penal Code (SPC).

132 Section 214(b) of PC.

133 Section 208 of CC.

134 Section 302 of PC.

135 *Ibid.*, section 159(2).

136 Sections 209(b) & 210(a) of SPC.

137 Section 227 of PC.

138 Sections 37(1)&(2) and 38 of CC; section 411 of Penal Code, Federal Provisions Act, Cap P3, Laws of the Federation of Nigeria 2004.

139 Section 49A (1) of CC.

140 *Ibid.*, Section 402(2); section 1(2) of Robbery and Firearms (Special Provisions) Decree No 47 of 1970.

141 Section 127(b) of SPC.

142 *Ibid.*, Section 129(b).

143 *Ibid.*, Section 131(b).

144 *Ibid.*, Section 406.

145 *Ibid.*, section 407.

146 *Ibid.*, section 408.

147 *Ibid.*, section 409.

148 *Ibid.*, section 133(b).

149 Sections 3A&3B of Criminal Code (Amendment) Law 2009 of Anambra State.

4. Recommendations and Conclusion

Be that as it may, the next global trend, apart from outright abolition, is to restrict the use of capital punishment to the most "heinous" or "serious" crime. Article 6(2) of ICCPR provides: "In countries that have not abolished it, sentence of death may be imposed only for the most serious of crimes..." Although no particular or specific offences have been mentioned to fit the category of most "serious" offences, yet several insinuations have been made to act as guidelines for the determination of such offences. For instance, the HRC points out that the expression "most serious of crimes" should be "read restrictively" to mean that death penalty should be a "quite exceptional measure."[150] Similarly, the Safeguards Guaranteeing the Protection of those Facing the Death Penalty identifies the "most serious crimes" with "intentional crimes with lethal or other extremely grave consequences."[151] Again, according to the U.N.'s reckoning, "the offences should be life-threatening in the sense that it is a very likely consequence of the action."[152]

In light of the foregoing, it appears that homicidal acts constitute the most fitting offences into the pigeonhole of "most serious crimes." No wonder in *Cox v. Canada*,[153] the HRC noted that the applicant was to be tried for complicity in two murders, which were said to be "undoubtedly very serious crimes." Therefore, in reviewing the list of capital crimes in Nigeria and especially making a suggestion on whether to add to or reduce the numbers of capital crimes, the legislature ought to be guided by the overall goal of identifying the most heinous or serious crimes consistent with Nigeria's international obligations under a number of U.N. conventions and protocols, as well as what obtains in many foreign jurisdictions.

With the above parameter, the list of capital crimes in Nigeria can be shortened drastically. There is not enough reason and justification why non-homicidal offences should be treated as capital ones. Thus such offences as adultery, incest, rape, sodomy, possession of criminal charms, cannibalism, unlawful possession of human corpse or any part thereof, juju and witchcraft offences, treason, treachery, armed robbery, kidnapping or deprivation of liberty, should not attract the extreme penalty once intentional death of any person is not directly traced to any of these. This notwithstanding the religious, ideological and sometimes cultural underpinnings and influences attendant to the designation of these offences as capital ones.

Moreover, it is also possible to thin down the homicidal capital offences under the relevant statutes. One may be guided by the test of what and what homicidal offences were committed intentionally. That is to say, in which of those offences are the two important elements of *actus reus* and *mens rea* present? Certainly, on the application of this test in respect of homicide, one is left with the offences of murder insofar as it is restricted to subsections (1) & (2) of section 316 of the Criminal Code, and fabricating false evidence which has led to the death of an innocent, if the witness in question knew

150 Report of the Human Rights Committee, GAOR, 37th Session, suppl. 40 (A/37/40) 94.
151 ESC Res. 1984/50; G.A. Res 39/118.
152 UN Doc. E/2000/3, para 79.
153 Supra.

the implications of his testimonies. The crimes of culpable homicide punishable with death and intentional homicide can equally be retained as capital offences.

Aside the above offences described as heinous and most serious, all others can conveniently be reduced to mere corporal offences punishable with terms of imprisonment or other penalties. Our recommendation is no less consistent with international standards. Hence, the Human Rights Committee has mentioned that crimes like espionage, political offences, misappropriation of State or public property, treason and so on do not meet the standard of "most serious crime."[154] The HRC has commented that the imposition of the death penalty for crimes that do not result in loss of human life is contrary to the ICCPR. Again, meting out death penalty for those who violate the offences of adultery, sodomy, incest, and so on would be most inappropriate in spite of the religious bias that informed their being made capital offences. The Islamic (*sharia*) law that created them so may reconsider a compromise stance as it did in the case of apostasy (*ridaa*) which, though a capital offence in Islam, was not created an offence at all in the *sharia* penal codes in Nigeria. Surely, criminalizing *ridaa* would mean that one is no longer free to convert from Islam to another religion despite the right to religious freedom guaranteed in both the Constitution[155] and paradoxically in the Quran.[156] It is therefore a happy thing that, just as in the case of *ridaa*, the legislators of the Sharia penal codes should toe the path of harmony, peace and modernity in respect of the other religiously related offences. Certainly, criminal law is all about protecting the society. But in capital cases, the inquiry should be whether death penalty fits a particular crime. Besides, for each and every capital crime, it should be dared to explore whether alternative penal measures would be a preferable substitute for the penalty of death.

154 Cf. concluding Observations, Cameroon, UN Doc. CCPR/C/79 Add. 116, para 14; Initial Report of Mali UN Doc. CCPR/C/1/Add. 49; UN Doc. CCPR/C SR. 200, 19 (1980). UN Doc. CCPR/C/SR 258, Para. 10 (Tomuschat); Initial Report of Mongolia, UN Doc. CCPR/C/1/Add. 38; etc.
155 Section 38, 1999 Constitution.
156 Quran 2:256.